

# CAN HYBRID COURTS OVERCOME LEGITIMACY CHALLENGES?: ANALYZING THE EXTRAORDINARY AFRICAN CHAMBERS IN SENEGAL

*Suhong Yang\**

## I. INTRODUCTION

Seeking justice is a global issue. Pursuing justice in post-conflict areas requires the cooperation of international communities. International criminal law has taken root since World War II<sup>1</sup> and developed rapidly since the 1990s.<sup>2</sup> The goals of international criminal law include traditional goals of criminal justice, such as deterrence, retribution, and advancing (international) social norms,<sup>3</sup> as well as transitional justice goals,<sup>4</sup> such as accountability, redress for victims, truth seeking, and reconciliation.<sup>5</sup> To achieve these goals, international society and/or national authorities adopt and combine different mechanisms, including criminal prosecutions, truth commissions, reparations for victims, and institutional reforms.<sup>6</sup> Although no

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\* S.J.D. Candidate, LL.M., Georgetown University Law Center; LL.B., Renmin University of China School of Law. Email: sy510@georgetown.edu. I am incredibly grateful to Ambassador Stephen J. Rapp for his guidance on this piece. I also benefit greatly from comments on earlier drafts from Professor Jane E. Stromseth, Professor Jennifer Trahan, Professor Stuart Ford, Dr. Ru Ding, Yun Ju Kang, Han-Hsi Liu, Andrew Kerr, Mario H. Osorio, participants in the February 2018 American Society of International Law (ASIL) International Courts and Tribunals Interest Group Annual Works-in-Progress Conference at John Marshall Law School in Chicago, participants in the April 2018 International Criminal Law Interest Group Works-in-Progress Workshop in conjunction with the ASIL Annual Meeting in Washington, D.C., and colleagues from the Georgetown S.J.D Program. All errors, of course, remain my own.

<sup>1</sup> The creation of the International Military Tribunals (IMTs) after the World War II, including the Nuremberg Tribunal which tried the top Nazis and the Tokyo Tribunal which tried the Japanese Leadership, is the landmark event in the history of international criminal law.

<sup>2</sup> During the 1990s, a few ad hoc international criminal tribunals were established, including the International Criminal Tribunal for Former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR); and main countries of the world took part in the negotiation of the Rome Statute of the permanent International Criminal Court in 1998.

<sup>3</sup> Maximo Langer, *The Archipelago and the Wheel. The Universal Jurisdiction and the International Criminal Court Regimes*, in *THE FIRST GLOBAL PROSECUTOR: PROMISE AND CONSTRAINTS* 204, 204 (Martha Minow, Cora True-Frost, and Alex Whiting eds., 2015); for detailed analysis on objectives of international criminal law, see, e.g., Mark A. Drumbl, *ATROCITY, PUNISHMENT, & INTERNATIONAL LAW* 149-80 (2007).

<sup>4</sup> *Id.* For the definition of transitional justice, see e.g., *What is Transitional Justice*, <https://www.ictj.org/about/transitional-justice>; United Nations Approach to Transitional Justice, [https://www.un.org/ruleoflaw/files/TJ\\_Guidance\\_Note\\_March\\_2010FINAL.pdf](https://www.un.org/ruleoflaw/files/TJ_Guidance_Note_March_2010FINAL.pdf).

<sup>5</sup> Jane E. Stromseth, *Peacebuilding and Transitional Justice: The Road Ahead*, in *MANAGING CONFLICT IN A WORLD ADRIFT* 571, 573 (Chester A. Crocker, Fen Osler Hampson, and Pamela Aall eds., 2015).

<sup>6</sup> *Id.* at 574.

single mechanism can achieve these goals, criminal prosecutions are without a doubt at the heart.<sup>7</sup>

“[L]egitimacy should be understood as a key variable that influences goal attainment and provides an important context and substance to any study of judicial effectiveness.”<sup>8</sup> The effectiveness of a court depends greatly on the court’s legitimacy. As a result, legitimacy has been a major concern for post-conflict tribunals which adjudicate violations of international criminal, humanitarian, and human rights law.<sup>9</sup>

To initiate prosecutions of international crimes, there are generally four approaches: (1) a state court exercises jurisdiction over crimes committed in its territory or by its nationals; (2) an international criminal tribunal initiates cases within its context; (3) a court of another state exercises the universal jurisdiction over core international crimes; or (4) a hybrid court initiates cases within its context.

Domestic courts in a state can try suspects who commit crimes in that state’s territory or suspects who are nationals of that state regardless of where they committed the crime. However, domestic courts and local lawyers may apply ordinary criminal law to mass atrocities.<sup>10</sup> For instance, perpetrators tried in domestic courts may be charged with murder, rape, or kidnapping, rather than genocide, crimes against humanity, or war crimes. By doing so, the charges do not “capture the complexity or magnitude of the atrocities committed, thereby minimizing the wrongs suffered.”<sup>11</sup> In addition, while domestic courts may charge the perpetrators with certain international crimes, local lawyers may be unfamiliar with the elements of such crimes and may not know how best to prove them, and judges are often not sure how to evaluate such charges.<sup>12</sup> Further, sometimes domestic courts may be unable or unwilling to prosecute high-ranking officials. Therefore, domestic jurisdiction has important but limited effects in addressing international crimes.

In addition to state courts, international crimes can be prosecuted in international criminal tribunals. There are three categories of international criminal tribunals. First are the tribunals established for trials against the defeated after World War II. Both of the International Military Tribunals (IMTs), including the Nuremberg Tribunal, which tried senior Nazi officials, and the Tokyo Tribunal, which tried the Japanese Leadership, were

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<sup>7</sup> See generally, Agata Fijalkowski and Raluca Grosescu (eds.), *TRANSITIONAL CRIMINAL JUSTICE IN POST-DICTATORIAL AND POST-CONFLICT SOCIETIES* (2015); Harold Hongju Koh, *International Criminal Justice* 5.0, 38 *YALE J. INT'L L.* 525, 542 (2013).

<sup>8</sup> Yuval Shany, *Chapter 7: Legitimacy*, *ASSESSING THE EFFECTIVENESS OF INTERNATIONAL COURTS* 137, 138 (2014).

<sup>9</sup> See generally, Nobuo Hayashi and Cecilia M. Bailliet (eds.), *THE LEGITIMACY OF INTERNATIONAL CRIMINAL TRIBUNALS* (2017).

<sup>10</sup> Laura Dickinson, *The Promise of Hybrid Courts*, 97 *AM. J. INT'L L.* 295, 305 (2003).

<sup>11</sup> *Id.*

<sup>12</sup> *Id.*

established by the Allies based on a charter.<sup>13</sup> Some critics state that the IMTs show the victor's justice, but these two tribunals have gained legitimacy through the fairness of the trials.<sup>14</sup> The second category is the temporary tribunals set for certain situations by the United Nations Security Council (UNSC). In 1993, the International Criminal Tribunal for Former Yugoslavia (ICTY) was established through UNSC Resolutions 808 and 827 to investigate crimes committed in the Balkan War.<sup>15</sup> In 1994, the International Criminal Tribunal for Rwanda (ICTR) was established through UNSC Resolution 955 to investigate crimes committed in the Rwandan genocide.<sup>16</sup> In its first case, *Prosecutor v. Tadic*, the ICTY illustrated that the UNSC has the authority to establish such an international tribunal because the tribunal perfectly matches the description in Article 41 of the UN Charter of "measures not involving the use of force"<sup>17</sup> which gives the ICTY legality.<sup>18</sup> The third category is the permanent court established by a multilateral treaty. On July 1, 2002, the International Criminal Court (ICC) came into being after more than 60 countries had ratified the Rome Statute of 1998.<sup>19</sup> The ICC has jurisdiction *ratione temporis* over crimes committed after that date,<sup>20</sup> jurisdiction *ratione materiae* over crimes of genocide, crimes against humanity, war crimes, and crimes of aggression,<sup>21</sup> jurisdiction *ratione personae* over crimes committed by nationals of its state parties,<sup>22</sup> and jurisdiction *loci* over crimes committed in the territory of its state parties

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<sup>13</sup> Charter of the International Military Tribunal – Annex to the Agreement for the prosecution and punishment of the major war criminals of the European Axis, August 8, 1945, [https://www.un.org/en/genocideprevention/documents/atrocity-crimes/Doc.2\\_Charter%20of%20IMT%201945.pdf](https://www.un.org/en/genocideprevention/documents/atrocity-crimes/Doc.2_Charter%20of%20IMT%201945.pdf); International Military Tribunal for the Far East Charter, January 19, 1946, [https://www.un.org/en/genocideprevention/documents/atrocity-crimes/Doc.2\\_Charter%20of%20IMT%201945.pdf](https://www.un.org/en/genocideprevention/documents/atrocity-crimes/Doc.2_Charter%20of%20IMT%201945.pdf).

<sup>14</sup> See David Luban, *The Legacies of Nuremberg*, 54 SOCIAL RESEARCH 779, 801-06 (1987); see also Antonio Cassese, *The Legitimacy of International Criminal Tribunals and the Current Prospects of International Criminal Justice*, 25 LEIDEN J. INT'L L. 491, 495 (2012).

<sup>15</sup> UN Doc. S/RES/808, February 22, 1993, <https://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/ICTY%20S%20RES%20808.pdf>; UN Doc. S/RES/827, May 25, 1993, <https://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/IJ%20SRES827.pdf>.

<sup>16</sup> UN Doc. S/RES/955, November 8, 1994, <https://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/IJ%20SRES955.pdf>.

<sup>17</sup> Charter of the United Nations, art. 41 ("The Security Council may decide what measures not involving the use of armed force are to be employed to give effect to its decisions...").

<sup>18</sup> IT-94-1, *Prosecutor v. Dusko Tadic*, Decision on the Defence Motion on Jurisdiction (Aug 10, 1995), available at <http://www.icty.org/x/cases/tadic/tdec/en/100895.htm> (last visited Feb 28, 2019).

<sup>19</sup> Rome Statute of the International Criminal Court, July 17, 1998, art. 126, UN Doc. A/CONF.183/9\*(1998) [hereinafter *Rome Statute*].

<sup>20</sup> *Id.* art. 11.

<sup>21</sup> *Id.* art. 5.

<sup>22</sup> *Id.* art. 12(2)(b).

including vessels or aircrafts with registration of a state party.<sup>23</sup> Additionally, a non-party state can accept the jurisdiction of the ICC,<sup>24</sup> and the UNSC can refer a situation to the ICC even if it does not satisfy the jurisdiction *ratione personae* or jurisdiction *ratione loci*.<sup>25</sup> The ICC has a “complementary principle” to domestic jurisdiction.<sup>26</sup> It also has a requirement of “gravity”<sup>27</sup> and a requirement of “interests of justice.”<sup>28</sup> The creation of the ICC is based on a treaty with consent of states by becoming a party and delegating its territorial and personal jurisdiction to the ICC.<sup>29</sup> The establishment of the ICC is regarded as a crucial step in the development of international criminal judicial bodies.<sup>30</sup> However, there are also some shortcomings: substantial jurisdiction gaps exist;<sup>31</sup> five permanent members<sup>32</sup> of the UNSC have different geopolitical interests and can exercise veto power to block resolutions; the ICC can only prosecute a few perpetrators in each situation; and the State Parties are reluctant to increase the ICC’s annual budget.<sup>33</sup> In addition, international criminal tribunals might be lacking in perceived legitimacy due to minimal local involvement.<sup>34</sup> Specifically, tribunals are often located far away from the local populations that the trial involves.<sup>35</sup> They do not publicize the work within affected communities well.<sup>36</sup> There is also a lack of participation by local actors, and the predominant use of common law may pose a challenge to local legal professionals’

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<sup>23</sup> *Rome Statute*, *supra* note 19, art. 12(2)(a).

<sup>24</sup> *Id.* art. 12(3).

<sup>25</sup> *Id.* art. 13(b).

<sup>26</sup> *Id.* arts. 17(1)(a) & (b).

<sup>27</sup> *Rome Statute*, art. 17(1)(d). The definition of gravity has been interpreted by the ICC in its cases. *See e.g.*, ICC-02/11-02/11, Decision on the Defence challenge to the admissibility of the case against Charles Blé Goudé for insufficient gravity, (The Prosecutor v. Charles Blé Goudé), Pre-Trial Chamber Judgment, November 12, 2014, available at [https://www.icc-cpi.int/CourtRecords/CR2015\\_05448.PDF](https://www.icc-cpi.int/CourtRecords/CR2015_05448.PDF) (last visited May 10, 2019).

<sup>28</sup> *Id.* art. 53(1)(c).

<sup>29</sup> *See, e.g.*, Antonio Cassese, *Reflections on the Current Prospects for International Criminal Justice*, in *LOOKING TO THE FUTURE: ESSAYS ON INTERNATIONAL LAW IN HONOR OF W. MICHAEL REISMAN* 433, 493 (Mahmoun H. Arsanjani et al. eds., 2011). The number of States Parties is 123 as of February 2019. For a complete list of States Parties to the Rome Statute, *see The States Parties to the Rome Statute*, ICC, [https://asp.icc-cpi.int/en\\_menus/asp/states%20parties/Pages/the%20states%20parties%20to%20the%20rome%20statute.aspx](https://asp.icc-cpi.int/en_menus/asp/states%20parties/Pages/the%20states%20parties%20to%20the%20rome%20statute.aspx) (last visited Feb 28, 2019).

<sup>30</sup> *See, e.g.*, Shany, *supra* note 8, *Chapter 10: The International Criminal Court* (with Sigall Horowitz and Gilad Noam), at 223.

<sup>31</sup> For example, the ICC does not have jurisdiction over crimes committed before July 1, 2002.

<sup>32</sup> The U.S., China, Russia, France and the U.K..

<sup>33</sup> Langer, *supra* note 3, at 214-17; *see Resolutions on the ICC Budget*, ICC, [https://asp.icc-cpi.int/en\\_menus/asp/bureau/WorkingGroups/budget/Pages/default.aspx](https://asp.icc-cpi.int/en_menus/asp/bureau/WorkingGroups/budget/Pages/default.aspx).

<sup>34</sup> *See, e.g.*, Margaret M. deGuzman, *The Global-Local Dilemma and the ICC’s Legitimacy*, in *LEGITIMACY AND INTERNATIONAL COURTS* 62, 66-67 (Nienke Grossman, Harlan Grant Cohen, Andreas Follesdal, Geir Ulfstein eds., 2018).

<sup>35</sup> For example, the ICC is located in The Hague, which is far from the situation countries where it has investigations or cases, including Uganda, Central Africa Republic, Bangladesh, etc.

<sup>36</sup> *See, e.g.*, Yvonne M. Dutton, *Bridging the Legitimacy Divide: The International Criminal Court’s Domestic Perception Challenge*, 56 *COLUM. J. TRANSNAT’L L.* 71 (2017).

understanding.<sup>37</sup> The establishment of international criminal tribunals can be a good approach to seeking transitional justice but is not sufficient to fully address international crimes.

Under universal jurisdiction, any state may prosecute and try core international crimes without any territorial, personal, or national interest link to the crime in question when it was committed.<sup>38</sup> The core crimes covered by universal jurisdiction, crimes against humanity, genocide and certain war crimes, are usually considered to be customary international law crimes.<sup>39</sup> Since these crimes affect the entirety of humanity, any state may assert jurisdiction over them.<sup>40</sup> Many states have passed legislation making their criminal laws applicable to these crimes, and hundreds of individuals have been investigated and subject to formal proceedings based on prescriptive universal jurisdiction, which evolves state practice and *opinion juris*.<sup>41</sup> However, “enforcement jurisdiction over core international crimes may not be exercised unless the defendant has a relevant link with the prosecuting state – such as being physically present in or becoming a citizen of the prosecuting state after committing the crime.”<sup>42</sup> The exercise of universal jurisdiction can be beneficial to seeking international criminal justice, but it should not be a primary approach because state courts may not be familiar with international core crimes and the trials may disrupt international relations.

For many reasons mentioned above, including domestic courts’ lack of specialized legal knowledge of international criminal crimes, the ICC’s limited jurisdiction and capacity, and foreign courts’ practical difficulty and political sensitivity, hybrid courts remain a very important alternative to prosecute perpetrators of mass atrocity crimes.<sup>43</sup> Hybrid courts combine both national and international elements under various models adapted to different situations, and have the potential to build domestic capacity and increase the legitimacy of prosecutions among affected populations.<sup>44</sup> However, as hybrid

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<sup>37</sup> Dickinson, *supra* note 10, at 300-03.

<sup>38</sup> See, e.g., RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES §402 & §404 (1987).

<sup>39</sup> See, e.g., UN Secretary-General, Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808, U.N. Doc. S/25704 (May 3, 1993), paras. 34-35; Questions Relating to the Obligation to Prosecute or Extradite [*Belgium v. Senegal*], International Court of Justice, Judgment of 20 July 2012, para. 99.

<sup>40</sup> See, e.g., Antony Duff, *Authority and Responsibility in International Criminal Law*, in THE PHILOSOPHY OF INTERNATIONAL LAW 589 (Samantha Besson & John Tasioulas eds., 2010); David Luban, *A Theory of Crimes against Humanity*, 29 YALE J. INT’L L. 85 (2004).

<sup>41</sup> Langer, *supra* note 3, at 218-20.

<sup>42</sup> *Id.* at 220.

<sup>43</sup> See, e.g., Jane E. Stromseth, *Justice on the Ground: Can International Criminal Courts Strengthen Domestic Rule of Law in Post-Conflict Societies?*, 1 HAGUE J. ON RULE L. 87 (2009); Neha Jain, *Conceptualising Internationalisation in Hybrid Criminal Courts*, 12 SING. Y.B. INT’L L. 81, 88 (2008); Parinaz Kermani Mendez, *The New Wave of Hybrid Tribunals: A Sophisticated Approach to Enforcing International Humanitarian Law or an Idealistic Solution with Empty Promises?*, 20 CRIM. L. F. 53, 55 (2009).

<sup>44</sup> See section II (A) of this article.

courts go beyond national prosecution and face a range of obstacles, the legitimacy of those courts may be challenged by both stakeholders and academic critics, and any defects in their legitimacy can further undermine the courts' authority and effectiveness.

This article focuses on the legitimacy of hybrid courts. It uses the Extraordinary African Chambers (EAC) in the Senegalese Courts as an example to elaborate on a comprehensive approach to evaluate the legitimacy of hybrid courts. The article first introduces the features and categories of hybrid courts and explains the need to examine hybrid courts' legitimacy, then provides a comprehensive approach to evaluate their legitimacy, which includes the analysis of both normative (internal) and sociological (external) legitimacy in the courts' origins, persons, procedures, and outcomes. Finally, it uses the comprehensive approach to evaluate the legitimacy of the EAC in Senegal as an illustration. The EAC provides good resources for the research of both its normative and sociological legitimacy and reflects the most recent development and practice of international law involving international institutions, states, regional organizations, and individuals.

## II. HYBRID COURTS AND THE NEED TO EXAMINE THEIR LEGITIMACY

In post-conflict situations, states may need international assistance to investigate crimes against perpetrators of grave violations of international criminal and humanitarian law.<sup>45</sup> Although international criminal law is increasingly assimilated with the ICC, hybrid justice remains common after the establishment of the landmark Special Court for Sierra Leone (SCSL). The establishment of the ICC, the permanent court with general but limited jurisdiction over international crimes, has not eliminated the need for more specific and tailored responses to mass violence in different countries. Hybrid courts can serve to fill the gap where the ICC does not or cannot step in, or they can be utilized as a more creative, legitimate, economical, and efficient mechanism to achieve justice on the ground.

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<sup>45</sup> See Etelle R. Higonnet, *Restructuring Hybrid Courts: Local Empowerment and National Criminal Justice Reform*, 23 ARIZ. J. INT'L & COMP. L. 347, 352-56 (2006).

### A. *Features and Categories of Hybrid Courts*

Hybrid criminal courts have sprung up in different parts of the world<sup>46</sup> as a significant tool to fight crimes of atrocity, including genocide, war crimes, crimes against humanity, and other serious violations of human rights. Hybrid courts emerged in the late 1990s and early 2000s,<sup>47</sup> developed quickly during 2000 to 2007,<sup>48</sup> and experienced a quiet period until more hybrid courts were established after 2014.<sup>49</sup>

There is no single definition of ‘hybridity,’ but the notion is used conventionally to refer to institutions that mix national and international elements.<sup>50</sup> Usually, hybrid courts combine both domestic and international personnel and judges, employ both domestic and international lawyers, have formal international participation, and may apply both domestic and international law.<sup>51</sup> In practice, the bottom line is that the bench of a hybrid court is always composed of both domestic and international judges. States might play a leading role in establishing a hybrid court, with assistance from the international community such as the UN, or the international participation might be predominant if the sovereign government does not exist or is weak, uncooperative, and corrupt. The subject-matter jurisdiction of hybrid courts usually covers core crimes enshrined in international law, including war crimes, crimes against humanity, and genocide, and sometimes also covers state law crimes, such as murder, torture, and sexual offenses, which are usually also elements of international crimes. Hybrid courts may emphasize domestic laws, especially in questions of criminal procedures.

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<sup>46</sup> See generally, Sarah Williams, *HYBRID AND INTERNATIONALISED CRIMINAL TRIBUNALS: SELECTED JURISDICTIONAL ISSUES* (2012); Aaron Fichtelberg, *HYBRID TRIBUNALS: A COMPARATIVE EXAMINATION OF THEIR ORIGINS, STRUCTURE, LEGITIMACY AND EFFECTIVENESS* (2015); Yves Beigbeder, *Part II The Mixed National/International Courts*, *INTERNATIONAL CRIMINAL TRIBUNALS: JUSTICE AND POLITICS* (2011), at 107-84; Elizabeth M. Bruch, *Hybrid Courts: Examining Hybridity Through a Post-Colonial Lens*, 28 *B.U. INT’L L. J.* 1 (2010); Sarah M. H. Nouwen, ‘Hybrid Courts’ *The Hybrid Category of a New Type of International Crimes Courts*, 2 *UTRECHT L. REV.* 190 (2006); Beth Van Schaack, *The Building Blocks of Hybrid Justice*, 44 *DENV. J. INT’L L. & POL’Y* 101 (2016); Jain, *supra* note 43; Mendez, *supra* note 43; Padraig McAuliffe, *Hybrid Tribunals at Ten: How International Criminal Justice’s Golden Child Became an Orphan*, 7 *J. INT’L L. & INT’L REL.* 1 (2011); Philippe Flory, *International Criminal Justice and Truth Commissions*, 13 *J. INT’L CRIM. JUST.* 19 (2015).

<sup>47</sup> The establishment of the Special Court for Sierra Leone in 2002 is a landmark event.

<sup>48</sup> Several hybrid courts were created in the aftermath of violence in Bosnia and Herzegovina, Cambodia, Indonesia (East Timor), Iraq, Lebanon, and Kosovo.

<sup>49</sup> The most recent hybrid courts are the Extraordinary African Chambers in Senegal and the Special Criminal Court in the Central African Republic.

<sup>50</sup> See Williams, *supra* note 46.

<sup>51</sup> Higonnet, *supra* note 45, at 356; see also, Bruch, *supra* note 46, at 6; but see Nouwen, *supra* note 46, at 213 (arguing that the mixed composition of the Bench is the “only defining commonality” of hybrid tribunals); for more detailed defining features of hybrid courts, see Williams, *supra* note 46, at 201-52.

Five models of international law practices have been used in the creation of hybrid courts.<sup>52</sup> The first model is created under the authority of a UNSC Resolution in territories under the UN administrations, such as the Special Panels for Serious Crimes in East Timor (SPSC)<sup>53</sup> and the “Regulation 64” Panels in the Courts of Kosovo.<sup>54</sup> There was no sovereign state government as an actor in launching the two courts, but domestic laws were applied in the prosecutions since the hybrid courts were created within the existing domestic judicial system.<sup>55</sup> The second is created by a bilateral agreement between the affected state and the UN, such as the SCSL<sup>56</sup> and the Extraordinary Chambers in the Courts of Cambodia (ECCC).<sup>57</sup> This model combines a strong state participation and a formal international participation, which in theory guarantees domestic involvement and international assistance with regards to financial issues, human resources, arrest, and enforcement. The third is more formally merged into domestic judicial systems with international elements, such as the War Crimes Chamber (WCC) within the Criminal Division of the State Court of Bosnia,<sup>58</sup> the Iraqi High Tribunal (IHT),<sup>59</sup> and the Special Criminal Court in the Central African Republic (SCC).<sup>60</sup> For this model, the international participation is not as prominent as other counterparts. The states play a leading role in seeking justice and accountability. The fourth is purely created by a UNSC resolution, such as the Special Tribunal for Lebanon (STL).<sup>61</sup> The STL is a unique example, because it is mainly a production of international efforts, established by the UNSC and located in The Hague, while its hybridity lies in that it combines Lebanese and international judges, applies only Lebanese criminal law, and has a field office in the Lebanese capital Beirut. The fifth model is created by a bilateral agreement between a state and a regional organization under universal jurisdiction, such as the Extraordinary

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<sup>52</sup> For the first four models, see Lindsey Raub, *Positioning Hybrid Tribunals in International Criminal Justice*, 41 INT'L L. & POL. 1013, 1039 (2009).

<sup>53</sup> UN Doc. S/RES/1272 (1999); U.N. Transitional Admin. in East Timor, Reg. No. 2000/11 on the Organization of Courts in East Timor, UNTAET/REG/2000/11 (Mar. 6, 2000).

<sup>54</sup> UN Doc. S/RES/1244 (1999).

<sup>55</sup> Raub, *supra* note 52, at 1026-31.

<sup>56</sup> UN Doc. S/RES/1315 (2000); Agreement between the United Nations and the Government of Sierra Leone and Statute of the Special Court for Sierra Leone, 16 January 2002.

<sup>57</sup> Agreement between the United Nations and the Royal Government of Cambodia Concerning the Prosecution under Cambodian Law of Crimes Committed During the Period of Democratic Kampuchea, U.N.-Cambodia, June 6, 2003, 2329 U.N.T.S. No. 41723.

<sup>58</sup> Law on the Court of Bosnia and Herzegovina, available at [http://www.un.org/en/genocideprevention/documents/atrocities-crimes/Doc.48\\_Law\\_on\\_Court\\_BiH\\_-\\_Consolidated\\_text\\_-\\_49\\_09.pdf](http://www.un.org/en/genocideprevention/documents/atrocities-crimes/Doc.48_Law_on_Court_BiH_-_Consolidated_text_-_49_09.pdf) (last visited Feb 28, 2019).

<sup>59</sup> Law No. (10) 2005 Law of The Iraqi Higher Criminal Court, available at [https://ihl-databases.icrc.org/applic/ihl/ihl-nat.nsf/0/62dfa419b75d039cc12576a1005fd6c1/\\$FILE/IST\\_statute\\_official\\_english.pdf](https://ihl-databases.icrc.org/applic/ihl/ihl-nat.nsf/0/62dfa419b75d039cc12576a1005fd6c1/$FILE/IST_statute_official_english.pdf) (last visited Feb 28, 2019).

<sup>60</sup> ORGANIC LAW NO. 15.003 ON THE CREATION, ORGANIZATION AND FUNCTIONING OF THE SPECIAL CRIMINAL COURT (August 2014).

<sup>61</sup> UN Doc. S/RES/1757 (2007).



American Chambers in Senegal (EAC).<sup>62</sup> The EAC is a unique practice with success, with its creation under universal jurisdiction as a hybrid court and the victims-driven success among many other characters, which will be discussed in detail in this article. In addition to the models mentioned above, other methods may be adopted to establish a hybrid court. For example, a proposed Hybrid Court for South Sudan (HCSS) is to be created by a regional organization, the African Union Commission, to address justice issues in Africa.<sup>63</sup>

Hybrid courts remain an important mechanism for criminal prosecutions of mass atrocities. There are various benefits that hybrid courts can bring to these prosecutions. For instance, hybrid courts provide the flexibility to adapt to the unique situation in each post-conflict state.<sup>64</sup> Hybrid courts may improve overall domestic judicial capacity by providing a platform whereby domestic personnel can engage, learn, and train.<sup>65</sup> Further, hybrid courts located in or near the affected areas can increase accessibility to the trial for victims.<sup>66</sup> Therefore, hybrid courts may have the potential to gain perceived legitimacy. It seems encouraging that hybrid courts can be an ideal design to fight mass atrocities, but the practical difficulty is: how can one create and operate a hybrid court that meets the intended promises and expectations?

### B. *The Need to Examine the Legitimacy*

Hybrid courts can play a significant role in initiating criminal prosecutions against international crimes. However, there are doubts as to whether these courts can reliably fight the crimes resulting from mass atrocities or other serious human rights violations.<sup>67</sup> When assessing the effectiveness of international courts, a goal-based approach is generally adopted.<sup>68</sup> The goals of hybrid courts can be comprehensive. An obvious and prominent goal is to end the impunity for perpetrators and seek to hold them accountable.<sup>69</sup> Other goals include retribution, deterrence, non-recurrence,

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<sup>62</sup> Agreement on the Establishment of the Extraordinary African Chambers Within the Senegalese Judicial System Between the Government of the Republic of Senegal and the African Union, Aug. 22, 2012, 52 I.L.M. 1024 (2013).

<sup>63</sup> Intergovernmental Authority on Development (IGAD), Agreement on the Resolution of the Conflict in the Republic of South Sudan (August 17, 2015), Chapter V.

<sup>64</sup> Raub, *supra* note 52, at 1024; *see also* Cassese, *supra* note 29, at 437.

<sup>65</sup> Olga Martin-Ortega and Johanna Herman, *Hybrid Tribunals and the Rule of Law*, JUST & DURABLE PEACE BY PIECE (2010), at 7.

<sup>66</sup> The travel to the courtroom takes less time if victims would like to participate in hearings. They can also watch the hearings online without inconvenient time differences.

<sup>67</sup> *See, e.g., Can the ECCC Achieve True Justice for the Victims?*, U.S. Holocaust Memorial Museum, <https://www.ushmm.org/genocide-prevention/countries/cambodia/case-study/justice/eccc>.

<sup>68</sup> *See* Shany, *supra* note 8, Chapter 1: *A Goal-Based Approach to Effectiveness Analysis*, at 13-30.

<sup>69</sup> I draw this conclusion based on the preamble and first few articles in charters or statutes of these hybrid courts.

victims' redress, truth-seeking, sometimes reconciliation, probably the rule of law and domestic capacity building, and the promotion of international legal norms.<sup>70</sup> Legitimacy itself is not a goal of hybrid courts, however, legitimacy should be understood as a key variable that influences goal attainment and provides an important context and substance to any study of judicial effectiveness.<sup>71</sup> If a court is not legitimate, it can hardly be effective.

Legitimacy of domestic courts relates to the established domestic judicial authority, which varies in different countries. For international or hybrid courts, the establishment of their legitimacy is mostly at an initial stage. Potential reasons for this need to establish legitimacy early on include the short history of the courts' appearance, the distrust of the courts' creation authority, the inadequate operations and practices of the courts, and the powerful main actors on trial before the courts. Legitimacy is frequently challenged when it comes to post-conflict tribunals that adjudicate violations of international criminal, humanitarian, and human rights law,<sup>72</sup> for sometimes being "victor's justice", being overwhelmingly influenced by international and domestic politics, or lacking protection of defendants' rights. International criminal justice is suffering from serious legitimacy challenges.<sup>73</sup> Therefore, the legitimacy is an important issue for hybrid courts which deal with international crimes.

Various kinds of hybrid courts have been established. There is no fixed or uniform model. On one hand, the flexibility of hybrid courts is beneficial to adapting to tailored situations in a specific area.<sup>74</sup> However, on the other hand, each hybrid court can be very different, which makes examining hybrid courts' legitimacy a complex task. Further, new models of hybrid courts may appear with states' practices. Flexibility and creativity may come along with defects in the design of hybrid courts. It is necessary to examine the legitimacy of the different kinds of existing hybrid courts, which will not only reflect the effectiveness of these courts, but also provide referential standards and predictions for prospective hybrid courts in the future.

### III. A COMPREHENSIVE APPROACH TO EXAMINE HYBRID COURTS' LEGITIMACY

Legitimacy is a complicated notion, relevant to but broader than legality and authority. The term "legitimacy" as applied to institutions is

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<sup>70</sup> Stromseth, *supra* note 5; Langer, *supra* note 3.

<sup>71</sup> Shany, *supra* note 8, *Chapter 7: Legitimacy*, at 138.

<sup>72</sup> Higonnet, *supra* note 45, at 356.

<sup>73</sup> See, e.g., David Luban, *After the Honeymoon: Reflections on the Current State of International Criminal Justice*, 11 J. INT'L CRIM. JUST. 505, 509 (2013); Yuval Shany, *Seeking Domestic Help: The Role of Domestic Criminal Law in Legitimizing the Work of International Criminal Tribunals*, 11 J. INT'L CRIM. JUST. 5, 8 (2013) [hereinafter Shany II].

<sup>74</sup> See *supra* note 64.

defined as “right to rule”<sup>75</sup> or “justified authority.”<sup>76</sup> A court’s overall legitimacy is comprised of different legitimating factors. This article proposes a comprehensive approach to examine the legitimacy of hybrid courts. Legitimacy should be looked into from both normative (internal) and sociological (external) perspectives. Specifically, legitimacy should be achieved in the courts’ origins, persons, procedures, and outcomes. Neither normative nor sociological legitimacy alone would lead to a finality of overall legitimacy. A strong normative legitimacy may result in an improved sociological legitimacy. Further, deficits in origin legitimacy may be compensated for by enhanced process legitimacy, and *vice versa*.<sup>77</sup> There is a reciprocal relationship among different elements of legitimacy from both perspectives.

#### A. *Two Perspectives: Normative and Sociological Legitimacy*

Traditionally, scholars discuss legitimacy from a normative perspective, which is more objective and rooted in philosophy or political theory.<sup>78</sup> Recently, more and more scholars are advocating that stakeholders’ subjective perceptions of legitimacy should be an important part of an institution’s overall legitimacy,<sup>79</sup> which is called sociological legitimacy.<sup>80</sup> Normative legitimacy is supposed to be grounded in objective principles, while sociological legitimacy depends on perceptions and is agent relative.<sup>81</sup> International and hybrid criminal courts are facing legitimacy challenges from both normative and sociological perspectives. For instance, the ICC’s

<sup>75</sup> See, e.g., Allen Buchanan and Robert O. Keohane, *The Legitimacy of Global Governance Institutions*, 20 ETHICS & INT’L AFF. 405 (2006); Jean d’Aspremont and Eric De Brabandere, *The Complimentary Faces of Legitimacy in International Law: The Legitimacy of Origin and the Legitimacy of Exercise*, 34 FORDHAM INT’L L. J. 190 (2011).

<sup>76</sup> Daniel Bodansky, *The Legitimacy of International Governance: A Coming Challenge for International Environmental Law*, 93 AM. J. INT’L L. 596, 601 (1999) [hereinafter Bodansky I].

<sup>77</sup> Robert Howse, *The Legitimacy of the World Trade Organization*, in THE LEGITIMACY OF INTERNATIONAL ORGANIZATIONS 355, 377 (Jean-Marc Coicaud and Veijo Aulis Heiskanen eds., 2001).

<sup>78</sup> Daniel Bodansky, *The Concept of Legitimacy in International Law*, in LEGITIMACY IN INTERNATIONAL LAW 309, 313 (Rüdiger Wolfrum & Volker Röben eds., 2008) [hereinafter Bodansky II].

<sup>79</sup> See e.g., Bodansky I, supra note 76, at 601; Buchanan & Keohane, supra note 75, at 405; Richard H. Fallon Jr., *Legitimacy and the Constitution*, 118 HARV. L. REV. 1787, 1795 (2005); Stuart Ford, *A Social Psychology Model of the Perceived Legitimacy of International Criminal Courts: Implications for the Success of Transitional Justice Mechanisms*, 45 VANDERBILT J. TRANSNATIONAL L. 405 (2012); Harry Hobbs, *Hybrid Tribunals and the Composition of the Court: In Search of Sociological Legitimacy*, 16 CHICAGO J. INT’L L. 482 (2016) [hereinafter Hobbs I].

<sup>80</sup> The notion of sociological legitimacy originally credits to Max Weber’s work, see MAX WEBER ON LAW IN ECONOMY AND SOCIETY 5 (Max Rheinstein ed., Edward Shils & Max Rheinstein trans., Harvard University Press 1969); see also Alan Hyde, *The Concept of Legitimation in the Sociology of Law*, 1983 WIS. L. REV. 379, 380–82 (1983).

<sup>81</sup> Nienke Grossman, *Legitimacy and International Adjudicative Bodies*, 41 GEO. WASH. INT’L L. REV. 107, 115-6 (2009) [hereinafter Grossman I].

selection of cases is criticized for being influenced by politics and power to maintain government cooperation, rather than purely based on principles of law and justice, challenging its normative legitimacy.<sup>82</sup> Also, the ICC is sometimes criticized for lacking perceived legitimacy from domestic audiences, thus weakening the local audiences' support of the court's work, challenging its sociological legitimacy.<sup>83</sup> Moreover, perceived legitimacy from the international community is vital to getting international funding and support.<sup>84</sup> Hybrid courts face diverse legitimacy challenges, but there has been little coverage in the legal literature.<sup>85</sup> When assessing a hybrid court's legitimacy, it is important not only to analyze its compliance with legal principles in its statute (or charter) and cases, but also to focus on stakeholders' perception of its legitimacy.

### i. Normative Legitimacy

Normative legitimacy relates to justifications for authority normally derived from "objective" notions of fairness and justice—<sup>86</sup> either legal norms or moral norms. Legal norms emphasize the condition of being in accordance with law or principles,<sup>87</sup> such as a consistent, procedurally fair, unbiased, and transparent application of norms.<sup>88</sup> Moral norms emphasize the importance of the moral justification, such as "satisfying a minimal democracy requirement and protect the most basic human rights."<sup>89</sup> When it relates to international or hybrid criminal courts, the legal norms are more important, because it is always assumed that the purpose to establish these

<sup>82</sup> See, e.g., Allison Marston Danner, *Enhancing the Legitimacy and Accountability of Prosecutorial Discretion At the International Criminal Court*, 97 (3) AM. J. INT'L L. 510, 515 (2003); James A. Goldston, *More Candour About Criteria: the Exercise of Discretion by the Prosecutor of the International Criminal Court*, 8 J. INT'L CRIM. JUST. 386-87(2010); Phil Clark, *Law, Politics and Pragmatism: the ICC and Case Selection in Uganda and the Democratic Republic of Congo*, in *COURTING CONFLICT? JUSTICE, PEACE, AND THE ICC IN AFRICA* 37, 44 (Nicholas Waddell and Phil Clark eds., 2008).

<sup>83</sup> See, e.g., Dutton, *supra* note 36.

<sup>84</sup> Ford, *supra* note 79, at 407.

<sup>85</sup> Most articles focus on the legitimacy problems of the Special Tribunal for Lebanon. See, e.g., Benedetta Berti, *Balancing Justice, Stability and Legitimacy: Lebanon and the UN Special Tribunal - Understanding the Domestic Impact of International Criminal Justice*, 19 MEDITERRANEAN POL. 117 (2014); John Cerone, *The Politics of International Justice - U.S. Policy and the Legitimacy of the Special Tribunal for Lebanon*, 40 DENV. J. INT'L L. & POL'Y 44 (2011); Marieke Wierda, Habib Nassar and Lynn Maalouf, *Early Reflections on Local Perceptions, Legitimacy and Legacy of the Special Tribunal for Lebanon*, 5 J. INT'L CRIM. JUST. 1065 (2007); Cassese, *supra* note 29.

<sup>86</sup> See, e.g., Martti Koskenniemi, *Legitimacy, Rights and Ideology: Notes Towards a Critique of the New Moral Internationalism*, 7 J. LEGAL & SOC. THEORY 349, 350-51 (2003); Bodansky II, *supra* note 78.

<sup>87</sup> Richard H. Fallon, Jr., *Legitimacy and the Constitution*, 118 HARV. L. REV. 1787, 1794 (2005).

<sup>88</sup> See Marc A. Loth, *Courts in Quest for Legitimacy: A Comparative Approach*, in *THE LEGITIMACY OF HIGHEST COURTS' RULINGS: JUDICIAL DELIBERATION AND BEYOND* 267 (N. Huls et al. eds., 2009).

<sup>89</sup> A. Buchanan, *JUSTICE, LEGITIMACY AND SELF-DETERMINATION: MORAL FOUNDATIONS FOR INTERNATIONAL LAW* (2004), at 187.

courts is to pursue international criminal justice, which is rooted in moral justifications.

Legal norms of fairness and justice that relate to justifications and authorities of a court cover various aspects. Normative legitimacy is a core and fundamental perspective of international and hybrid courts' legitimacy, because it articulates "why a state should obey a court's ruling even if it may run contrary to the state's perceived interests," and it can help "identify where international courts are lacking and what can be done to strengthen them."<sup>90</sup>

## ii. Sociological Legitimacy

Sociological studies of law generally focus on its "external manifestation."<sup>91</sup> Sociological legitimacy is defined as involving the actual acceptance of authority by a relevant constituency.<sup>92</sup> That is to what extent relevant audiences perceive an institution's authority to be justified.<sup>93</sup> "An institution is legitimate in the sociological sense when it is widely believed to have the right to rule."<sup>94</sup> The ability of international and hybrid courts to confer legitimacy on international regimes of cooperation, the laws applied by their organs, and the political and legal outcomes they generate depends to a large extent on the court's own legitimacy in the eyes of key constituencies.<sup>95</sup> In this context, the key question is whether the authority of the court has been accepted or not, and by whom. For an international or hybrid court, the authority of the court should be accepted by relevant states, public opinion within such states, potential litigants, and other stakeholders.<sup>96</sup> A formal manifestation of acceptance of the court's authority, compliance with the judgment, and general support of the court, demonstrate the acceptance of such a court.<sup>97</sup> In addition, it should be believed that the court is "grounded on values, principles, and goals that reflect [the majority of its constituencies]."<sup>98</sup> In turn, "the court's sociological legitimacy can heighten

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<sup>90</sup> Nienke Grossman, *The Normative Legitimacy of International Courts*, 86 TEMP. L. REV. 61, 64 (2013) [hereinafter Grossman II].

<sup>91</sup> Reza Banakar, *NORMATIVITY IN LEGAL SOCIOLOGY* (Springer 2015), at 44.

<sup>92</sup> Ian Hurd, *Legitimacy and Authority in International Politics*, 53 INT'L ORG. 379, 381(1999).

<sup>93</sup> Daniel Bodansky, *Legitimacy in International Law and International Relations*, in INTERDISCIPLINARY PERSPECTIVES ON INTERNATIONAL LAW AND INTERNATIONAL RELATIONS: THE STATE OF THE ART 321, 324-28 (Jeffrey Dunoff and Mark Pollack eds., 2013) [hereinafter Bodansky III].

<sup>94</sup> Buchanan & Keohane, *supra* note 75, at 405 (emphasis omitted).

<sup>95</sup> Shany, *supra* note 8, *Chapter 7: Legitimacy*, at 137; *see also* Vesselin Popovski, *Legality and Legitimacy of International Criminal Tribunals*, in LEGALITY AND LEGITIMACY IN GLOBAL AFFAIRS 388, 389 (Richard Falk, Mark Jurgensmeyer, and Vesselin Popovski eds., 2012).

<sup>96</sup> Shany, *supra* note 8, *Chapter 7: Legitimacy*, at 139.

<sup>97</sup> *Id.*

<sup>98</sup> Cassese, *supra* note 14, at 492.

the court's prospect of success."<sup>99</sup> A court "must enjoy public confidence if it is to be successful in carrying out its duties."<sup>100</sup>

These two perspectives are interrelated: moral and legal norms can be derived from social customs, and perceptions of justified authority often depend on the strength of beliefs in the underlying legal and moral norms.<sup>101</sup> Social institutions will be perceived by the population-at-large as legitimate if their claim for authority is supported by the rational logic of the legal bureaucracy.<sup>102</sup> Normative legitimacy is a prerequisite to conferring sociological legitimacy on the institutions creating and applying them and can facilitate the attainment of the court's ultimate ends in pursuit of international criminal justice and ending impunity.<sup>103</sup>

*B. Four Specific Elements: Origins, Persons, Procedures, and Outcomes*

Traditional approaches to examine the legitimacy of international institutions usually focus on origins, process, and outcomes.<sup>104</sup> Furthermore, the adequate process of a court generally requires impartial judges (subjects) and fair and transparent procedures (objects). For a hybrid court, the mixture of persons is a defining character to distinguish it from purely international or purely domestic courts. Therefore, this article proposes to analyze the persons' prong individually.

i. Origins (Source Legitimacy)

Source legitimacy refers to the manner and authority used to create a hybrid court. It addresses whether the court is established pursuant to appropriate legal and moral norms and whether it is perceived as having such normatively appropriate origins.<sup>105</sup> State consent should be a focus for the courts' origins or sources.<sup>106</sup> International institutions usually derive legitimacy from states' consent to their jurisdiction,<sup>107</sup> and it is similar for

<sup>99</sup> Hobbs, *supra* note 63, at 520-22.

<sup>100</sup> *Prager and Oberschlick v. Austria*, 313 EUROPEAN COURT OF HUMAN RIGHTS (ser. A) 13 (1995).

<sup>101</sup> deGuzman, *supra* note 33, at 64.

<sup>102</sup> Max Weber, *ECONOMY AND SOCIETY: AN OUTLINE OF INTERPRETATIVE SOCIOLOGY* VOL 1 (Guenther Roth and Claus Wittich eds., originally published in 1922, University of California Press, Berkeley 1978), at 215.

<sup>103</sup> Shany, *supra* note 7, *Chapter 7: Legitimacy*, at 137-38.

<sup>104</sup> See, e.g., Silje Aambo Langvatn & Theresa Squatrito, *Conceptualizing and Measuring the Legitimacy of International Criminal Tribunals*, in *THE LEGITIMACY OF INTERNATIONAL CRIMINAL TRIBUNALS* 41, 58-64 (Nobuo Hayashi and Cecilia M. Bailliet eds., 2017).

<sup>105</sup> deGuzman, *supra* note 34, at 69.

<sup>106</sup> Rüdiger Wolfrum, *Legitimacy of International Law from a Legal Perspective: Some Introductory Considerations*, in *LEGITIMACY IN INTERNATIONAL LAW*, *supra* note 78, at 1, 6.

<sup>107</sup> JAN KLABBERS ET AL., *THE CONSTITUTIONALIZATION OF INTERNATIONAL LAW*, 39 (2009); Lukas H. Meyer & Pranay Sanklecha, *Introduction*, in *LEGITIMACY, JUSTICE AND*

hybrid courts. States play an important role in establishing a hybrid court by conferring jurisdiction to the court in various methods.<sup>108</sup> In this article, source legitimacy will be illustrated by discussing how the Extraordinary African Chambers (EAC) in the Senegalese Courts were established, whether the EAC was created within legal authority, and how different stakeholders regard the authority to establish the EAC. The EAC's relationship with other judicial institutions, such as domestic courts, foreign courts, regional courts, and international courts will also be covered, because source legitimacy lies in jurisdiction issues such as the principle of complementarity.<sup>109</sup>

## ii. Persons (Input Legitimacy)

Personal legitimacy concerns the major judicial actors of the court, such as prosecutors and judges, who should be independent from the influence of political bodies and be seen as such.<sup>110</sup> From the normative perspective, it refers to an individual decision-maker's potential to act as the source of legitimacy for the court.<sup>111</sup> "Judges' professional and personal identities and goals may also influence adjudicatory outcomes."<sup>112</sup> Further, personal legitimacy has a significant influence on the court's sociological legitimacy.<sup>113</sup> Rulings from fair and impartial adjudicators are worthy of respect, while those from biased adjudicators are not. It is important that the prosecutors and judges be perceived as legitimate among local audiences and international communities. This article will illustrate the idea of hybrid courts' personal legitimacy by introducing how the judges and prosecutors shall be selected according to the text of the EAC's statute and looking into its practice by analyzing the persons' backgrounds, genders, and reputations.

## iii. Procedures (Input Legitimacy Continued)

Process legitimacy relates to the operational practices and procedures of the court,<sup>114</sup> which may be the most significant element of legitimacy in law scholars' eyes.<sup>115</sup> It mainly addresses the fairness and

PUBLIC INTERNATIONAL LAW 1, 4-8 (Lukas H. Meyer, ed., 2009); Bodansky I, *supra* note 76, at 597, 605; Buchanan & Keohane, *supra* note 75, at 412-13.

<sup>108</sup> See section II (A) of this article.

<sup>109</sup> See Popovski, *supra* note 95, at 405.

<sup>110</sup> Ruth Mackenzie and Philippe Sands, *International Courts and Tribunals and the Independence of the International Judge*, 44 HARV. INT'L L. J. 271 (2003).

<sup>111</sup> David Easton, *A SYSTEMS ANALYSIS OF POLITICAL LIFE* (New York: John Wiley & Sons, 1965), at 302.

<sup>112</sup> Grossman II, *supra* note 90, at 79.

<sup>113</sup> See generally, Harry Hobbs, *Towards a Principled Justification for the Mixed Composition of Hybrid International Criminal Tribunals*, 30 LEIDEN J. INT'L L. 177 (2017) [hereinafter Hobbs II]; Hobbs I, *supra* note 63. Hobbs's articles emphasize the composition of hybrid court's judges (personal legitimacy) and sociological legitimacy.

<sup>114</sup> See Aaron Fichtelberg, *Democratic Legitimacy and the International Criminal Court: A Liberal Defense*, 4 J. INT'L CRIM. JUST. 765, 782 (2006).

<sup>115</sup> Bodansky I, *supra* note 76, at 612 (stating that "authority can be legitimate because it involves procedures considered to be fair").

adequacy of decision-making processes.<sup>116</sup> The selection of cases, defendants' rights,<sup>117</sup> victims' participation, and the court's outreach activities<sup>118</sup> are important issues of procedural legitimacy. For normative legitimacy, the focus should be a doctrinal analysis of the statute of the court, and the procedures the court employs in the end. For sociological legitimacy, stakeholders' perceptions of procedural fairness in adjudicating and punishing defendants and victims' participation should be primary considerations. This article will illustrate the issues of process legitimacy by discussing the EAC's designs and practices relating to how the court selects its defendants, whether the defendants have adequate procedural rights, to what extent the victims are involved in the litigation, and how the court carries out its duties in outreach activities among diverse audiences.

#### iv. Outcomes (Output Legitimacy)

Output legitimacy focuses on the results the court produces, which include punishment of perpetrators and impacts on victims and their communities.<sup>119</sup> For one thing, the assessment of the legitimacy of a hybrid court's decisions is based on the source and the process of their production.<sup>120</sup> For another, judicial outcomes that conflict with the court's judicial authority or basic principles of justice may make constituencies challenge the legitimacy of the court.<sup>121</sup> Even if the origins, persons, and procedures engendering a court seem legitimate, "a court that makes immoral or unjust rulings lacks legitimacy."<sup>122</sup> To examine output legitimacy, the focus is whether the judgments are made within the court's authority and comply with basic principles of justice, how affected audiences perceive the judgments, and whether the judgements are or will be enforced. This article will illustrate the legitimacy of hybrid courts' outcomes by introducing the EAC's judgement results and the (potential) enforcement of the judgement. The EAC's interaction with other transitional justice mechanisms, such as victim's reparations, will also be discussed, because different mechanisms contribute to the outcomes.

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<sup>116</sup> See, e.g., THOMAS M. FRANCK, *FAIRNESS IN INTERNATIONAL LAW AND INSTITUTIONS* 7 (1995); J.H.H. Weiler, *The Rule of Lawyers and the Ethos of Diplomats: Reflections on the Internal and External Legitimacy of WTO Dispute Settlement*, 35 J. WORLD TRADE 191, 204 (2001).

<sup>117</sup> See David Luban, *Fairness to Rightness: Jurisdiction, Legality, and the Legitimacy of International Criminal Law*, in *THE PHILOSOPHY OF INTERNATIONAL LAW* (Samantha Besson and John Tasioulas eds., 2010).

<sup>118</sup> See Dutton, *supra* note 36.

<sup>119</sup> deGuzman, *supra* note 34, at 79-81.

<sup>120</sup> Shany, *supra* note 8, at 143-45.

<sup>121</sup> *Id.*

<sup>122</sup> Grossman II, *supra* note 90, at 68.



#### IV. AN ILLUSTRATION: LEGITIMACY OF THE EXTRAORDINARY AFRICAN CHAMBERS IN SENEGAL

The Extraordinary African Chambers were inaugurated by Senegal and the African Union (AU)<sup>123</sup> in February 2013 to prosecute those most responsible for international crimes committed in Chad between 1982 and 1990, the period when Hissène Habré was president. A 1992 Chadian Commission of Inquiry accused Habré's government of systematic torture and stated that 40,000 people died during his rule.<sup>124</sup> The EAC was created within the existing Senegalese court structure in Dakar and includes personnel from Senegal and other AU member states.<sup>125</sup> The EAC was mandated to apply international law and may apply Senegalese law in the case of any substantive legal vacuum.<sup>126</sup> The EAC has jurisdiction over the crimes of genocide, crimes against humanity, war crimes, and torture.<sup>127</sup>

The Chadian former president Hissène Habré is the only person prosecuted before the EAC to date. When Habré ruled Chad during 1982 to 1990, he mainly appointed members from his ethnic group, the Gorane, to positions in his administration.<sup>128</sup> His regime adopted repressive and politically targeted actions including forced disappearance, arbitrary detention, and torture. A notorious example is the Directorate of Documentation and Security (DDS)<sup>129</sup> created by Habré in 1983. The DDS was a detention center where a number of arrested people were unfairly interrogated, seriously tortured, and even arbitrarily killed.<sup>130</sup> Although Habré had good administrative talents in economic development<sup>131</sup> and was

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<sup>123</sup> The AU is becoming active in making regional efforts in achieving transitional justice. See e.g., Chidi Anselm Odinkalu, *International Criminal Justice, Peace and Reconciliation in Africa: Re-imagining an Agenda Beyond the ICC*, 40 AFRICA DEVELOPMENT / Afrique et Développement 257 (2015).

<sup>124</sup> Commission of Inquiry into the Crimes and Misappropriations Committed by Ex-President Habré, His Accomplices and/or Accessories, *Chad: Report of the Commission of Inquiry into the Crimes and Misappropriations Committed by Ex-President Habré, His Accomplices and/or Accessories*, reprinted in 3 TRANSITIONAL JUSTICE: HOW EMERGING DEMOCRATICS RECKON WITH FORMER REGIMES 51, 91-2 (Neil J. Kritz, ed., 1995), available at <https://www.usip.org/sites/default/files/file/resources/collections/commissions/Chad-Report.pdf> (last visited Mar 3, 2019) [hereinafter *Report of the Commission of Inquiry*].

<sup>125</sup> Statute of the Extraordinary African Chambers within the Courts of Senegal Created to Prosecute International Crimes Committed in Chad between 7 June 1982 and 1 December 1998, Jan. 30, 2013, 52 I.L.M. 1028 (2013), art. 11. [hereinafter *Statute*]. There is an English translation by Reed Brody, Mark de Barros, and Pauline Hilmy, Human Rights Watch, available at <https://www.hrw.org/news/2013/09/02/statute-extraordinary-african-chambers> (last visited Mar 3, 2019).

<sup>126</sup> *Id.* art. 16.

<sup>127</sup> *Id.* art. 4.

<sup>128</sup> Robert Buijtenhuijs, *Hissène Habré: Seigneur de la guerre jusqu'au bout*, 41 Politique Africaine 135 (1991), available at <http://www.politique-africaine.com/numeros/pdf/041135.pdf> (last visited Mar 3, 2019).

<sup>129</sup> Directorate de Documentation et Sécurité.

<sup>130</sup> See *Report of the Commission of Inquiry*, *supra* note 104.

<sup>131</sup> See Buijtenhuijs, *supra* note 108.

supported by the U.S.<sup>132</sup> and French<sup>133</sup> governments, his discriminatory and repressive policies led to his political failure.<sup>134</sup>

Habré's trial at the EAC began in July 2015 and ended in February 2016. The appeal ended with a final verdict in April 2017. It was the first trial in the world in which the courts in one state tangibly prosecuted the former ruler of another state for alleged human rights crimes. It was also the first universal jurisdiction case to proceed to trial in Africa. The EAC combines efforts from the affected state Chad, the forum state Senegal, the AU, other international donor countries and organizations,<sup>135</sup> leading NGOs in human rights area,<sup>136</sup> and individuals<sup>137</sup> who persisted to file the case and created the victim's associations.<sup>138</sup> The support and cooperation for the court from individual, domestic, and international levels and the actual, effective operations of the court make the EAC an envy of and a shining star among tribunals adjudicating international crimes. It is also notable that the EAC carries out its duties with a very small budget compared to other international or hybrid criminal courts.<sup>139</sup> Further, the EAC has made extraordinary efforts to record the trials, undertake outreach programs to both Chad and Senegal, and guarantee victims' participation and reparations.<sup>140</sup> The EAC is generally considered as a success, although drawbacks and shortcomings exist when placed under serious and specific examinations.<sup>141</sup> That illustrates what can be improved if a similar court is to be established in the future.

In this part, this article analyzes the legitimacy issues of the EAC, using the approach proposed in Part III. The discussion will be divided into

<sup>132</sup> See *Report of the Commission of Inquiry*, *supra* note 104, at 88.

<sup>133</sup> See *Accord de Cooperation Militaire Technique*, Fr.-Chad, Jun. 19, 1976, available at [https://www.legifrance.gouv.fr/jo\\_pdf.do?cidTexte=JPDF3004197800001919&categorieLien=id](https://www.legifrance.gouv.fr/jo_pdf.do?cidTexte=JPDF3004197800001919&categorieLien=id) (last visited Mar 3, 2019). This agreement about military cooperation came into force when Habré took the power.

<sup>134</sup> *Harrowing insight into the rise and fall of one of the world's most cruel dictators, former Chadian President Habre*, AL JAZEERA, November 3, 2016, <https://www.aljazeera.com/programmes/specialseries/2016/10/hissene-habre-dictator-trial-161030093148939.html>.

<sup>135</sup> Such as Belgium, France, the Netherlands, the U.S., Germany, the European Union, the UN etc.

<sup>136</sup> Such as Human Rights Watch, Amnesty International, the International Commission of Jurists, the Fédération Internationale des Ligues des Droits de l'Homme (FIDH) etc.

<sup>137</sup> Such as survivors like Souleymane Guengueng, Clement Abaifouta, and victims' lawyer Jacqueline Moudeina etc.

<sup>138</sup> Such as the Chadian Association for the Promotion and Defense of Human Rights (ATPDH).

<sup>139</sup> The total budget is only less than €9 million contributed by international donors, including: Chad (€3 million); the European Union (€2 million); the Netherlands (€1 million); the African Union (US\$1 million); the United States (US\$1 million); Belgium (€500,000); Germany (€500,000); France (€300,000); and Luxembourg (€100,000). See *Q&A: The Case of Hissène Habré before the Extraordinary African Chambers in Senegal*, HUMAN RIGHTS WATCH (May 3, 2016), <https://www.hrw.org/news/2016/05/03/qa-case-hissene-habre-extraordinary-african-chambers-senegal#22>. For comparison, the least expensive hybrid court, the Special Court for Sierra Leone, cost about €270 million.

<sup>140</sup> See *infra* section IV D (2) of this article.

<sup>141</sup> See *infra* the conclusion of section IV of this article.

four main topics, covering the EAC's origins, persons, procedures, and outcomes. Further, for each topic, this article analyzes both the relevant articles in the EAC's statute and the court's real practice to examine the legitimacy from a normative perspective and assess the sociological legitimacy to the extent possible. Sociological legitimacy is subjective, agent relative, and dynamic.<sup>142</sup> The diverse stakeholders of the EAC are mainly local victims in Chad, and also include the Chadian government, the defendant, the Senegalese authority and people, the AU, other international donors and NGOs. Since the EAC has been established in a unique way and has done an excellent job in its outreach activities with its constituencies, it can provide good resources for the research of both its normative and sociological legitimacy. However, empirical research with interviews and surveys in Chad and Senegal about the EAC's sociological legitimacy remains in need of further study, leaving that an unsolved part of the overall assessment of the EAC.

#### A. *The Establishment of the EAC under Universal Jurisdiction*

The EAC is a hybrid court with few international elements. It was established under the authority of a regional organization (the AU) and a sovereign state (Senegal) with a nexus to the cases it hears (the long-term presence of the defendant in its region) under the concept of universal jurisdiction for international core crimes. Plus, it has consent from the originally affected state (Chad).<sup>143</sup> On August 22, 2012, Senegal and the AU signed an agreement to create this special tribunal within the Senegalese judicial system to prosecute the perpetrators of international law violations in Chad between 1982 and 1990.<sup>144</sup> A statute of the Extraordinary African Chambers was adopted on January 30, 2013.<sup>145</sup> These two legal documents constitute the foundation of the EAC and become the direct sources of international law that the EAC should apply.<sup>146</sup> These documents are based on customary international law and international conventions ratified by Chad relating to crimes and serious violations of international law.<sup>147</sup> For procedural rules, the Senegalese Criminal Procedure Code governs.<sup>148</sup> Senegalese domestic law can also be resorted to when there is a substantive legal vacuum.<sup>149</sup> Chad formally waived Habré's immunity of jurisdiction

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<sup>142</sup> Grossman I, *supra* note 81, at 116–17.

<sup>143</sup> See Reed Brody, VICTIMS BRING A DICTATOR TO JUSTICE: THE CASE OF HISSÈNE HABRÉ (2017), at 28-29, available at [https://www.brot-fuer-die-welt.de/fileadmin/mediapool/2\\_Downloads/Fachinformationen/Analyse/Analysis70-The\\_Habre\\_Case.pdf](https://www.brot-fuer-die-welt.de/fileadmin/mediapool/2_Downloads/Fachinformationen/Analyse/Analysis70-The_Habre_Case.pdf) (last visited Mar 3, 2019).

<sup>144</sup> Agreement on the Establishment of the Extraordinary African Chambers Within the Senegalese Judicial System Between the Government of the Republic of Senegal and the African Union, art. 1(1), Aug. 22, 2012, 52 I.L.M. 1024 (2013) [hereinafter *Agreement*].

<sup>145</sup> *Statute*, *supra* note 125.

<sup>146</sup> *Id.* art. 16(1).

<sup>147</sup> *Id.* arts. 3(1), 23(1).

<sup>148</sup> *Id.* arts. 12(3), 13(1), 14(5), 17(1), 22, & 26(1).

<sup>149</sup> *Statute*, *supra* note 125, art. 16(2).

when the case was filed in Belgium.<sup>150</sup> Although there is no official government document that waives Habré's immunity at the EAC, Chad gives consent to the EAC's jurisdiction over Habré by contributing funds and cooperating with the trial.<sup>151</sup>

The establishment of the EAC is the result of years of political and judicial bargaining regarding Habré. After Habré's rule, the subsequent president in Chad, Idriss I. Déby, Habré's former military chief, immediately created a Commission of Inquiry into the crimes and misappropriations committed by Habré and his accessories.<sup>152</sup> The Commission of Inquiry produced a content-rich report in 1992 revealing and condemning the atrocities conducted by Habré's regime.<sup>153</sup> However, the new government was not interested in justice, putting the report aside afterwards.<sup>154</sup>

Various efforts have been made to bring Habré to justice, including exercising universal jurisdiction in domestic courts of Senegal and Belgium, petitioning several international institutions, and seeking domestic prosecutions in Chad, which have been seen as "one of the world's most patient and tenacious campaigns for justice".<sup>155</sup> After Déby took power in Chad, Habré fled to Senegal, settled down with a Senegalese wife, and maintained good relationships with rich and influential elites in Senegal.<sup>156</sup> The case against Habré was first filed by some Chadian victims in Senegal in 2000.<sup>157</sup> However, the Senegalese Court of Appeal of Dakar dismissed Habré's indictment for lack of jurisdiction, reasoning that the UN Convention Against Torture had not been implemented into national law in Senegal,<sup>158</sup> and the dismissal was later confirmed by the highest court within the Senegalese judiciary.<sup>159</sup> Then victims filed complaints in Belgium and the UN Committee Against Torture (CAT).<sup>160</sup> Belgium asked Senegal for Habré's extradition.<sup>161</sup> The CAT also recommended Senegal to take appropriate actions to implement the Convention in its domestic legal system

<sup>150</sup> Questions relating to the Obligation to Prosecute or Extradite (*Belgium v. Senegal*), International Court of Justice, Application Instituting Proceedings (Feb. 19, 2009), § 5, available at <https://www.icj-cij.org/files/case-related/144/15054.pdf> (last visited Mar 3, 2019).

<sup>151</sup> See Brody, *supra* note 143.

<sup>152</sup> *Report of the Commission of Inquiry*, *supra* note 104.

<sup>153</sup> *Id.*

<sup>154</sup> Brody, *supra* note 143, at 8.

<sup>155</sup> Geoffrey York, *Former Dictator of Chad Arrested on Allegations of 40,000 Murders*, TORONTO GLOBE AND MAIL (June 30, 2013), available at <https://www.theglobeandmail.com/news/world/former-dictator-of-chad-arrested-in-senegal-on-allegations-of-40000-murders/article12901175/> (last visited Mar 3, 2019).

<sup>156</sup> See Brody, *supra* note 143, at 24.

<sup>157</sup> *Id.* at 9.

<sup>158</sup> *Ministère Public v. Hissène Habré*, Cour d'appel [CA] [regional court of appeal] Dakar, ch. d'accusation, Chambre d'accusation, Arrêt No. 135 (Apr. 7, 2000) (Sen.).

<sup>159</sup> *Souleymane Guengueng v. Hissène Habré*, Courde Cassation [Cass.] [supreme court for judicial matters] crim., Arrêt No. 14 (Mar. 20, 2001) (Sen.).

<sup>160</sup> See Brody, *supra* note 143, at 9, and *infra* note 171.

<sup>161</sup> Brody, *supra* note 143, at 9.

and comply with the obligation to extradite or prosecute.<sup>162</sup> In response, the AU mandated Senegal to prosecute Habré on behalf of Africa,<sup>163</sup> seeking an African solution. Then Senegal amended its domestic laws to prepare for the trial.<sup>164</sup> However, Habré and his lawyers strategically complained to the Court of Justice of the Economic Community of West African States (ECOWAS) about the retroactive nature of the Senegalese amended domestic law on torture. The ECOWAS came out with a “bizarre ruling,”<sup>165</sup> confirming the new laws violated Habré’s rights due to retroactivity and holding that Habré should be tried before an ad hoc special jurisdiction of an international character.<sup>166</sup> In the meantime, Habré had been prosecuted in Chadian domestic courts and even been sentenced to death *in absentia*.<sup>167</sup> Though Chad failed to extradite Habré from Senegal to enforce the judgement,<sup>168</sup> Habré could have been killed if sent back to Chad, where the right to a fair trial would be an unlikely luxury.<sup>169</sup> Meanwhile, in 2009, Belgium filed a case against Senegal at the International Court of Justice (ICJ).<sup>170</sup> The ICJ concluded that “Senegal must, without further delay, submit the case of Mr. Hissène Habré to its competent authorities for the purpose of

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<sup>162</sup> Committee Against Torture, Decisions of the Committee Against Torture under Art. 22 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, ¶¶ 9.6-9.12, U.N. Doc. CAT/C/36/D/181/2001 (May 19, 2006) [hereinafter Committee Against Torture’s Decisions].

<sup>163</sup> See, e.g., Decision on the Hissène Habré Case and the African Union, AU Doc. Assembly/AU/Dec.103 (VI) (Jan. 2006), available at [https://au.int/sites/default/files/decisions/9554-assembly\\_en\\_23\\_24\\_january\\_2006\\_auc\\_sixth\\_ordinary\\_session\\_decisions\\_declarations.pdf](https://au.int/sites/default/files/decisions/9554-assembly_en_23_24_january_2006_auc_sixth_ordinary_session_decisions_declarations.pdf); Decision on the Hissène Habré Case and the African Union, AU Doc. Assembly/AU/Dec.127 (VII), 2 July 2006, available at [https://au.int/sites/default/files/decisions/9555-assembly\\_au\\_dec\\_111-133\\_vii\\_e.pdf](https://au.int/sites/default/files/decisions/9555-assembly_au_dec_111-133_vii_e.pdf); Decision on the Hissène Habré Case, AU Doc. Assembly/AU/Dec. 401 (XVIII), 31 January 2012, available at [https://au.int/sites/default/files/decisions/9649-assembly\\_au\\_dec\\_391\\_-\\_415\\_xviii\\_e.pdf](https://au.int/sites/default/files/decisions/9649-assembly_au_dec_391_-_415_xviii_e.pdf). (last visited Mar 3, 2019).

<sup>164</sup> See M. Niang, *The Senegalese Legal Framework for the Prosecution of International Crimes*, 7 J. INT’L CRIM. JUST. 1047 (2009).

<sup>165</sup> William Schabas, *Bizarre Ruling on Non-Retroactivity from the ECOWAS Court*, 4 December 2010, available at <http://humanrightsdoctorate.blogspot.com/2010/12/bizarre-ruling-on-non-retroactivity.html> (last visited March 3, 2019); for further discussion on the retroactivity issue, see Sarah Williams, *The Extraordinary African Chambers in the Senegalese Courts: An African Solution to an African Problem?* 11 J. INT’L CRIM. JUST. 1139, 1156-59 (2013) [hereinafter Williams II]; for a considerable critique of the ECOWAS Judgment, see Valentina Spiga, *Non-Retroactivity of Criminal Law: A New Chapter in the Hissène Habré Saga*, 9 J. INT’L CRIM. JUST. 5 (2011).

<sup>166</sup> *Hissène Habré v. Republic of Senegal*, Case No. ECW/CCJ/JUD/06/10, Judgment, (Econ. Community of W. Afr. States [ECOWAS] Community Ct. of Justice Nov. 18, 2010), available at [http://jurisafrika.org/html/pdf\\_ecowa.pdf](http://jurisafrika.org/html/pdf_ecowa.pdf) (last visited Mar 3, 2019).

<sup>167</sup> See, e.g., Steve Czajkowski, *Chad court sentences ex-dictator Habré to death in absentia*, Jurist (Aug. 16, 2008), available at <http://www.jurist.org/paperchase/2008/08/chad-court-sentences-ex-dictator-habre.php> (last visited Mar 3, 2019).

<sup>168</sup> *Id.*

<sup>169</sup> *Id.*

<sup>170</sup> See Questions relating to the Obligation to Prosecute or Extradite, *supra* note 150.

prosecution, if it does not extradite him.”<sup>171</sup> Eventually, the “interminable political and legal soap opera”<sup>172</sup> ended with the establishment of the EAC by Senegal and the AU jointly. Further, Habré lost his political support in Senegal when Abdoulaye Wade was no longer the Senegalese president.<sup>173</sup>

Usually, for a hybrid court, the domestic elements come from the originally affected state, and the state delegates its territorial and/or personal jurisdiction to the hybrid court, which is the case for the Special Court for Sierra Leone, the Extraordinary Chambers in the Courts of Cambodia, and the Special Criminal Court in the Central African Republic.<sup>174</sup> Alternatively, a hybrid court can build its jurisdiction based on the powers of the Security Council under Chapter VII of the UN Charter, as is the case for the Special Tribunal for Lebanon.<sup>175</sup> The EAC is unique and may even be seen as a landmark. The crimes were not committed in the territory of the forum state, Senegal, and the territorial state, Chad, has not delegated its jurisdiction to a hybrid court existing in the Senegalese judicial system. The jurisdiction of the EAC is based on universal jurisdiction arising from the nature of the crimes. Although it is generally accepted that states can exercise universal jurisdiction over several international core crimes, the EAC is the first hybrid court to adjudicate cases purely depending on universal jurisdiction.

Universal jurisdiction over international core crimes has a strong theoretical basis and is supported by quite a few state practices. This article does not reach a direct and simple conclusion regarding whether the EAC’s exercise of universal jurisdiction itself is legitimate. Nevertheless, this article proposes that the EAC gains its source legitimacy by the enhancement of a series of factors. First, the EAC gains its authority from the AU, which is the official and powerful inter-governmental organization among African states. The participation of the AU in the establishment of the EAC not only guarantees its source legitimacy from a normative perspective, but also strengthens stakeholders’ confidence and trust in this court. Second, the forum state, Senegal, has a genuine nexus to the case by having the presence

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<sup>171</sup> Questions relating to the Obligation to Prosecute or Extradite (*Belgium v. Senegal*), International Court of Justice, Judgment, ¶128 (July 20, 2012), available at [http://www.worldcourts.com/iccj/eng/decisions/2012.07.20\\_Belgium\\_v\\_Senegal.pdf](http://www.worldcourts.com/iccj/eng/decisions/2012.07.20_Belgium_v_Senegal.pdf) (last visited Mar 3, 2019).

<sup>172</sup> Human Rights Watch, *Senegal/Chad: Nobel Winners, African Activists Seek Progress in Habré Trial* (2010), available at <https://www.hrw.org/news/2010/07/21/senegal/chad-nobel-winners-african-activists-seek-progress-habre-trial> (last visited Mar 3, 2019).

<sup>173</sup> Roland Adjovi, *Introductory Note to the Agreement on the Establishment of the Extraordinary African Chambers within the Senegalese Judicial System Between the Government of the Republic of Senegal and the African Union and the Statute of the Chambers*, 52 INT’L LEGAL MATERIALS 1020, 1022 (American Society of International Law 2013).

<sup>174</sup> These three courts reside respectively in Sierra Leone, Cambodia, and Central African Republic.

<sup>175</sup> UN Doc. S/RES/1757, May 30, 2007, [https://www.stl-tsl.org/sites/default/files/documents/legal-documents/statute/Statute\\_of\\_the\\_Special\\_Tribunal\\_for\\_Lebanon\\_\\_English.pdf](https://www.stl-tsl.org/sites/default/files/documents/legal-documents/statute/Statute_of_the_Special_Tribunal_for_Lebanon__English.pdf).

of the defendant in its territory, which guarantees the feasibility of the exercise of universal jurisdiction. Third, although the originally affected state, Chad, did not officially participate in the establishment of the EAC, Chad provides funding to and cooperates with the court, which demonstrates a consent to the court's jurisdiction. These factors help perfect the source legitimacy of the EAC. In addition, a trial taking place on the African continent, rather than in an European court or in The Hague, leads to significantly more acceptance in Africa, because international justice is often regarded as neocolonial by public opinion in Africa.<sup>176</sup> Last but not least, the EAC seems to be the most practical way, or even possibly the only way, to deal with Habré's case due to the many legal and political reasons introduced earlier in this article. Apart from the trial itself, the EAC reveals a novel and creative method about how a hybrid court can be established and strengthens people's confidence about the use of universal jurisdiction over international core crimes by demonstrating its practice to the international community.

### B. *The Least Requirement of Mixed Persons at the EAC*

The EAC, which was established within the Senegalese existing judicial system, contains some minimal international elements in order to comply with the ECOWAS's judgment that Habré should be tried in a court with international elements. The EAC's limited international elements are reflected in the minimal number of international judges and prosecutors participating in the court. The nomination procedure is that all the judges and prosecutors shall be nominated by Senegal's Justice Minister and appointed by the chairperson of the AU Commission.<sup>177</sup> The standard includes high moral character, in particular for their impartiality and integrity, and at least 10 years of related practicing experience.<sup>178</sup> For Presiding judges, there is an extra requirement of possessing qualifications for appointment to the highest judicial offices in their states.<sup>179</sup>

In fact, all the prosecutors in the EAC are Senegalese,<sup>180</sup> and there have been only two judges who do not hold Senegalese nationality.<sup>181</sup> The EAC is composed of four chambers. All the judges in the Investigative Chamber and the Indicting Chamber are Senegalese.<sup>182</sup> For both the Trial Chamber and the Appeals Chamber, only the Presiding judges are non-Senegalese judges from another AU member state.<sup>183</sup> Taking a closer look at

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<sup>176</sup> Julia Duchrow, *Foreword*, in Reed Brody, VICTIMS BRING A DICTATOR TO JUSTICE: THE CASE OF HISSÈNE HABRÉ (2017), available at [https://www.brot-fuer-die-welt.de/fileadmin/mediapool/2\\_Downloads/Fachinformationen/Analyse/Analysis70-The\\_Habre\\_Case.pdf](https://www.brot-fuer-die-welt.de/fileadmin/mediapool/2_Downloads/Fachinformationen/Analyse/Analysis70-The_Habre_Case.pdf) (last visited Mar 3, 2019).

<sup>177</sup> *Statute*, *supra* note 125, arts. 11(1)(2)(3)(4), 12(1).

<sup>178</sup> *Id.* arts. 11(5), 12(2).

<sup>179</sup> *Id.* art. 11(5).

<sup>180</sup> *Id.* art. 12.

<sup>181</sup> *Statute*, *supra* note 125, art. 11(1)(2)(3)(4).

<sup>182</sup> *Id.* arts. 11(1), 11(2).

<sup>183</sup> *Id.* arts. 11(3), 11(4).

the composition of the judges on the EAC, the Senegalese judges come from different levels of courts within the Senegalese judicial system, including the Supreme Court of Senegal, the High Court of Dakar, the Court of Appeal of Dakar.<sup>184</sup> The only two international judges include Mr. Gbertao Gustave KAM, the Presiding Judge of the Trial Chamber, who is from Burkina Faso and previously had experience in both the Judiciary of Burkina Faso and the International Criminal Tribunal for Rwanda (ICTR),<sup>185</sup> and Mr. Wafi Ougadéye, the Presiding Judge of the Appeal Chamber, who is from Mali and previously worked for the Supreme Court of Mali.<sup>186</sup>

There are advantages and disadvantages of having a limited number of international judges. On the one hand, it is convenient to include more local judges on the court, which reduces the financial burden of the EAC's operations, and local judges are familiar with Senegalese criminal procedure. In addition, Senegalese judges can be viewed as having independence because they have no connection to Chadian victims or the Chadian government, who may both have prejudice against the defendant. On the other hand, local judges and prosecutors may not be familiar with international crimes, and sometimes international actors in the court gain more perceived legitimacy because they may be considered more impartial and more experienced with international criminal justice.

Another point to mention is that all the judges at the EAC are male.<sup>187</sup> It is discouraging but not surprising, given that, in order to be selected, the candidate should have at least 10 years of professional experience.<sup>188</sup> However, the reality is that females are getting to be actively involved in judicial systems in the AU region only in recent years.<sup>189</sup> It is important that female judges participate in adjudicating international crimes.<sup>190</sup> The advantage of having female judges includes bringing feminist perspectives to achieving justice in a more well-rounded way.<sup>191</sup> For example, rape is an important component of international crimes, which sometimes might be ignored.<sup>192</sup> Female legal experts' experience, wisdom, and participation can make huge contributions to the work of the courts. More

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<sup>184</sup> See AU Press Release N.089\2015, available at [http://www.chambresafricaines.org/pdf/PR%20089-Appointment%20Judges-Trial%20Chamber-AEC-final%20\(2\).pdf](http://www.chambresafricaines.org/pdf/PR%20089-Appointment%20Judges-Trial%20Chamber-AEC-final%20(2).pdf); Appointment of Appeal Judges, available at <http://www.chambresafricaines.org/index.php/le-coin-des-medias/communiqu%C3%A9-de-presse/643-nomination-des-juges-d-assises-d-appel.html>. (last visited Mar 3, 2019).

<sup>185</sup> *Id.*

<sup>186</sup> *Id.*

<sup>187</sup> AU Press Release N.089\2015 and Appointment of Appeal Judges, *supra* note 200.

<sup>188</sup> *Statute*, *supra* note 125, arts. 11(5), 12(2).

<sup>189</sup> See generally, Gretchen Bauer & Josephine Dawuni eds., *GENDER AND THE JUDICIARY IN AFRICA: FROM OBSCURITY TO PARITY?* (2016).

<sup>190</sup> Nienke Grossman, *Sex on the Bench: Do Women Judges Matter to the Legitimacy of International Courts?* 12(2) CHI. J. INT'L L. 647 (2012) [hereinafter Grossman III].

<sup>191</sup> *Id.*

<sup>192</sup> Mark Ellis, *Breaking the Silence: Rape as an International Crime*, 38(2) CASE W. RES. J. INT'L L. 225 (2007).



profoundly, gender equality is a requirement of legitimacy *per se*.<sup>193</sup> Female representation on the bench is not only normatively legitimate, but can also enhance the court's perceived legitimacy among its constituencies.

Overall, the situation of the personnel composition at the EAC is not negative. To begin with, Senegal has an advanced legal system among all the AU states.<sup>194</sup> The professionalism of Senegalese legal experts is highly recognized in Africa.<sup>195</sup> Moreover, since the crimes were committed in Chad, not Senegal, judges and prosecutors from Senegal may be considered to enjoy better impartiality than those from Chad in the view of both victims and Habré, considering that Habré had even been sentenced to death penalty *in absentia* by a Chadian court.<sup>196</sup> Further, although the Senegalese persons appointed to the EAC had no experience in international criminal law before, they were trained and received international judicial assistance during the court's operation.<sup>197</sup> Several international criminal law experts were sent to Senegal to work with the prosecutors.<sup>198</sup> Training workshops were also held by international organizations such as the International Committee of the Red Cross (ICRC).<sup>199</sup>

To ensure legitimacy and efficacy, international and female representation should be guaranteed in the work of a hybrid court, and local persons should get trained to facilitate their work.

### C. *The Process and Operations at the EAC*

Regarding the process and operations at the EAC, this article discusses how cases are selected, whether the defendant's rights are protected, how the court carries out its outreach activities, and whether victims can fully participate during the trial process. All these issues should be pursued within a legitimate bound, and all the individual achievements of legitimacy working together can make the whole process more legitimate as well as enhance the court's sociological legitimacy.

#### i. Case Selection and Subject-Matter Jurisdiction

Although the name of the court is "Extraordinary African Chambers," which seems to say that the EAC could potentially be a court adjudicating international crimes throughout Africa, the fact is that the EAC

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<sup>193</sup> Julie C. Suk, *Gender Parity and State Legitimacy: From Public Office to Corporate Boards*, 10(2) INT'L J. CONST. L. 449 (2012).

<sup>194</sup> Horace Segnonna Adjolohoun, *Visiting the Senegalese Legal System and Legal Research: A Human Rights Perspective*, 2009, available at <https://www.nyulawglobal.org/globalex/SENEGAL.html>.

<sup>195</sup> *Id.*

<sup>196</sup> Czajkowski, *supra* note 167.

<sup>197</sup> *Agreement*, *supra* note 144, art. 10.

<sup>198</sup> Brody, *supra* note 143, at 32.

<sup>199</sup> *Id.*

does not seem to function as a general forum to try other perpetrators in Africa. The mandate of the EAC is limited to international crimes committed in Chad during 1982 to 1990<sup>200</sup> and is not extended to a broader context. After the appeal judgment in April 2017, the EAC closed its doors.<sup>201</sup>

Habré has been the only person tried at the EAC, although the EAC's mandate is not narrowed down to only prosecute Habré.<sup>202</sup> Anyone responsible for the violations of international law during the period of Habré's regime may be prosecuted.<sup>203</sup> Actually, the EAC has made efforts to seek the indictment of five other officials in Habré's administration.<sup>204</sup> However, none of them were ultimately brought before the EAC.<sup>205</sup> Three suspects remained at large.<sup>206</sup> The other two were in Chad, but the Chadian government refused to transfer them to the EAC.<sup>207</sup> The Chadian president Déby was likely concerned about the potential for his own prosecution by agreeing to send more suspected perpetrators to the EAC, because he had been the military chief of Habré's regime.<sup>208</sup> Instead, in 2015 a Chadian court initiated domestic prosecutions and convicted 20 people of international crimes, including the two wanted by the EAC, both of whom were sentenced to life imprisonment.<sup>209</sup> Habré's lawyers have criticized that Déby was manipulating the EAC.<sup>210</sup>

Based on its statute, the EAC can ask for extradition of suspects other than Habré within its mandate.<sup>211</sup> The flaw lies in the Chadian government's non-cooperation with the EAC's extradition requests.<sup>212</sup> As a matter of fact, many suspects wanted by the International Criminal Court are still at large, as is often the case when seeking the end of impunity for perpetrators of atrocities.<sup>213</sup> At least there is some hope, since the trial of Habré encourages the Chadian people's belief in international criminal justice.

The subject-matter jurisdiction of the EAC covers genocide, crimes against humanity, war crimes, and torture.<sup>214</sup> The definitions of the former

<sup>200</sup> *Agreement*, *supra* note 144, art. 1(1); *Statute*, *supra* note 125, arts. 1, 3(1).

<sup>201</sup> *Statute*, *supra* note 125, art. 37(1).

<sup>202</sup> *Agreement*, *supra* note 144, art. 1(1); *Statute*, *supra* note 125, art. 3(1).

<sup>203</sup> *Id.*

<sup>204</sup> Brody, *supra* note 143, at 14.

<sup>205</sup> *Id.*

<sup>206</sup> *Id.*

<sup>207</sup> *Id.*

<sup>208</sup> Brody, *supra* note 143, at 15.

<sup>209</sup> *Id.*

<sup>210</sup> *Id.* at 25.

<sup>211</sup> *Agreement*, *supra* note 144, art. 1(1); *Statute*, *supra* note 125, arts. 1, 3(1).

<sup>212</sup> Brody, *supra* note 143, at 14.

<sup>213</sup> Arresting ICC Suspects At Large: Why It Matters, What the Court Does, What States Can Do, International Criminal Court, January 2019, available at <https://www.icc-cpi.int/news/seminarBooks/bookletArrestsENG.pdf>

<sup>214</sup> *Statute*, *supra* note 125, art. 4.

three crimes follow what the Rome Statute of the ICC states.<sup>215</sup> It is noticeable that torture is listed as a separate crime in the EAC's statute,<sup>216</sup> although torture appears as a circumstance in both crimes against humanity<sup>217</sup> and war crimes.<sup>218</sup> There seems to be textual repetition among the definition of crimes listed in the statute, but this is not a severe flaw. The reason for the EAC to list torture as a separate crime is that the UN Convention against Torture constitutes the legal basis of Senegal's obligation to prosecute or extradite Habré, pursuant to the CAT and the ICJ decisions.<sup>219</sup> The separation of torture in the statute actually aims to emphasize the legitimacy of the court.

## ii. Defendant's Rights

Defendants at the EAC enjoy the right to a fair and public hearing,<sup>220</sup> the right to be presumed innocent,<sup>221</sup> the right to a free and independent counsel,<sup>222</sup> the right to security and protection,<sup>223</sup> and the right to appeal.<sup>224</sup> All these rights seem to have been respected during the trial of Habré.

Defendants often challenge the legitimacy of the adjudicating forum when charged with international criminal crimes. Habré is of no exception. He consistently claimed that "the Chambers ... are illegitimate and illegal" and refused to respond to any procedures.<sup>225</sup> His lawyers also refused to appear.<sup>226</sup> To guarantee the Defendant's right to counsel pursuant to the statute, the EAC appointed three lawyers to defend Habré and adjourned for forty-five days to allow the lawyers some time to prepare, although Habré still refused to cooperate.<sup>227</sup> Habré was eventually required to appear in court by force, but he remained silent for the entire trial.<sup>228</sup> After the conviction made by the Trial Chamber, Habré's court-appointed lawyers also made efforts to appeal for him.<sup>229</sup>

One legitimacy concern here may be that forty-five days may not be sufficient for Habré's newly appointed lawyers to make full preparations to defend him, considering the complexity of the case and the huge workload of

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<sup>215</sup> *Id.* arts. 5, 6, & 7.

<sup>216</sup> *Id.* art. 8.

<sup>217</sup> *Id.* art. 6(g).

<sup>218</sup> *Id.* art. 7(1)(b).

<sup>219</sup> *Statute, supra* note 125; Committee Against Torture's Decisions, *supra* note 162.

<sup>220</sup> *Statute, supra* note 125, art. 21(2).

<sup>221</sup> *Id.* art. 21(3).

<sup>222</sup> *Agreement, supra* note 144, art. 7(1).

<sup>223</sup> *Agreement, supra* note 144, art. 9; *Statute, supra* note 125, art. 34.

<sup>224</sup> *Statute, supra* note 125, art. 25(1).

<sup>225</sup> Brody, *supra* note 143, at 15.

<sup>226</sup> *Id.* at 15-16

<sup>227</sup> *Id.*

<sup>228</sup> *Id.*

<sup>229</sup> Brody, *supra* note 143, at 18.

reviewing materials.<sup>230</sup> They should have been allowed more time to prepare arguments.

The entire trial at the EAC moved swiftly, compared to lengthy trials at the ICTY or the ICC, where every issue was adequately discussed by allowing a great deal of motions.<sup>231</sup> However, the quick trial at the EAC does not mean a lack of respect for the Defendant's rights or weaken its procedural legitimacy. The case had been filed at different places for many years, during which numerous investigations were conducted and abundant evidence was collected.<sup>232</sup> All the previous efforts provided the basis for the EAC to hold a continuous trial and work with efficiency, and it was not necessary to postpone the process, causing a waste of time and resources.

### iii. The Court's Outreach Activities and Judicial Cooperation

It is important for the EAC to promote its work in both Senegal and Chad, as well as in the international community. Although Senegal and Chad were both French colonies, the two countries do not share a lot in common in their history or maintain a close relationship during recent developments. Senegal is located in West Africa while Chad is located in Central Africa, with a distance of more than 2,000 miles away from each other. Very few people with a Chadian origin live in Senegal.<sup>233</sup> The little contact between Senegal and Chad made Habré's crimes committed in Chad unknown by the majority of Senegalese people.<sup>234</sup> Unaware of his crimes, some leading Senegalese media even spoke in support of Habré, influenced by his political support in Senegal.<sup>235</sup> To improve Senegalese people's understanding of the trial, to gain Chadian people's trust in the EAC's work, to promote the value of international criminal justice in a worldwide range, and to further enhance the EAC's sociological legitimacy, it is necessary that outreach activities be adequately conducted.

The EAC is considered to be a good example for its outreach activities. According to the court's statute, the administrator of the EAC is specially required to work for the court's public relations with international community, carry out outreach programs to raise public awareness regarding the court's work both in Africa and internationally, and assist in establishing a judicial cooperation mechanism between Senegal and other countries.<sup>236</sup> For the court's practice, the recordings of the entire trial at the EAC was

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<sup>230</sup> *Id.* at 32.

<sup>231</sup> *See, e.g.*, ICC-01/09-01/11, Decision No. 5 on the Conduct of Trial Proceedings (Principles and Procedure on 'No Case to Answer' Motions), June 3, 2004, available at <https://www.legal-tools.org/doc/128ce5/pdf/>

<sup>232</sup> Brody, *supra* note 143, at 32-33.

<sup>233</sup> Ethnic Groups in Senegal, [https://en.wikipedia.org/wiki/Ethnic\\_groups\\_in\\_Senegal](https://en.wikipedia.org/wiki/Ethnic_groups_in_Senegal) (last visited Nov 24, 2019).

<sup>234</sup> Brody, *supra* note 143, at 24.

<sup>235</sup> *Id.*

<sup>236</sup> *Statute, supra* note 125, art. 15(2)(3)(5).

broadcasted on the internet, radio, and television in both Chad and Senegal,<sup>237</sup> which guaranteed people's access to the trial.<sup>238</sup> The EAC also facilitated the travel of Chadian journalists to Senegal.<sup>239</sup> In addition, a Coalition of NGOs from Senegal, Belgium, and Chad contracted with the court and undertook important, extra outreach activities independent from the EAC's press office.<sup>240</sup> The coalition trained journalists in Senegal and Chad, organized public debates, launched a website, and drafted many materials to promote the case.<sup>241</sup>

Mostly, hybrid courts are located in the originally affected area,<sup>242</sup> which guarantees proximity to populace, thus benefitting the sociological legitimacy. The EAC is specially located in a third country for the many aforementioned reasons. The distance between the EAC and the crime state weakens some of its advantages as a hybrid court. Fortunately, the court's ample outreach work makes up for this part.

Apart from outreach activities, the EAC actively seeks judicial cooperation,<sup>243</sup> which not only facilitates its own work, but also improves the court's image and influence in the international community. The EAC obtains information from many sources, including governments, international organization, NGOs, and complaints filed by victims.<sup>244</sup> As the EAC obtains this information, the court's mission and work are promoted on a wide stage. The EAC also uses significant resources of investigations and evidence by judicial authorities of other states,<sup>245</sup> which saves money and time, and puts victims' efforts, other institutions' long-term work, and collaborative investigations together.<sup>246</sup>

#### iv. Victim's Participation

When seeking international criminal justice, victims should be put in a central position. Fortunately, victims have been important actors at the EAC, by advocating and initiating the case with endeavor, and actively participating during the trial process.<sup>247</sup>

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<sup>237</sup> *Id.* art. 36; Brody, *supra* note 143, at 18.

<sup>238</sup> *Statute*, *supra* note 125, art. 33.

<sup>239</sup> Brody, *supra* note 143, at 13, 18.

<sup>240</sup> *Id.* at 18.

<sup>241</sup> *Id.*

<sup>242</sup> One exception is the Special Tribunal for Lebanon, which is located in The Hague due to the weakness of the Lebanese government. For discussion and criticism, *see* Berti, *supra* note 85; Cerone, *supra* note 85; Wierda et al., *supra* note 85.

<sup>243</sup> Brody, *supra* note 143, at 33.

<sup>244</sup> *Statute*, *supra* note 125, art. 17(4).

<sup>245</sup> *Id.* art. 18(1)(2).

<sup>246</sup> Brody, *supra* note 143, at 21-25.

<sup>247</sup> *Id.* at 19-21.

For one thing, victims and civil parties played a fundamental role in bringing Habré to justice.<sup>248</sup> A leader among the survived victims, Souleymane Guengueng, made tremendous contributions to the documentation of what they suffered, and persistently sought any opportunity to file complaints in different courts.<sup>249</sup> Those efforts contribute a lot towards achieving the establishment of the EAC.

For another, the EAC guarantees victims' participation during the trial, which makes the victims heard in court.<sup>250</sup> According to the court's statute, victims can participate as civil parties,<sup>251</sup> which can be formed at any stage during investigations. Victims also have a right to representatives.<sup>252</sup> The EAC may assist victims in finding and paying representatives when necessary,<sup>253</sup> and direct the witnesses and victims who appear before the court in an appropriate manner. The EAC also ensures their protection and security.<sup>254</sup> Many of Habré's victims testified in court as witnesses. On July 15, 2013, the first 1,015 victims registered as civil parties.<sup>255</sup> The investigative judges got an overwhelming response from the victims and the society when visiting Chad, gathering statements from approximately 2,500 victims and witnesses, including former officials of the Habré government.<sup>256</sup> The Court finally admitted 7, 396 civil parties.<sup>257</sup> Strikingly, even rape victims came forward.<sup>258</sup> The victims of sexual violence had kept silent about rape in documentation and interviews, but some of them decided to come forward when the trial happened.<sup>259</sup>

The EAC received positive comments for victims' sufficient participation at the court. "Never in a trial for mass crimes have the victims' voices been so dominant."<sup>260</sup> The trial itself "showcased the victims' efforts [to bring Habré to justice] and largely met their expectations."<sup>261</sup> When the victims say, "I feel relieved, I said everything I have been wanting to say,"<sup>262</sup>

<sup>248</sup> *Id.*

<sup>249</sup> *Id.*

<sup>250</sup> Thierry Cruvellier, *The Trial of Hissène Habré*, N.Y. TIMES (Feb. 15, 2016), available at <https://www.nytimes.com/2016/02/16/opinion/the-landmark-trial-of-hissene-habre.html>.

<sup>251</sup> *Statute*, *supra* note 125, art. 14.

<sup>252</sup> *Id.*

<sup>253</sup> *Id.* arts. 14(3)(4), 15(4).

<sup>254</sup> *Agreement*, *supra* note 144, art. 9; *Statute*, *supra* note 125, arts. 15(4), 34.

<sup>255</sup> Brody, *supra* note 143, at 13.

<sup>256</sup> *Id.* at 14

<sup>257</sup> For a complete list, see *The General Prosecutor v. Hissen Habré*, Appeal Judgment (April 27, 2017), *Appendix*, available at [http://www.chambresafraicaines.org/pdf/Arr%C3%AAt\\_int%C3%A9gral.pdf](http://www.chambresafraicaines.org/pdf/Arr%C3%AAt_int%C3%A9gral.pdf) (last visited Mar 3, 2019). [hereinafter *Appeal Judgment*].

<sup>258</sup> Brody, *supra* note 143, at 27.

<sup>259</sup> *Id.*

<sup>260</sup> Cruvellier, *supra* note 250.

<sup>261</sup> Brody, *supra* note 143, at 6.

<sup>262</sup> Souleymane Guengueng, a survivor who testified at the trial, available at <https://www.hrw.org/blog-feed/trial-Hissène-Habré> (last visited Mar 3, 2019).

and “this is what I have been waiting for years: my moment of justice,”<sup>263</sup> all the efforts pay off.

From a normative perspective, the victims’ rights are respected and protected by the EAC, and their participation in trials is guaranteed. The EAC’s legitimacy is reinforced by the fact that victims’ views of the case could be represented. In turn, after being heard, victims could feel relieved and recognize that the EAC is as a court to bring about justice, which enhances the court’s sociological legitimacy.

Although there are still some deficiencies in the EAC’s process, such as the inadequate time for the defendant’s lawyers to prepare, the overall process legitimacy is acceptable. Generally speaking, the EAC achieved success in initiating Habré’s case, holding a fair and efficient trial, and hearing an appeal. Moreover, the EAC made tremendous efforts in carrying out outreach activities and guaranteeing victims’ participation, which not only leaves a good example that successors can learn from, but also improves the EAC’s perceived legitimacy in its main stakeholders’ views, including the victims, the Senegalese local people, and the international community.<sup>264</sup> When examining the legitimacy of a judicial institution, it is necessary to evaluate various aspects and analyze each of them individually. However, a deficit in any one aspect does not deny the institution’s legitimacy.<sup>265</sup> Legitimacy is not the end of a court’s mission and it can hardly be achieved perfectly in every aspect. Legitimacy should be viewed as a comprehensive issue; it is important to improve all the aspects, which eventually will work together to enhance the institution’s overall legitimacy.

#### D. *The Legal Conclusions Made by the EAC*

On May 30, 2016, the Trial Chamber convicted Habré of crimes against humanity, war crimes and torture, including rape and sexual slavery, sentenced him to life imprisonment, and ordered him to pay millions for victims’ compensation.<sup>266</sup> On April 27, 2017, the Appeals Chamber affirmed the conviction and sentence and ordered Habré to pay 123 million euros in compensation via a victims trust fund.<sup>267</sup>

##### i. The Conviction of the Perpetrator

The Trial Chamber convicted Habré of crimes against humanity, war crimes and torture, which are three of the main crimes listed in the EAC’s

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<sup>263</sup> Abdourahmane Gueye, a survivor who testified at the trial, <https://www.hrw.org/blog-feed/trial-Hissène-Habré> (last visited Mar 3, 2019).

<sup>264</sup> Brody, *supra* note 143, at 21-27.

<sup>265</sup> Howse, *supra* note 77.

<sup>266</sup> *Public Minister v. Hissen Habré*, Judgment (May 30, 2016), available at [http://www.chambresafraicaines.org/pdf/Jugement\\_complet.pdf](http://www.chambresafraicaines.org/pdf/Jugement_complet.pdf) (last visited Mar 3, 2019). [hereinafter *Judgment*].

<sup>267</sup> *Appeal Judgment*, *supra* note 257.

statute.<sup>268</sup> The conviction specifically includes rape and sexual slavery, which are parts of the definition of crimes against humanity and were addressed by several female victims during the trial.<sup>269</sup> According to the EAC's statute, the sentence upon conviction should be between 30 years imprisonment and life imprisonment.<sup>270</sup> The death penalty cannot be applied.<sup>271</sup> After a careful consideration of the gravity of crimes and the Defendant's personal situation, the EAC sentenced Habré to life imprisonment.<sup>272</sup>

The Appeals Chamber affirmed most charges against Habré.<sup>273</sup> It rejected most of the grounds of appeal, which included the unlawful composition of the appellate bench, infringement of the Defendant's rights, the fact that witnesses attended the trial proceedings prior to their giving testimony, and the failure to issue the Trial Chamber judgement within proper time limits.<sup>274</sup> But the Appeals Chamber overturned one conviction of directly raping a certain woman, because the charge had not been included in the initial indictment.<sup>275</sup> However, the Appeals Chamber upheld Mr. Habré's conviction for other acts of sexual violence.<sup>276</sup> All eight of the rape victims who were recognized by the Trial Chamber were recognized as such by the Appeals Chamber.<sup>277</sup> With the Appeals Chamber's affirmation of the charges, Habré's conviction was finalized and he was sentenced to life imprisonment.<sup>278</sup>

## ii. Victims' Reparations and Compensation

Victims' reparations are an important mechanism and indispensable composition of transitional justice. In this case, there are no victims' reparations separated from the criminal prosecution as an independent mechanism. It was ordered in the judgment that a compensation fund for victims' reparations should be created.<sup>279</sup> According to the statute, the EAC may order a fine and/or a forfeiture for reparations<sup>280</sup> and establish a victims' trust fund.<sup>281</sup> The Trial Chamber ordered Habré to pay for victims' compensation, but it did not give an exact amount or distribution of the compensation.<sup>282</sup> The Appeals Chamber clarified the total amount of

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<sup>268</sup> *Statute, supra* note 125, arts. 6, 7, & 8.

<sup>269</sup> Brody, *supra* note 143, at 27.

<sup>270</sup> *Statute, supra* note 125, art. 24(1).

<sup>271</sup> *Id.*

<sup>272</sup> *Judgment, supra* note 266, at 527-35.

<sup>273</sup> *Appeal Judgment, supra* note 257.

<sup>274</sup> *Id.*

<sup>275</sup> *Id.*

<sup>276</sup> *Id.*

<sup>277</sup> *Id.*

<sup>278</sup> *Appeal Judgment, supra* note 257, at 131.

<sup>279</sup> *Id.*

<sup>280</sup> *Statute, supra* note 125, arts. 24(2), 27(1)(2).

<sup>281</sup> *Id.* art. 28.

<sup>282</sup> *Judgment, supra* note 266.



compensation (82 billion francs CFA, approximately US\$153 million, 123 millions euros) by listing the 7,396 victims eligible for reparations and each one's entitled amount.<sup>283</sup> Applications of 3,489 persons were rejected.<sup>284</sup>

The compensation ordered in this judgment can be understood as individual and material reparations for victims. Collective and spiritual reparations such as memorials, museums, apologies are not included.<sup>285</sup> The lack of collective and spiritual reparations does not undermine the outcome legitimacy of the EAC. Only monetary reparations (compensation) are authorized in the EAC's statute apart from restitution and rehabilitation.<sup>286</sup> Most forms of collective and spiritual reparations may exert better effects if taking place in proximity to victims, leaving the Chadian government a more appropriate actor to take charge. The EAC delivers justice to the victims through the conviction of Habré, which could constitute a kind of collective and spiritual reparation in a broader understanding. In addition, the Habré trial is not the end for victims' reparations. Reparations can be achieved in further stages.

A trust fund has been mandated to search for and recover Habré's assets and to seek voluntary contributions from countries and other willing parties.<sup>287</sup> Those 3,489 additional persons who had not produced sufficient proof of the identity could also further apply to the trust fund to determine their eligibility.<sup>288</sup> "The establishment and operationalization of the Trust Fund within a reasonable timeframe could finally complete the victims' long fight for justice," said Jacqueline Moudeina, president of the Chadian Association for the Promotion and Defense of Human Rights (ATPDH) and lawyer for Habré's victims.<sup>289</sup> Limited assets, including a house and two small bank accounts in Senegal, have been identified that could be used for reparations.<sup>290</sup> Yet further work remains for the trust fund to do, and cooperation and contribution of the governments are essential. Victims should be genuinely consulted on their preferred means of reparation.

In comparison, a Chadian domestic criminal court ordered 75 billion CFA francs (approximately US\$ 140 million) in reparations to 7,000 victims

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<sup>283</sup> *Appeal Judgment, supra* note 257, *Appendix*.

<sup>284</sup> *Id.*

<sup>285</sup> *Id.*

<sup>286</sup> *Statute, supra* note 125, art. 27(1).

<sup>287</sup> *Statute, supra* note 125, art. 28; Assembly/AU/Dec.676(XXX), 28- 29 January 2018, Addis Ababa, Ethiopia, adopted the Statute of the Trust Fund for victims of Hissène Habré crimes available at [https://au.int/sites/default/files/decisions/33908-assembly\\_decisions\\_665\\_-689\\_e.pdf](https://au.int/sites/default/files/decisions/33908-assembly_decisions_665_-689_e.pdf) (last visited Mar 4, 2019).

<sup>288</sup> *Appeal Judgment, supra* note 257, *Appendix*.

<sup>289</sup> *Hissène Habré Case: Trust Fund for Victims*, February 7, 2018, Human Rights Watch, available at <https://www.hrw.org/news/2018/02/07/hissene-habre-case-trust-fund-victims> (last visited Mar 4, 2019).

<sup>290</sup> *Id.*

in March 2015, half out of the defendants' assets and half by the Chadian government.<sup>291</sup> However, no further actions have been taken after that.<sup>292</sup>

In conclusion, the judgment against Habré is made within the EAC's authority pursuant to legal principles, and it is strongly enforceable since Habré has been physically present before the EAC. Moreover, victims are entitled to compensation clarified by the EAC, which adopts a good combination of justice and reparations for the victims, and a trust fund has been established to obtain sufficient reparations gradually.

The practice of the EAC has provided many experiences and lessons that a future hybrid court may learn from. The EAC is the production of African efforts, which reveals a possible regional approach to fighting crimes of atrocity. It is "widely hailed as a milestone for justice in Africa."<sup>293</sup> The EAC is closer to a domestic court exercising universal jurisdiction over international crimes than to a traditional hybrid or international criminal court.<sup>294</sup> It sets a precedent to create a hybrid court on the basis of universal jurisdiction. Its success proves to the international community that "an AU-led initiative is a viable alternative to the exercise of universal jurisdiction by other states."<sup>295</sup> For its legitimacy concerns, the EAC has an enhanced performance in obtaining the justified authority of its origin and delivering a fair judgment which also contributes to victims' reparations. Some minor flaws lie in the EAC's inadequate participation of international and female personnel as well as the defendant's lawyers insufficient time for reparations, but these are not fatal to the EAC's legitimacy. For the sociological perspective, the EAC's excellent job in promoting its outreach activities and guaranteeing victims' participation in the trial significantly improves stakeholders' perception of the court's legitimacy, including Chadian victims, Senegalese local people, and the international community. This observation can be further tested and supported by an empirical research study among various constituencies of the EAC.

After analyzing specific legitimacy issues and taking account of different perspectives, the EAC's comprehensive legitimacy appears qualified, although there is room for perfection. After all, the idea to establish the EAC is a slight compromise, influenced by politics and a strategic handling of a pre-existing legal dilemma. Legal practices can develop and improve during the process as more practices happen. Hopefully, in the

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<sup>291</sup> *Chad: Habré-era Agents Convicted of Torture*, March 25, 2015, Human Rights Watch, available at <https://www.hrw.org/news/2015/03/25/chad-habre-era-agents-convicted-torture> (last visited Nov 24, 2019).

<sup>292</sup> *Chad: Government Fails Ex-Dictator's Victims -3 Years On, No Action on Habré-Era Reparations*, March 22, 2018, Human Rights Watch, available at <https://www.hrw.org/news/2018/03/22/chad-government-fails-ex-dictators-victims> (last visited Mar 3, 2019).

<sup>293</sup> Brody, *supra* note 143, *Summary*.

<sup>294</sup> Williams II, *supra* note 165, at 1140.

<sup>295</sup> *Id.* at 1154.

future, international or hybrid criminal courts will provide a better answer when seeking to establish their legitimacy.

## V. CONCLUSION

In post-conflict situations, states may need international assistance to investigate crimes. Due to domestic courts' lack of specialized legal knowledge of international crimes and the ICC's limited jurisdiction and capacity, hybrid criminal courts, which combine both national and international elements, have been regarded as a significant asset to be used to prosecute mass atrocities in post-conflict areas, such as Bosnia and Herzegovina, Cambodia, East Timor, Lebanon, Kosovo, Chad, and Central African Republic. Usually, hybrid courts combine both domestic and international personnel and judges, employ both domestic and international lawyers, may apply both domestic and international law, and have formal international participation. Hybrid courts can provide flexibility for the unique situation in each post-conflict state, can improve overall domestic judicial capacity by providing a platform where domestic personnel can engage, and can increase accessibility to the trial for victims, since hybrid courts are usually located in or near the affected areas.

When assessing a hybrid court's legitimacy, it is important to take both normative and sociological perspectives. Normative legitimacy relates to justifications for authority normally derived from "objective" notions of fairness and justice. Sociological legitimacy is defined as involving the actual acceptance of authority by a relevant constituency. That is, to what extent relevant audiences perceive an institution's authority to be justified. Neither normative nor sociological legitimacy alone would lead to a finality of the overall legitimacy. Further, legitimacy should be specifically achieved in the courts' sources, personnel, procedures, and outcomes.

Source legitimacy refers to the origins, manner, and authority used to create a hybrid court. It addresses whether the court is established pursuant to legal norms and whether it is perceived as having such normatively appropriate origins. Personnel legitimacy concerns the major actors of the court, such as prosecutors and judges, who should be independent from the influence of political bodies and be seen as such. Process legitimacy focuses on the operational practices and procedures of the court. The doctrinal analysis of the charter or statute of the court, the court's procedural practices, and constituencies' perception of procedural fairness are main concerns of process legitimacy. Finally, output legitimacy relates to the results the court produces, which includes the punishment of perpetrators and impact on victims and their communities. It addresses whether the judgments are within the court's authority and comply with basic principles of justice, whether the judgments are sufficiently enforced, and whether audiences perceive the outcomes favorably. It is noticeable that deficits in source legitimacy may be

compensated for by enhanced process legitimacy, and *vice versa*. Different elements should be examined for the overall evaluation of legitimacy.

The Extraordinary African Chambers were established by Senegal and the African Union in February 2013 to prosecute those responsible for international crimes committed in Chad between 1982 and 1990, the period when Habré was president. The EAC was created inside the existing Senegalese judicial system on the basis of universal jurisdiction, with personnel mainly from Senegal and a few judges from other AU member states. It received funds and support from foreign governments, international institutions, and non-governmental organizations. And it conducted the first trial in the world in which the courts of one country prosecuted the former ruler of another for alleged human rights crimes. It was also the first universal jurisdiction case to proceed to trial in Africa, and the Chadian government demonstrated consent to Senegal's exercising universal jurisdiction. In May 2016, Trial Chamber of the EAC convicted Habré of crimes against humanity, war crimes, and torture including rape and sexual slavery. In April 2017, the Appeals Chamber confirmed the verdict and ordered Habré to pay 123 million euros in compensation via a victims' trust fund. The EAC made extraordinary efforts to record the trials, undertake outreach programs to both Chad and Senegal, and guarantee victims' participation and reparations. When assessing the legitimacy of the EAC, the overall evaluation is optimistic, with stronger legitimacy in its origin and outcomes, despite slightly weak legitimacy in its persons and procedures. The EAC should also enjoy stakeholders' confidence in its legitimacy, which can be further testified by an empirical research. The examination of the EAC's legitimacy helps show how hybrid courts can reinforce their legitimacy and provides various lessons and experiences for its peers and successors.