
ANTONIN SCALIA LAW SCHOOL
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ARTICLES:

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RESTITUTION OF THE SALAMANCA PAPERS

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“SPAIN FOR THE SPANIARDS”: AN EXAMINATION OF THE PLUNDER & POLEMIC RESTITUTION OF THE SALAMANCA PAPERS

*Emily T. Behzadi**

I. INTRODUCTION

Though often sought to be forgotten, the looting, theft, and destruction of cultural property plays an innate, and perhaps uncomfortable, role in Spain’s domestic history. From colonial looting of gold and codices to the confiscation of property from Jews and Muslims during the Spanish Inquisition,¹ it is without dispute that these illicit acts of plunder are a permanent stain on the history of the Spanish Empire. Although often perceived as primitive events or conducted during a time where the laws of armed conflict served more as a suggestion rather than a mandatory practice, it is nevertheless incumbent on modern scholars to recognize this previously institutionalized practice during times of armed conflict.

Modern scholarship regarding plunder and restitution of cultural property primarily focuses on World War II-era confiscations.² Scholarly developments in this jurisprudential area have not only spurred widespread codification of international policy towards restitution of Nazi-looted art, but have also illuminated the need for analogous solutions for cultural property plundered during similar times of armed conflict. One such example of this need is property taken during the Spanish Civil War, which occasioned vast plunder and destruction of art and cultural property from 1936 to 1939. Perhaps the most notoriously devastating attack on cultural heritage during the Spanish Civil War was the looting of thousands of documents,

* J.D., Georgetown University Law Center, 2015; M.A. Twentieth Century Spanish Art from New York University Institute of Fine Arts. I wish to express gratitude to Dean Leticia Diaz, Ana Luisa Solis Escobosa, Taylor Holmes, and Candy Heller for their invaluable comments regarding this article, although any errors or omissions are purely my own. I also wish to thank Dr. Norbert Baer for his valued guidance with the initial conception of this article. A draft of this article was presented at the Southeastern Association of Law Schools Annual Conference Cultural Heritage “Work in Progress” August 1, 2019. Thank you to those who offered comments and feedback.

¹ During the Spanish Inquisition, the Spaniards confiscated an extraordinary number of Jewish and Islamic property from those refusing to convert to Catholicism. The number of properties seized and destroyed is unknown, but generally accepted to be in large quantity. For a detailed history of this period, see HENRY CHARLES LEA, *A HISTORY OF THE INQUISITION OF SPAIN* (1907). Michelina Restaino, *The 1492 Jewish Expulsion from Spain: How Identity Politics and Economics Converged*, University Honors Program Theses. 325 (2018).

² Understandably so, as the devastating years of combat and occupation during World War II resulted in the greatest displacement of cultural property in modern history. For a full discussion of the vast plunder and destruction that occurred during World War II see LYNN NICHOLAS, *THE RAPE OF EUROPA* (1994).

photographs, prints, and artworks from private citizens and institutions that were politically adverse to General Francisco Franco's totalitarian regime.³ The property seized included two hundred tons of historical documents and culturally significant objects taken from various autonomous communities throughout Spain. Catalonia, an autonomous community with a particularly contentious history with Spain, bore the brunt of this war-time plunder. The objects taken from Catalonia and other autonomous communities were stored in an archive in the historic town of Salamanca for over forty-years without disturbance.⁴ After questions over the ownership of these objects emerged in the 1990s, the moniker "*Los Papeles de Salamanca*" ("The Salamanca Papers") became a symbol of Catalonia's continual struggle to overcome the past injustices of the Spanish Civil War.

Under existing principles of Spanish and international law, difficulties have arisen when evaluating whether the Spanish State or Catalonia are the bona fide owners of this historical archive. Given the historically tumultuous relationship between the Spanish Government and the Catalan Government, it is not surprising that over eighty years have passed since the end of the Spanish Civil War, and yet the return, or lack thereof, of the Salamanca Papers continues to be an indignantly contested issue. The conflict over the ownership of the Salamanca Papers is one rarely discussed outside of Spain, and this issue is particularly vexing, as scholarship and policy often only consider international armed conflicts, rather than those of a domestic nature. The question then arises, what happens if, as in the case of Spain, the dispute over the restitution of cultural property is chiefly a domestic matter and a consequence of civil unrest? Since the Salamanca Papers retain historical and cultural significance for both Spaniards and Catalans alike, the perfunctory notion that there is an ethical and moral duty to restitute the property solely to Catalonia becomes more challenging to conceptualize.

The purpose of this article is to examine the ongoing legal dispute over the ownership of the Salamanca Papers from both national and international perspectives. Part II provides a historical overview of the Spanish Civil War and the ensuing plunder of the Salamanca Papers. Part III will then discuss the controversy and ongoing litigation surrounding the restitution of the Salamanca Papers and their subsequent return to Catalonia. Part IV provides a survey of Spain's cultural heritage laws and their application to the case of the Salamanca Papers. Part V applies this conflict to international laws regarding the plunder and restitution of cultural property. Finally, Part VI concludes that individual claimants, as opposed to state or regional governments, should retain ownership over their portion of the Salamanca Papers. Overall, this article reveals the weaknesses in Spain's legal regime of restitution, which, as a result of competing political factions,

³ PAUL PRESTON, *THE SPANISH HOLOCAUST: INQUISITION AND EXTERMINATION IN THE TWENTIETH-CENTURY SPAIN* 488 (2012).

⁴ *Id.*

has ultimately failed to provide redress to those Spaniards victimized by Franco's regime. The fundamental goal of this article is to advance the notion that States, like Spain, have both a moral and legal obligation to sustain a meaningful and effective restitution program, specifically after civil wars or similar armed conflicts. Restitution of the Salamanca Papers may serve as the first step toward mending the deep fissures of the Spanish Civil War, which still tacitly remain undisturbed in Spain.

II. SPANISH CIVIL WAR & PLUNDER OF CULTURAL PROPERTY

A. *The Spanish Civil War & the Counter-Revolution*

The Spanish Civil War and the decades-long dictatorship that ensued thereafter were consequences of a clash of sociopolitical ideals between the democratically elected government of the Spanish Second Republic (the so-called "Republicans," or sometimes referred to as the "Leftists") and the devoted, Catholic Church-endorsed military rebellion led by General Francisco Franco (referred to often as the "Nationalists," "Francoists," or the "Falange").⁵ While Spain is one of the oldest countries in Europe, it had trouble becoming a modernized and politically stable nation during the nineteenth and twentieth centuries.⁶ The formation of the Second Spanish Republic and the abdication of King Alfonso XIII relegated the clerical, military, and land elites to lower ranks of the Spanish government, and the Republicans did little to ease the resulting tensions from this demotion.⁷ Between 1931 and 1936, Leftists groups, which were comprised mainly of the anarcho-syndicalist trade union, the National Confederation of Labor (CNT), the Spanish Socialist Workers' Party (PSOE), the Communist Party of Spain (PCE), the General Union of Labor (UGT), and the "Center-left Republicans," were fighting amongst themselves for control over the central government in Spain.⁸

Although the Leftists all agreed that they needed to unite to defeat their conservative opponents, they were sharply polarized on the means and subsequent ends of doing.⁹ The divisive nature of the Leftist *movimientos* (movements) arguably created a vacuum for the rise of the Nationalists.

⁵ To be clear, the Vatican never took a firm side during the Spanish Civil War. However, the Catholic Church in Spain was well-supported by Franco's troops. See STANLEY G. PAYNE, *THE SPANISH CIVIL WAR* (2008) (ebook).

⁶ STANLEY G. PAYNE, *THE SPANISH CIVIL WAR* (2008) (ebook); For a comprehensive overview of Spain's cultural transition to modernity, see *THE CAMBRIDGE COMPANION TO MODERN SPANISH CULTURAL* (David T. Gies ed., 1999).

⁷ James Friedberg, *The Wane in Spain (Of Universal Jurisdiction): Spain's Forgetful Democratic Transition And The Prosecution Of Tyrants*, 114 W. VA. L. REV. 825, 843 (2012).

⁸ STANLEY G. PAYNE, *THE SPANISH CIVIL WAR* 47 (2008) (ebook); For an account of the conflicts within the various factions of the Republican army from pre-Civil War origins to its defeat in 1939, see MICHAEL ALPERT, *THE REPUBLICAN ARMY IN THE SPANISH CIVIL WAR 1936-1939* (1st ed. 2013).

⁹ See ALPERT, *supra* note 8.

According to Edward E. Malefakis,¹⁰ “[t]he tragedy of Republican Spain, in short, was that a civil war of its own always lurked within its ranks as it fought the greater Civil War against the Nationalists.”¹¹ Erstwhile, the Nationalists devoted themselves to building mass militias, which included garnering the support of the most trained and equipped colonials of the Second Republic’s army for the rebellion.¹² Between July 1936 and April 1939, chaos ensued in the country, with the essential breakdown of authority occurring in most parts of Spain.¹³ The military insurrection of July 1936, which arguably commenced the Spanish Civil War, resulted in a large number of executions and unlawful killings by the Republicans and Franco’s Nationalists.¹⁴ Richard Herr, a noted scholar of Spanish history, characterizes this stage of the Civil War as bound with “ferocious cruelty.”¹⁵

While the Civil War was primarily a consequence of civil unrest, it was also a profoundly international conflict, with roots from foreign influences across the globe. The Nationalist *causa* (cause) supported by Nazi Germany and Fascist Italy, primarily fought to annihilate the labor unions, the socialists, and those against the Catholic church.¹⁶ On the other hand, the Republican faction, backed by Mexico and Russia, fought against Hitler and Nazism, the Catholic Church, the military castes, and, of course, the wealthy landowners.¹⁷ However, this war was not solely a product of political tensions, but rather a divergence of struggles in all aspects of society, including religion, education, and culture, with both sides demanding a singular and uncompromising resolution.¹⁸ As a consequence of this global and national clash of political and cultural ideologies, the Spanish Civil War

¹⁰ Edward E. Malefakis was a well-known American Spanish history professor, who among his other notable accomplishments, was commissioned in 2004 by the government of Spain to advise over the subject Salamanca Papers. See *The Committee of Experts Considers It 'Fair and Legitimate' to Return the Archive of Salamanca to Catalonia*, ELMUNDO.ES (Dec. 24, 2004, 2:23), <https://www.elmundo.es/elmundo/2004/12/23/cultura/1103821126.html>.

¹¹ Edward E. Malefakis, *Internal Political Problems and Loyalties*, in CIVIL WARS IN THE 20TH CENTURY 111 (Robin Higham ed., 1st ed. 1972).

¹² Juan J. García Blesa & Víctor L. Gutiérrez Castillo, *The Rights Of The Victims of Past Atrocities in Spain: Reparation Without Truth and Justice?*, 29 CONN. J. INT'L L. 227, 229 (2014).

¹³ *Id.* at 230.

¹⁴ Peter Burbridge, *Waking the Dead of the Spanish Civil War: Judge Baltasar Garzon and the Spanish Law of Historical Memory*, 9 J. INT'L CRIM. JUST. 753 (2011).

¹⁵ RICHARD HERR, AN HISTORICAL ESSAY ON MODERN SPAIN 190 (1st ed. 1974).

¹⁶ Luc Reydam, *A la guerre comme à la guerre: patterns of armed conflict, humanitarian law responses and new challenges*, 88 INT'L REV. OF THE RED CROSS, 729, 738 (2006).

¹⁷ *Id.*

¹⁸ For an examination of the social and cultural tensions occurring during the Spanish Civil War, see Claudio Hernández Burgos, *Bringing back Culture: Combatant and Civilian Attitudes during the Spanish Civil War, 1936-1939*, 101 THE J. OF THE HIST. ASS'N 448, 449-463 (2016).

resulted in violence, extra-judicial killings, torture, and the destruction and pillaging of private real and personal property.¹⁹

The Spanish Civil War served as “the destruction of the past, or rather the social mechanisms linking the individual’s experience with previous generations...and the damage to cultural heritage was particularly serious.”²⁰ Notably, an enormous wave of vandalism, destruction, and pillaging of art was rife on both the Republican and Nationalist sides. Systematic looting and pillaging were carried out in many parts of the Republican zone, specifically in Catholic churches.²¹ However, the tremendous mass of systematic confiscations and destruction of cultural property is greatly attributed to the Nationalist side. Indeed, as the Nationalists began to gain strength and take over more territories, their coordination of the seizure and destruction of cultural property increased as well.²²

B. Franco’s Campaign of Systematic Confiscations

As Hitler had accomplished in World War II, General Francisco Franco similarly designed an organized and methodical program intended to systematically acquire cultural property from each region he conquered.²³ This program informally began in 1937, a year after Franco launched the uprising that led to the civil war.²⁴ Franco established the *Oficina de Investigación y Propaganda Anticomunista* (“OIPA”) (the Office of Anti-Communist Investigation and Propaganda), which sought to create an index of evidence, for the prosecution of communists and Marxists, and a library and museum, to educate the public about the threat of communism.²⁵ One of OIPA’s early initiatives was to confiscate Masonic documents and symbolic objects, which the organization saw as directly related to communism.²⁶ As the Nationalists took over more territory, their targets began to expand,

¹⁹ PAUL PRESTON, *THE SPANISH HOLOCAUST: INQUISITION AND EXTERMINATION IN THE TWENTIETH-CENTURY SPAIN 475-488* (2012) (providing a detailed account of the systematic violence and damage to cultural heritage, which occurred during the Spanish Civil); *see also* OLIVIA MUÑOZ-ROJAS, *ASHES AND GRANITE: DESTRUCTION AND RECONSTRUCTION IN THE SPANISH CIVIL WAR AND ITS AFTERMATH* (2011).

²⁰ Julián Esteban-Chapapria, *The Spanish Civil War and Cultural Heritage*, 14 *FUTURE ANTERIOR: J. OF HIST. PRESERVATION, HIST., THEORY, AND CRITICISM*, 79, 79 (2017).

²¹ PAYNE, *supra* note 6, at 105-106. Madrid was an exception as the Board of Confiscation and Protection of Artist Treasure protected existing artwork in buildings seized by political and union organizations, which were defending the public; Esteban-Chapapria, *supra* note 20, at 81-82.

²² PRESTON, *supra* note 3, at 488.

²³ *Id.* at 486. In particular, to “recover all documentation related to secret sects and their activities in Spain found in possession of individuals or official entities, storing it carefully in a place far removed from danger where it can be catalogued and classified in order to create an archive that will permit the exposure and punishment of the enemies of the fatherland.”

²⁴ Peter Anderson, *The ‘Salamanca Papers’: Plunder, Collaboration, Surveillance and Restitution*, 89 *BULL. OF SPANISH STUD.*, 171, 175 (2012).

²⁵ *Id.* at 176.

²⁶ *Id.* at 177.

specifically into northern Spain.²⁷ OIPA apprehended a large bounty of documentary material from the Basque government, which OIPA thereafter exploited to produce criminal files to later prosecute political adversaries.²⁸ OIPA's efforts were part of an expansive international campaign to fight "*contra el comunismo*" (against communism) and to "immunize the country of the Marxist virus."²⁹

Ramón Serrano Suñer, Franco's minister of the interior and an admirer of the Nazis, subsequently created the *Delegación del Estado para la Recuperación de Documentos* or the State Office for the Recovery of Documents ("DERD") on April 26, 1938.³⁰ DERD's primary mission was the confiscation of documents from organizations and individuals that were considered a threat to the insurgent Nationalist regime or opposed its societal and political views.³¹ The main targets of DERD included institutions devoted to military service, police stations, social workers, propaganda offices, foreign correspondences, as well as public education, political parties, trade unions, and freemasons, among many others.³² The Nationalists believed these institutions not only supported the Second Republic, but were also "*enemigos de la patria*" ("enemies of the nation").³³ This belief served as Franco's rationale behind the creation of DERD and the ongoing confiscations that succeeded the Nationalists' victory.³⁴

Henceforth, DERD adopted and enhanced OIPA's scheme of confiscation. In addition to documents, DERD also confiscated books, magazines, periodicals, posters, paintings, sculptures, and other objects of cultural significance.³⁵ With respect to Masonic organizations, DERD targeted symbolic ceremonial objects, such as furniture and clothes.³⁶ As the Nationalists invaded new cities, they would seize what they considered to be the most important material owned by both private citizens and public and private institutions.³⁷ In addition to cities, the Francoists set up *Comisiones Provinciales de Bienes Incautados* (Provincial Commissions of Confiscated

²⁷ *Id.*

²⁸ *Id.*

²⁹ *Id.* at 176.

³⁰ See Marc Balcells, *The Knife that Still Divides: The Archive of Salamanca and the Heritage of Spain's Civil War in the 21st Century*, 5 ARTS SOC. SCI. J. 1, 2 (2014).

³¹ See *id.*; see also PRESTON, *supra* note 3, at 466 (explaining DERD's purpose).

³² See THE DIGNITY COMM'N, THE ARCHIVES FRANCO STOLE FROM CATALONIA: THE CAMPAIGN FOR THEIR RETURN 8-9 (Editorial Milenio 2004) (2004).

³³ See Anderson, *supra* note 24 at 174; see also Jesús Espinosa Romero & Sofía Rodríguez López, *El Archivo de Guerra Civil De Salamanca. De La Campaña a la Transición*, CENTRO DOCUMENTAL DE LA MEMORIA HISTÓRICA 131, 137 (2015), https://www.ucm.es/data/cont/docs/446-2015-11-23-j2015_maq_espinosa%20romero%20jesus.pdf.

³⁴ See Anderson, *supra* note 24, at 174.

³⁵ THE DIGNITY COMM'N, *supra* note 32, at 16.

³⁶ *Id.*; For an examination of Franco's treatment of freemasonry during the Spanish Civil War, see generally Julius Ruiz, *Fighting the International Conspiracy: The Francoist Persecution of Freemasonry, 1936-1945*, 12:2 POL., RELIGION AND IDEOLOGY 179 (2011).

³⁷ Anderson, *supra* note 24, at 177.

Property) in small occupied provincial areas to seize the assets of those countrymen considered enemies of the regime.³⁸ The seizures of these small provincial areas seemingly served as practice for DERD's larger targets.

DERD's highest priority was Catalonia, specifically Barcelona, which had its provisional seat on both the national Republican and Basque governments.³⁹ On January 28, 1939, two days after the occupation of Barcelona, approximately six DERD-designated search teams carried out a massive program of two thousand search and confiscation operations throughout the city.⁴⁰ The teams began seizing objects at random and in substantial quantity, with the most desirable targets being newspapers, magazines, books, and printing presses from private institutions.⁴¹ With respect to the Catalan government, the DERD teams ransacked official buildings, the headquarters of major political parties and movements, and the private homes of politicians and union leaders.⁴² Due to the vast quantity of objects seized, DERD could not process and organize all objects effectively.⁴³ Nonetheless, it is estimated that over two hundred tons of documents were confiscated in Catalonia alone.⁴⁴

Most of the confiscated materials were then sent to Salamanca, where archivists would extract information about the social and political activities of thousands of private individuals.⁴⁵ After the Civil War, DERD used the extrapolated information to not only punish political enemies, but to also return objects to those private owners who swore fidelity to Franco's regime.⁴⁶ However, most of the objects were not returned to their rightful owners, and those that were not sent to Salamanca were subject to a worse fate, as the Nationalists created the Department of Press and Publicity, which succeeded at "purging" materials considered to be against the Nationalist movement from public libraries, cultural institutions, publishers' offices, and bookshops.⁴⁷ This Department destroyed at least seventy-two tons of published material, and the profits from the sale of that destruction were aimed to fund DERD's activities.⁴⁸

After the end of the Civil War, Franco enacted laws to legitimize the confiscations that had occurred during the conflict. On February 9, 1939, Franco's regime instituted the *Ley de Responsabilidades Políticas* (Law of Political Responsibilities), which essentially served as a legal means to

³⁸ Conxita Mir, *The Francoist Repression in the Catalan Countries*, 1 CATALAN HIST. REV., 133, 140 (2008).

³⁹ See THE DIGNITY COMM'N, *supra* note 32, at 9.

⁴⁰ See Balcells, *supra* note 30, at 2.

⁴¹ See *id.*

⁴² See *id.*

⁴³ See THE DIGNITY COMM'N, *supra* note 32, at 10.

⁴⁴ See *id.* at 13.

⁴⁵ See Balcells, *supra* note 30, at 2.

⁴⁶ See THE DIGNITY COMM'N, *supra* note 32, at 10-11.

⁴⁷ See *id.* at 11.

⁴⁸ See *id.*

financially punish those members of the Republican contingent.⁴⁹ Due to the alleged “magnitude of intentional and material consequences of grievances inflicted on Spain” by the Republicans, the Law of Political Responsibilities sought to “harmonize the sacred interests of the country” through mandatory economic sanctions and monetary reparations.⁵⁰ Under Chapter 1, Article 3.0 of the Law of Political Responsibilities, all parties or groups declared “*fuera de la ley*” (“out of the law”)⁵¹ suffered “the absolute loss of their rights of all kinds and the total loss of their assets. These assets will be wholly owned by the State.”⁵² The confiscated assets were then used to benefit the new Francoist state, which included a pathway to refinance the rebuilding of the country.⁵³ On March 1, 1940, the Franco Regime, passed *La Ley de Represión de la Masonería y el Comunismo del 1 de Marzo de 1940* (the Law of the Repression of Masonry and Communism of March 1, 1940), which, among other things, criminalized Freemasonry, communism, and “other clandestine societies”; created a special court for the suppression of Freemasonry and communism; and permitted the seizure of the personal property and ritual objects associated with Masonic rites from the freemasons.⁵⁴

While it never came to fruition, May 1939 records suggest that Franco desired to display the captured property in a museum to be called the “Museum of the Crusade.”⁵⁵ Similar to the “Museum of the Revolution” in Havana, Cuba, the “Museum of the Crusade,” was meant to show the world the moral lessons taught by the Spanish fight against Communism.⁵⁶ It is not clear why the Nationalists never established the museum. Perhaps it is because they principally desired to punish their political enemies more than educating the public on the faults of communism. It is possible that the

⁴⁹ *Ley de Responsabilidades Políticas* [Law of Political Responsibilities] pmbi. (B.O.E. 1939, 44) (Spain).

⁵⁰ *Id.*

⁵¹ *Id.* at ch. 1, art. 2.0. According to Chapter 1, Article 2.0 these groups included the following: the Action Republican Party, Republican Left, Republican Union, Federal Party, National Confederation of Labor, General Union of Workers, Socialist Workers Party, Communist Party, Trade Union Party, Pestaña Trade Union, Iberian Anarchist Federation, National Party, Basque Country, Basque Nationalist Action, Solidarity of Basque Workers, Catalan Esquerra, Gallego Party, Marxist Unification Workers Party, Libertarian Athenaeum, Red Relief International, Unified Socialist Party of Catalonia, Rabassaires Union, Catalan Action Republican Party, Republican Catalan Party, Democratic Union of Catalonia, State of Catalonia, the Masonic Lodges and any other entities with views expressing sympathies banned by the law.

⁵² *Id.* at ch. 1, art. 3.0.

⁵³ See Mir, *supra* note 38, at 140; see also Ramón Arnabat Mata, LA REPRESIÓN: EL ADN DEL FRANQUISMO ESPAÑOL, 39 CUADERNOS DE HISTORIA 33, 36 (2013).

⁵⁴ See *Ley de 1 de Marzo de 1940 Sobre Represión de la Masonería y del Comunismo* [Law of the Repression of Masonry and Communism of March 1, 1940] art. 1 (B.O.E. 1940, 62) (Spain).

⁵⁵ Anderson, *supra* note 24, at 176.

⁵⁶ *Id.*; Claire Boobbyer, *On The Trail Of Fidel Castro: 10 Must-Visit Sights In Cuba*, THE TELEGRAPH, (Nov. 28, 2016) (discussing the “Museum of the Revolution” in Havana, Cuba which showcases, through various galleries, the history of the country’s revolutionary struggle), <https://www.telegraph.co.uk/travel/destinations/caribbean/cuba/articles/in-the-footsteps-of-fidel-castro-historical-attractions-in-cuba/>.

immense volume of disorganized objects was too big of a task to actualize in the middle of rebuilding a country. Whatever the reason, the two hundred tons of confiscated objects were instead transported to Salamanca to establish an archive of civil war assets.⁵⁷

While the archives were not particularly well organized, the regime did achieve its intended purpose: to punish its political enemies.⁵⁸ The Nationalists managed to create card files from all of the objects in the archives, which described suspects' ideological leanings and alleged crimes.⁵⁹ These card files would then, in turn, be used as evidence to prosecute alleged crimes.⁶⁰ The purpose of these records was ultimately to punish political adversaries, but the itemized records kept by the regime also contained reports on opponents with alleged connections to the freemasons, Jews, evangelists, Rotary Club members, and other spiritualist organizations.⁶¹ Although the classification process may have successfully created a police record, it ultimately failed at achieving any semblance of a professional archive. From 1939 until the termination of DERD in 1977, the archives remained a source for Franco's regime to institutionalize repression within varying subjugated groups.⁶² The collection was thereafter transferred to the newly democratic institution, the Ministry of Culture and Sports in 1979.⁶³ Even after the transition to democracy, the archives remain an *aide-mémoire* of the government that produced them, as those archives detail an account of the repression and violence that occurred during the civil war and the dictatorship that followed.

III. THE POLEMIC RESTITUTION CONTROVERSY OF THE SALAMANCA PAPERS

The massive archive in Salamanca and the controversy over its contents remains a little-known matter to anyone outside of Spain. Since the transition from dictatorship to democracy, the discussion over the restitution of these objects serves as an enduring vestige of the atrocities of the Spanish Civil War. Two years after the death of Franco, the new democratic government worked to convert what was essentially a repository of the objects confiscated during the Spanish Civil War into a legitimate historical

⁵⁷ Balcells, *supra* note 24, at 2.

⁵⁸ *See id.*

⁵⁹ *Id.*; *see also* Preston, *supra* 3, at 489.

⁶⁰ THE DIGNITY COMM'N, *supra* note 32, at 14.

⁶¹ *Id.* at 15.

⁶² *Id.*

⁶³ Culture Ministry, *Orden de 7 de mayo de 1979 por la que se dispone se adscriban al Archivo Histórico Nacional los fondos documentales de la extinguida Sección de Servicios Documentales, formando en el mismo una División independiente*, (June 21, 1979), <https://www.boe.es/eli/es/o/1979/05/07/2>.

archive.⁶⁴ During this transition, the Spanish government introduced no measures to restitute the property to their rightful owners, nor did the government apprise the public of the existence of the archive or its contents.⁶⁵

The contents within the archive were, and still are, of great importance to the citizens of Catalonia, as much of the cultural property stored in Salamanca came from the 1938 confiscations in Barcelona.⁶⁶ Josep Bargalló i Valls, former Prime Minister of the *Generalitat de Catalunya* (the Government of Catalonia), affirmed the great importance of the archive to the Catalan people:

It can therefore surprise no one that the Catalan people want to recover the documents that bear witness to their country's age-old identity. No nation may steal from another elements that are essential to the framework of national history; no nation may steal from another the cultural trappings that sustain national memory. Thus it is that the people of Catalonia today call for the return of what was taken from them as a symbol of their submission, the spoils of war taken on their defeat. If there is a genuine desire to build a State of brother nations, in which respect for the plural nature of the different historical communities involved is truly guaranteed, the historical memory of these nations must also be maintained. To turn a blind eye to their demands is to wreck the chance of furthering dialogue and the possibility of peaceful coexistence. Turning a blind eye to their demands also shows a desire to perpetuate the symbols of defeat. The documents retained at Salamanca signify much more than mere historical heritage. They represent the defeat of the Catalan people in 1939.⁶⁷

While the question of whether to return the objects to Catalonia is one that Spain's Ministry of Culture and Sports insists is a legal and not a "political problem," the history of the restitution of the objects has proven to be inherently partisan.⁶⁸ A year after the reestablishment of the *Generalitat* of Catalonia in 1977, Josep Benet, a noted Catalan historian and senator in

⁶⁴ Toni Strubell, *Address at the London School of Economics: From Pillage to Reparation: The Struggle for Salamanca Papers* (Nov. 8, 2006), http://www.fundacioemilidarder.cat/documentos/D_35.pdf.

⁶⁵ Elena Yeste Piquer, *Guerra de Archivos: el Patrimonio Documental de la Memoria*, LAS CUARTAS JORNADAS ARCHIVO Y MEMORIA. LA MEMORIA DE LOS CONFLICTOS: LEGADOS DOCUMENTALES PARA LA HISTORIA 1, 5 (Madrid, 2009).

⁶⁶ THE DIGNITY COMM'N, *supra* note 32, at 12.

⁶⁷ *Id.* at 1 [hereinafter the "Generalitat"].

⁶⁸ *El Gobierno insiste en que el traslado de los papeles de Salamanca es una cuestión de cumplimiento de la ley*, LA GACETA (June 20, 2019), <https://www.lagacetadesalamanca.es/salamanca/el-gobierno-insiste-en-que-el-traslado-de-los-papeles-de-salamanca-es-una-cuestion-de-cumplimiento-de-la-ley-CD1162235>.

the first democratically elected Spanish parliament, made the initial demand for restitution of, what is now coined, the "Salamanca Papers."⁶⁹ Notably, Manuel Fraga, one of the founding fathers of the Spanish *Partido Popular* ("Popular Party"), which is now ironically one of the conservative parties in Spain, followed this appeal by making a formal request to the Spanish Parliament on March 18, 1980 for the return of the objects to Catalonia.⁷⁰

Although these requests were mostly unsuccessful, they did lead to some significant legislative measures introduced by both the Spanish and Catalanian governments. On May 18, 1989, the Parliament of Catalonia passed Resolution 73/III *La Recuperació Del Material Documental Requisat a Catalunya a Partir del 1939* (the "Recovery of Material Documents Requisitioned from Catalonia Since 1939"), which served as a formal demand to the Spanish government for the return of all cultural property belonging to the Catalan government and its private citizens.⁷¹ While this resolution went unanswered, the issue of the Salamanca Papers became a topic of fervent controversy by 1995, when on March 15, 1995, Carmen Alborch, the Spanish Minister of Culture, pronounced that Civil War documents would be returned to the Catalan Government, but "with sufficient delicacy to implement it legally and ensure that the documentation of Catalonia can be continued in Salamanca, through microfilming."⁷²

This pronouncement was marred with controversy, resulting in over 55,000 people from Salamanca demonstrating against the transfer.⁷³ On April 25, 1995, the Mayor of Salamanca delivered to the Minister of Culture 97,000 signatures protesting the return of the contents of the archive to Catalonia.⁷⁴ In November 1995, the Ministry of Culture created *La Junta Superior De Archivos* (the "Superior Board of Archives"), a judicial body specifically created to decide the future location of the archives.⁷⁵ In January 1996, Minister Alborch appointed a commission of experts to study the archives and to determine their provenance.⁷⁶ While some work had

⁶⁹ Piquer, *supra* note 65. For purposes of this paper, the objects at issue shall hereinafter be called the "Salamanca Papers." However, note that the archive contains more than just documents, but also posters, paintings, books, flags, and other objects of cultural and historical significance.

⁷⁰ Anderson, *supra* note 24, at 172 n.6.

⁷¹ See *Proposició No De Llei Sobre La Recuperació Del Material Documental Requist a Catalunya a Partir Del 1939*, (May 22, 1989), <https://www.parlament.cat/document/bopc/48856.pdf>, at 4624-4625.

⁷² *El Gobierno devuelve a Cataluña los archivos históricos requisados en 1939*, EL PAÍS, (March 18, 1995), https://elpais.com/diario/1995/03/18/cultura/795481201_850215.html.

⁷³ José Ángel Montañés, *Una Histórica Reclamación*, EL PAÍS, (Dec. 24, 2004), https://elpais.com/diario/2004/12/24/cultura/1103842801_850215.html.

⁷⁴ *Los 'papeles de Salamanca': del franquismo a la actualidad*, EL MUNDO (January 31, 2006), <https://www.elmundo.es/elmundo/2005/06/09/cultura/1118336528.html>.

⁷⁵ *La Junta Superior de Archivos Sólo «Prestaba» los Documentos*, ABC, (Jan. 09, 2005), https://www.abc.es/hemeroteca/historico-09-01-2005/abc/Cultura/la-junta-superior-de-archivos-solo-prestaba-los-documentos_9631371227468.html.

⁷⁶ *Los 'papeles de Salamanca': del franquismo a la actualidad*, EL MUNDO (January 31, 2006), <https://www.elmundo.es/elmundo/2005/06/09/cultura/1118336528.html>.

occurred towards the recuperation of the archive, that work soon ceased in May of 1996 with the electoral triumph of the Popular Party, a conservative political party in Spain, which subsequently pronounced that the documents “no se moverán” (“will not move”).⁷⁷

On November 27, 1996, the Superior Board of Archives forwarded the report of the commission of experts to the Spanish Congress.⁷⁸ The report recommended the creation of an “Archive of the Civil War in Salamanca” to hold and eventually display all objects from the Spanish Civil War.⁷⁹ However, the report also recommended objects that were not from the Civil War to be returned to Catalonia in the form of a “deposit,” with the national government still retaining ownership.⁸⁰ On March 12, 1999, by Royal Decree, the Spanish parliament officially established “The General Archive of the Spanish Civil War,” to house all of the documents confiscated during the Civil War.⁸¹ That same year, the Ministry of Culture established *El Patronato del Archivo de la Guerra Civil* (“The Patronage of the Archive of the Civil War”), a new body in charge of dealing with “technical decisions” about the Archive, including those claims of restitution by the government of Catalonia.⁸² In 2002, a group of journalists, historians, archivists, writers, and cultural activists launched the *Comissió de la Dignitat* (the “Dignity Commission”) to promote and lobby for the repatriation of the looted materials to Catalonia.⁸³ That same year, the Archive announced that it planned to produce an exhibition entitled *Propaganda en Guerra*, with the very materials the Dignity Commission desired to repatriate.⁸⁴ In response, the Commission demanded the return of the property and, in Madrid’s major newspaper *El País*, called for the suspension of the exhibition.⁸⁵

The *Patronato del Archivo de la Guerra Civil* rejected the transfer of the archive to Catalonia, opining that the archive needed to stay in Salamanca to preserve its unity, per recommendations from the United Nations Educational, Scientific, and Cultural Organization (“UNESCO”).⁸⁶ On December 23, 2004, the commission of experts again submitted a non-

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ *Real Decreto 426/1999, de 12 de Marzo, de Creación del Archivo General de la Guerra Civil Española*, B.O.E., 1999, 426 (Spain), <https://www.boe.es/eli/es/rd/1999/03/12/426/dof/spa/pdf>.

⁸² Ignacio Francia, *Constituido el Patronato del Archivo de la Guerra Civil*, *El País* (Jun. 18, 1999), https://elpais.com/diario/1999/06/18/cultura/929656806_850215.html.

⁸³ THE DIGNITY COMM’N, *supra* note 32, at 8-9.

⁸⁴ Ignacio Francia, *Una exposición con estos fondos augura polémicas*, *El País* (Jun. 25, 2002), https://elpais.com/diario/2002/06/25/cultura/1024956003_850215.html.

⁸⁵ *Id.*

⁸⁶ *El Patronato del Archivo de Salamanca deniega el traslado de documentos a Cataluña*, *EL PAÍS*, (July 21, 2002) https://elpais.com/cultura/2002/07/22/actualidad/1027288801_850215.html.

binding report recommending the return of the documents to Catalonia.⁸⁷ After the change of parliamentary majority in 2004, the Spanish government pronounced a desire to initiate “a process of dialogue with the Government of the *Generalitat*, through the appropriate institutional channels, to timely resolve the dispute raised in relation to the seized documentation that is currently collected in the General Archive of the Civil War of Salamanca.”⁸⁸ On November 16, 2005, after several attempts to block its approval, the Spanish Government passed *Ley 21/2005* (Law 21/2005), which accomplished two important things: (1) it mandated restitution of the Salamanca Papers to their rightful owners or heirs in Catalonia, and (2) it created a new archive with the purpose of documenting the events of the Civil War.⁸⁹ Unsurprisingly, after the passage of *Ley 21/2005*, the municipal government of Salamanca and the autonomous government of Castilla-León, run by the conservative *Partido Popular*, as well as thirty-three senators from Spanish Parliament, immediately appealed the law as unconstitutional and sought to suspend the return, which was to occur on January 19, 2006.⁹⁰

On March 14, 2013, Spain’s highest court ruled that the law was constitutional, finding that the objects seized from Catalan organizations and individuals must be returned to their rightful owners in Catalonia.⁹¹ To arrive at this conclusion, the Court considered the Appellant’s⁹² primary argument: that restitution of the Salamanca Papers would damage the integrity of the archive and would ultimately result in “a spoliation” of the archive and a “disturbance of the fulfillment of the [Archive’s] social function.”⁹³ In arguing against the constitutionality of the law, the Appellant further contended under Article 149.1.28 of the Spanish Constitution, that it has the

⁸⁷ *Los 'papeles de Salamanca': del franquismo a la actualidad*, EL MUNDO (January 31, 2006), <https://www.elmundo.es/elmundo/2005/06/09/cultura/1118336528.html>.

⁸⁸ *Los 'papeles de Salamanca' ya se encuentran en el Archivo Municipal de Cataluña*, EUROPA PRESS, (Jan. 31, 2006), <https://www.europapress.es/cultura/noticia-papeles-salamanca-ya-encuentran-archivo-municipal-cataluna-20060131121221.html>.

⁸⁹ *Ley 21/2005, de 17 de Noviembre, de Restitución a la Generalidad de Cataluña de los Documentos Incautados con Motivo de la Guerra Civil Custodiados en el Archivo General de la Guerra Civil Española y de Creación del Centro Documental de la Memoria Histórica* [Law 21/2005, of November 17, on the return to the Generalitat of Catalonia of the documents seized on the occasion of the Civil War kept in the General Archive of the Spanish Civil War and the creation of the Documentary Center of Historical Memory] art.4, art. 6 (L.O. 2005).

⁹⁰ *Recurso de inconstitucionalidad 9007-2005, Interpuesto por la Junta de Castilla y León en relación con diversos preceptos de la Ley 21/2005, de 17 de noviembre, de restitución a la Generalitat de Cataluña de los documentos incautados con motivo de la guerra civil custodiados en el Archivo General de la Guerra Civil Española y de creación del Centro Documental de la Memoria Histórica*, <https://global.economistjurist.es/BDI/class/descarga.php?id=55060>.

⁹¹ Tereixa Constenla, *El Constitucional avala el envío de los 'papeles de Salamanca' a Cataluña*, EL PAÍS (Feb. 1, 2013) https://elpais.com/cultura/2013/02/01/actualidad/1359721614_077469.html.

⁹² For purposes of this note, the “Appellant” shall be referred to as the municipal government of Salamanca and the autonomous government of Castilla-León, as well as thirty-three senators from Spanish Parliament, which appealed the constitutionality of Ley 21/2005.

⁹³ S.T.C., Mar. 14, 2013 (T.C., No. 3803, p. 151) (Spain) (Discussing the “social function” is a concept under Spain’s cultural heritage laws, which will be discussed *infra*.)

exclusive power of the “defense of the Spanish cultural, artistic and monumental heritage against exportation and exploitation” concerning “museums, libraries and archives of state ownership, without prejudice to their management by the Autonomous Communities.”⁹⁴ It argued that not allowing the Spanish Government to properly dispose of the property would be in violation of Article 149.1.28 of the Spanish Constitution, which obligates the Spanish Government to adopt the necessary measures to deal with the issue of cultural property despoliation and to guarantee the preservation of the historical and cultural heritage of Spain.⁹⁵

The Constitutional Court disagreed with the Appellant’s assertions and held that Catalonia had the competency (essentially the power or jurisdiction) to effectuate the purpose of the law, i.e., to restitute the property to the rightful owners and heirs.⁹⁶ In ruling in favor of the law’s constitutionality, the Court considered whether the law had a reasonable purpose and was not “arbitrary or irrational.”⁹⁷ According to the Constitutional Court, a law has a reasonable purpose if it is “not devoid of any foundation” and, “although one can legitimately disagree with the concrete solution adopted,” it does not make it “arbitrary or irrational.”⁹⁸ The Constitutional Court found that because the Spanish Government enacted the Spanish Historical Heritage Law, which explicitly permits the transfer of cultural property assets to other administrations, including governments of autonomous communities, *Ley 21/2005* did not infringe on Article 149.1.28 of the Spanish Constitution.⁹⁹ Furthermore, *Ley 21/2005* was held to have a rational purpose, as the restoration of the objects to their rightful owners could not be deemed “arbitrary or unreasonable.”¹⁰⁰

However, this ruling by Spain’s Constitutional Court was not enough to end this dispute over the archives.¹⁰¹ While over 400,000 materials have been returned to the *Generalitat* of Catalonia, litigation continues as to some of the remaining materials.¹⁰² After the Spanish Constitutional Court’s judgment in 2013, the *Asociación Salvar el Archivo* (Save the Archive Association) (“SAA”), an association devoted to lobbying for the Salamanca Papers to remain in Salamanca, filed a new lawsuit in the *Tribunal Superior*

⁹⁴ *Id.*

⁹⁵ *Id.* at 152.

⁹⁶ *Id.* at 161.

⁹⁷ *Id.* at 160.

⁹⁸ *Id.* at 161.

⁹⁹ *Id.* at 161-162.

¹⁰⁰ *Id.* at 160.

¹⁰¹ See Aina Grau, *Papeles de Salamanca, ¿un viaje de ida y vuelta?*, EL NACIONAL, (April 24, 2017), https://www.elnacional.cat/ca/cultura/papers-salamanca-viatge-anada-tornada_152202_102.html.

¹⁰² See *El Supremo confirma la devolución de una remesa de papeles de Salamanca a la Generalitat cinco años después*, LA VANGUARDIA, (June 17, 2019), <https://www.lavanguardia.com/politica/20190617/462925468391/supremo-devolucion-papeles-salamanca-cinco-anos-despues.html>.

de Justicia de Cataluña (Superior Court of Justice of Catalonia) (“TSJC”).¹⁰³ The TSJC outlined the essential arguments of the case as being: (1) the legality of the procedure outlined in *Ley 21/2005*, which transferred the Salamanca Papers to Catalonia, (2) the legality of the delivery of property transferred to different persons and institutions that were not the original owners or heirs, and (3) the failure of the *Generalitat* to digitize the transferred documents as required by *Ley 21/2005*.¹⁰⁴ In support of its argument, SAA maintained that the deadline imposed by *Ley 21/2005*, which required claimants to come forward within one year after the law’s enactment, had well-since passed and required Catalonia to transfer back all of those unclaimed objects to the Salamanca Archive.¹⁰⁵ The SAA further accused Catalonia of conveying ownership to people or entities who were not the legitimate owners or their successors.¹⁰⁶

In late 2017, the TSJC dismissed the SAA’s claim for primarily procedural issues, noting that the Catalan court did not have the jurisdiction to resolve the matter, since it was the Spanish Ministry of Culture who authorized the return of the documents between 2006 and 2011.¹⁰⁷ The Catalonia Superior Court did not reach the substance of the SAA’s claim because it lacked the “competence” to do so.¹⁰⁸ In fact, the TSJC required the SAA to pay €1,500 euros for payment of the court costs for bringing the inadmissible lawsuit.¹⁰⁹ The TSJC instead indicated that *Ley 21/2005* was controlling over all matters related to this dispute and that the State Administration retained sole competence to decide about the return of the documents.¹¹⁰

In October 2018, Minister of Culture José Guirao announced the convening of a commission to “resolve the pending issues” of the Salamanca Papers “in accordance with the law,” noting that “there are not many...[a]t some point it got stuck on political issues.”¹¹¹ In the interim, the State decided not to give any more property to Catalonia until the situation was corrected.¹¹² In a meeting in November 2018, Spain’s Minister of Culture and Sports, the Minister of Culture of Castilla y León, and the Mayor of

¹⁰³ T.S.J., Nov. 24, 2017 (R.O.J. No. 12334, p. 2) (Spain).

¹⁰⁴ *Id.* (Providing an analysis about documentary funds for which are allegedly owed to the rightful owners.).

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

¹⁰⁷ *Id.* at 5.

¹⁰⁸ *Id.* at 2.

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

¹¹¹ *Ministerio de Cultura y Generalitat catalana deshuelan su relación en los 'papeles de Salamanca'*, EL MUNDO (Oct. 18, 2018), <https://www.elmundo.es/cultura/2018/10/18/5bc7be2be5fdeac7208b463c.html>.

¹¹² *Guirao: No saldrán más 'papeles' del Archivo de Salamanca que no estén amparados por la ley de 2005*, LA GACETA DE SALAMANCA (Dec. 11, 2018), <https://www.lagacetadesalamanca.es/hemeroteca/guirao-compromete-saldran-archivos-salamanca-GTGS255388>.

Salamanca entered into a dual agreement, wherein the government would limit the transfer of documents from the Salamanca Archive and strictly comply with *Ley 21/2005*.¹¹³ In exchange, the Minister of Culture and Sports agreed to “enhance the Documentary Center of Historical Memory and expand its content” to be “a large center, the most complete possible, for the study of a historical period from Spain.”¹¹⁴

Although the Minister of Culture announced that the issue of the Salamanca Papers would be resolved in 2019, this optimistic outlook has yet to come to fruition. The SAA called this a “false closing” of the issue, as it fails to address the issues with the papers brought up in the Catalonia court case.¹¹⁵ Following the court cases, three political parties in the Spanish Government, the *Partido Popular* (“PPs”), *Ciudadanos* (“Cs”) and *Vox*, signed the SAA’s manifesto, demanding return of those documents already sent to Catalonia and affirming that no more transfers will be made to the so-called “separatists who want to break the unity of Spain.”¹¹⁶ On January 22, 2019, the Spanish Senate approved a motion to give “its strongest support to the integrity of the Salamanca Archive, complying with laws and judicial resolutions,” as well as requiring the *Generalitat* to immediately return any of the objects that have not been restored, as well as those that were returned to individuals who were not the rightful owner.¹¹⁷

Simultaneously, in a case before the *Tribunal Supremo*, the court of highest original jurisdiction, the *Generalitat* reiterated its right for the return of “all documents and assets confiscated by DERD from the *Generalitat* and private individuals or legal entities with residence, domicile, delegation, or sections in Catalonia.”¹¹⁸ Some of the objects requested from the archive include 1,675 boxes of documents, 938 books, ten posters, three maps, and

¹¹³ *Ministerio, Junta y Ayuntamiento de Salamanca acuerdan ceñir la salida y regreso de papeles del Archivo de Salamanca al estricto cumplimiento de la Ley de 2005*, MINISTERIO DE CULTURA Y DEPORTE (Nov. 11, 2018), <http://www.culturaydeporte.gob.es/actualidad/2018/12/20181211-ministro-salamanca.html>.

¹¹⁴ *Id.*

¹¹⁵ *Cierre en falso del caso de los papeles del Archivo de Salamanca*, LA GACETA (Dec. 15, 2018), <https://gaceta.es/espana/cierre-en-falso-del-caso-de-los-papeles-del-archivo-de-salamanca-20181215-0009/>.

¹¹⁶ Pilar Santos, *PP, Cs y Vox apoyan que la Generalitat devuelva parte de los 'papeles de Salamanca'*, EL PERIÓDICO (Mar. 7, 2019), <https://www.elperiodico.com/es/politica/20190306/pp-cs-vox-manifiesto-archivo-salamanca-7340120>.

¹¹⁷ *El Senado insta al Gobierno a que pida la restitución de documentos al Archivo*, EL NORTE DE CASTILLO (Jan. 23, 2019), <https://www.elnortedecastilla.es/salamanca/senado-insta-gobierno-20190123080936-nt.html>.

¹¹⁸ S.T.S., June 11, 2019 (R.O.J., No. 1885, p. 3) (Spain) (stating the appeal before the Tribunal Supreme was based on a previous dismissal of Catalonia’s claims due to “administrative silence.” The National Court held in favor of Catalonia and the State Administration appealed.).

four flags.¹¹⁹ The State Administration argued that the *Generalitat*'s retention of the assets of legal entities or heirs which have disappeared violates "the spirit, purpose, and literalness of Law 21/2005," which serve to protect "the interest of the original owners or their successors to recover what... was seized."¹²⁰ Instead, the State Administration argued that Catalonia's entrustment of the remains of the archive was used to serve "its own purpose and a particular interest of theirs not covered by Law 21/2005."¹²¹ On June 18, 2019, the *Tribunal Supremo*, reiterated the Constitutional Court's finding of the constitutionality of *Ley 21/2005* and mandated that the rest of the archival documents be returned to the *Generalitat*, bearing in mind that it must only be documents or effects seized in Catalonia by the DERD.¹²² However, the *Tribunal Supremo* held the *Generalitat* does not retain ownership of the assets, and that the transfer of documentation to the *Generalitat* was only for a very specific purpose – to return the assets to the original owners.¹²³

Notwithstanding these decisions, the SAA and its proponents continue to demand that the Spanish government mandate Catalonia to return any of the 400,000 objects that, according to it, were given to "front organizations" in order to avoid their return to Salamanca.¹²⁴ Other opponents argue the Salamanca Papers are an important point of research on the Civil War, and that it is more practical to keep all them gathered together in one place.¹²⁵ Another contended argument is that the transfer of the property to Catalonia unduly discriminates against other autonomous communities.¹²⁶ While much of the property belonging to the Catalan government has been returned, anti-independence tensions in Spain have created an atmosphere where Rightists want to see the return of the property

¹¹⁹ *El Supremo confirma la devolución de una remesa de papeles de Salamanca a la Generalitat cinco años después*, LA VANGUARDIA (June 17, 2019), <https://www.lavanguardia.com/politica/20190617/462925468391/supremo-devolucion-papeles-salamanca-cinco-anos-despues.html>.

¹²⁰ S.T.S., June 11, 2019 (R.O.J., No. 1885, p. 8) (Spain).

¹²¹ *Id.*

¹²² *Id.* at 7.

¹²³ *Id.* at 8.

¹²⁴ Begoña F. Orive, *200.000 'papeles' de Salamanca están en 'organizaciones pantalla' de Cataluña según Salvar el Archivo*, LA GACETA DE SALAMANCA (Mar. 14, 2019), <https://www.lagacetadesalamanca.es/salamanca/200-000-papeles-de-salamanca-estan-en-organizaciones-pantalla-de-cataluna-segun-salvar-el-archivo-EH779868>.

¹²⁵ Asociación Salvar de Archivo de Salamanca, *Manifiesto De La Asociación Salvar El Archivo De Salamanca En Apoyo Del Archivo General De La Guerra Civil Española, Con Sede En Salamanca*, <https://www.salvararchivosalamanca.es/wp-content/uploads/2019/04/Manifiesto-apoyo-Archivo-de-Salamanca.pdf>.

¹²⁶ Miguel Rojo, *El traslado de papeles del Archivo es un robo que hay que reparar urgentemente*, EL NORTE DE CASTILLA (Jan. 13, 2015), <https://www.elnortedecastilla.es/salamanca/201501/13/traslado-papeles-archivo-robo-20150113131003.html>.

to the archive as a form of patriotism.¹²⁷ Catalans see the return of the Salamanca Papers as a form of reparation for the atrocities of the Spanish Civil War and an affirmation of democracy.¹²⁸ They also desire to be able to retain all of the Salamanca Papers and be the final arbiters of their disposal.¹²⁹ Ultimately, both sides' arguments are seeded in zealous political factions, which are uncompromising in their desired solution for the Salamanca Papers. Notwithstanding these various arguments, the debate over the rightful ownership over the archive raises important multifaceted moral, political, and legal issues, which must be examined through the lenses of national and international law.

IV. SPAIN'S LEGAL FRAMEWORK FOR RESTITUTION OF THE SALAMANCA PAPERS

A. *Spain's Cultural Heritage Laws & the "Social Function" of the Salamanca Papers*

The constant struggle between Spain and Catalonia over the Salamanca Papers is, in part, a reflection of the country's ambiguous cultural heritage laws on the restitution of property. With over forty-eight world heritage sites, the significance that Spain and its citizens hold in its cultural property is evident in the fact that its constitution specifically enumerates the importance of their protection. Article 46 of the Spanish Constitution charges the government to "guarantee the preservation and promote the enrichment of historical, cultural, and artistic heritage of Spain and of the property of which it consists, regardless of their legal status and their ownership."¹³⁰ This provision of the Spanish Constitution gives the government seemingly unobstructed powers to promote and protect Spanish cultural heritage, regardless of individual ownership.¹³¹ Spain's concept of ownership is found under Article 33 of the Spanish Constitution, which states:

1. The right to private property and inheritance is recognized.
2. The social function of these rights shall determine the limits of their content in accordance with the law.

¹²⁷ See, e.g., *Partido Popular, Vox y Ciudadanos apoyan la unidad del Archivo de Salamanca*, ACTUALL (Aug. 03, 2019), <https://www.actuall.com/democracia/partido-popular-vox-y-ciudadanos-se-suman-a-la-lucha-por-la-unidad-del-archivo-de-salamanca/> (identifying numerous right-wing parties, which maintain that "Catalonia Separatists" illegally hold a portion of the Salamanca Papers).

¹²⁸ *La Generalitat empieza a devolver los 'papeles de Salamanca' a sus propietarios*, EL CORREO DE ANDALUCÍA (Dec. 21, 2011), <http://elcorreoweb.es/historico/la-generalitat-empieza-a-devolver-los-papeles-de-salamanca-a-sus-propietarios-AEEC317236>.

¹²⁹ *Id.*

¹³⁰ C.E., B.O.E. n. 46, Dec. 29, 1978 (Spain).

¹³¹ *Id.*

3. No one may be deprived of his or her property and rights, except on justified grounds of public utility or social interest and without a property compensation in accordance with the law.¹³²

This definition of property rights under Spanish law is an interesting one. While it recognizes the fundamental rights to personal property, it also limits the principle of ownership to those objects which retain a “social function.”¹³³ Depending on the type of object, this seemingly fluid condition can be a justification for interference with private property rights.¹³⁴ Indeed, this justification invariably leads to the assumption that community or collective interest may take precedence over private property ownership, depending on type of object and objective of that function.¹³⁵ As a result, the “social function” inherent in the Spanish Constitution plays an inevitable role in the adjudication of cultural property disputes in Spain.

In addition to this inherent constitutional authority, the Spanish government enacted the *Ley del Patrimonio Histórico Español* (Spanish Historical Heritage Law) (“LPHE”) in 1985 to advance specific protective measures for Spain’s valuable cultural heritage.¹³⁶ Aligned with the country’s innate interest in protecting its holding of diverse heritage, the LPHE defines Spanish Historical Heritage as “movable and immovable objects of artistic, historical, paleontological, archeological, ethnological, scientific, or technical interest. It also comprises documentary and bibliographic heritage...”¹³⁷ This law, like many of its analogous international conventions, aims to protect, promote, and transmit the Spanish cultural heritage to future generations.¹³⁸ Documentary and bibliographic heritage, like many of the works comprising of the Salamanca Papers, also holds unique legal status under Spain’s cultural heritage laws.¹³⁹ The LPHE broadly qualifies documentary heritage as: “any expression in natural or conventional language and any other type of graphic, sound or image expression given on any type material medium, including computer media.”¹⁴⁰ The sole exception to this definition is “non-original copies of

¹³² *Id.* at art. 33.

¹³³ Luis Javier Capote Pérez, *Cultural Heritage and Spanish Private Law*, 2 SANTANDER ART AND CULTURAL L. REV. 237, 239 (2017).

¹³⁴ *Id.*

¹³⁵ *Id.*; For a discussion on the evolution of property rights in other areas of the law in Spain see G. Orozco Pardo & E. Pérez Alonso, *La Tutela Civil y Penal del Patrimonio Histórico, Cultural y Artístico* (McGraw-Hill, Madrid ed. 1996).

¹³⁶ *Ley del Patrimonio Histórica Española* [Spanish Historical Heritage Law] (“L.P.H.E.”) art. 1(1) (B.O.E., 1980, 155).

¹³⁷ *Id.* at art. 1(2).

¹³⁸ Specifically, Article 1 of the L.P.H.E. declares that the purposes of the regulation is “the protection, promotion and transmission to future generations of Spanish Historical Heritage.”

¹³⁹ L.P.H.E. art. 48(1) (B.O.E., 1985, 155).

¹⁴⁰ *Id.* at art. 49(1).

publications are excluded.”¹⁴¹ Article 49(5) of the Act also permits the State to “declare that certain documents, though not as old as those mentioned in the above sections, shall form part of the documentary heritage.”¹⁴²

The LPHE also provides certain tax deductions to property considered part of Spain’s cultural, artistic, and historical heritage.¹⁴³ Moveable property that is considered of “cultural interest,” is considered especially valuable under the LPHE and, thus, the Act imposes certain limitations on its maintenance and disposal. For example, owners of moveable property are required to record their property in a special inventory.¹⁴⁴ Likewise, owners of such movable property are required to notify state administrative officials before any potential sale or transfer.¹⁴⁵ Article 29(1) of LPHE restricts the export of any “movable property” deemed to belong to the Spanish Historical Heritage.¹⁴⁶ The LPHE emphasizes that such property belongs to the State and such ownership is “inalienable and cannot lapse.”¹⁴⁷ As a result, if a private citizen desires to sell a property deemed of cultural interest, both national and regional administrations have the right of first refusal over other purchasers.¹⁴⁸ While ownership interests remain with the owners, the State seemingly retains a quasi-legal interest in all property considered part of its cultural, artistic, or historical heritage. Thus, by an object’s status as historical, artistic, or cultural heritage, its possessor’s ability to sell or otherwise dispose of the property is significantly limited.¹⁴⁹

The case of *Santos et al. v. Teodora* illuminates this notion of public and private ownership of cultural property in Spain.¹⁵⁰ This case arises from an ownership dispute of a documental archive of the six heirs of General Juan

¹⁴¹ *Id.*

¹⁴² *Id.* at art. 49(5).

¹⁴³ *Id.* at art. 70(1).

¹⁴⁴ L.P.H.E. art. 26(2) (B.O.E., 1985, 155). Under the LPHE, there is a procedure of claiming something as cultural heritage. After undergoing a lengthy determination process, the property is registered in a general registry and will be given an official legal and artistic title. The property’s status as a cultural heritage also provides its possessor with separate responsibilities that it must maintain.

¹⁴⁵ *Id.* at Art. 26(4); see e.g., *Jesus Miguel et al. v. the State of Spain*, S.T.S., May 6, 2002 (R.O.J No. 3154) (Spain) (finding that an Italian painting belongs to the Spanish artistic heritage and, thus, the owner’s freedom to sell was restricted to the national market).

¹⁴⁶ L.P.H.E. art. 29(1) (B.O.E., 1985, 155). For more information on contract nullities in Spain, see Jesus Delgado Echeverría & M.A. Parra Lucán, *Las Nulidades de los Contratos. En la Teoría y en la Práctica*, (Dykinson ed., 2005).

¹⁴⁷ L.P.H.E. art. 29(1) (B.O.E., 1985, 155).

¹⁴⁸ See L.P.H.E. art. 38(1)(3) (B.O.E., 1985, 155). Likewise, if the original owners fail to notify the state or local governments of the sale, these administrations have the right of redemption and to repurchase the properties from the purchaser.

¹⁴⁹ Capote Pérez, *supra* note 133, at 247.

¹⁵⁰ See generally *Santos et al. v. Teodora*, A.P. Soria, Mar. 27, 2009 (R.O.J. No. 56) (Spain).

Yagüe Blanco, one of the chief army officers of the Falange.¹⁵¹ Teodora, who under the will was charged with filing and archiving the documents, refused to return them to the family home.¹⁵² The five other siblings filed an action seeking the return of the documents to the family archive and an injunction refraining Teodora from any further action without express authorization from the other co-owners.¹⁵³ While each claimant utilized private property laws to claim individual ownership, the Appellate Court's conclusion was that the claimants were not co-owners at all, but merely "holders" of the property.¹⁵⁴ Finding that the property was "subject to a special legal regime and a unique legal protection," the Appellate Court determined that the cultural value of the documental archive took precedence over the private interests of the heirs as a result of the historical nature of the archive.¹⁵⁵ To that end, the Appellate Court held that the litigants were "without legitimacy to take action as co-owners."¹⁵⁶

The court in *Santos et al. v. Teodora* demonstrates Spain's desire for the State to have an impenetrable hold over property considered part of its historical and cultural heritage. Given this unique legal protection afforded to property of this nature, the "social function" of the Salamanca Papers is particularly relevant to its dispute. In the 2013 Constitutional Court case, the State heavily relied on this constitutional requirement, arguing that the transfer of the Salamanca Papers to Catalonia and the dismantling of the archive would result in the "disturbance of the fulfillment of the social function...to the detriment of...today's Spanish citizens and successive generations"¹⁵⁷ Through this argument, the State appears to assume that the disparate location of the objects defeats the social function of the papers and, in turn, their ultimate cultural and historical value. The Constitutional Court disagreed, and found that the maintenance of the "social function" of the archive would not depend on the physical location of the objects.¹⁵⁸ Indeed, the Court explicitly found that digitalized copies of the documents, with the authentic copy going to the *bona fide* owner, would suffice to maintain this social function.¹⁵⁹

While the Spanish Historical Heritage Law recognizes the rights of private citizens, it also declares that its ultimate purpose is "the protection, promotion, and transmission to future generations of Spanish Historical Heritage."¹⁶⁰ Thus, everyone, including private and public actors, has a

¹⁵¹ Tulio Demicheli, *Una Biografía Rescata el Perfil más Humano del General Yagüe*, ABC, (March 11, 2010), https://www.abc.es/cultura/libros/abci-biografia-rescata-perfil-mas-humano-general-yague-201003110300-11491175943_noticia.html.

¹⁵² *Santos et al. v. Teodora*, at 2.

¹⁵³ *Id.*

¹⁵⁴ *Id.* at 4.

¹⁵⁵ *Id.*

¹⁵⁶ *Id.*

¹⁵⁷ S.T.C., Mar. 14, 2013 (T.C. No. 3803, p. 152) (Spain).

¹⁵⁸ *Id.* at 157.

¹⁵⁹ *Id.*

¹⁶⁰ L.P.H.E., art. 1 (B.O.E. 1985, 15) (Spain).

constitutional duty to protect and promote Spanish cultural and historical heritage.¹⁶¹ In relation to the Salamanca Papers, the proponents of their retention in Salamanca seemingly believe that their inherent value as universally “Spanish” is better served in one location together, as part of the collective memory of all of the Spanish people.¹⁶² The underlying significance of Spanish cultural heritage over private ownership interest, as articulated in the Spanish Constitution and the Spanish Historical Heritage Law, informs this basis for opposition. Undoubtedly, the notion that these papers serve a “social function” for Spaniards becomes muddled when considered in conjunction with their function for citizens of regional autonomies, which retain their own distinctive cultural and historical patrimonies. Accordingly, the “social function” of the Salamanca Papers plays an indispensable role in the continual struggle between this national and regional controversy.

B. “España nos roba”¹⁶³ The Region-State Dichotomy in Spain

The current discord between the *Generalitat* of Catalonia and the Spanish State is a result of thousands of years of political, territorial, and economic struggles between the two governments.¹⁶⁴ Catalonia, like many of Spain’s autonomous regions, maintains a long and rich history, dialect, and culture, independent from its Spanish identity.¹⁶⁵ Since the end of the “War of Catalan Separation” to present day, Catalonia has struggled, and has ultimately failed, to realize its goal for independence.¹⁶⁶ Catalonia became part of the Spanish Empire in 1714, after Barcelona’s surrender to the Castilians more than three hundred years ago.¹⁶⁷ During the nineteenth and twentieth centuries, Catalonia entered a period referred to as “*Renaixencia*,” (Renaissance) which saw significant industrial and economic development within the region, as well as the rise of Catalan nationalism.¹⁶⁸ However, after Franco’s victory in 1939, Catalonia’s autonomy was eliminated,

¹⁶¹ C.E., art. 46, (B.O.E. 1978) (Spain).

¹⁶² This is evident by the fact that the proponents of the Salamanca Papers’ retention in Salamanca continuously argue that the papers must be together in order to preserve the history and identity of the Spanish people. See Manuel Artero Rueda, *De Paseata con Policarpo Sánchez por Los Infames Entresijos del Expolio al Archivo de Salamanca*, LA PASEATA (Jan. 13, 2017), <https://lapaseata.net/2017/01/31/policarpo-expolio-archivo-salamanca/>.

¹⁶³ Translated to “Spain robs us,” this was a motto used by proponents of the Salamanca Papers’ transfer to Catalonia. See Jesús García Calero, *El Archivo de Salamanca Vuelve a la «Normalidad» de Entregar Más Papeles a la Generalitat*, ABC, (Oct. 22, 2018), https://www.abc.es/cultura/abci-archivo-salamanca-vuelve-normalidad-entregar-mas-papeles-generalitat-201810190217_noticia.html.

¹⁶⁴ See Dr. Josep Ma Reniu, *Could Catalonia Become Independent?*, 42 INT’L J. LEGAL INFO. 67 (2014).

¹⁶⁵ See ALBERT BALCELLS, *CATALAN NATIONALISM PAST AND PRESENT*, (Geoffrey J. Walker ed. 1996) for an in-depth overview of Catalonia’s journey towards independence.

¹⁶⁶ See Ma Reniu, *supra* note 164, at 68.

¹⁶⁷ Marta García Barcia, *Catalonia, the New European State?*, 20 ILSA J. INTL & COMP. L. 399, 414 (2013-2014).

¹⁶⁸ *Id.* at 400.

resulting in the repression of the Catalan language, cultural expression, and identity.¹⁶⁹ With the death of Franco and the codification of the Spanish Constitution in 1978, Catalonia's pursuit for political autonomy reemerged with fervor.¹⁷⁰

The unification of the country and the restoration of rights for autonomous communities coincided with Spain's transition to democracy.¹⁷¹ Spain's Constitution of 1978 reiterates the "indissoluble unity of the Spanish nation," and simultaneously "recognizes and guarantees the right to self-government of the nationalities and regions of which it is composed and the solidarity among them all."¹⁷² The Spanish Constitution provides a distinctive framework for self-governance for autonomous regions, by enumerating that "[m]atters not expressly assigned to the State by this Constitution may fall under the jurisdiction of the self-governing communities by virtue of their Statutes of Autonomy."¹⁷³ However, the Spanish Constitution clarifies that national law takes precedence over those of autonomous communities; specifically, "matters not claimed by Statutes of Autonomy shall fall with the State, whose laws shall prevail, in case of conflict, over those of the Self-governing Communities regarding all matters in which exclusive jurisdiction has not been conferred upon the latter."¹⁷⁴ Unlike the United States, where any powers not delegated to the federal government are left to the states, the Spanish Constitution identifies explicit matters for which autonomous communities may self-govern.¹⁷⁵ While each autonomous community may enlarge their self-governance through amendments to regional statutes of autonomy, ultimately any amendments to its governing statute must be approved by the Spanish Parliament.¹⁷⁶

The self-governance enumerated in the Spanish Constitution extends to Spain's cultural and historical heritage. The individual autonomous communities also have their own *leyes de patrimonio historico* (cultural heritage laws), which further aim to protect and promote the cultural heritage and identity of the individual region.¹⁷⁷ In particular, Catalonia's *Ley 9/1993* (Law 9/1993) gives the *Generalitat* the power "to designate cultural assets of national interest, the highest protection category, which corresponds to that of assets of cultural interest defined by said Law on

¹⁶⁹ See *id.* at 401.

¹⁷⁰ Christopher K. Connolly, *Independence in Europe: Secession, Sovereignty, and the European Union*, 24 DUKE J. COMP. & INT'L L. 51, 56 (2013).

¹⁷¹ *Id.* at 57.

¹⁷² C.E., art. 2 (B.O.E. 1978) (Spain).

¹⁷³ *Id.* at art. 149(3).

¹⁷⁴ *Id.*

¹⁷⁵ Carmen Gonzalez, *The Catalan National Identity And Catalonia's Bid For Independence*, 32 CONN. J. INT'L L. 115, 123 (2016).

¹⁷⁶ *Id.*

¹⁷⁷ For access to each of the autonomous regions' cultural heritage laws, see LEGISLACIÓN CONSOLIDADA, <https://www.boe.es/buscar/act.php?id=BOE-A-1993-26497&p=20120323&tn=1>.

Spanish Historic Heritage.”¹⁷⁸ Of particular importance, “[t]he Catalan Ministry of Culture shall ensure the return to Catalonia of assets with values proper to Catalan cultural heritage that are outside its territory.”¹⁷⁹ Both national and Catalan law are seemingly in agreement that the protection and promotion of cultural heritage is a critical goal, fundamental to regional and national identities. However, the control, protection, and preservation over cultural heritage belonging to both the National Government and the autonomous region certainly conflict.

This region-state dichotomy in Spain is particularly relevant to the dispute over the Salamanca Papers. Undoubtedly, the political ramifications over either solution for the Salamanca Papers cannot be ignored, as this dispute remains a struggle over Spain’s identity as a nation. The historical narrative of the suppression of the Catalan people informs their desire for restitution of the Salamanca Papers.¹⁸⁰ The failure of the State to return all objects thus serves as a symbolic affront to its identity and culture. Conversely, those supporting the Spanish government believe the return of the papers to Catalonia “would break up the history of Spain and [be] a short step to breaking up Spain itself.”¹⁸¹ As Carolyn Boyd, a distinguished scholar on Spanish history described, “the intensity of the struggle registers the degree to which history and historical memory are perceived to hold the key to collective identity and political justice.”¹⁸²

The intertwining narrative between the “social function” of cultural heritage and national identity percolates to the legal basis for ownership over the Salamanca Papers. On appeal to the Spanish Constitutional Court, the Appellant argued that *Ley 21/2005* is unconstitutional because the law was contrary to article 149.1.28 of the Spanish Constitution, which designates the State with exclusive “competence” over the archives of state ownership.¹⁸³ The Appellant argues that the uniqueness of certain institutions, such as the *Museo del Prado*, the National Library, the National Historical Archive, and the General Archive of the Spanish Civil War, are so unique and fundamental to Spain’s identity and heritage, that any law mutilating or distorting such collections would be unconstitutional.¹⁸⁴ In ruling against the Appellant, the Constitutional Court opined that there was “no doubt” that Catalonia’s retention of the objects would sufficiently protect the public interests of the

¹⁷⁸ *Ley 9/1993, de 30 de Septiembre, del Patrimonio Cultural Catalán* [Law 9/1993, of September 30, on Catalan Cultural Heritage] (“L.P.C.C.”) pml. (B.O.E. 1993) (Spain). As in the LPHE, there is a particular designation process of property to be considered historical heritage or of the national interest.

¹⁷⁹ *Id.* at art. 1(4).

¹⁸⁰ See Kathryn Crameri, *History Written by the Losers: History, Memory, Myth and Independence in Twenty-First Century Catalonia*, 11 HISPANIC ISSUES ON LINE, 35, 36 (2012).

¹⁸¹ Balcells, *supra* note 30, at 5.

¹⁸² Carolyn Boyd, *The Politics of History and Memory in Democratic Spain*, 617 ANNALS OF THE AMERICAN ACADEMY OF POLITICAL AND SOCIAL SCIENCE 133, 137 (2008).

¹⁸³ S.T.C., Mar. 14, 2013 (T.C., No. 3803, p. 154) (Spain).

¹⁸⁴ *Id.* at 153.

State and the autonomous communities for the conservation and enjoyment of the Salamanca Papers.¹⁸⁵

The Court, in finding for the constitutionality of the law, specifically addressed the relationship between the cultural heritage laws of the State and the autonomous regions.¹⁸⁶ Both regional and state cultural heritage laws support the Court's findings. Catalonia's *Ley 9/1993*, like the LPHE, explicitly imposes obligations on private movable property owners that conserve and protect the property.¹⁸⁷ Similarly, the LPHE calls upon each autonomous community to be responsible for the protection of Spain's historical heritage.¹⁸⁸ Under both the Spanish Constitution and the regional and state cultural heritage laws, the power to protect and maintain cultural property is an inalienable duty of the State and autonomous communities.¹⁸⁹ While it is clear that the aim of LPHE is for the Spanish State and autonomous communities to work symbiotically for the protection of cultural heritage, the issue of the Salamanca Papers has become entangled by politics.

Since Spain's transition to democracy, the autonomy of Catalonia and its identity as a sovereign government has been a topic of great political discourse, which has continued to escalate until present-day. The Salamanca Papers serve as a paradigmatic example of the tension between national and regional identity in Spain, specifically as it relates to Catalonia. The legal framework of the autonomous communities plays a particularly important role in the Salamanca Papers conflict, as the Spanish Constitution recognizes and guarantees the competence of these communities to exercise only those powers delegated to them.¹⁹⁰ *Ley 21/2005* recognizes the inherent importance of the Salamanca Papers as "the rebirth of the right of...institutions to recover their historical memory and restitution of their institutional archive...[and] the documents and effects seized in that tragic period of the history of Spain."¹⁹¹ As Catalonia slowly gravitates towards independence, the question of legal ownership or the right of possession over the Salamanca Papers would clearly change this legal and political framework. While this state-region dichotomy continues to permeate the debate, it is clear that successful restitution to rightful owners can only be realized by a neutral negotiated solution, beyond state-regional politics.

¹⁸⁵ *Id.* at 161.

¹⁸⁶ *See id.* at 158.

¹⁸⁷ L.P.C.C. art. 1(1) (B.O.E. 1993) (Spain). For example, L.P.C.C. Article 21 imposes a duty of conservation for all assets considered Catalan cultural heritage.

¹⁸⁸ L.P.H.E. art. 6 (B.O.E. 1985, 155) (Spain).

¹⁸⁹ *See id.* at pmb1.

¹⁹⁰ C.E., B.O.E. n. 311, Dec. 29, 1978 (Spain).

¹⁹¹ L.O., art. 1 (R.O.E 2005, 276) (Spain).

C. “*Devuelve lo que no es tuyo*”¹⁹²: *Catalonia’s Right to the Entirety of the Salamanca Papers.*

Currently, the issue of the Salamanca Papers has yet to be resolved in Spain. Should Catalonia be able to hold on to those papers that do not belong to them? Could their retention of the papers be a form of reparation for the suppression that Catalonia suffered during the war? Before the promulgation of the Spanish Constitution in 1978, Spain codified the Amnesty Law of 1977, which essentially served to decriminalize acts of political violence committed during the Civil War and Franco’s forty-year dictatorship.¹⁹³ Political elites at the time of the drafting of the new constitution desired to attain a “collective amnesia” of the events that transpired during the Spanish Civil War, resting on a *de facto* “*pacto del olvido*,” or “pact of forgetting,” to avoid responsibility for the wrongdoings of the dictatorship.¹⁹⁴ However, the opening of the Civil War section of the National Historical Archive in Salamanca, which made public the existence of the Salamanca Papers, resurrected the collective memory of the atrocities that occurred during the Spanish Civil War.¹⁹⁵ While various laws have been put into place to restore the legal rights of citizens and autonomous communities who were unjustly repressed during the Franco regime, the failure to resolve the Salamanca Papers controversy serves as constant reminder of the friction between Spain and its autonomous communities.¹⁹⁶

One of the problems lies in the fact that the *Generalitat* claims that it has already returned ninety-five percent of the papers to their original owners.¹⁹⁷ In response to this claim, the SAA argues that such return was done in an “inappropriate way,” as the “returned documents...[have] not been returned to their legitimate owners.”¹⁹⁸ By way of example, the SAA asserts that many of the documents may belong to owners or heirs in Asturias, Valencia, Madrid, and Murcia.¹⁹⁹ According to the SAA, some of the 400,000 documents were unduly returned to improper parties throughout

¹⁹² Translated to “return what is not yours,” this serves as the slogan for the Save the Archive Association, which believes Catalonia should not have the right to keep those objects that were not taken from the Catalan region.

¹⁹³ L.O. art 1 (B.O.E. 1977, 248) (Spain).

¹⁹⁴ Boyd, *supra* note 182, at 135.

¹⁹⁵ *Id.* at 136.

¹⁹⁶ Among the legislation to be effectuated included recognition of the welfare rights for those previously in the Republican army, restitution or compensation to political parties of goods seized in application of the *Ley de Responsabilidades*, and the restitution of document and effects seized after Franco’s victory during the Spanish Civil War. T.S.J., Nov. 24, 2017 (R.O.J., No. 12334, p. 4) (Spain).

¹⁹⁷ José Ángel Montañés, *Ofensiva para pedir los ‘papeles de Salamanca’ pendientes*, EL PAÍS (July 26, 2018),

https://elpais.com/ccaa/2018/07/26/catalunya/1532633092_214499.html.

¹⁹⁸ José Ángel Montañés, *40 personas piden en Barcelona el retorno a Salamanca de los ‘papeles’*, EL PAÍS (Apr. 22, 2016),

https://elpais.com/ccaa/2016/04/22/catalunya/1461355748_488894.html.

¹⁹⁹ *Id.*

Catalonia.²⁰⁰ While it has been made clear by both the Constitutional Court in 2013 and the *Tribunal Supremo* in 2019 that *Ley 21/2005*, which gives competence to Catalonia to possess the Salamanca Papers, is in fact constitutional, neither the courts nor the law address the critical issue of what to do with those assets that were not seized from Catalonia.²⁰¹

Both courts affirm that “the transfer to the *Generalitat* of the documents seized in their territory during the [C]ivil [W]ar [,] to be the one in charge of returning them to their legitimate owners[,] cannot be labeled unreasonable or devoid of any justification.”²⁰² While the constitutionality of *Ley 21/2005* is definite, Catalonia’s retention of those assets that were not taken from Catalan territory by DERD is an issue that still must be determined. *Ley 21/2005* specifically enumerates that those documents and effects, that were taken by DERD during the Spanish Civil War, must be returned to Catalonia.²⁰³ Under this law, the requests for restitution shall be “processed and resolved by the procedure established by the *Generalitat of Catalonia* in the exercise of its powers.”²⁰⁴ The law additionally accounts for other autonomous communities, specifying that:

The restitution of documents, documentary funds and effects to civilians or private entities may be carried out by the Communities Autonomous upon request, in accordance with the procedure established by the Government and in accordance with the requirements set forth in article 5.²⁰⁵

This language is somewhat unclear. Do the autonomous communities have to seek restitution from the State or from the *Generalitat* of Catalonia?

Consequently, if the documents and other effects are all transferred to Catalonia, then how could the other autonomous communities seek restitution from Catalonia? The problem is that neither the LPHE nor Catalonia’s Cultural Heritage Law specifically provides Catalonia with this competency. While Article 6 of LPHE gives autonomous communities the power to enforce the cultural heritage laws found therein, there is no provision or measure in LPHE requiring restitution of previously seized materials.²⁰⁶ Furthermore, Catalonia’s *Ley 9/1993* only assumes “major responsibilities for the protection of local cultural heritage within the sphere of its powers.”²⁰⁷ Like the National Government, the *Generalitat* has the

²⁰⁰ Jesús García Calero, *El Archivo de Salamanca vuelve a la «normalidad» de entregar más papeles a la Generalitat*, ABC (Oct. 22, 2018), https://www.abc.es/cultura/abci-archivo-salamanca-vuelve-normalidad-entregar-mas-papeles-generalitat-201810190217_noticia.html.

²⁰¹ See S.T.S., June 11, 2019 (R.O.J., 1885, p. 10) (Spain); S.T.C., Mar. 14, 2013 (T.C., No. 3803, p. 162) (Spain).

²⁰² S.T.S., June 11, 2019 (R.O.J. 1885, p. 10) (Spain); See also S.T.C., Mar. 14, 2013 (T.C., No. 3803, p. 162) (Spain).

²⁰³ L.O., R.O.E. art. 2 (B.O.E. 2005, 21) (Spain).

²⁰⁴ *Id.* at art. 5(2).

²⁰⁵ *Id.* at art. 6.

²⁰⁶ L.P.H.E. art. 6 (B.O.E. 1985, 155) (Spain).

²⁰⁷ L.P.C.C. pmb. (B.O.E. 1993) (Spain).

power to designate cultural assets of national interest and to maintain and conserve assets of cultural interest as defined by the LPHE.²⁰⁸ However, Catalonia's Cultural Heritage Law provides no such mechanism for restitution or repatriation of illegally seized or plundered assets.²⁰⁹

As Catalonia retains the rights to effectuate the provisions under LPHE, it retains the competency to maintain, conserve, and protect those assets considered in the cultural interest, including the Salamanca Papers.²¹⁰ While Catalonia has a statutory basis to possess the Salamanca Papers, as articulated in the June 2019 *Tribunal Supremo* decision, the law does not provide for the unconditional transfer of these assets to the *Generalitat*.²¹¹ The temporal limitations of Catalonia's retention of the papers have long passed under *Ley 21/2005*, which provided that claimants must come forward one year after the law's enactment in 2005.²¹² It is unclear as to how long Catalonia will be able to retain objects that were not taken from its territory. However, both the Constitutional Court and the *Tribunal Supremo* are seemingly in agreement that Catalonia's current possession is reasonable.²¹³ *Ley 21/2005* was promulgated for the purpose of allowing Catalonia to effectuate the legitimate goal of its codification – restitution to lawful owners.²¹⁴ The Constitutional Court in 2013 affirmed that because the *Generalitat* has the competences in matters of cultural and historical heritage, it is therefore not possible to find that Catalonia's "restitution of documents is unreasonable," regardless of where the objects were taken.²¹⁵

As contended above, under Spanish law, the State retains quasi-ownership interests in all of its property considered cultural, artistic, or historical heritage. Theoretically, Catalonia retains a similar interest in cultural heritage considered specifically Catalan. Assets considered part of Spain's cultural and historical heritage consist as part of the culture of the whole country, and therefore the two levels of government should work together to realize a solution. Despite the limitations on objects of cultural interest, rightful owners of these materials are entitled to enjoyment and restitution of their property.²¹⁶ Such ambiguity in the law is perhaps the reason this conflict has persisted for over forty years.

²⁰⁸ *Id.*

²⁰⁹ *See id.*

²¹⁰ *See* L.P.H.E. pmb. (B.O.E. 1985) (Spain).

²¹¹ *See* S.T.S., June 11, 2019 (R.O.J., No. 1885, p. 9) (Spain).

²¹² L.O. art. 5 (R.O.E. 2005, 276) (Spain).

²¹³ *See* S.T.S., June 11, 2019 (R.O.J., 1885, p. 9) (Spain); S.T.C., Mar. 14, 2013 (T.C., No. 3803, p. 161-62) (Spain).

²¹⁴ S.T.S., June 11, 2019 (R.O.J., No. 1885, p. 9) (Spain).

²¹⁵ S.T.C., Mar. 14, 2013 (T.C., No. 3803, p. 160) (Spain).

²¹⁶ *See Código Civil* [Civil Code] art. 348 (1889) (Spain) (defining the private property concept of ownership as "the right to enjoy and dispose of a thing, without greater limitations than those set forth in the laws. The owner shall have an action against the holder and the possessor of the property to claim it").

V. THE INTERNATIONAL LEGAL FRAMEWORK OF PROPERTY CONFISCATION DURING THE SPANISH CIVIL WAR

A. *The Salamanca Papers as Spoils of War or Lawful War Booty?*

Throughout history, it has been customary for the victors of war to claim an ownership right over the spoils, including objects of national and regional cultural and historical significance.²¹⁷ Indeed, “history was frequently written in booty rather than in books, and the upward surge of nations can still be traced through the remains of wartime plunder.”²¹⁸ However, for more than a century, the international community has recognized that cultural property is immune from seizure during times of armed conflict.²¹⁹ The earliest document which was considered an implicit recognition of this international concept arose during the U.S. Civil War through a group of instructions for the government’s armies.²²⁰ The so-called “Lieber Code” enumerated protections for cultural property from wanton destruction and private misappropriation.²²¹ Subsequent instruments, such as the 1874 International Declaration Concerning the Laws and Customs of War (the “Brussels Declaration”)²²² and the 1880 Oxford Laws of War on Land²²³ reiterated the essential premise that the seizure, confiscation, and pillaging of property is unlawfully forbidden under international law.

The acceptance of these instruments and the principles they represent did not become codified into international law until the Hague Conventions of 1899, which specified, “[a]ll seizure of and destruction, or intentional damage done to such institutions, to historical monuments, works of art or science, is prohibited, and should be made the subject of proceedings.”²²⁴ The Hague Convention of 1907 reiterated these principles; however, Spain was not a signatory to this agreement.²²⁵ The strength and enforceability of the prohibition against seizures during wartime was tested

²¹⁷ Stephan Wilske, *International Law and the Spoils Of War: To the Victor the Right of Spoils? The Claims for Repatriation of Art Removed From Germany by The Soviet Army During or as a Result of World War II*, 3 UCLA J. INT’L L. & FOR. AFF., 223, 242 (1998).

²¹⁸ Wojciech W. Kowalski, *Historical background of the concept of restitution of works of art as a legal institution*, 288 RECUEIL DES COURS 24, 54 (2001).

²¹⁹ Wayne Sandholtz, *Plunder, Restitution, and International Law*, 17 INT’L J. CULT. PROP. 147, 163 (2010).

²²⁰ Francis Lieber, U.S. War Department, Instructions for the Government of Armies of the United States in the Field, General Orders No. 100 (Apr. 24, 1863) [hereinafter “Lieber Code”].

²²¹ *Id.* at art. 35, 46.

²²² Project of an International Declaration Concerning the Laws and Customs of War, Brussels, (Aug. 27, 1874) [hereinafter “Brussels Declaration”].

²²³ The Laws of War on Land, Oxford, (Sept.9, 1880).

²²⁴ Convention (II) with Respect to the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land. The Hague, (July 29, 1899). [hereinafter “1899 Hague Convention”].

²²⁵ Convention (IV) respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land. The Hague, (Oct. 18, 1907) [hereinafter “1907 Hague Convention”].

during World War I and the prohibition against plunder was largely not respected.²²⁶ Nonetheless, the prosecution of these actions of plunder did not emerge until after World War II during the International Military Tribunal in Nuremberg.²²⁷

While the pillaging and plunder of property was, and still is, violative of international law, the seizure of lawful “booty of war” remains permissible. Article 45 of the Lieber Code provides: “[a]ll captures and booty belong, according to the modern law of war, primarily to the government of the captor.”²²⁸ The Hague Convention of 1907 similarly permits an occupying army to “take possession of...generally all movable property belonging to the State which may be used for military operations.”²²⁹ “War booty” is defined as “property necessary and indispensable for the conduct of war, such as food, means of transportation, and means of communication, and is lawfully taken.”²³⁰

Franco’s systematic confiscation of property during the Spanish Civil War is seen by both proponents and opponents of the Spanish’s governments retention of the property as *botín de guerra* (war booty).²³¹ While both sides generally agree with the classification of the property, the contrasting sides conflict as to how this classification supports their respective positions. Proponents of the retention of the documents in Catalonia have called the confiscation of the Salamanca papers as *botín de guerra* and, as a result, have stated the documents belong in Catalonia.²³² On the other hand, proponents of the papers staying in Salamanca have argued that because the papers constitute *botín de guerra*, and since they were taken in a time of war, the Spanish government should retain ownership over the

²²⁶ Kowalski, *supra* note 218, at 65.

²²⁷ Alfred Rosenberg was the first individual to be found guilty of “crimes against humanity” specifically for his organization and direction of the “Einsatzstab Rosenberg,” which plundered museums and libraries, confiscated art treasures and collections, and pillaged private houses. *International Military Tribunal (Nuremberg) Judgment and Sentences*, 41 AM. J. INT’L. L. 172, 287-288 (1947).

²²⁸ Lieber Code, *supra* note 198, at art. 45.

²²⁹ 1907 Hague Convention, *supra* note 225, at art. 53.

²³⁰ *Menzel v. List*, 49 Misc. 2d, 300, 307 (Sup. Ct. N.Y. Co. 1966); *see also* 1907 Hague Convention, *supra* note 225, at annex (stating “An army of occupation can only take possession of cash, funds, and realizable securities which are strictly the property of the State, depots of arms, means of transport, stores and supplies, and, generally all movable property belonging to the State which may be used for military operations”).

²³¹ *See e.g.*, Josep Cruaynes I Tor, *El Papeles de Salamanca. L’espoliació del patrimoni documental de Catalunya (1938-1939)*, 19 REVISA LLIGALL, 35, 63 (2002); Pío Moa, *Los Papeles de Salamanca, Libertad Digital*, (June 24, 2004), <https://www.libertaddigital.com/opinion/pio-moa/los-papeles-de-salamanca-19349>.

²³² Miguel Lorenci, *Los papeles del Archivo de Salamanca son botín de guerra*, DIARIO DE LEÓN, July 12, 2004, <https://www.diariodeleon.es/articulo/cultura/los-papeles-archivo-salamanca-son-botin-guerra/20041207000000749884.html>.

property in the Salamanca Archive to serve as “a reminder of intolerance, the racism or political totalitarianism.”²³³

Whether the Salamanca Papers are considered “plunder” or “war booty” is indeed a noteworthy quandary. As detailed above, part of the Salamanca Archive is comprised of documents taken by Franco’s troops to be used as evidence to imprison their political adversaries and anyone seen as an “*enemigo*” of Franco’s regime.²³⁴ Additionally, some of the documents, which are now destroyed, were also sold and used to fund the Falange’s war-time efforts.²³⁵ A similar argument could be made that the confiscation of propaganda could prevent troops from joining the opposing troops. To that end, it is not a completely illogical argument that the Salamanca Papers may have been used for military operations. However, the argument that the Salamanca Papers are considered lawful war booty is attenuated.

Like Hitler’s government in World War II, Franco’s definition of war booty was certainly very broad.²³⁶ Unlike food or water, the Salamanca Papers were not integral to advance the Falange’s ultimate war time goal – to take over the national Spanish government. As stated above, the moniker the “Salamanca Papers” is a misnomer, as much of the property is also comprised of works of art, propaganda posters, books, and other cultural artifacts.²³⁷ Like the confiscation of property during World War II, the systematic plunder of the Salamanca Papers served a deeper dogmatic purpose, unrelated to wartime activities. While Franco’s troops used some of the papers confiscated for informational purposes towards their military advancement,²³⁸ the primary purpose of setting up OIPA and DERD was to prove the existence of “Marxist activities in Spain and in particular...of Masonic societies, League of the Rights of Man, Friends of Russia, International Red Aid, etc.”²³⁹ During the offensive in Santander, Franco sent orders to the army generals to save:

[a]ll kinds of documentation of Official Centers (military and civil), political and social, which must provide very interesting information in the first place, for the immediate development of operations, in another aspect for the discovery of responsibilities for the solvent movement that

²³³ Carloes Cue, *El conflicto de los 'papeles de Salamanca' llega al Senado*, EL PAÍS (Feb. 11, 2005), https://elpais.com/diario/2005/02/11/cultura/1108076409_850215.html.

²³⁴ Anderson, *supra* note 24, at 174.

²³⁵ THE DIGNITY COMM’N, *supra* note 32, at 11.

²³⁶ See *Menzel v. List*, 49 Misc. 2d 200 n. 2 (Sup. Ct. N.Y. Co. 1966) (discussing Hitler’s broad definition of booty and citing to list of the goods decreed by Nazis to qualify as booty).

²³⁷ THE DIGNITY COMM’N, *supra* note 32, at 16.

²³⁸ See Romero, *supra* note 33, at 134-135.

²³⁹ *Id.* at 133.

put the Nation at the edge of its ruin and always as a precise material to facilitate the judgment of history.²⁴⁰

Franco's broad orders serve as evidence that the seized documentations served multiple purposes. His language seems to suggest that the "development of operations" is secondary to the ultimate goal to "facilitate the judgment of history."²⁴¹ Indeed, the Salamanca Papers were more useful after the Civil War, in order to effectuate the creation of the police archive and to prosecute political adversaries.²⁴² While these objects served a dual purpose, the subordinate use for wartime operations indicates that the Salamanca Papers likely cannot be considered lawful booty.²⁴³

The classification of the Salamanca Papers as pillage or plunder is similarly not abundantly clear. "Pillage or plunder" is defined as "the taking of private property not necessary for the immediate prosecution of war effort, and is unlawful."²⁴⁴ The applicability of this definition to the Spanish Civil War confiscations is difficult for two reasons. First, while some of the property confiscated by Franco's regime was owned by private citizens, much of the property was from public organizations and autonomous governments.²⁴⁵ Second, the property in question was not taken by a foreign government or occupying force. Rather, the property was taken by insurgent forces within Spain – i.e. Spanish citizens.²⁴⁶ Furthermore, the insurgent forces in this case were not signatories to either the 1899 or 1907 Hague Conventions. As such, can property be considered "pillaged or plundered" when it was taken by a *de facto* government, which thereafter became the legitimate and recognized for over forty years?²⁴⁷

According to the International Criminal Tribunal for the former Yugoslavia ("ICTY"), pillage may occur "when private or public property is appropriated intentionally and unlawfully."²⁴⁸ However, the Rome Statute of the International Criminal Court substantially limits the elements of the crime of "pillage," requiring:

(1) [t]he perpetrator appropriated certain property; (2) [t]he perpetrator intended to deprive the owner of the property

²⁴⁰ *Id.* at 135.

²⁴¹ *Id.*

²⁴² Anderson, *supra* note 24, at 176.

²⁴³ However, it should be noted that a case-by-case analysis would need to be effectuated due to the disparate nature of the entirety of the Salamanca Paper collection.

²⁴⁴ *Menzel v. List*, 49 Misc. 2d 200, 307 (Sup. Ct. N.Y. Co. 1966).

²⁴⁵ THE DIGNITY COMM'N, *supra* note 32, at 16.

²⁴⁶ Indeed, OIPA was "part and parcel of Franco's personal secretariat." See Anderson, *supra* note 24 at 175-176.

²⁴⁷ The recognition of the Nationalists as "belligerents" subjects them to the 1899 Hague Convention and requires compliance with international law. Whether the Nationalist should be considered "belligerents" is discussed *infra*. For more information on the recognition of belligerency during the Spanish Civil War, See Vernon A. O'Rourke, *Recognition of Belligerency and the Spanish Civil War*. 31 A.J.I.L. 398, 413 (1937).

²⁴⁸ *Prosecutor v. Kordic & Cerkez*, Case No. IT-95-14/2-A, p. 26, ¶84 (Dec. 17, 2004).

and to appropriate it for *private or personal use* (3); [t]he appropriation was without the consent of the owner; (4) [t]he conduct took place in the context of and was associated with an international armed conflict [and] (5) The perpetrator was aware of factual circumstances that established the existence of an armed conflict.²⁴⁹

Franco's regime systematically appropriated the property through the confiscation of objects of historical, cultural, and artistic significance from both private citizens and public institutions.²⁵⁰ These takings were unequivocally without the consent of their owners.²⁵¹ The appropriation took place during armed conflict of arguably international character, as multiple countries, including Germany, Russia, and Mexico, battled on both sides of the civil conflict.²⁵² However, the international community's reluctance to recognize the conflict as a "state of war," which would entail full belligerent rights and obligations, might preclude the classification of the Spanish Civil War as an "international armed conflict."²⁵³ The perpetrators were undoubtedly aware of the circumstances surrounding the armed conflict, as their direct ability to carry out these confiscations was a result of the Falange's advancement during the Civil War. The only element of the crime of "pillaging" that may be inapplicable is the requirement that the appropriation was "for *private or personal use*."²⁵⁴ While it can be argued that the perpetrators of these confiscations committed these acts due to their own personal disdain for Leftist politics, the subsequent public use of the objects to create an archive and to prosecute individuals in state courts negates this argument.

The Salamanca Papers' status as "plunder" is stronger than their status as lawful "war booty." When defining "war crimes," the Nuremberg Charter included the "plunder of public or private property, wanton destruction of cities, towns or villages, or devastation not justified by military

²⁴⁹ Rome Statute of the International Criminal Court, Elements of Crimes, Article 8(2)(b)(xvi) (2011). While the criminality of pillaging under this section is applicable to individual liability, its classification is important to distinguishing whether the property was taken in violation of international law.

²⁵⁰ *Appropriated*, Black's Law Dictionary (6th ed. 1990). Although "appropriated" is not defined in the Rome Statute, Black Law's dictionary defines it as "exercis[ing] dominion over an object to the extent, and for the purpose, of making it subserve one's own proper use or pleasure."

²⁵¹ See THE DIGNITY COMM'N, *supra* note 32.

²⁵² For a discussion of the nature of foreign involvement in the Spanish civil war, see Antony Beever, *The Civil War Becomes International* in THE BATTLE FOR SPAIN: THE SPANISH CIVIL WAR, 1936-1939, 129-186 (Penguin ed. 2006).

²⁵³ See O'Rourke, *supra* note 247, at 413.

²⁵⁴ For a discussion of the inclusion of the element of "private and personal use" as inconsistent with the laws of armed conflict and the accepted definition of pillage in international criminal law See James G. Stewart, *Defining Pillage: Elements of the Offense*, CORPORATE WAR CRIMES: PROSECUTING PILLAGE OF NATURAL RESOURCES, OPEN SOCIETY JUSTICE INITIATIVE PUBLICATION, 19-23 (2010).

necessity.”²⁵⁵ Additionally, after World War II, the Nuremberg International Military Tribunal charged the defendants with the specific war crime of the plunder of both public and private property because they “ruthlessly exploited the people and the material resources of the countries they occupied, in order to strengthen the Nazi war machine, to depopulate and impoverish the rest of Europe, to enrich themselves and their adherents, and to promote German economic supremacy over Europe.”²⁵⁶ The confiscation of public and private property by Franco’s insurgent forces was for the ultimate goal of prosecuting crimes committed during the war by Republican militia and armed forces, which resulted in the individuals’ identification, punishment, and death.²⁵⁷ While the Falange attempted to legitimize these confiscations through proactive laws such as *El Ley de Politicas Responsabilidades*, such wanton despoliation of both public and private property for the sake of political persecution and to enrich the Falange’s stronghold over Spain would certainly qualify as “plunder.”

The Falange’s status as a non-foreign occupying force adds a layer of complexity to the classification of the Salamanca Papers as plunder. When Spain signed the 1899 Hague Convention on July 29, 1899 and ratified it on September 4, 1900, the government of Spain was bound by the provisions found therein.²⁵⁸ However, whether Franco and the Nationalists were bound by the provisions of the 1899 Hague Convention depends on if the Falange forces were considered “belligerents.”²⁵⁹ Under Article 1, to be considered “belligerents,” the following conditions must occur: (1) the forces must be commanded by a person responsible for his subordinates; (2) the forces must have a fixed emblem recognizable at a distance; (3) the forces must carry arms openly; and (4) the forces must conduct their operations in accordance with the laws and customs of war.²⁶⁰ When applying this definition to the Spanish Civil War, three of the four elements were fulfilled. The Nationalist forces were commanded by General Franco and they openly carried arms as they invaded the various regions all over Spain.²⁶¹ The Falange also affixed

²⁵⁵ See Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis Powers and Charter of the International Military Tribunal, Aug. 8, 1945, art. 6(b), 59 Stat. 1544, 82 U.N.T.S. 279 [hereinafter “Nuremberg Charter”].

²⁵⁶ See International Military Tribunal, the United States of America, the French Republic, the United Kingdom of Great Britain and Northern Ireland and the Union of Soviet Socialist Republics v. Hermann Wilhelm Goring et. al. (Indictment), 1 Trial of the Major War Criminals Before the International Military Tribunal 27, 55-56 (1947).

²⁵⁷ Blesa and Castillo, *supra* note 12, at 230.

²⁵⁸ *Convention (II) with Respect to the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land. The Hague, 29 July 1899*, INT’L COMM. RED CROSS https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/States.xsp?xp_viewStates=XPages_NORMStatesParties&xp_treatySelected=150.

²⁵⁹ 1899 Hague Convention, *supra* note 224, at art. 1.

²⁶⁰ *Id.*

²⁶¹ ALEJANDRO DE QUESADA, *THE SPANISH CIVIL WAR 1936–39 (1): NATIONALIST FORCES*, 46 (Osprey Publishing 2014).

to their uniforms their emblem of the yoke and arrows.²⁶² However, the last prong is likely not met as Francisco Franco's failure to adhere to the traditional laws and customs of war, as well as his troops' undertaking of various unprosecuted war crimes, is well documented.²⁶³ Notwithstanding the international nature of the Spanish Civil War, the failure of the international community to recognize the insurgent Nationalists as "belligerents" demonstrates a desire to relegate it to a purely domestic conflict.

If the 1954 Hague Convention were retroactive and applicable to activity occurring during the Spanish Civil War, the Falange's status as an occupier would be clearer.²⁶⁴ Article 4 of the 1954 Hague Convention mandates that states shall refrain from "requisitioning movable cultural property situated in the territory of another High Contracting Party."²⁶⁵ While this definition seems to limit the prohibitions under the convention to those occupying another territory in an international context, Article 19(1) states "[i]n the event of an armed conflict not of an international character occurring within the territory of one of the High Contracting Parties, each party to the conflict shall be bound to apply, as a minimum, the provisions of the present Convention which relate to respect for cultural property."²⁶⁶ According to Patty Gerstenblith,²⁶⁷ the use of "party" with a lowercase "p" in Article 19(1), without delineating the word "State," "State Party" or "High Contracting Party," means that the provision "applies to all the parties to a non-international conflict."²⁶⁸ Thus, even if the Falange was not a part to the 1954 Hague Convention, it would have been required to "to prohibit, prevent and, if necessary, put a stop to any form of theft, pillage or misappropriation of...cultural property."²⁶⁹

Additionally, the Second Protocol of the 1954 Hague Convention, adopted in 1999, expanded the application of cultural heritage provisions of the 1954 Hague Convention to apply to non-international armed conflicts, specifically by stating that all of its provisions "shall apply in the event of an armed conflict not of an international character, occurring within the territory

²⁶² *Id.*; see *Yoke and Arrows*, IMPERIAL WAR MUSEUM, <https://www.iwm.org.uk/collections/item/object/29146>.

²⁶³ See Human Rights Council. 27th Session. Report of the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence, Pablo de Greiff. Mission to Spain. U.N. Doc. A/HRC/27/56/Add.1 (July 22, 2014) available at <https://www.refworld.org/docid/543fc0fc4.html>.

²⁶⁴ Neither the 1954 Hague Convention nor its protocols have any language permitting retroactivity of the instruments.

²⁶⁵ Convention for the Protection of Cultural Property in the Event of Armed Conflict, May 14, 1954, 249 U.N.T.S. 240, art. 4.3 [hereinafter "1954 Hague Convention"].

²⁶⁶ *Id.* at art. 19(1).

²⁶⁷ Patty Gerstenblith is a distinguished research professor of law at DePaul University and director of its Center for Art, Museum & Cultural Heritage Law.

²⁶⁸ Patty Gerstenblith, *The Destruction Of Cultural Heritage: A Crime Against Property Or A Crime Against People?*, 15 J. MARSHALL REV. INTELL. PROP. L. 336 (2016).

²⁶⁹ 1954 Hague Convention, *supra* note 266, at art. 4.3.

of one of the Parties.”²⁷⁰ Spain ratified the Second Protocol on July 6, 2001.²⁷¹ While Article 22 limits the applicability of this provision by stating that “riots, isolated and sporadic acts of violence and other acts of a similar nature” do not fall under the Second Protocol, such a characterization is presumably inconsistent with the nature of the three-year armed conflict, which ravaged Spain during the Civil War.²⁷² Thus, even though the Falange was a non-state actor in a conflict of arguably domestic nature, the pillaging and plunder of the Salamanca Papers would be a violation of the 1954 Hague Convention.²⁷³

The classification of the Salamanca Papers as plunder is necessary to determine a resolution for their disposal. If the papers are designated as war booty, then perhaps the Spanish government would have a legitimate claim to their ownership and retention under international law.²⁷⁴ If applying contemporary standards of international law, it is clear that the papers should be considered plunder. It is likely for this reason that Spain’s Constitutional Court declared that the “plunder is indisputable.”²⁷⁵ Deeming the Salamanca Papers to be considered plunder, the next question that must be answered is whether Spain is obligated to return the property to its original owners or their heirs eighty years after the Civil War.

B. Spain’s International Obligation to Restitute Plunder from the Spanish Civil War

The obligation to return plundered cultural property after armed conflict is a result of a series of international treaties, to which Spain is a signatory member of many. While the government of Spain maintains that it has the ultimate constitutional authority to dispose of the Salamanca Papers, this section equivocates that it has an indisputable obligation to return the property to the rightful owners, or their heirs, under international law. The jurisprudential obligation of restitution dates back to Ancient Rome in accordance with the legal maxim “*restitutio in integrum*,” which generally permitted the restoration of rights to property, that were later found to have been taken illegally.²⁷⁶ Between the 17th and 18th centuries, attitudes towards the antiquated practice of spoils of war began to gradually change,

²⁷⁰ Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict, Mar. 26, 1999, 2253 U.N.T.S. 212, art. 22 [hereinafter “Hague Convention Second Protocol”].

²⁷¹ *State Parties*, UNESCO, <http://www.unesco.org/new/en/culture/themes/armed-conflict-and-heritage/convention-and-protocols/states-parties/>.

²⁷² Hague Convention Second Protocol, *supra* note 271, at art. 22(2).

²⁷³ See e.g., Zoe Howe, *Can the 1954 Hague Convention Apply to Non-state Actors?: A Study of Iraq and Libya*, 47 TEX. INT’L L.J. 403 (2012).

²⁷⁴ See e.g., *Pauly v United States*, 152 Ct Cl 838, 843 (1961) (finding that horses captured by U.S. forces during World War II during an overrun of German forces were considered “war booty”).

²⁷⁵ S.T.C., Mar. 14, 2013 (T.C., No. 3803, p. 152) (Spain).

²⁷⁶ Kowalski, *supra* note 218, at 24.

specifically with the codification of the Treaty of Westphalia in 1648, which provided limited return of property to the estates of the Holy Roman Empire.²⁷⁷ Following the Napoleonic Wars, which resulted in unprecedented plunder of art treasures, the Conference of Vienna instituted this Roman concept "*restitutio in integrum*," thereby cancelling this inherent right to spoils as a lawful means to acquire property.²⁷⁸

After the Lieber Code and subsequent declarations, the 1899 and 1907 Hague Conventions adopted provisions protecting signatory states from seizure of property, but not necessarily rendering restitution as obligatory.²⁷⁹ The end of World War I and the signing of the Treaty of Versailles in 1919 saw the establishment of restitution as an obligation under international law.²⁸⁰ In particular, Article 238 compelled Germany to "make restitution in cash of taken away, seized or sequestered, and also restitution of animals of every nature and securities taken away, seized, sequestered, in the case in which it proves possible to identify them in territory belonging to Germany or her Allies."²⁸¹ Article 245 went even further and extended Germany's requirement of restitution to include plunder taken during the war between France and Prussia from 1870 to 1871.²⁸² The Treaty of Versailles endorsed the principle that restitution was the sole remedy for violation of the international law against plundered cultural property, even after the passing of a long period of time.²⁸³

Despite the recognition and codification of international laws prohibiting the seizure of property and the subsequent requirements to retribute any seized property, Franco's totalitarian regime, for the most part, failed to return the property confiscated during the Spanish Civil War. In the meantime, further obligations to retribute cultural property arose after World War II in response to the large-scale plundering carried out by the Nazis. For example, after the end of World War II, the allied powers produced the "Inter-Allied Declaration Against Acts of Dispossession Committed in Territories Under Enemy Occupation or Control," also commonly known as

²⁷⁷ Wilske, *supra* note 217, at 244; In 1648, the Treaty of Westphalia ended the Thirty Years War by "acknowledging the sovereign authority of various European princes. This event marked the advent of traditional international law, based on principles of territoriality and state autonomy." Harold Hongju Koh, *Why Do Nations Obey International Law?*, 106 YALE L.J. 2599, 2604-05 (1997) (quoting Arthur Nussbaum, *A Concise History of the Law of Nations*, 24 (1947)).

²⁷⁸ Wilske, *supra* note 217, at 246.

²⁷⁹ See 1899 Hague Convention, *supra* note 224; See also 1907 Hague Convention, *supra* note 225.

²⁸⁰ Treaty of Versailles, June 28, 1919, 1919 For. Rel. (Paris Peace Conference, XIII) 55, 740, 743; Senate document 51, 66th Congress, 1st Sess. (1920).

²⁸¹ *Id.* at art. 238.

²⁸² *Id.* at art. 245.

²⁸³ Zhang Yue, *Customary International Law and the Rule Against Taking Cultural Property as Spoils of War*, 17 CHINESE J. INT'L L., 943, 980 (2018).

the “London Declaration.”²⁸⁴ The London Declaration reserved the right of the Allies to invalidate any “transfers of, or dealings with, property, rights and interests of any description whatsoever,” including those that may have appeared to have been “legal in form.”²⁸⁵ In order to improve the international rules of the protection of cultural property during armed conflict, a committee of international experts set out to draft a new convention.²⁸⁶ The issue of restitution was relegated to the Hague Convention of 1954’s First Protocol, which requires each contracting party to undertake to “return, at the close of hostilities, to the competent authorities of the territory previously occupied, cultural property which is in its territory.”²⁸⁷ Spain signed the First Protocol on May 14, 1954.²⁸⁸ While the 1954 Hague Convention does not delineate obligations to return plundered art, “it can be asserted that the obligation to return illicitly taken cultural objects is inherent in the obligation to respect cultural property and in the prohibition on seizing and pillaging of cultural property.”²⁸⁹

In 1991, the UN Security Council under Resolution 686 (1991), required Iraq to “return all Kuwait property seized by Iraq, [and] the return to be completed in the shortest possible period.”²⁹⁰ In 2003, the UN Security Council requested States to “facilitate the safe return to Iraqi institutions of Iraqi cultural property...illegally removed from the Iraq National Museum, the National Library, and other locations in Iraq.”²⁹¹ More recently in the case of Syria, the UN Security Council asked States to “take appropriate steps to prevent the trade in Iraqi and Syrian cultural property, thereby allowing for their eventual safe return to the Iraqi and Syrian people.”²⁹² These cases exemplify this widespread state practice to return objects unlawfully taken during armed conflict.

The mid-1990s saw a reemergence in the interest in the return of cultural property confiscated by the Nazis.²⁹³ During this period of renewed interest, the international community drafted multiple documents to solve the ongoing issues involving Nazi-era restitutions, including: the 1998

²⁸⁴ Inter-Allied Declaration Against Acts of Dispossession Committed in Territories Under Enemy Occupation or Control; Establishment of Inter-Allied Sub-Committee on Acts of Dispossession, 1 Foreign Relations, 439, 444 (1943).

²⁸⁵ *Id.*

²⁸⁶ Wojciech W. Kowalski, *Restitution of works of art looted in times of war*, 288 RECUEIL DES COURS 154, 188 (2001).

²⁸⁷ Protocol for the Protection of Cultural Property in the Event of Armed Conflict (1954), art. I (3) (1956) [hereinafter “Hague Convention First Protocol”].

²⁸⁸ *Id.*

²⁸⁹ Marc-André Renold, *Cross-border restitution claims of art looted in armed conflicts and wars and alternatives to court litigations*, (2016) [https://www.lootedart.com/web_images/pdf2016/IPOL_STU\(2016\)556947_EN.pdf](https://www.lootedart.com/web_images/pdf2016/IPOL_STU(2016)556947_EN.pdf).

²⁹⁰ S.C. Res. 686, para. 2(d) (Mar. 2, 1991).

²⁹¹ S.C. Res. 1483, para. 7 (May 22, 2003).

²⁹² S.C. Res. 2199, para. 17 (Feb. 12, 2015).

²⁹³ This was a result of a variety of factors including the declassification of World War II documents and the publication of numerous books on the looting which occurred during the war.

Washington Conference Principles on Nazi Confiscated Art (“Washington Conference Principles”)²⁹⁴, the 1999 Council of Europe Resolution 1205 on Looted Jewish Cultural Property (“Council of Europe Resolution 1205”),²⁹⁵ the 2009 Terezin Declaration of Holocaust Era Assets and Related Issues (“Terezin Declaration”),²⁹⁶ and the 2009 Draft UNESCO Declaration of Principles Relating to Cultural Objects Displaced in Connection with the Second World War (“Draft UNESCO Declaration”).²⁹⁷ While these are all non-binding international instruments, they generally affirm the same premise – there is an international moral and legal obligation to encourage domestic measures to restitute property plundered during World War II. Again, Spain participated in the creation of these soft law principles.

The obligatory notion to return stolen objects is also practiced in museums around the world. For example, in 2018, the British Museum restituted eight 4,000-year-old clay cones looted from Iraq after the fall of Saddam Hussein in 2003.²⁹⁸ In 2019, The Metropolitan Museum of Art, the United States’ largest art museum, restituted the “Gold Coffin of Nedjemankh,” after a determination that it was a stolen antiquity.²⁹⁹ In regards to objects found in American museums that were confiscated during World War II, the American Alliance of Museums’ asks to the museum “to

²⁹⁴ U.S. DEP’T OF STATE, WASHINGTON CONFERENCE ON HOLOCAUST-ERA ASSETS (1998). [hereinafter “Washington Principles”]. In 1998, the U.S. Department of State and the U.S. Holocaust Memorial Museum co-hosted the Washington Conference on Holocaust-Era Assets, which was attended by representatives of forty-four countries, including Spain. The conference adopted and endorsed the Washington Conference Principles on Nazi Confiscated Art, which generally called for the finding, identification, and restitution of cultural property plundered during World War II.

²⁹⁵ Eur. Consult. Ass., *Resolution 1205 on Looted Jewish Cultural Property*, 1st Sess., DOC. NO. 8563 ((2000)). In 1999, the Council of Europe codified Resolution 1205 on Looted Jewish Cultural Property, which encouraged the restitution of Nazi-looted property for countries found within the European Union.

²⁹⁶ Terezin Declaration of Holocaust Era Assets and Related Issues, June 30, 2009, <https://2009-2017.state.gov/p/eur/rls/or/126162.htm>. In 2009, the Czech Republic sponsored a second conference to survey the developments in restitution of Nazi-looted assets as a result of the 1998 Washington Conference.

²⁹⁷ Director-General of UNESCO, General Conference, Draft of the Declaration of Principle Relation to Cultural Objects Displaced in Connection with the Second World War, Doc. 35C/24, 3-4 (July 31, 2009), <http://unesdoc.unesco.org/images/0018/001834/183433e.pdf> (last visited Aug 7, 2019). UNESCO attempted to adopt binding principles of restitution of plundered art. However, the draft declaration never received a consensus and thus was not adopted.

²⁹⁸ Palko Karasz, *British Museum to Return Looted Antiquities to Iraq*, NEW YORK TIMES (Aug. 10, 2018), <https://www.nytimes.com/2018/08/10/arts/iraq-looted-objects-british-museum.html>.

²⁹⁹ *Ancient gold coffin returned to Egypt from New York as looted antiquity*, USA TODAY (Sept. 25, 2019), <https://www.usatoday.com/story/life/2019/09/25/ancient-gold-coffin-returned-egypt-new-york-looted-antiquity/2444916001/>.

seek to resolve the matter with the claimant in an equitable, appropriate and mutually agreeable manner.”³⁰⁰

While the focus has primarily been on World War II-era cases, the norm and customary obligation to facilitate “just and fair solutions” for those who are victims of plundered property can readily apply to other cases. In the case of the Salamanca Papers, the Spanish government’s continued refusal to transfer the remaining assets to Catalonia and demands for the return of the other transferred documents is directly contrary to both hard and soft principles of international law toward restitution of plundered objects. Regardless of the domestic nature of the Spanish Civil War, Spain, as a signatory of the 1954 Hague Convention and its First Protocol, is bound by the obligations to not only protect cultural property, but to return objects forcefully requisitioned after its armed conflict.³⁰¹ After World War II, Spain has continued to sign on to policies denouncing the plunder of cultural property by Nazis and subsequently calling for their return.³⁰² Regardless of whether these instruments are legally binding or not, it is generally expected for signatory states to abide by to make reasonable efforts to follow their express provisions. Spain’s desire to hold the entirety of the loot confiscated during the Spanish Civil War for the purpose of a historical archive is not justified under international law. The Spanish government continual efforts to thwart restitution to rightful owners is inconsistent with the international obligations for which it bound itself.

VI. REALIZING A SOLUTION: THE DE-POLITIZATION OF RESTITUTION OF THE SALAMANCA PAPERS

The preamble of the 1970 UNESCO Convention on the Means of Prohibiting and Preventing Illicit Import, Export, and Transfer of Ownership of Cultural Property provides that “cultural property constitutes one of the basic elements of civilization and national culture.”³⁰³ The Salamanca Papers are seen both by the Spanish and Catalan people as a symbol of their respective identities and cultures. As a result, neither government is compromising in the approach to achieving an ultimate resolution to this

³⁰⁰ *Unlawful Appropriation of Objects During the Nazi Era*, AMERICAN ALLIANCE OF MUSEUMS <https://www.aam-us.org/programs/ethics-standards-and-professional-practices/unlawful-appropriation-of-objects-during-the-nazi-era/>.

³⁰¹ See Hague Convention First Protocol, *supra* note 288.

³⁰² However, note that, according to Stuart E. Eizenstat, an adviser to the State Department Spain has “taken no steps” to fulfill its principles of restituting Nazi-looted art. See William D. Cohan, *Five Countries Slow to Address Nazi-Looted Art, U.S. Expert Says*, NEW YORK TIMES (Nov. 26 2018), <https://www.nytimes.com/2018/11/26/arts/design/five-countries-slow-to-address-nazi-looted-art-us-expert-says.html>.

³⁰³ *Id.*; Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, Nov. 14, 1970, 96 Stat. 2350, 823 U.N.T.S. 231, pmb1. [hereinafter “1970 UNESCO Convention”]. The 1970 UNESCO Convention sought to address international issues pertaining to the increase of thefts in museums and archeological sites, which were thereafter sold in the market.

dispute. Despite the strong customary international law towards restitution, there is currently no international forum for Catalonia to bring a claim against the Spanish government. It is thus axiomatic that, in order to achieve a final solution to the disposal of the Salamanca Papers, both sides must transcend state-regional politics to achieve a "just and fair" solution for rightful owners and heirs.

The current legal framework in Spain for the identification and restitution of claimants of any object of the Salamanca Papers does not effectively adhere to international law nor does it adequately redress the victims of the Spanish Civil War. While *Ley 21/2005* promulgates procedures for the restitution of the objects to legitimate owners, the exercise of these rights were only for a year following the enactment of the law, on November 17, 2005.³⁰⁴ Moreover, the request must be made through the *Generalitat* of Catalonia, notwithstanding that the source of some of these objects may be from other autonomous communities.³⁰⁵ *Ley 21/2005* also fails to distinguish between public and private institutions. Clearly, the law, while a step in the right direction, does not adequately protect individual claimants.

As a practical matter, the solution to this dispute is to enact domestic policy in Spain outlining specific measures and procedures for lawful claimants to come forward. *Ley 21/2005* is outdated and must be replaced by a contemporary piece of legislation, which addresses not only those issues from Catalonia, but also those from other autonomous communities, public and private institutions, and private citizens. First, Spain should restructure the legal framework of the new *Ley 21/2005* to create mechanisms for the identification of Civil War-era looted cultural property. As articulated in the Washington Principles with respect to Nazi-looted art, this law must make "every effort...[to] publicize art that is found to have been confiscated...in order to locate its pre-War owners or their heirs."³⁰⁶ In order to actualize this goal, there should be a detailed registry, which delineates identifiable information, including the date of confiscation, the province or autonomous community of confiscation, the current location, the current possessors, a detailed description of the property, and the last known owner of the property. This registry should be made available online, in multiple languages, in order to allow for ex-patriates who immigrated to other countries during the Civil War to potentially identify their stolen objects.

This new law should also expand the temporal requirements to allow for claimants to come forward after a reasonable amount of time. The sheer volume of objects from the archive to categorically identify and document would be an immense undertaking, requiring a collaboration by the Spanish government and the other autonomous communities. Creation of this registry

³⁰⁴ L.O. art. 5 (R.O.E. 2005, 276) (Spain).

³⁰⁵ *Id.*

³⁰⁶ Washington Principles, *supra* note 295.

would also require a team of multidisciplinary experts, trained in art, history, provenance, law, and regional idiosyncrasies. Accordingly, in order to account for the period of time required to accumulate the sheer volume of information necessary to create such a registry, the statute of limitations for this law should extend beyond the publication of the registry, for a period of no less than five years.

Additionally, this law should extend not only to those assets found in the Historical Archive and in Catalonia, but to all Civil War-confiscated objects found throughout the country that may be subject to ownership disputes in the future. The law should also create a neutral judicial body to oversee and resolve claims of Civil War-era property. This judicial body should have exclusive jurisdiction over these issues and be the only one with competency to make a determination based on clear and convincing evidence of ownership. After a decision is made by the judicial body, the determination shall be binding on all parties. However, the law should clarify that those claimants who come forward and are ultimately determined to be the true owner of the assets must comply with limitations enumerated in the Spanish Historical Heritage Act and the Spanish Constitution. The law should also provide a "right of first refusal" provision, permitting the National Government to provide cash restitution for the stolen property.

In the event that no rightful owners come forward, then the law should delineate whether the state or the autonomous community where the property was confiscated should retain ownership over the objects. In the interest of fairness and recompense for the injustices occurring during the war, the autonomous community should necessarily retain ownership over any unclaimed property. However, a fair balance of the equities and the "social function" of the property would ultimately need to be considered before enumerated in the law. Perhaps in such an instance, a case-by-case determination by the neutral judicial body would be necessary. As outlined at length above, the core of the dispute over the Salamanca Papers is essentially over the culture and identity of Spain and Catalonia. Any domestic policy should focus on the individual owners themselves, as opposed to concentrating on regional or national ownership. This law should encourage provenance research to identify rightful owners and should foster a fair and equitable procedure beyond national-regional politics.

VII. CONCLUSION

Notwithstanding Spain's goal to retain "collective amnesia" over the atrocities of the Spanish Civil War and Franco's repressive dictatorship that followed, the dispute over the Salamanca Papers offers an axiomatic example of the lasting tensions between the Spanish government and Catalonia that continue to pervade the political atmosphere in Spain. Given that eighty years have passed since the conclusion of the war, the assets plundered during this period must be dealt with efficiently and with a focus on providing

restitution to the victims and heirs of Franco's regime. Driven by fervent ideals of patriotism and culturalism, both Catalan separatist leaders and far-right nationalist parties in Spain are categorically resolute in finding a solution to this contentious dispute. The inability of both governments to come to a mutual compromise reveals institutional weaknesses in Spain's legal framework regarding the restitution of plundered cultural property. In order for Spain to comply with its international hard and soft law obligations to restitute plundered property, Spain must draft new policies which reconcile the rights of lawful owners with the "social function" inherent in each asset considered part of its cultural and historical patrimony. In the end, one thing will always ring true, "if a man [or woman] has something once, always something of it remains."³⁰⁷

³⁰⁷ ERNEST HEMINGWAY, *FOR WHOM THE BELL TOLLS*, 171 (Simon and Schuster ed. 1968).

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 II¹ and developed rapidly since the 1990s.² The goals of international criminal law include traditional goals of criminal justice, such as deterrence, retribution, and advancing (international) social norms,³ as well as transitional justice goals,⁴ such as accountability, redress for victims, truth seeking, and reconciliation.⁵ 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.⁶ Although no

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¹ 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.

² 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.

³ 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).

⁴ *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.

⁵ 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).

⁶ *Id.* at 574.

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

“[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.”⁸ 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.⁹

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.¹⁰ 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.”¹¹ 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.¹² 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

⁷ 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).

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

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

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

¹¹ *Id.*

¹² *Id.*

established by the Allies based on a charter.¹³ Some critics state that the IMTs show the victor's justice, but these two tribunals have gained legitimacy through the fairness of the trials.¹⁴ 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.¹⁵ In 1994, the International Criminal Tribunal for Rwanda (ICTR) was established through UNSC Resolution 955 to investigate crimes committed in the Rwandan genocide.¹⁶ 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"¹⁷ which gives the ICTY legality.¹⁸ 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 1998.¹⁹ The ICC has jurisdiction *ratione temporis* over crimes committed after that date,²⁰ jurisdiction *ratione materiae* over crimes of genocide, crimes against humanity, war crimes, and crimes of aggression,²¹ jurisdiction *ratione personae* over crimes committed by nationals of its state parties,²² and jurisdiction *loci* over crimes committed in the territory of its state parties

¹³ 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/atrocities-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/atrocities-crimes/Doc.2_Charter%20of%20IMT%201945.pdf.

¹⁴ 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).

¹⁵ 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>.

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

¹⁷ 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...").

¹⁸ 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).

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

²⁰ *Id.* art. 11.

²¹ *Id.* art. 5.

²² *Id.* art. 12(2)(b).

including vessels or aircrafts with registration of a state party.²³ Additionally, a non-party state can accept the jurisdiction of the ICC,²⁴ and the UNSC can refer a situation to the ICC even if it does not satisfy the jurisdiction *ratione personae* or jurisdiction *ratione loci*.²⁵ The ICC has a “complementary principle” to domestic jurisdiction.²⁶ It also has a requirement of “gravity”²⁷ and a requirement of “interests of justice.”²⁸ 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.²⁹ The establishment of the ICC is regarded as a crucial step in the development of international criminal judicial bodies.³⁰ However, there are also some shortcomings: substantial jurisdiction gaps exist;³¹ five permanent members³² 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.³³ In addition, international criminal tribunals might be lacking in perceived legitimacy due to minimal local involvement.³⁴ Specifically, tribunals are often located far away from the local populations that the trial involves.³⁵ They do not publicize the work within affected communities well.³⁶ 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’

²³ *Rome Statute*, *supra* note 19, art. 12(2)(a).

²⁴ *Id.* art. 12(3).

²⁵ *Id.* art. 13(b).

²⁶ *Id.* arts. 17(1)(a) & (b).

²⁷ *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 (last visited May 10, 2019).

²⁸ *Id.* art. 53(1)(c).

²⁹ *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 (last visited Feb 28, 2019).

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

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

³² The U.S., China, Russia, France and the U.K..

³³ 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.

³⁴ *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).

³⁵ 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.

³⁶ *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.³⁷ 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.³⁸ The core crimes covered by universal jurisdiction, crimes against humanity, genocide and certain war crimes, are usually considered to be customary international law crimes.³⁹ Since these crimes affect the entirety of humanity, any state may assert jurisdiction over them.⁴⁰ 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*.⁴¹ 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.”⁴² 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.⁴³ 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.⁴⁴ However, as hybrid

³⁷ Dickinson, *supra* note 10, at 300-03.

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

³⁹ 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.

⁴⁰ 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).

⁴¹ Langer, *supra* note 3, at 218-20.

⁴² *Id.* at 220.

⁴³ 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).

⁴⁴ 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.⁴⁵ 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.

⁴⁵ 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 world⁴⁶ 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,⁴⁷ developed quickly from 2000 to 2007,⁴⁸ and experienced a quiet period until more hybrid courts were established after 2014.⁴⁹

There is no single definition of ‘hybridity,’ but the notion is used conventionally to refer to institutions that mix national and international elements.⁵⁰ 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.⁵¹ 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.

⁴⁶ 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).

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

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

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

⁵⁰ See Williams, *supra* note 46.

⁵¹ 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.⁵² 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)⁵³ and the “Regulation 64” Panels in the Courts of Kosovo.⁵⁴ 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.⁵⁵ The second is created by a bilateral agreement between the affected state and the UN, such as the SCSL⁵⁶ and the Extraordinary Chambers in the Courts of Cambodia (ECCC).⁵⁷ 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,⁵⁸ the Iraqi High Tribunal (IHT),⁵⁹ and the Special Criminal Court in the Central African Republic (SCC).⁶⁰ 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).⁶¹ 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

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

⁵³ 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).

⁵⁴ UN Doc. S/RES/1244 (1999).

⁵⁵ Raub, *supra* note 52, at 1026-31.

⁵⁶ 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.

⁵⁷ 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.

⁵⁸ 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 (last visited Feb 28, 2019).

⁵⁹ 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).

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

⁶¹ UN Doc. S/RES/1757 (2007).

American Chambers in Senegal (EAC).⁶² 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.⁶³

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.⁶⁴ Hybrid courts may improve overall domestic judicial capacity by providing a platform whereby domestic personnel can engage, learn, and train.⁶⁵ Further, hybrid courts located in or near the affected areas can increase accessibility to the trial for victims.⁶⁶ 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.⁶⁷ When assessing the effectiveness of international courts, a goal-based approach is generally adopted.⁶⁸ 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.⁶⁹ Other goals include retribution, deterrence, non-recurrence,

⁶² 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).

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

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

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

⁶⁶ 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.

⁶⁷ *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>.

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

⁶⁹ 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.⁷⁰ 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.⁷¹ 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,⁷² 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.⁷³ 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.⁷⁴ 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

⁷⁰ Stromseth, *supra* note 5; Langer, *supra* note 3.

⁷¹ Shany, *supra* note 8, *Chapter 7: Legitimacy*, at 138.

⁷² Higonnet, *supra* note 45, at 356.

⁷³ 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].

⁷⁴ See *supra* note 64.

defined as “right to rule”⁷⁵ or “justified authority.”⁷⁶ 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*.⁷⁷ 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.⁷⁸ Recently, more and more scholars are advocating that stakeholders’ subjective perceptions of legitimacy should be an important part of an institution’s overall legitimacy,⁷⁹ which is called sociological legitimacy.⁸⁰ Normative legitimacy is supposed to be grounded in objective principles, while sociological legitimacy depends on perceptions and is agent relative.⁸¹ International and hybrid criminal courts are facing legitimacy challenges from both normative and sociological perspectives. For instance, the ICC’s

⁷⁵ 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).

⁷⁶ 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].

⁷⁷ 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).

⁷⁸ 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].

⁷⁹ 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].

⁸⁰ 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).

⁸¹ 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.⁸² 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.⁸³ Moreover, perceived legitimacy from the international community is vital to getting international funding and support.⁸⁴ Hybrid courts face diverse legitimacy challenges, but there has been little coverage in the legal literature.⁸⁵ 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—⁸⁶ either legal norms or moral norms. Legal norms emphasize the condition of being in accordance with law or principles,⁸⁷ such as a consistent, procedurally fair, unbiased, and transparent application of norms.⁸⁸ Moral norms emphasize the importance of the moral justification, such as "satisfying a minimal democracy requirement and protect the most basic human rights."⁸⁹ 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

⁸² 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).

⁸³ See, e.g., Dutton, *supra* note 36.

⁸⁴ Ford, *supra* note 79, at 407.

⁸⁵ 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.

⁸⁶ See, e.g., Martti Koskeniemi, *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.

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

⁸⁸ 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).

⁸⁹ 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."⁹⁰

ii. Sociological Legitimacy

Sociological studies of law generally focus on its "external manifestation."⁹¹ Sociological legitimacy is defined as involving the actual acceptance of authority by a relevant constituency.⁹² That is to what extent relevant audiences perceive an institution's authority to be justified.⁹³ "An institution is legitimate in the sociological sense when it is widely believed to have the right to rule."⁹⁴ 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.⁹⁵ 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.⁹⁶ 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.⁹⁷ In addition, it should be believed that the court is "grounded on values, principles, and goals that reflect [the majority of its constituencies]."⁹⁸ In turn, "the court's sociological legitimacy can heighten

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

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

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

⁹³ 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].

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

⁹⁵ 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).

⁹⁶ Shany, *supra* note 8, *Chapter 7: Legitimacy*, at 139.

⁹⁷ *Id.*

⁹⁸ Cassese, *supra* note 14, at 492.

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

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.¹⁰¹ 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.¹⁰² 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.¹⁰³

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.¹⁰⁴ 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.¹⁰⁵ State consent should be a focus for the courts' origins or sources.¹⁰⁶ International institutions usually derive legitimacy from states' consent to their jurisdiction,¹⁰⁷ and it is similar for

⁹⁹ Hobbs, *supra* note 63, at 520-22.

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

¹⁰¹ deGuzman, *supra* note 33, at 64.

¹⁰² 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.

¹⁰³ Shany, *supra* note 7, *Chapter 7: Legitimacy*, at 137-38.

¹⁰⁴ 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).

¹⁰⁵ deGuzman, *supra* note 34, at 69.

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

¹⁰⁷ 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.¹⁰⁸ 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.¹⁰⁹

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.¹¹⁰ From the normative perspective, it refers to an individual decision-maker's potential to act as the source of legitimacy for the court.¹¹¹ "Judges' professional and personal identities and goals may also influence adjudicatory outcomes."¹¹² Further, personal legitimacy has a significant influence on the court's sociological legitimacy.¹¹³ 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,¹¹⁴ which may be the most significant element of legitimacy in law scholars' eyes.¹¹⁵ 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.

¹⁰⁸ See section II (A) of this article.

¹⁰⁹ See Popovski, *supra* note 95, at 405.

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

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

¹¹² Grossman II, *supra* note 90, at 79.

¹¹³ 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.

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

¹¹⁵ 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.¹¹⁶ The selection of cases, defendants' rights,¹¹⁷ victims' participation, and the court's outreach activities¹¹⁸ 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.¹¹⁹ 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.¹²⁰ 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.¹²¹ Even if the origins, persons, and procedures engendering a court seem legitimate, "a court that makes immoral or unjust rulings lacks legitimacy."¹²² 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.

¹¹⁶ 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).

¹¹⁷ 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).

¹¹⁸ See Dutton, *supra* note 36.

¹¹⁹ deGuzman, *supra* note 34, at 79-81.

¹²⁰ Shany, *supra* note 8, at 143-45.

¹²¹ *Id.*

¹²² 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)¹²³ 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.¹²⁴ The EAC was created within the existing Senegalese court structure in Dakar and includes personnel from Senegal and other AU member states.¹²⁵ The EAC was mandated to apply international law and may apply Senegalese law in the case of any substantive legal vacuum.¹²⁶ The EAC has jurisdiction over the crimes of genocide, crimes against humanity, war crimes, and torture.¹²⁷

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.¹²⁸ 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)¹²⁹ 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.¹³⁰ Although Habré had good administrative talents in economic development¹³¹ and was

¹²³ 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).

¹²⁴ 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*].

¹²⁵ 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).

¹²⁶ *Id.* art. 16.

¹²⁷ *Id.* art. 4.

¹²⁸ Robert Buijtenhuijs, *Hissein 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).

¹²⁹ Directorate de Documentation et Sécurité.

¹³⁰ See *Report of the Commission of Inquiry*, *supra* note 104.

¹³¹ See Buijtenhuijs, *supra* note 108.

supported by the U.S.¹³² and French¹³³ governments, his discriminatory and repressive policies led to his political failure.¹³⁴

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,¹³⁵ leading NGOs in human rights area,¹³⁶ and individuals¹³⁷ who persisted to file the case and created the victim's associations.¹³⁸ 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.¹³⁹ 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.¹⁴⁰ The EAC is generally considered as a success, although drawbacks and shortcomings exist when placed under serious and specific examinations.¹⁴¹ 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

¹³² See *Report of the Commission of Inquiry*, *supra* note 104, at 88.

¹³³ 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 (last visited Mar 3, 2019). This agreement about military cooperation came into force when Habré took the power.

¹³⁴ *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>.

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

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

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

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

¹³⁹ 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.

¹⁴⁰ See *infra* section IV D (2) of this article.

¹⁴¹ 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.¹⁴² 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).¹⁴³ 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 1990.¹⁴⁴ A statute of the Extraordinary African Chambers was adopted on January 30, 2013.¹⁴⁵ These two legal documents constitute the foundation of the EAC and become the direct sources of international law that the EAC should apply.¹⁴⁶ These documents are based on customary international law and international conventions ratified by Chad relating to crimes and serious violations of international law.¹⁴⁷ For procedural rules, the Senegalese Criminal Procedure Code governs.¹⁴⁸ Senegalese domestic law can also be resorted to when there is a substantive legal vacuum.¹⁴⁹ Chad formally waived Habré's immunity of jurisdiction

¹⁴² Grossman I, *supra* note 81, at 116–17.

¹⁴³ 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 (last visited Mar 3, 2019).

¹⁴⁴ 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*].

¹⁴⁵ *Statute*, *supra* note 125.

¹⁴⁶ *Id.* art. 16(1).

¹⁴⁷ *Id.* arts. 3(1), 23(1).

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

¹⁴⁹ *Statute*, *supra* note 125, art. 16(2).

when the case was filed in Belgium.¹⁵⁰ 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.¹⁵¹

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.¹⁵² The Commission of Inquiry produced a content-rich report in 1992 revealing and condemning the atrocities conducted by Habré's regime.¹⁵³ However, the new government was not interested in justice, putting the report aside afterwards.¹⁵⁴

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".¹⁵⁵ 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.¹⁵⁶ The case against Habré was first filed by some Chadian victims in Senegal in 2000.¹⁵⁷ 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,¹⁵⁸ and the dismissal was later confirmed by the highest court within the Senegalese judiciary.¹⁵⁹ Then victims filed complaints in Belgium and the UN Committee Against Torture (CAT).¹⁶⁰ Belgium asked Senegal for Habré's extradition.¹⁶¹ The CAT also recommended Senegal to take appropriate actions to implement the Convention in its domestic legal system

¹⁵⁰ 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).

¹⁵¹ See Brody, *supra* note 143.

¹⁵² *Report of the Commission of Inquiry*, *supra* note 104.

¹⁵³ *Id.*

¹⁵⁴ Brody, *supra* note 143, at 8.

¹⁵⁵ 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).

¹⁵⁶ See Brody, *supra* note 143, at 24.

¹⁵⁷ *Id.* at 9.

¹⁵⁸ *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.).

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

¹⁶⁰ See Brody, *supra* note 143, at 9, and *infra* note 171.

¹⁶¹ Brody, *supra* note 143, at 9.

and comply with the obligation to extradite or prosecute.¹⁶² In response, the AU mandated Senegal to prosecute Habré on behalf of Africa,¹⁶³ seeking an African solution. Then Senegal amended its domestic laws to prepare for the trial.¹⁶⁴ 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,”¹⁶⁵ 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.¹⁶⁶ In the meantime, Habré had been prosecuted in Chadian domestic courts and even been sentenced to death *in absentia*.¹⁶⁷ Though Chad failed to extradite Habré from Senegal to enforce the judgement,¹⁶⁸ Habré could have been killed if sent back to Chad, where the right to a fair trial would be an unlikely luxury.¹⁶⁹ Meanwhile, in 2009, Belgium filed a case against Senegal at the International Court of Justice (ICJ).¹⁷⁰ The ICJ concluded that “Senegal must, without further delay, submit the case of Mr. Hissène Habré to its competent authorities for the purpose of

¹⁶² 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].

¹⁶³ 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; 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; 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. (last visited Mar 3, 2019).

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

¹⁶⁵ 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).

¹⁶⁶ *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 (last visited Mar 3, 2019).

¹⁶⁷ 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).

¹⁶⁸ *Id.*

¹⁶⁹ *Id.*

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

prosecution, if it does not extradite him.”¹⁷¹ Eventually, the “interminable political and legal soap opera”¹⁷² 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.¹⁷³

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.¹⁷⁴ 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.¹⁷⁵ 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

¹⁷¹ 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/icj/eng/decisions/2012.07.20_Belgium_v_Senegal.pdf (last visited Mar 3, 2019).

¹⁷² 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).

¹⁷³ 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).

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

¹⁷⁵ 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.

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.¹⁷⁶ 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.¹⁷⁷ The standard includes high moral character, in particular for their impartiality and integrity, and at least 10 years of related practicing experience.¹⁷⁸ For Presiding judges, there is an extra requirement of possessing qualifications for appointment to the highest judicial offices in their states.¹⁷⁹

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

¹⁷⁶ 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 (last visited Mar 3, 2019).

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

¹⁷⁸ *Id.* arts. 11(5), 12(2).

¹⁷⁹ *Id.* art. 11(5).

¹⁸⁰ *Id.* art. 12.

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

¹⁸² *Id.* arts. 11(1), 11(2).

¹⁸³ *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.¹⁸⁴ 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),¹⁸⁵ and Mr. Wafi Ougadéye, the Presiding Judge of the Appeal Chamber, who is from Mali and previously worked for the Supreme Court of Mali.¹⁸⁶

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

¹⁸⁴ 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-presses/643-nomination-des-juges-d-assises-d-appel.html>. (last visited Mar 3, 2019).

¹⁸⁵ *Id.*

¹⁸⁶ *Id.*

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

¹⁸⁸ *Statute*, *supra* note 125, arts. 11(5), 12(2).

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

¹⁹⁰ 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].

¹⁹¹ *Id.*

¹⁹² 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*.¹⁹³ 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.¹⁹⁴ The professionalism of Senegalese legal experts is highly recognized in Africa.¹⁹⁵ 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.¹⁹⁶ 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.¹⁹⁷ Several international criminal law experts were sent to Senegal to work with the prosecutors.¹⁹⁸ Training workshops were also held by international organizations such as the International Committee of the Red Cross (ICRC).¹⁹⁹

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

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

¹⁹⁴ 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>.

¹⁹⁵ *Id.*

¹⁹⁶ Czajkowski, *supra* note 167.

¹⁹⁷ *Agreement*, *supra* note 144, art. 10.

¹⁹⁸ Brody, *supra* note 143, at 32.

¹⁹⁹ *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 1990²⁰⁰ and is not extended to a broader context. After the appeal judgment in April 2017, the EAC closed its doors.²⁰¹

Habré has been the only person tried at the EAC, although the EAC's mandate is not narrowed down to only prosecute Habré.²⁰² Anyone responsible for the violations of international law during the period of Habré's regime may be prosecuted.²⁰³ Actually, the EAC has made efforts to seek the indictment of five other officials in Habré's administration.²⁰⁴ However, none of them were ultimately brought before the EAC.²⁰⁵ Three suspects remained at large.²⁰⁶ The other two were in Chad, but the Chadian government refused to transfer them to the EAC.²⁰⁷ 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.²⁰⁸ 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.²⁰⁹ Habré's lawyers have criticized that Déby was manipulating the EAC.²¹⁰

Based on its statute, the EAC can ask for extradition of suspects other than Habré within its mandate.²¹¹ The flaw lies in the Chadian government's non-cooperation with the EAC's extradition requests.²¹² 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.²¹³ 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.²¹⁴ The definitions of the former

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

²⁰¹ *Statute*, *supra* note 125, art. 37(1).

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

²⁰³ *Id.*

²⁰⁴ Brody, *supra* note 143, at 14.

²⁰⁵ *Id.*

²⁰⁶ *Id.*

²⁰⁷ *Id.*

²⁰⁸ Brody, *supra* note 143, at 15.

²⁰⁹ *Id.*

²¹⁰ *Id.* at 25.

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

²¹² Brody, *supra* note 143, at 14.

²¹³ 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>

²¹⁴ *Statute*, *supra* note 125, art. 4.

three crimes follow what the Rome Statute of the ICC states.²¹⁵ It is noticeable that torture is listed as a separate crime in the EAC's statute,²¹⁶ although torture appears as a circumstance in both crimes against humanity²¹⁷ and war crimes.²¹⁸ 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.²¹⁹ 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,²²⁰ the right to be presumed innocent,²²¹ the right to a free and independent counsel,²²² the right to security and protection,²²³ and the right to appeal.²²⁴ 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.²²⁵ His lawyers also refused to appear.²²⁶ 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.²²⁷ Habré was eventually required to appear in court by force, but he remained silent for the entire trial.²²⁸ After the conviction made by the Trial Chamber, Habré's court-appointed lawyers also made efforts to appeal for him.²²⁹

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

²¹⁵ *Id.* arts. 5, 6, & 7.

²¹⁶ *Id.* art. 8.

²¹⁷ *Id.* art. 6(g).

²¹⁸ *Id.* art. 7(1)(b).

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

²²⁰ *Statute, supra* note 125, art. 21(2).

²²¹ *Id.* art. 21(3).

²²² *Agreement, supra* note 144, art. 7(1).

²²³ *Agreement, supra* note 144, art. 9; *Statute, supra* note 125, art. 34.

²²⁴ *Statute, supra* note 125, art. 25(1).

²²⁵ Brody, *supra* note 143, at 15.

²²⁶ *Id.* at 15-16

²²⁷ *Id.*

²²⁸ *Id.*

²²⁹ Brody, *supra* note 143, at 18.

reviewing materials.²³⁰ 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.²³¹ 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.²³² 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.²³³ The little contact between Senegal and Chad made Habré's crimes committed in Chad unknown by the majority of Senegalese people.²³⁴ Unaware of his crimes, some leading Senegalese media even spoke in support of Habré, influenced by his political support in Senegal.²³⁵ 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.²³⁶ For the court's practice, the recordings of the entire trial at the EAC was

²³⁰ *Id.* at 32.

²³¹ *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/>

²³² Brody, *supra* note 143, at 32-33.

²³³ Ethnic Groups in Senegal, https://en.wikipedia.org/wiki/Ethnic_groups_in_Senegal (last visited Nov 24, 2019).

²³⁴ Brody, *supra* note 143, at 24.

²³⁵ *Id.*

²³⁶ *Statute, supra* note 125, art. 15(2)(3)(5).

broadcasted on the internet, radio, and television in both Chad and Senegal,²³⁷ which guaranteed people's access to the trial.²³⁸ The EAC also facilitated the travel of Chadian journalists to Senegal.²³⁹ 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.²⁴⁰ The coalition trained journalists in Senegal and Chad, organized public debates, launched a website, and drafted many materials to promote the case.²⁴¹

Mostly, hybrid courts are located in the originally affected area,²⁴² 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,²⁴³ 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.²⁴⁴ 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,²⁴⁵ which saves money and time, and puts victims' efforts, other institutions' long-term work, and collaborative investigations together.²⁴⁶

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.²⁴⁷

²³⁷ *Id.* art. 36; Brody, *supra* note 143, at 18.

²³⁸ *Statute*, *supra* note 125, art. 33.

²³⁹ Brody, *supra* note 143, at 13, 18.

²⁴⁰ *Id.* at 18.

²⁴¹ *Id.*

²⁴² 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.

²⁴³ Brody, *supra* note 143, at 33.

²⁴⁴ *Statute*, *supra* note 125, art. 17(4).

²⁴⁵ *Id.* art. 18(1)(2).

²⁴⁶ Brody, *supra* note 143, at 21-25.

²⁴⁷ *Id.* at 19-21.

For one thing, victims and civil parties played a fundamental role in bringing Habré to justice.²⁴⁸ 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.²⁴⁹ 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.²⁵⁰ According to the court's statute, victims can participate as civil parties,²⁵¹ which can be formed at any stage during investigations. Victims also have a right to representatives.²⁵² The EAC may assist victims in finding and paying representatives when necessary,²⁵³ and direct the witnesses and victims who appear before the court in an appropriate manner. The EAC also ensures their protection and security.²⁵⁴ Many of Habré's victims testified in court as witnesses. On July 15, 2013, the first 1,015 victims registered as civil parties.²⁵⁵ 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.²⁵⁶ The Court finally admitted 7, 396 civil parties.²⁵⁷ Strikingly, even rape victims came forward.²⁵⁸ 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.²⁵⁹

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."²⁶⁰ The trial itself "showcased the victims' efforts [to bring Habré to justice] and largely met their expectations."²⁶¹ When the victims say, "I feel relieved, I said everything I have been wanting to say,"²⁶²

²⁴⁸ *Id.*

²⁴⁹ *Id.*

²⁵⁰ 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>.

²⁵¹ *Statute*, *supra* note 125, art. 14.

²⁵² *Id.*

²⁵³ *Id.* arts. 14(3)(4), 15(4).

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

²⁵⁵ Brody, *supra* note 143, at 13.

²⁵⁶ *Id.* at 14

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

²⁵⁸ Brody, *supra* note 143, at 27.

²⁵⁹ *Id.*

²⁶⁰ Cruvellier, *supra* note 250.

²⁶¹ Brody, *supra* note 143, at 6.

²⁶² 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,”²⁶³ 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.²⁶⁴ 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.²⁶⁵ 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.²⁶⁶ 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.²⁶⁷

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

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

²⁶⁴ Brody, *supra* note 143, at 21-27.

²⁶⁵ Howse, *supra* note 77.

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

²⁶⁷ *Appeal Judgment*, *supra* note 257.

statute.²⁶⁸ 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.²⁶⁹ According to the EAC's statute, the sentence upon conviction should be between 30 years imprisonment and life imprisonment.²⁷⁰ The death penalty cannot be applied.²⁷¹ After a careful consideration of the gravity of crimes and the Defendant's personal situation, the EAC sentenced Habré to life imprisonment.²⁷²

The Appeals Chamber affirmed most charges against Habré.²⁷³ 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.²⁷⁴ But the Appeals Chamber overturned one conviction of directly raping a certain woman, because the charge had not been included in the initial indictment.²⁷⁵ However, the Appeals Chamber upheld Mr. Habré's conviction for other acts of sexual violence.²⁷⁶ All eight of the rape victims who were recognized by the Trial Chamber were recognized as such by the Appeals Chamber.²⁷⁷ With the Appeals Chamber's affirmation of the charges, Habré's conviction was finalized and he was sentenced to life imprisonment.²⁷⁸

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.²⁷⁹ According to the statute, the EAC may order a fine and/or a forfeiture for reparations²⁸⁰ and establish a victims' trust fund.²⁸¹ The Trial Chamber ordered Habré to pay for victims' compensation, but it did not give an exact amount or distribution of the compensation.²⁸² The Appeals Chamber clarified the total amount of

²⁶⁸ *Statute*, *supra* note 125, arts. 6, 7, & 8.

²⁶⁹ Brody, *supra* note 143, at 27.

²⁷⁰ *Statute*, *supra* note 125, art. 24(1).

²⁷¹ *Id.*

²⁷² *Judgment*, *supra* note 266, at 527-35.

²⁷³ *Appeal Judgment*, *supra* note 257.

²⁷⁴ *Id.*

²⁷⁵ *Id.*

²⁷⁶ *Id.*

²⁷⁷ *Id.*

²⁷⁸ *Appeal Judgment*, *supra* note 257, at 131.

²⁷⁹ *Id.*

²⁸⁰ *Statute*, *supra* note 125, arts. 24(2), 27(1)(2).

²⁸¹ *Id.* art. 28.

²⁸² *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.²⁸³ Applications of 3,489 persons were rejected.²⁸⁴

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.²⁸⁵ 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.²⁸⁶ 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.²⁸⁷ 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.²⁸⁸ "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.²⁸⁹ Limited assets, including a house and two small bank accounts in Senegal, have been identified that could be used for reparations.²⁹⁰ 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

²⁸³ *Appeal Judgment, supra* note 257, *Appendix*.

²⁸⁴ *Id.*

²⁸⁵ *Id.*

²⁸⁶ *Statute, supra* note 125, art. 27(1).

²⁸⁷ *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 (last visited Mar 4, 2019).

²⁸⁸ *Appeal Judgment, supra* note 257, *Appendix*.

²⁸⁹ *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).

²⁹⁰ *Id.*

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

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."²⁹³ The EAC is closer to a domestic court exercising universal jurisdiction over international crimes than to a traditional hybrid or international criminal court.²⁹⁴ 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."²⁹⁵ 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

²⁹¹ *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).

²⁹² *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).

²⁹³ Brody, *supra* note 143, *Summary*.

²⁹⁴ Williams II, *supra* note 165, at 1140.

²⁹⁵ *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.

THE FINAL FRONTIER: PREVENTING SPACE FROM BECOMING THE WILD WEST THROUGH THE ESTABLISHMENT OF INTERNATIONALLY RECOGNIZED PROPERTY RIGHTS

Chad Crowell*

I. INTRODUCTION

Imagine a giant, 120 mile wide, orb of cash floating in outer space. An orb so vast that it contains enough money to give each of the 7 billion people on Earth \$1.4 billion. Now picture millions more of these orbs, all up for grabs. Or imagine a bar of gold, floating in outer space, so large and so close it illuminates the night sky. These images may seem like fanciful dreams, but they are actually rooted in reality. In the asteroid belt.¹ In the Moon.² The resources available in outer space on planets, moons, and asteroids are worth near incalculable amounts.³ As such, a more appropriate, modern adaptation of the famous old saying might be: “There’s gold in them there stars.”⁴

Space may be the final frontier, but it need not become a lawless expanse akin to the Wild West. Over the past quarter century, space travel has become increasingly common and private organizations have begun to overtake public actors.⁵ This has led to the commercialization of space.⁶ While current commercial activities have been limited to putting satellites in

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¹ See Andrew Wong, *Space Mining Could Become A Real Thing — And It Could Be Worth Trillions*, CNBC (May 15, 2018, 12:39 AM), <https://www.cnbc.com/2018/05/15/mining-asteroids-could-be-worth-trillions-of-dollars.html>; Brid-Aine Parnell, *NASA Will Reach Unique Metal Asteroid Worth \$10,000 Quadrillion Four Years Early*, FORBES (May 26, 2017, 6:12 AM), <https://www.forbes.com/sites/bridaineparnell/2017/05/26/nasa-psyche-mission-fast-tracked/#5ab1274b4ae8>; Asteroids, NASA, <https://solarsystem.nasa.gov/asteroids-comets-and-meteors/asteroids/in-depth>.

² See Eames Yates, *How A Self-Made Billionaire Is Trying to Access \$16 Quadrillion Worth of Minerals on the Moon*, BUSINESS INSIDER (Oct. 4, 2016, 9:56 AM), <https://www.businessinsider.com/accessing-16-quadrillion-worth-of-minerals-on-moon-2016-9>.

³ Robert Walker, *Is There A Fortune To Be Made On Mars?*, FORBES (Sept. 26, 2016, 12:59 PM), <https://www.forbes.com/sites/quora/2016/09/26/is-there-a-fortune-to-be-made-on-mars/#3f8e62ed6e28>; Yates, *supra* note 2; See Parnell, *supra* note 1.

⁴ See Edward A. Johnson, “*Thar’s Gold in Them Thar Hills:*” *Georgia Gold History*, DIGITAL LIBRARY OF GEORGIA, <http://dlg.galileo.usg.edu/dahlonoga/history.php>.

⁵ See Kristin Houser, *Private Companies, Not Governments, Are Shaping The Future of Space Exploration*, FUTURISM (June 12, 2017), <https://futurism.com/private-companies-not-governments-are-shaping-the-future-of-space-exploration>; Alan Yuhas, *The New Space Race: How Billionaires Launched the Next Era of Exploration*, THE GUARDIAN (Feb. 9, 2018, 11:31 AM), <https://www.theguardian.com/science/2018/feb/09/new-space-race-billionaires-elon-musk-jeff-bezos>.

⁶ See Yuhas, *supra* note 5.

orbit or delivering supplies to the International Space Station (ISS)⁷, the next inevitable progression will lead to commercial human space travel to the ISS and beyond.⁸ As low-orbit travel becomes increasingly routine, States and companies have set their sights on the next logical steps – traveling further out into space to mine for resources and colonizing the Moon and Mars.⁹ Currently, a number of international agreements govern State actions in space, but these treaties are decades old and fail to fully contemplate nongovernmental actors and the commercialization of space.¹⁰ In order to appropriately deal with the rapid progression of technology and the new players in space travel, a new set of guidelines must be established. These guidelines must govern property rights on celestial bodies, preventing wholesale claims to entire planets while maintaining countries' and companies' incentives to be first. This article proposes guidelines that establish temporary, renewable property rights to encourage use and innovation while preventing wasteful monopolies and stagnation.

In order to be able to properly craft a workable system to govern property rights on celestial bodies, one must first consider the current international and domestic regulations in place. This article analyzes United Nations (U.N.) Treaties that regulate activities in space, which are outdated and ill-equipped to deal with the current state of technology and space travel. It will also briefly analyze how the Antarctic Treaty System can be used as a reference when formulating new space-related treaties. This article then conducts an analysis of U.S. domestic law, which shows that U.S. lawmakers are beginning to understand the need to have effective regulations and guidelines in place. However, as these U.S. laws are not internationally based, they do little to effectively regulate the global space industry.

Next, this article analyzes current discussions over celestial property rights, highlighting serious gaps in the conversation. While there is near unanimous agreement that increased guidance is needed over celestial property rights, many people believe it is an issue for the future. But in reality, this is a problem that must be addressed today.¹¹ Further, those

⁷ See *id.*; Houser, *supra* note 5.

⁸ Houser, *supra* note 5.

⁹ See e.g. LUXEMBOURG SPACE AGENCY, <https://space-agency.public.lu/en/space-resources.html> (last visited Sept. 30, 2019); Vladimir Soldatkin, *Russia Wants to Join Luxembourg in Space Mining*, REUTERS (Mar. 6, 2019, 9:06 AM), <https://www.reuters.com/article/us-luxembourg-russia-space/russia-wants-to-join-luxembourg-in-space-mining-idUSKCN1QN10Q>; *Making Life Multiplanetary*, SPACEX, <https://www.spacex.com/mars> (last visited Sept. 30, 2019).

¹⁰ See e.g. Outer Space Treaty, *infra* note 24; Andrew Zaleski, *Luxembourg Leads the Trillion-Dollar Race to Become the Silicon Valley of Asteroid Mining*, CNBC (Apr. 16, 2018, 9:01 AM), <https://www.cnbc.com/2018/04/16/luxembourg-vies-to-become-the-silicon-valley-of-asteroid-mining.html>. Not only is international law lacking in this area, but individual States' laws are also sparse. In 2017, Luxembourg became the only country other than the U.S. to adopt laws governing rights over resources from space.

¹¹ See Zaleski, *supra* note 10; *Making Life Multiplanetary*, *supra* note 9. SpaceX has plans to put humans on Mars by 2024 for long term habitation, demonstrating one of the reasons celestial property rights must be taken under immediate consideration.

discussions that do actually propose a solution fail to properly weigh national and corporate interests in a fair system.

Finally, this article proposes a new solution in order to ensure countries are protected against land grabbing akin to that of the 18th century colonial powers and to ensure corporations are provided sufficient guidance to protect against chaotic, unguided power struggles. The proposed solution allows for temporary property rights to be established automatically upon first arrival in a location. Under the proposed guidelines, these property ownership rights are renewable at the end of a set time period, provided the land on the celestial body is being efficiently used and the actor has not violated the rights of others. Further, these property rights are to be overseen by an international tribunal, under the United Nations and the International Court of Justice, with compulsory jurisdiction in all matters.

II. BACKGROUND

Property rights are not a new issue for States to contemplate. In the Age of Discovery, explorers planted flags and claimed unfamiliar lands for States.¹² Contentious, and often armed, conflicts over property rights have occurred throughout history in attempts to determine which State would control vast expanses of land and resources.¹³ The diplomatic tactics used during the ‘Partition of Africa’ and the Berlin Conference of 1884, which established European claims to African lands, show that contemplating land right issues before armed conflicts arise from them is the most prudent approach.¹⁴ In 1961, States around the world effectuated this diplomatic approach through the implementation of a treaty over the largest unclaimed land mass left on Earth – Antarctica.¹⁵ Recognizing the importance of an established framework of laws to prevent armed conflicts, the international community has attempted to put forth a number of treaties and agreements governing activities in space.

¹² See *Russia Plants Flag Under N Pole*, BBC NEWS (Aug. 2, 2007), <http://news.bbc.co.uk/2/hi/europe/6927395.stm> (quoting a Canadian official in modern times stating that “[t]his isn't the 15th Century. You can't go around the world and just plant flags and say 'We're claiming this territory'.")

¹³ See *French and Indian War*, HISTORY, <https://www.history.com/topics/native-american-history/french-and-indian-war> (last updated Sept. 6, 2019). The French and Indian War was fought between the French and British over territories in North America, with Britain gaining vast tracts of land after winning the war.

¹⁴ See Maureen Shisia, *What Was the Scramble For Africa?*, WORLDATLAS, <https://www.worldatlas.com/what-was-the-scramble-for-africa.html> (last updated Feb. 27, 2018).

¹⁵ The Antarctic Treaty (Dec. 1, 1959), 12 U.S.T. 794, 402 U.N.T.S. 71. See also *The Antarctic Treaty*, SECRETARIAT OF THE ANTARCTIC TREATY, <https://www.ats.aq/e/antarctic treaty.html> (last visited Oct. 18, 2019); *Antarctic Treaty*, U.S. STATE DEP'T, <https://www.state.gov/t/avc/trty/193967.htm> (last updated Jan. 20, 2017).

A. *The United Nations and U.N. Space Agreements*

In the mid-twentieth century, in the midst of the Space Race, the international community realized that there was a need for a governing body to oversee space-based activities. As a result, in 1958, the United Nations Office for Outer Space Affairs (UNOOSA) was founded.¹⁶ UNOOSA is in charge of promoting international peaceful uses of outer space, maintaining the United Nations Register of Objects Launched into Outer Space, and overseeing the implementation of a number of international treaties concerning space-based activities.¹⁷ UNOOSA also operates as the secretariat of a number of U.N. committees, including the United Nations Committee on the Peaceful Uses of Outer Space (COPUOS).¹⁸ COPUOS is tasked with ensuring international cooperation and peaceful use of outer space, as well as assessing legal problems that arise from space exploration.¹⁹ By ensuring international cooperation in outer space and assessing potential legal problems, COPOUS has been instrumental in creating space treaties and defining legal principles in outer space.²⁰

Through a number of declarations and the five major space treaties, detailed below, UNOOSA and COPOUS have helped outline the international legal principles governing outer space since the start of the Space Race.²¹ This article will review the various U.N. agreements governing activities in outer space and on celestial bodies. It will be apparent that the established outer space agreements are outdated and more recent ones have failed to garner the support needed from the international community to make them effectual.

i. *The Declaration of Legal Principles Governing the Activities of States in the Exploration and Uses of Outer Space*

The first major space-focused international agreement created was the Declaration of Legal Principles Governing the Activities of States in the Exploration and Uses of Outer Space (1963 Declaration).²² Through a U.N. General Assembly Resolution, this declaration established general principles of peaceful international cooperation in outer space and space-based

¹⁶ *History*, UNITED NATIONS OFFICE FOR OUTER SPACE AFFAIRS, <http://www.unoosa.org/oosa/en/aboutus/history/index.html> (last visited Oct. 18, 2019).

¹⁷ *Roles and Responsibilities*, UNITED NATIONS OFFICE FOR OUTER SPACE AFFAIRS, <http://www.unoosa.org/oosa/en/aboutus/roles-responsibilities.html> (last visited Oct. 18, 2019).

¹⁸ *Id.*

¹⁹ *Committee on the Peaceful Uses of Outer Space*, UNITED NATIONS OFFICE FOR OUTER SPACE AFFAIRS, <http://www.unoosa.org/oosa/en/ourwork/copuos/index.html> (last visited Oct. 18, 2019).

²⁰ *See id.*

²¹ *Id.*

²² G.A. Res. 1962 (XVIII), Declaration of Legal Principles Governing the Activities of States in the Exploration and Uses of Outer Space (Dec. 13, 1963).

activities.²³ However, as a mere resolution, this declaration has little binding power.

ii. The Outer Space Treaty

Ten years after the first-ever satellite, Sputnik 1, was launched into space, and at the height of the Space Race, the international community came together to create the first treaty governing activities in outer space.²⁴ In 1967, the Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies, also known as the Outer Space Treaty, finally codified legal guidelines to govern international activities in space.²⁵ The Outer Space Treaty was the first of the five major U.N. agreements regarding space-based activities, and it put many of the principles from the 1963 Declaration into a treaty.²⁶ The Outer Space Treaty included provisions stating: outer space is not subject to claims of sovereignty, by any means; outer space is free for exploration by all; States are responsible for the national space activities of both governmental and nongovernmental actors; and States must avoid harmfully contaminating celestial bodies.²⁷ The Outer Space Treaty has been widely recognized in the international community, with 107 parties and 23 non-party signatories.²⁸

iii. The Rescue Agreement

In 1968, the second of the major U.N. space treaties was created: the Agreement on the Rescue of Astronauts, the Return of Astronauts and the Return of Objects Launched into Outer Space.²⁹ Also known as the Rescue Agreement, this treaty is focused on astronaut rescues and international

²³ *Id.*

²⁴ Steve Garber, *Sputnik and the Dawn of the Space Age*, NASA (Oct. 10, 2007), <https://history.nasa.gov/sputnik/>; Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies (Jan. 27, 1967), 18 UST 2410, 610 UNTS 205 [hereinafter Outer Space Treaty].

²⁵ Outer Space Treaty, *supra* note 24.

²⁶ *Id.*

²⁷ *Id.*

²⁸ U.N. Committee on the Peaceful Uses of Outer Space, *Status of International Agreements relating to activities in outer space as at 1 January 2018*, U.N. Doc A/AC.105/C.2/2018/CRP.3 (Apr. 11, 2018), available at http://www.unoosa.org/documents/pdf/spacelaw/treatystatus/AC105_C2_2018_CRP03E.pdf. International agreements are only binding on those States that choose to partake. For international agreements, there are parties and non-party signatories. A party is a State that has signed onto the agreement and ratified it, making it legally binding. A non-party signatory is a State that has signed onto the agreement, indicating that it intends to ratify it, but has not yet officially ratified it. Therefore, non-party signatories are not legally bound by the agreement.

²⁹ See Agreement on the Rescue of Astronauts, the Return of Astronauts and the Return of Objects Launched into Outer Space (Apr. 22, 1968), 19 UST 7570, 672 UNTS 119 [hereinafter Rescue Agreement].

cooperation in such activities.³⁰ Though not on the same level as the Outer Space Treaty, the Rescue Agreement has garnered widespread international acclaim with 92 parties and 24 non-party signatories.³¹

iv. The Liability Convention

In 1972, the international community established the third major treaty governing space-based activities in the Convention on International Liability for Damage Caused by Space Objects.³² Also called the Liability Convention, this agreement focused on liability for space launches and items in orbit (or falling out of orbit).³³ With 89 parties and 22 non-party signatories, the Liability Convention has received wide international recognition, but illustrates the continued decline in international agreement on how activities in space should be governed since the Outer Space Treaty.³⁴

v. The Registration Convention

As the Space Race came to an end, the fourth major U.N. agreement over space-based activities was created. The Convention on Registration of Objects Launched into Outer Space, also called the Registration Convention, required the registration of space launches and the orbit of all space objects.³⁵ The Registration Convention, like the Rescue Agreement and the Liability Convention, does not include any provisions relating to property rights on celestial bodies or the right to appropriate resources from planets and asteroids.³⁶ These rights, which had been discussed in the Outer Space Treaty, were not redefined by any of the three subsequent international agreements on space-based activities.³⁷ With only 67 parties and 3 non-party signatories, the Registration Convention shows the continued decline in participation from prior agreements. This decline is starkly indicative of States' unwillingness to join international agreements regulating activities in outer space in recent years.³⁸

³⁰ *Id.* at art. 2. This agreement did not include any provisions relating to property rights or the rights to appropriating resources on planets, asteroids, and other celestial bodies.

³¹ U.N. Committee on the Peaceful Uses of Outer Space, *supra* note 28.

³² Convention on International Liability for Damage Caused by Space Objects (Mar. 29, 1972), 24 UST 2389, 961 UNTS 187 [hereinafter Liability Convention].

³³ *Id.* at art. 2. This agreement did not include any provision relating to property rights or the rights to appropriating resources on celestial bodies.

³⁴ See U.N. Committee on the Peaceful Uses of Outer Space, *supra* note 28.

³⁵ Convention on Registration of Objects Launched into Outer Space (Jan. 14, 1975), 28 UST 695, 1023 UNTS 15 [hereinafter Registration Convention].

³⁶ See *id.*; Liability Convention, *supra* note 32; Rescue Agreement, *supra* note 29.

³⁷ Registration Convention, *supra* note 35; Liability Convention, *supra* note 32; Rescue Agreement, *supra* note 29; Outer Space Treaty, *supra* note 24.

³⁸ See U.N. Committee on the Peaceful Uses of Outer Space, *supra* note 28.

vi. The Moon Treaty

The fifth and final major U.N. agreement regarding space-based activities is the Agreement Governing the Activities of States on the Moon and Other Celestial Bodies, also known as the Moon Treaty.³⁹ Twelve years after the Outer Space Treaty first codified international regulations for activities in space, the Moon Treaty attempted to update these guidelines.⁴⁰ Updating these guidelines was essential, as, in those twelve years, the U.S. had landed men on the moon and the number of countries with the capability to launch items into space had more than doubled.⁴¹

The Moon Treaty expanded upon the 1967 Outer Space Treaty, including provisions such as: banning military bases from being established on celestial bodies; banning the claiming of sovereignty by a State over any portion of a celestial body; banning the ownership of celestial bodies by any organization or person; allowing international governmental organizations to own property on celestial bodies; requiring approval from other States prior to the exploration or use of a celestial body; and establishing an international regime to oversee space exploration and ensure proper management of celestial resources.⁴² The Moon Treaty also sought to establish jurisdiction for space-based activities, with international law as the governing body of law over all celestial bodies and activities in space.⁴³ This would have been in direct contrast to current international practice, which gives a country responsibility for and jurisdiction over anything it sends into space.⁴⁴

The Moon Treaty has received virtually no support in the international community.⁴⁵ The treaty has only 18 parties and 4 non-party signatories, and no country that currently engages in manned space exploration has become a party.⁴⁶ The Moon Treaty is indicative of the culmination of the sharp decline in countries' willingness to agree to international agreements governing their activities in space,⁴⁷ as those activities grow in size and frequency.

³⁹ G.A. Res. 34/68, Agreement Governing the Activities of States on the Moon and Other Celestial Bodies (Dec. 5, 1979) [hereinafter Moon Treaty].

⁴⁰ *See id.*

⁴¹ *Timeline: 50 Years of Spaceflight*, SPACE.COM (Sept. 28, 2012), <https://www.space.com/4422-timeline-50-years-spaceflight.html>.

⁴² Moon Treaty, *supra* note 39.

⁴³ *Id.*

⁴⁴ *International Space Station Legal Framework*, EUROPEAN SPACE AGENCY, https://m.esa.int/Science_Exploration/Human_and_Robotic_Exploration/International_Space_Station/International_Space_Station_legal_framework (last visited Oct. 18, 2019).

⁴⁵ Louis de Gouyon Maitgnon, *The 1979 Moon Agreement*, SPACE LEGAL ISSUES (July 17, 2019), <https://www.spacelegalissues.com/the-1979-moon-agreement/>.

⁴⁶ U.N. Committee on the Peaceful Uses of Outer Space, *supra* note 28.

⁴⁷ When analyzing the number of parties and signatories to the Outer Space Treaty (1967) as compared to the number of parties and signatories to the Moon Treaty (1979). *See id.*; Outer Space Treaty, *supra* note 24.

While there have been other U.N. General Assembly Resolutions regulating activities in outer space,⁴⁸ no major international treaty governing activities in outer space and on celestial bodies has been created since 1979.⁴⁹ It has been forty years since the last international treaty on space-based activities was created and even longer since an agreement has received widespread international recognition.⁵⁰

B. *An Analogous Agreement – The Antarctic Treaty System*

The international treaty governing Antarctica is analogous to the U.N. treaties that govern activities in outer space. Antarctica is remote, cold, and barren – just like the celestial bodies in our solar system. Further, like the planets and asteroids in question, Antarctica has no indigenous population.⁵¹ Yet, Antarctica has been the site of research and exploration by a number of nations, all done peacefully and in accordance with international agreements.⁵² Therefore, internationally recognized regulations and treaties governing activities in the Antarctic can be used as a helpful guideline when looking to establish a successful, enduring system of regulating property rights on celestial bodies.

In 1959, the Antarctic Treaty System (ATS) was established to govern the use of land in Antarctica.⁵³ The treaty came about as the result of competing claims over Antarctic territories by seven different nations, with another five nations having outposts established on the continent at that time.⁵⁴ It sought to regulate activities in order to prevent open hostilities from developing from the competing claims.⁵⁵

The ATS was essential in ensuring disputes over the veracity of claims to land on the continent did not escalate to armed conflicts. The ATS did not rebuke any State's territorial sovereignty claims that had already been established when the ATS was made; however, it prevents States from claiming new land.⁵⁶ The ATS also states that disputes on the frozen

⁴⁸ See e.g. G.A. Res. 51/122, Declaration on International Cooperation in the Exploration and Use of Outer Space for the Benefit and in the Interest of All States, Taking into Particular Account the Needs of Developing Countries (Feb. 4, 1996). This declaration stated that space would be used for the common good and current States with developed space-based capabilities would help facilitate the development of such capabilities by other States. It did not include any provision relating to property rights or the rights to appropriating resources on celestial bodies, and as a mere resolution it lacks the binding power of a treaty.

⁴⁹ See Moon Treaty, *supra* note 39.

⁵⁰ See *id.*; Registration Convention, *supra* note 35.

⁵¹ Dep't of the Env't and Energy, *How Many People Live in Antarctica*, AUSTRALIAN ANTARCTIC DIVISION, <http://www.antarctica.gov.au/about-antarctica/people-in-antarctica/how-many> (last updated Mar. 11, 2003).

⁵² Arthur B. Ford, *Antarctica*, ENCYCLOPEDIA BRITANNICA, <https://www.britannica.com/place/Antarctica> (last visited Oct. 18, 2019).

⁵³ See The Antarctic Treaty, *supra* note 15.

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ *Id.*

continent between States should be resolved through peaceful discussion or, with the voluntary consent of all parties, through the International Court of Justice.⁵⁷ For years, the ATS has successfully prevented the international community from coming to blows over disputes in Antarctica. However, nearly fifty years after its establishment, ATS faces new, unforeseen challenges.⁵⁸ Changes in the global environment and technological advancements have led to new developments in Antarctica, such as increased fishing and tourism, presenting new challenges to the treaty and testing ATS's mettle.⁵⁹

C. *Domestic Space Law in the United States*

The United States has always been a pioneer in space-related activities. A number of domestic councils and organizations have been created to get the U.S. into outer space and to deal with the various aspects of space travel.⁶⁰ In recent years, the U.S. has also begun to demonstrate that it understands private actors' desires to become involved in space travel; U.S. lawmakers have begun to loosen legal restrictions and pass laws to help private actors and to facilitate the commercialization of space.⁶¹

In 1958, the United States passed the National Aeronautics and Space Act (1958 Space Act), establishing the National Aeronautics and Space Administration (NASA)⁶² and the National Aeronautics and Space Council (NASC).⁶³ The NASC, now known as the National Space Council (NSC), has been in effect intermittently since its establishment.⁶⁴ The NSC, when operative, serves to facilitate the sharing of technological information and promote increased space technology and travel.⁶⁵ This includes sharing technology and information between public and private actors, as can be seen by the various corporate and public service members of the National Space

⁵⁷ *Id.*

⁵⁸ See Klaus Dodds, *Governing Antarctica: Contemporary Challenges and the Enduring Legacy of the 1959 Antarctic Treaty*, 1 *Glob. Policy* 1 (2010).

⁵⁹ *Id.*

⁶⁰ See e.g. *NASA History Overview*, NASA, <https://www.nasa.gov/content/nasa-history-overview> (overview (last visited Oct. 24, 2019)); *Mission*, OFFICE OF SPACE COMMERCE, <https://www.space.commerce.gov/about/mission/> (last visited Oct. 24, 2019).

⁶¹ See *US Commercial Space Launch Competitiveness Act*, Pub L. No. 114-90 (2015).

⁶² *NASA History Overview*, *supra* note 60; *Mission*, *supra* note 60.

⁶³ National Aeronautics and Space Act, 42 U.S.C. § 2451 et seq., Pub. L. No. 85-568 (1958), *repealed* by National Aeronautics and Space Program, 41 U.S.C. § 20101 et seq., 124 Stat. 3328 (2010); National Aeronautics and Space Administration Authorization Act, Fiscal Year 1989, Pub. L. No. 100-685, 102 Stat. 4083 (codified as amended at 42 U.S.C. § 2471 (2010)).

⁶⁴ *NASA Statement on National Space Council*, NASA, <https://www.nasa.gov/press-release/nasa-statement-on-national-space-council> (last updated Jun. 18, 2018).

⁶⁵ NASA, CHARTER OF THE NATIONAL SPACE COUNCIL USERS' ADVISORY GROUP (2017), available at , <https://www.nasa.gov/content/national-space-council-users-advisory-group>.

Council Users' Advisory Group.⁶⁶ At the time, however, the 1958 Space Act made space travel wholly owned by the U.S. government, preventing space technology from being used by private actors or for commercial purposes.⁶⁷

After space travel significantly developed, the Commercial Space Launch Act of 1984 (1984 Space Act) was passed.⁶⁸ The Act was intended to facilitate the commercialization of space.⁶⁹ It overturned the wholesale governmental ownership of space travel and restrictions on private space travel from the 1958 Act, paving the way for private actors to begin space travel and for the commercialization of space.⁷⁰ However, the 1984 Act did not address potential property rights over celestial bodies or resources found in space.⁷¹

U.S. domestic law addressed space-related property rights after the Moon landings.⁷² Federal law and NASA policy states that any lunar samples collected are permanent property of the U.S. government.⁷³ However, this contradicts both the Outer Space Treaty, to which the U.S. is a party, and the Moon Treaty, to which the U.S. is not even a signatory.⁷⁴ Both treaties establish that States cannot claim ownership over any items on or from celestial bodies.⁷⁵

In 2015, the U.S. continued its deviation from international agreements with regards to ownership over items in space on celestial bodies. The U.S. Commercial Space Launch Competitiveness Act, also known as the SPACE Act of 2015, was implemented to help encourage development and innovation in space-based corporate endeavors.⁷⁶ The SPACE Act of 2015 establishes that the United States recognizes private rights to resources found in space.⁷⁷ However, the property or resource must be actually obtained before rights can be claimed.⁷⁸ Recognition of individual property rights to

⁶⁶ *Id.* The National Space Council Users' Advisory Group consists of members such as: Marillyn Hewson, CEO of Lockheed Martin; Gwynne Shotwell, President and COO of SpaceX; Dennis Muilenburg, CEO of the Boeing Company; and Buzz Aldrin, former Gemini 12 and Apollo 11 astronaut.

⁶⁷ *National Aeronautics and Space Act, supra* note 63.

⁶⁸ *Commercial Space Launch Act of 1984*, 51 U.S.C. § 50901 et seq., Pub. L. No. 98-575 (1984).

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² See NASA, IG-12-007, NASA'S MANAGEMENT OF MOON ROCKS AND OTHER ASTROMATERIALS LOANED FOR RESEARCH, EDUCATION, AND PUBLIC DISPLAY 12 (2011), available at <https://oig.nasa.gov/audits/reports/FY12/IG-12-007.pdf>.

⁷³ *Id.*

⁷⁴ See Outer Space Treaty, *supra* note 24; Moon Treaty, *supra* note 39.

⁷⁵ Outer Space Treaty, *supra* note 24; Moon Treaty, *supra* note 39.

⁷⁶ *US Commercial Space Launch Competitiveness Act*, Pub L. 114-90 (2015) [hereinafter *SPACE Act*].

⁷⁷ See *id.*; Outer Space Treaty, *supra* note 24; Moon Treaty, *supra* note 39.

⁷⁸ *SPACE Act, supra* note 76. The law states that actions taken to "obtain" a resource include "to possess, own, transport, use, and sell it."

space resources is in direct contradiction with international treaties.⁷⁹ However, the SPACE Act of 2015 asserts that there is no claim of sovereignty or ownership over a celestial body being made by the United States, in line with previous international treaties.⁸⁰

The U.S. Department of Commerce has recognized the impending commercialization of space for many years. In 1988, the Office of Space Commerce within the U.S. Department of Commerce was created to facilitate the development of a United States based commercial industry in space.⁸¹ In 2018, the U.S. Secretary of Commerce announced plans to create a new organization, the Space Policy Advancing Commerce Enterprise (SPACE) Administration, which would encompass the Office of Space Commerce.⁸² These recent developments within the U.S. Department of Commerce, along with the SPACE Act of 2015, show that U.S. lawmakers understand the growing importance of creating regulations to properly govern space-based commercial activities as technology rapidly progresses.⁸³

D. *Space-Based Case Law*

For centuries, people have attempted to claim ownership over the Moon, planets, and stars,⁸⁴ from claims made by Prussian King Frederick the Great in the 1700s to those made by ordinary people in the early 21st century.⁸⁵ These claims ranged from ownership over the Moon to ownership over all of outer space itself.⁸⁶ Many of the claims are so outlandish that they are met by the courts with incredulosity and promptly dismissed.⁸⁷ However, as these claims grow in number and humankind travels further out into the stars, court rulings and reasoning behind such cases grows in importance.

Unsurprisingly, international and U.S. case law on space-based activities is significantly limited. One U.S. case, directly relating to property rights in space, is that of *Nemitz v. NASA*.⁸⁸ *Nemitz* was a case concerning

⁷⁹ Compare Outer Space Treaty, *supra* note 24, with *id.*

⁸⁰ Compare SPACE Act, *supra* note 76, with Outer Space Treaty, *supra* note 24, and Moon Treaty, *supra* note 39.

⁸¹ See *Legal and Departmental Authorities of the Office of Space Commerce*, OFFICE OF SPACE COMMERCE, <https://www.space.commerce.gov/law/office-of-space-commercialization/> (last visited Sept. 30, 2019).

⁸² See Sean Higgins, *Trump Makes Commerce Department the New Space Agency*, WASHINGTON EXAMINER (June 26, 2018), <https://www.washingtonexaminer.com/policy/economy/trump-makes-commerce-department-the-new-space-agency>.

⁸³ See OFFICE OF SPACE COMMERCE, *supra* note 81; SPACE Act, *supra* note 76.

⁸⁴ Adam Mann, *Space Cases: The Weirdest Legal Claims in Outer Space*, WIRED (June 1, 2012, 6:30 AM), <https://www.wired.com/2012/06/space-cases/>.

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ *Nemitz v. U.S.*, 2004 WL 3167042, *1 (D. Nev. 2004), *aff'd sub nom*, *Nemitz v. NASA*, 126 Fed. App'x 343 (9th Cir. 2005).

whether or not a private citizen could own an asteroid.⁸⁹ Nemitz had filed an ownership claim for the asteroid Eros in an online registry for celestial land claims.⁹⁰ Nemitz claimed he wanted to mine the asteroid for its platinum, but NASA stated that Nemitz had no legal standing to claim ownership and his claim violated the 1967 Outer Space Treaty.⁹¹ In 2015, the Ninth Circuit affirmed the district court's ruling that Nemitz was unable to prove actual ownership and did not have legal standing to claim ownership over the asteroid.⁹² Despite his claim of ownership, Nemitz purchased the asteroid from a party that had no real legal claim to the property rights of the asteroid.⁹³ Furthermore, the distinction was made that Nemitz's claim came from Earth.⁹⁴ Nemitz had never been to the asteroid or even sent any form of probe to the asteroid.⁹⁵ Had Nemitz made physical contact with the asteroid, his property ownership claim would potentially have been seen as more legitimate by the court, under the SPACE Act of 2015.⁹⁶ However, as it stands, *Nemitz* is a clear instance of a U.S. court upholding the validity of provisions from within the Outer Space Treaty as binding on the United States and on a private U.S. citizen.⁹⁷

The preceding review of international space agreements, analogous international agreements, and U.S. domestic space laws shows the need for an updated system of international laws that govern activities in space. While some nations have developed domestic laws to govern activities and property rights in space, there is no up-to-date international legal consensus on the issue. As activities in space become more commonplace, legal issues will inevitably arise.⁹⁸ This article will next discuss the problem at hand, analyze some of the various proposed solutions to establish an international legal framework that governs space, and propose a new solution that would

⁸⁹ *Id.*

⁹⁰ *Id.*; Keay Davidson, *Final Frontier For Lawyers -- Property Rights In Space / Land Claims, Commercial Schemes and Dreams Have Legal Eagles Hovering*, SF GATE (Oct. 16, 2005, 4:00 AM), <https://www.sfgate.com/news/article/Final-frontier-for-lawyers-property-rights-in-2564610.php>. Ironically, Nemitz's claim was filed in an unofficial online registry for celestial lands that had been created solely by a law professor in an attempt to stir up discussion on this very topic – legal issues in space.

⁹¹ See also Davidson, *supra* note 90.

⁹² *Id.*

⁹³ *Id.*; *Nemitz*, 2004 WL 3167042, at *1.

⁹⁴ See Blake Gilson, *Defending Your Client's Property Rights in Space: A Practical Guide for the Lunar Litigator*, 80 FORDHAM L. REV. 1367, 1391 (2011).

⁹⁵ *Id.*

⁹⁶ *Id.*; K.G. Orphanides, *American Companies Could Soon Mine Asteroids for Profit*, WIRE2, (Nov. 12, 2015), <https://www.wired.co.uk/article/how-to-mine-asteroids-for-fun-and-profit>.

⁹⁷ See *Nemitz*, 2004 WL 3167042, at *1; see generally Outer Space Treaty, *supra* note 24.

⁹⁸ See *Timeline: 50 Years of Spaceflight*, *supra* note 41. See generally Mike Baker, *NASA Astronaut Anne McClain Accused by Spouse of Crime in Space*, N.Y. TIMES (Aug. 23, 2019), <https://www.nytimes.com/2019/08/23/us/nasa-astronaut-anne-mcclain.html> (discussing the first known crime committed in space).

establish temporary, renewable property rights overseen by an international tribunal.

III. ANALYSIS

A. *The Cosmic Void of Adequate Regulation*

Despite a lack of recent, widely accepted international agreements on space-based activities, many people recognize the need for a better set of regulations, more honed to the circumstances of today's technological and economic environment. The most recent and widely recognized international agreement governing property rights in space is over fifty years old.⁹⁹ In those fifty years, the number of countries with the capability to send rockets into space has significantly grown and private actors have become involved.¹⁰⁰ The antiquated regulations that are intended to guide and restrict these modern day State and non-State actors are from a time long ago, when there were no private corporations sending rockets into outer space and the U.S. and the USSR were the only countries with space-based capabilities.¹⁰¹

One need not pick up a law school property book to know how important property rights are and how much people want to feel secure in what they own. Without property rights, there is little incentive to be first to a location. Furthermore, a lack of property rights will likely lead to high tensions between corporations, all vying for the same mineral rich deposits on celestial bodies.¹⁰² While property rights are essential, and need to be further developed for space and celestial bodies, the laws and regulations over property rights in space must be designed in a way to prevent any discouragement of innovation and exploration.¹⁰³

It is essential to address property rights on celestial bodies as the commercialization of space grows exponentially.¹⁰⁴ Furthermore, many State and non-State actors have indicated desires to colonize the Moon and Mars in the near future.¹⁰⁵ Currently, the only international regulations in

⁹⁹ See Outer Space Treaty, *supra* note 24.

¹⁰⁰ See *Timeline: 50 Years of Spaceflight*, *supra* note 41; see e.g., *About SpaceX*, SPACEX, <https://www.spacex.com/about>.

¹⁰¹ See David Sarnacki, *Property Rights in Space: Asteroid Mining*, 2 TEX. A&M J. PROP. L. 123, 123 (2014); See *Timeline: 50 Years of Spaceflight*, *supra* note 41.

¹⁰² See Sarnacki, *supra* note 101, at 138.

¹⁰³ *Id.* at 124.

¹⁰⁴ Jay Bennett, *One Chart Shows How Much SpaceX Has Come to Dominate Rocket Launches*, POPULAR MECHANICS (July 13, 2017), <https://www.popularmechanics.com/space/rockets/a27290/one-chart-spacex-dominate-rocket-launches/> (showing SpaceX's market share of space launches has gone from 5% in 2013 to 45% in 2017).

¹⁰⁵ See *Colonizing the Moon*, NASA, <https://sservi.nasa.gov/articles/colonizing-the-moon/> (last visited Oct. 11, 2019); Melia Robinson, *Elon Musk Wants to Colonize Mars with SpaceX – Here's What He Said It Will Be Like as One of the First Residents*, BUSINESS INSIDER (Mar. 11, 2018), <https://www.businessinsider.com/elon-musk-colonization-of-mars-sxsw-2018-3>.

place state that property cannot be owned.¹⁰⁶ Once colonies on celestial bodies start appearing and businesses start mining resources from celestial bodies, these regulations will be insufficient. State and non-State actors will likely demand some form of ownership rights over the property their colony is located on or over the resources they mined from celestial bodies. Without these property rights, a colony's right to the land it is located on will be undefined, and any mining of resources in space could be considered a violation of international treaties, which would significantly stifle the commercialization of space.¹⁰⁷

B. A Regulatory Black Hole: The Current State of Laws Governing Celestial Property

Looking at how States claimed land during the Age of Exploration can help determine what has historically been recognized as a valid territorial claim.¹⁰⁸ During the Age of Exploration, States believed they could claim land if an explorer planted their flag on it.¹⁰⁹ The essential element here is the *planting of the flag*. It was understood that a physical presence was essential to being able to effectively assert rights over land. This sentiment should continue into today's practice with property on celestial bodies. While current treaties preempt and prohibit any land claims on celestial bodies, if an appropriate claim were to be made, it would surely require some form of physical presence there.¹¹⁰

Current U.N. treaties establish that States cannot claim sovereignty over, own property on, or exploit resources found on celestial bodies.¹¹¹ This poses serious problems regarding colonization rights and the ability to conduct commercial activities in space. Technically, according to the U.N. treaties, actors would have no valid legal claim of ownership over the land they settled and cultivated or the resources they mined.¹¹²

Consideration given to the ATS provides insight not only into a possible system that may work to regulate international activities on celestial bodies, but also to the flaws of the current system. While the ATS has been

¹⁰⁶ See Outer Space Treaty, *supra* note 24; Moon Treaty, *supra* note 39; Sarnacki, *supra* note 101, at 126.

¹⁰⁷ See Outer Space Treaty, *supra* note 24; Moon Treaty, *supra* note 39; Sarnacki, *supra* note 101, at 145.

¹⁰⁸ See Leslie I. Tennen, *Towards a New Regime for Exploitation of Outer Space Mineral Resources*, 88 NEB. L. REV. 794, 804 (2010); *Russia Plants Flag Under N. Pole*, *supra* note 12

¹⁰⁹ See Tennen, *supra* note 108; *Russia Plants Flag Under N. Pole*, *supra* note 12.

¹¹⁰ See e.g. Outer Space Treaty, *supra*, note 24. As the saying goes, "possession is nine-tenths of the law." In order for any feasibly legitimate claim to be made over property on celestial bodies, especially if done in contradiction with international treaties, it is only reasonable to require to actor asserting ownership to possess the land prior to claiming ownership.

¹¹¹ See *id.*

¹¹² See *id.*; Moon Treaty, *supra* note 39.

effective in preventing armed conflicts from arising over Antarctica, it is nearly half a century old and certain issues have begun to arise that were not possibly foreseen at the time of its creation.¹¹³ Similarly, the treaties governing activities in space are outdated and face numerous challenges when attempting to cope with the situations presented by the rapidly developing technology of today's society.¹¹⁴ Updated treaties, on both outer space and Antarctica, could alleviate modern day problems by more directly addressing them.

U.S. domestic law has recently sought to encourage commercial endeavors in space and foster increased commercial activities.¹¹⁵ U.S. lawmakers have passed laws, such as the SPACE Act of 2015, to help encourage these kinds of commercial developments and to adapt to the rapidly changing space industry.¹¹⁶ Current U.S. law allows private actors to claim ownership over resources obtained from celestial bodies.¹¹⁷ However, by doing so, the U.S. is in direct contradiction with the U.N. Outer Space Treaty and Moon Treaty.¹¹⁸

Unsurprisingly, as discussed above, U.S. case law on space-based activities is significantly limited. In *Nemitz v. NASA*, the Ninth Circuit ruled in favor of NASA, finding that Nemitz's ownership claim to an asteroid had no legal basis and that it was in violation of the Outer Space Treaty.¹¹⁹ This case is a clear instance of U.S. courts upholding the validity of certain provisions from within the Outer Space Treaty as binding on the United States and on private U.S. citizens.¹²⁰ The court had stated that private citizens could not claim property rights to an asteroid.¹²¹ However, the key distinction here is that the citizen had not made physical contact with the asteroid prior to his claim of ownership.¹²² No cases have yet presented themselves where people have claimed ownership over celestial bodies with which they have made actual, physical contact.

One essential consideration when seeking to establish a legal system to govern activities in outer space is the different legal impact treaties have on public versus private actors. The terms of treaties can be negotiated by States, but private actors have historically been unable to take part in such negotiations.¹²³ Further, treaties bind only the States that sign onto and ratify

¹¹³ See Dodds, *supra* note 58.

¹¹⁴ See e.g. Outer Space Treaty, *supra* note 24.

¹¹⁵ See *SPACE Act*, *supra* note 76.

¹¹⁶ *Id.*

¹¹⁷ *Id.*

¹¹⁸ See *id.*; Outer Space Treaty, *supra* note 24; Moon Treaty, *supra* note 39.

¹¹⁹ *Nemitz*, 2004 WL 3167042, at *2; Outer Space Treaty, *supra* note 24.

¹²⁰ See *Nemitz*, 2004 WL 3167042, at *1; Outer Space Treaty, *supra* note 24 (stating that no party can claim ownership over any celestial body).

¹²¹ *Nemitz*, 2004 WL 3167042, at *1.

¹²² *Id.*; Davidson, *supra* note 90.

¹²³ See States, Territories, and Governments, 1 HACKWORTH DIGEST OF INTERNATIONAL LAW ch. 2, §10, at 50. The American Instructions for the Geneva Convention stated that the U.S. did not mind the Red Cross being present but strictly did not want the Red Cross to have a

them,¹²⁴ but are not binding on nongovernmental actors.¹²⁵ As indicated by the increasing activities of private actors in outer space, it is essential that private actors be considered when creating a legal system for space-based activities and be bound by such a system.¹²⁶ On Earth, while current treaties do not bind private actors, the home nations of such actors are held responsible for the actions of these private parties. However, if a private actor were to come into possession of bountiful resources on a far-away celestial body, one that could potentially be enough to cripple the global economy,¹²⁷ it would be near impossible to hold the private actor accountable. Therefore, in order to head off potential legal challenges by private actors in the future, any proposed solution must be binding on both private and public actors alike.

Despite the U.S. attempting to encourage commercial activity in space and allowing resources to be claimed from space, there are still clear gaps in the regulations covering property rights in space. Furthermore, the conflicts between current U.S. law and international treaties makes clear that the international community at large is not entirely on the same page regarding property rights in space.¹²⁸ With the increasingly global economic environment and the rapidly growing commercialization of space, the problem still remains – are actors able to claim property rights on celestial bodies and over resources from those bodies?

C. *Analyzing Previously Proposed Solutions to Govern Celestial Property*

While many recognize that property rights in space need to be delineated and adapted to the rapidly changing, privatizing, and commercializing space industry, few offer a solution. Many either fail to proffer a solution altogether or state that a solution should be determined, but

vote in the convention, as it is not a sovereign State and therefore the treaty was not binding on it.

¹²⁴ See U.N. Committee on the Peaceful Uses of Outer Space, *supra* note 28.

¹²⁵ See HACKWORTH DIGEST OF INTERNATIONAL LAW, *supra* note 123, at 50; *see also* *Mars: We Are Not Alone* (National Geographic television broadcast Nov. 12, 2018). The second season of the National Geographic series *Mars* provides a fictional, dramatic rendition of an international cooperative colony on Mars and its interactions with a colony created by a private organization. The series also provides analysis from real world experts and players in the space industry, such as Neil DeGrasse Tyson and Elon Musk, to name a few. One of the most emphatic points made throughout the second season is the lack of power treaties and current international regulations have over private, non-public actors.

¹²⁶ See Yuhas, *supra* note 5.

¹²⁷ See Parnell, *supra* note 1; Shivali Best, *NASA Plans to Explore a \$10,000 Quadrillion Asteroid that Could Cause the World's Economy to Collapse*, DAILY MAIL (Jan. 18, 2017 3:15 AM), <https://www.dailymail.co.uk/sciencetech/article-4128582/Nasa-plans-explore-expensive-asteroid.html>. A large influx in precious metals, such as those contained in asteroids, could devastate the global economy and devalue currencies around the world.

¹²⁸ See *SPACE Act*, *supra* note 76; Outer Space Treaty, *supra* note 24.

at a later date.¹²⁹ Additionally, some of the solutions offered are based on old doctrines or on models currently in place that would be ineffectual on a large scale.

i. First in Possession

One option that has been offered as a possible legal solution is a new adaptation of an old system – the First In Possession Ownership Doctrine that was used during 17th, 18th, and 19th century exploration.¹³⁰ The First in Possession Ownership Doctrine is equivalent to the way European countries planted a flag and claimed all the land as their own. This doctrine gives ownership over property to the first person to arrive there and claim it.¹³¹

However, this solution fails to address a number of problems. Allowing first-in-possession ownership could create an instance where two actors have unknowingly (or knowingly) put in action plans to utilize the same celestial body.¹³² In this case, this solution could lead to a waste of resources and hostilities if the second-to-arrive actor is not allowed to use the property on the celestial body the first actor has claimed.

Furthermore, this solution encourages speed.¹³³ While speed is important, actors must also take into account the safety of any manned travel being conducted. By encouraging speed and providing lifetime property rights to the first actor there, this solution could lead to dangerous shortcuts being taken, potentially resulting in harm and loss of life.¹³⁴

Additionally, this solution does not address potential waste. Under the First In Possession Ownership Doctrine, if an actor uses the land for a certain amount of time after arriving but then its activities go dormant, that actor would still have perpetual rights to the property, despite it sitting idle.¹³⁵ Another actor, who failed to reach the property first, may have an actual, productive, ongoing use for that property, but this use may go unrealized and

¹²⁹ See Hassan Safavi, *Legal Aspects of Settlement on the Moon and Mars*, 34 PROC. ON L. OUTER SPACE 85, 85-94 (1991); *Regulating Space: Innovation, Liberty, and International Obligations: Hearing before the Subcommittee on Space, H. Comm. on Science, Space, and Technology*, 115th Cong. (2017) (testimony of Laura Montgomery, Attorney and Sole Proprietor, Ground Based Space Matters, LLC) [*hereinafter* Regulating Space].

¹³⁰ Brandon C. Gruner, *A New Hope for International Space Law: Incorporating Nineteenth Century First Possession Principles into the 1967 Space Treaty for the Colonization of Outer Space in the Twenty-First Century*, 35 SETON HALL L. REV. 299, 355-57 (2004).

¹³¹ *Id.*

¹³² *But see id.*

¹³³ *Id.* at 344.

¹³⁴ *Id.*

¹³⁵ Brandon C. Gruner, *A New Hope for International Space Law: Incorporating Nineteenth Century First Possession Principles into the 1967 Space Treaty for the Colonization of Outer Space in the Twenty-First Century*, 35 SETON HALL L. REV. 299, 340 (2004).

the property may go to waste under the First In Possession Ownership Doctrine.

Finally, this proffered solution does not address what would qualify to establish first in possession ownership – if unmanned drones could establish such rights or if manned exploration and arrival is required.

ii. Registration of Space Activities

Another potential solution is requiring the registration of all activities in space and on celestial bodies.¹³⁶ This solution relies on the belief that, if all actors know what each other are doing, they will avoid one another, preventing hostile disputes over rights to the same property.¹³⁷ However, this solution fails to recognize that the real issue is property rights, not that actors will be unaware of what others are doing. While space is expansive, there are only a limited number of easily accessible celestial bodies.¹³⁸ Therefore, it is impractical to believe that, simply because one party has registered activity on the nearest mineral-rich celestial body, another party will not attempt to exploit that deposit as well. This solution offers no adequate form of dispute resolution if the registration of activities is insufficient to preempt property rights conflicts from arising.¹³⁹

iii. Refining Old International Regulations Under A New International Governing Body

In *Transporting a Legal System for Property Rights: from the Earth to the Stars*, space law scholar Rosanna Sattler proposes creating a new international governing body with controlling jurisdiction to enforce a legal system over outer space activities.¹⁴⁰ Sattler appreciates the need to establish laws regulating property rights in space in order to “stimulate commercial enterprise on the [M]oon, asteroids, and Mars.”¹⁴¹ Yet, while Sattler’s article artfully articulates the reasons a solution is needed and proposes a reasonable governing framework, it fails to propose and outline exactly what property rights would be enforced by this newly proposed international governing body.¹⁴²

¹³⁶ Regulating Space, *supra* note 129.

¹³⁷ See generally *id.*

¹³⁸ See ASTERANK, <http://www.asterank.com> (last visited Sept. 30, 2019); *Asteroid Mining: Potential Targets*, WIKIPEDIA, https://en.wikipedia.org/wiki/Asteroid_mining#Potential_targets (last updated Oct. 11, 2019).

¹³⁹ See Regulating Space, *supra* note 129.

¹⁴⁰ Rosanna Sattler, *Transporting a Legal System for Property Rights: from the Earth to the Stars*, 6 CHI. J. INT'L L. 23, 44 (2005).

¹⁴¹ *Id.* at 27.

¹⁴² *Id.* at 44.

iv. Use It or Lose It

Wayne White Jr., attorney and CEO of aerospace and defense technology and services company SpaceBooster LLC, has written extensively on space law and property rights in space.¹⁴³ White has proposed a number of solutions for space property rights, most prominently that which would provide property rights for those who control and use the property.¹⁴⁴ While this solution ensures economic efficiency, with no property going claimed and unused, it fails to address exactly what is necessary to qualify as ‘using’ property and what jurisdiction would govern disputes between States.¹⁴⁵ White’s solution proposes only a “mini-treaty” and focuses on States passing domestic laws to govern their citizens.¹⁴⁶ Without an overarching international agreement, White’s solution could allow for States to enact conflicting domestic laws, which would likely lead to international uncertainty and conflict.

D. A Better Solution – Temporary, Renewable Property Rights

It is essential for both public and private actors to know where they stand legally when conducting activities in outer space. If actors do not know the legal status of their activities, it is discouraging. Therefore, an accepted legal framework over activities in outer space, and property rights on celestial bodies, must be established. All States should implement an internationally agreed upon system that presents a legal framework addressing: the need to provide assurance of the enforceability of property rights claims, the need to avoid the inequity seen during the time of global colonization, and the need to avoid potential waste through perpetual property rights. This article’s proposed system would combine elements of some of the previously offered solutions. It would seek to establish a legal framework governing space-based activities, while continuing to encourage exploration and innovation.

The key elements of this proposed solution are: ownership over harvested resources; temporary property rights to property, awarded to the first party to physically arrive at a location and claim it; renewable rights to the property after an certain time period, provided the property is being used and the rights of others are being respected; a delineated territorial boundary for such property right claims; international recognition of these property rights for land and resources on celestial bodies; regulations with equal effect

¹⁴³ See e.g. Wayne White, *Nemitz vs. U.S., the First Real Property Case in United States Courts*, 47 PROC. ON L. OUTER SPACE 339, 349 (2004); Wayne N. White, Jr., *Implications of a Proposal for Real Property Rights in Outer Space*, 42 PROC. ON L. OUTER SPACE 366, 371 (1999); Wayne N. White, Jr., *Real Property Rights in Outer Space*, 40 PROC. ON L. OUTER SPACE 370, 380-81 (1997).

¹⁴⁴ White, Jr., *Real Property Rights in Outer Space*, *supra* note 142, at 380-81.

¹⁴⁵ *Id.*

¹⁴⁶ *Id.*

on private and public actors alike; and compulsory jurisdiction over space-based conflicts vested within an independent international tribunal.

This proposed system would use the first in possession doctrine in part, similar to how property rights were determined in the Age of Exploration, but would not create these rights in perpetuity, unlike in the past.¹⁴⁷ It would establish ownership rights for a set period of time, akin to how U.S. patent ownership rights are given – allowing for renewal at the end of the ownership period if the claim is still valid and being properly used.¹⁴⁸ This system would also use portions of the registration solution previously discussed;¹⁴⁹ however, unlike that solution, it would not merely require registration but would also vest property rights in actors. The proposed solution would also establish clear legal definitions regarding what exactly qualified as “use” of the property, in order to ensure there was no uncertainty or confusion by actors regarding if they would be able to renew their ownership rights.

Importantly, this proposed system would establish property rights over only limited portions of land and would not allow for wholesale claiming of entire celestial bodies. International law currently recognizes that a nation’s territorial boundaries extend 12 nautical miles offshore.¹⁵⁰ While there have been a number of disputes by bordering countries over the exact delineation of their own territorial waters,¹⁵¹ an extensive legal framework and rulings by the ICJ have helped create an international consensus and prevented these disputes from escalating to the point of physical hostilities.¹⁵² Similar territorial boundaries must be established for celestial bodies. Twelve nautical miles extending out may not be feasible, as some asteroids and celestial bodies are even smaller than that.¹⁵³ However, a certain territorial extension beyond established outposts on celestial bodies, the exact distance to be determined through international deliberation in the same way the 12 nautical mile boundary was reached,¹⁵⁴ will help prevent close encounters and contentious property disputes between competing parties. Therefore, this is an essential element of the proposed celestial property right regulation solution.

The most challenging, and the most important, aspect of any proposed system of regulations over space-based activities is the enforcement

¹⁴⁷ See Gruner, *supra* note 130, at 355-57.

¹⁴⁸ *Patent FAQs*, USPTO, <https://www.uspto.gov/help/patent-help#patents>.

¹⁴⁹ See *Regulating Space*, *supra* note 129.

¹⁵⁰ See U.N. Convention on the Law of the Sea, Dec. 10, 1982, 1833 U.N.T.S. 3.

¹⁵¹ See *e.g.* North Sea Continental Shelf Cases (Ger. v. Den. and Neth.), Judgment, 1969 I.C.J. 4 (Feb. 20). This was a dispute over territorial boundaries in the North Sea on the continental shelf, a resource rich area. Stark similarities can be drawn between the dispute between nations over resources in this case and potential future land disputes in outer space over resources.

¹⁵² *Id.*

¹⁵³ See *Asteroids*, *supra* note 1.

¹⁵⁴ See United Nations Convention on the Law of the Sea, *supra* note 152, at art. 3.

of such regulations. In order to be effective and to have any impact on the actions of actors in outer space, it is essential that the system be internationally recognized. The most effective form of recognition would be in the form of a widely ratified U.N. treaty.¹⁵⁵ Decreased participation in international treaties over space-based activities shows why this is such a challenge – as their activities grow in scope, countries are increasingly reluctant to submit themselves to an international body to govern their activities in outer space.¹⁵⁶ However, without an international agreement, especially amongst the space powerhouse States,¹⁵⁷ any system of property rights will be ineffectual. In order to properly regulate property rights on celestial bodies, this proposed system of temporary property rights must be both widely ratified and overseen by an international governing body.

Further, the jurisdiction of the governing body over celestial property rights must be compulsory. In certain circumstances and treaties, compulsory arbitration or jurisdiction of the International Court of Justice (ICJ) is woven into the agreement.¹⁵⁸ In order for the proposed solution and regulation to be most effective, all parties to the treaty must submit to compulsory jurisdiction. Compulsory jurisdiction is most common in international agreements over things such as trade rights, and less common over agreements on things such as human rights.¹⁵⁹ This is due to the fact that international community can reciprocate the violation of trade agreements with in-kind retaliations.¹⁶⁰ However, this kind of retaliation is not as enticing, or not even possible, for violations of agreements over things such as human rights. Property rights on celestial bodies are more akin to trade rights, and the threat of in-kind retaliation should be enough to keep parties in line. A shining example of this is the Antarctic Treaty System, which has stood as an internationally recognized treaty preventing hostile territorial disputes for nearly fifty years.¹⁶¹ However, in order to get States to agree to compulsory jurisdiction and to assuage any concerns States may have about giving up control of cases they are involved in to an international

¹⁵⁵ See e.g. Outer Space Treaty, *supra* note 24; Moon Treaty, *supra* note 39. Most nations are willing to abide by the regulations set forth in the Outer Space Treaty, but few abide by the Moon Treaty as it has received nearly nonexistent support internationally.

¹⁵⁶ See generally Outer Space Treaty, *supra* note 24; Moon Treaty, *supra* note 39. Comparatively, very few countries are parties to the most recent U.N. treaty over space activities, and the treaty that most clearly regulates property rights in space.

¹⁵⁷ U.N. Committee on the Peaceful Uses of Outer Space, *supra* note 28.

¹⁵⁸ See e.g. *Introduction into the WTO Dispute Resolution System*, WTO, https://www.wto.org/english/tratop_e/dispu_e/dispu_settlement_cbt_e/c1s3p3_e.htm.

¹⁵⁹ *Id.*

¹⁶⁰ See generally *Current Foreign Retaliatory Actions*, INT'L TRADE ADMIN., https://www.trade.gov/mas/ian/tradedisputes-enforcement/retaliations/tg_ian_002094.asp (Last visited October 10, 2019).

¹⁶¹ See Leslie Hook & Benedict Mander, *The Fight to Own Antarctica*, FIN. TIMES (May 24, 2018), <https://www.ft.com/content/2fab8e58-59b4-11e8-b8b2-d6ceb45fa9d0>.

tribunal,¹⁶² the proposed international tribunal would consist of five members, with one judge from each of the States that are a party to the litigation and the other three neutral judges selected jointly by the two States' judges.¹⁶³

Any celestial property rights system must be internationally recognized and respected in order to be effective, and the most effective way to ensure the system is respected is in the same manner current agreements mentioned above are ensured – through the threat of compulsory jurisdiction, sanctions, and retaliation.

IV. CONCLUSION

Land is an indescribably precious resource, and a finite one. As Mark Twain once stated, “[b]uy land, they ain’t making any more of it.”¹⁶⁴ For this reason, for millennia, wars have been fought over land. Yet, since the late twentieth century and the establishment of the United Nations, nations have mostly been able to control their ambitions and disagreements, and there have been few wars over land. Most international disputes are currently resolved through negotiation and conversation instead of combat.¹⁶⁵ However, as people push into new territories, new laws must be established to maintain order and to deal with new, changing circumstances. Without a proper, comprehensive system in place to regulate outer space and activities on celestial bodies, it is entirely possible that off-planet disagreements could lead to actual hostilities and the interstellar environment could begin to become a lawless expanse akin to the Wild West.¹⁶⁶

The commercialization of space travel is already upon us, and the exploration and colonization of celestial bodies is the inevitable next step. The internationally recognized space treaties of the mid-twentieth century are far outdated and ill-equipped to deal with the expansion of space travel and increased involvement of private corporate actors. While many people have recognized the need for appropriate regulation of space-based activities, most have simply discussed the issue and pushed it aside to be dealt with at a later

¹⁶² Concern over submitting to compulsory jurisdiction of an international tribunal was likely one of the factors resulting in the decline in participation in the Moon Treaty. *See generally* Moon Treaty, *supra* note 39.

¹⁶³ Non-state actors and private organizations would be represented on the tribunal by a judge from the country they are headquartered in.

¹⁶⁴ Douglas A. McIntyre, *Memo to Congress: “Buy Land, They Ain’t Making Any More Of It,”* TIME (Jan. 28, 2009), <http://content.time.com/time/business/article/0,8599,1874407,00.html>.

¹⁶⁵ Security Council and Mediation, UNITED NATIONS, <https://peacemaker.un.org/peacemaking-mandate/security-council> (last visited October 10, 2019).

¹⁶⁶ *See Wild West*, MERRIAM-WEBSTER <https://www.merriam-webster.com/dictionary/Wild%20West> (last visited September 30, 2019). The changing, unfamiliar environment in the western American frontier combined with a lack of effective legal framework resulted in it being known as the “Wild West.”

date. The United States government has taken some steps to address the issue and encourage domestic corporations to continue innovation and exploration, but this is an inadequate solution for an industry that will operate on an international scale and impact nations across the globe.¹⁶⁷

The time is here to consider and implement laws and regulations to govern public and private international activities and land rights in space. Failure to consider the topic now could result in unregulated, unrestricted, unfathomable corporate activity and international animosity as parties try to lay claim to large swaths of celestial bodies while retroactively legislating property rights. The proposed system, allowing for temporary, renewable property rights to be claimed over small portions of land on celestial bodies, would allow actors to feel secure in their rights while preventing inequitable land grabbing. Only a system such as this can both provide adequate regulation and continue encouraging development and exploration. The United States should lead the charge to develop an internationally recognized framework for property rights on celestial bodies that governs State and nongovernmental actors alike.¹⁶⁸

Therefore, the United States should propose a new international treaty establishing guidelines and an independent international organization. This organization would create and define temporary property rights of land on celestial bodies. It would be binding on both private and public parties alike, and the organization would establish a monitoring body to watch over these claims. This would provide assurances to those actors conducting commercial activities in space that their rights are secure, for a time, while avoiding perpetual property rights which could lead to inequity, waste, and land grabbing.

Ambition has long driven mankind. Whether it be to new heights, such as building a personal computer or landing on the Moon, or to unimaginable atrocities, such as seeking to expand territorial boundaries through unadulterated warfare or developing atomic weapons, ambition has been a driving force since the beginning. Now, ambition is driving both countries and companies to strive to be the first to do a variety of different things in outer space. In order to keep this ambition in check, and to prevent

¹⁶⁷ National Space Policy of the United States of America, NAT'L AERONAUTICS AND SPACE ADMIN., https://history.nasa.gov/national_space_policy_6-28-10.pdf (last visited October 10, 2019).

¹⁶⁸ Based on its past experience with the United Nations, the United States should be eager to be one of the founding members of a system governing activities in space. As a founding member of the United Nations, the United States was granted a permanent seat on the Security Council, a vital power that many other countries were not given. *See generally History of the United Nations*, UNITED NATIONS, <https://www.un.org/en/sections/history/history-united-nations/> (last visited Sept. 30, 2019); *United Nations Security Council Current Members*, UNITED NATIONS, <https://www.un.org/securitycouncil/content/current-members> (last visited October 10, 2019). As a leader in the space industry, the United States could secure its own interests while furthering international cooperation by being a proponent and founder of a system governing activities in space.

it from creating hostile situations, certain guidelines must be established. When faced with such a wide-open frontier, only an international community united behind a common set of regulations can hold other parties back. Yet, it is imperative that such a system not be prohibitively restrictive, as a burdensome regulatory system is unlikely to last.

The proposed model that allows for temporary, renewable property rights to be granted over a limited territory on a first in possession basis strikes the perfect balance between the lawless Wild West and an overly restrictive junta. It crafts a system that encourages innovation and exploration while preventing stagnation, abuse, and monopolization. It creates a fair system that the international community should be willing to join, in which the community at large holds one another accountable through compulsory submission to a recognized international tribunal. And it ensures that the final frontier remains a lawful one.

BUT IN THE END, IT DOESN'T EVEN MATTER: HOW THE NINTH CIRCUIT'S SPLIT FROM FIVE OTHER CIRCUITS AND SUBSEQUENT SUPREME COURT CASE CHANGED NOTHING FOR SECTION 14(e) CLAIMS.

*Melissa Sevier**

I. INTRODUCTION

The April 20, 2018 decision in *Varjabedian v. Emulex Corp.* established that a showing of negligence will allow plaintiffs to recover in claims alleging violations of Section 14(e) of the Exchange Act.¹ This decision broke with five other circuit courts, who have all held that plaintiffs are required to prove scienter. When the Supreme Court of the United States granted certiorari on January 4, 2019, the case garnered a lot of attention, resulting in the filing of eleven amicus briefs.² The attention was not surprising, considering the notable circuit split and the large pool of individuals, companies, and federal entities concerned with what they deemed to be a shift in the balance between shareholders and corporations. It was therefore shocking when, on April 23, 2019, two weeks after oral arguments were heard, the Supreme Court dismissed the writ of certiorari as improvidently granted.³ Given that the entirety of the opinion is a single sentence stating as much, it is impossible to know the motivation behind the dismissal. However, as outlined in this case note, any decision the Court made would not ultimately have made a difference in the current state of Section 14(e) claims.

This case note will analyze the Ninth Circuit's decision, its effects on future mergers and acquisitions (M&A), and how the decision might affect investment by foreign corporations. Part II discusses the background of the Securities and Exchange Act with a focus on Sections 14(e) and 10(b). Part III provides the background of the case. Part IV explains the Ninth Circuit's holding and analyzes the reasoning. Specifically, Part IV will break down the Court's handling of relevant Supreme Court holdings, decisions from other circuits, analysis of relevant background and policy, and what the Court may have missed in its consideration. Part V discusses the future implications of the holding: the effect on future plaintiffs and the effect on foreign investors and corporations. Finally, Part VI discusses the Supreme Court filings and ultimate outcome.

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¹ See *Varjabedian v. Emulex Corp.*, 888 F.3d 399, 401 (9th Cir. 2018), *cert. granted*, (U.S., Jan. 4, 2019), *cert. dismissed*, (U.S., Apr. 23, 2019).

² *Emulex Corp. v. Varjabedian*, SCOTUSBLOG, <https://www.scotusblog.com/cases/cases/emulex-corp-v-varjabedian/> (showing all the briefs submitted).

³ *Id.*

The decision of the Ninth Circuit and the Brief in Opposition filed by the respondent provide the strongest legal arguments based on the plain language of the statute and well-reasoned precedent, while the Petition for Writ of Certiorari and Amicus Briefs make strong policy arguments and somewhat tenuous legal arguments.⁴ Given the Court's function as an interpreter of the law and not a law maker, i.e. plain meaning over policy, the Petitioner's cause would have been more appropriate in a legislative rather than judicial forum. The Petitioner, and several of the amicus briefs, described U.S. courts as already swarming with Section 14(e) claims, asserting that 90% of mergers and acquisitions result in a lawsuit under the section. It is difficult to see how the Ninth Circuit's lowering of the pleading standard would have any real effect on an already extreme situation.

II. BACKGROUND OF SECURITIES AND EXCHANGE ACT

In October of 1929 the stock market crashed.⁵ Congress believed the only way for the economy to recover was to restore investors' confidence in capital markets.⁶ In pursuit of this goal, Congress passed the Securities Act of 1933, the first regulation covering securities in the United States.⁷ The Securities Act of 1933 sought to reduce fraud and misrepresentation by requiring companies to register securities and provide potential investors with accurate financial information regarding the securities offered for public sale.⁸ The Securities Exchange Act of 1934 followed a year later, expanding the scope of the original Act.⁹ In the midst of the rapidly developing and expanding marketplace, the Act felt revolutionary to those first effected by it.¹⁰ The punishments for violating the Act were costly, and companies' efforts to comply were executed somewhat blindly, as no development or interpretation of the Act had been expanded through government agencies or judicial proceedings.¹¹ The Securities Exchange Act was established to "regulate (1) credit in security transition(s)...; (2) security markets...; and (3) securities publicly traded..."¹² The purpose of these regulations was to limit speculation, prevent unfair practices, and make public enough adequate information to discourage insider trading.¹³ In conjunction with The Securities Exchange Act of 1934, Congress created the Securities Exchange

⁴ See Analysis, *infra* Section III.

⁵ *Creation of the SEC*, SEC, <https://www.sec.gov/Article/whatwedo.html>.

⁶ *Id.*

⁷ *The Laws That Govern the Securities Industry*, SEC, <https://www.sec.gov/Article/whatwedo.html>.

⁸ *Id.*

⁹ See CHARLES H. MEYER, *THE SECURITIES EXCHANGE ACT OF 1934* 11 (2003); see also *Securities Exchange Act of 1934*, SEC, <https://www.sec.gov/Article/whatwedo.html>.

¹⁰ See MEYER *supra* note 9.

¹¹ *Id.*

¹² *Id.*

¹³ *Id.*

Commission (SEC) to enforce the new regulations.¹⁴ The Act also gave the SEC broad authority over the securities industry.¹⁵

Originally, the Securities and Exchange Act did not govern cash tender offers.¹⁶ This lack of regulation provided the means for a dramatic increase of hostile takeovers in the mid-1960's, in which cash offers would be extended to shareholders without any information on the purchaser's intentions, or even identity.¹⁷ The Williams Act was enacted in 1968 to fill this gap in the Securities and Exchange Act, by extending regulations to cash tender offers.¹⁸ Five subsections were added to the Exchange Act through the Williams Act:¹⁹ 13(d), 13(e), 14(d), 14(e), and 14(f).²⁰ These subsections were later broadened to cover exchange offers in addition to cash offers following an amendment in 1970.²¹ The most relevant subsection for our purposes is 14(e).²² Titled "Untrue statement of material fact or omission of fact with respect to tender offer," Section 14(e) states:

It shall be unlawful for any person to make any untrue statement of a material fact or omit to state any material fact necessary in order to make the statements made, in the light of the circumstances under which they are made, not misleading or to engage in any fraudulent, deceptive, or manipulative acts or practices, in connection with any tender offer or request or invitation for tenders, or any solicitation of security holders in opposition to or in favor of any such offer, request, or invitation. The Commission shall, for the purposes of this subsection, by rules and regulations define, and prescribe means reasonably designed to prevent, such acts and practices as are fraudulent, deceptive, or manipulative.²³

Following the 1970 amendment, it was believed by some that Section 14(e) was an antifraud provision which prohibited certain behavior during the tender offer period in the same manner that Rule 10b-5 created a right to action over misbehavior toward the buyer and/or seller.²⁴ However, the

¹⁴ *What We Do*, SEC, <https://www.sec.gov/Article/whatwedo.html>.

¹⁵ See *Securities Exchange Act of 1934*, *supra* note 9.

¹⁶ Andrew E. Nagel, Andrew N. Vollmer & Paul R.Q. Wolfson, *The Williams Act: A Truly "Modern" Assessment*, HARV. L. SCH. ON CORP. GOVERNANCE & FIN. REG. 1, 5 (2011), <https://corpgov.law.harvard.edu/wp-content/uploads/2011/10/The-Williams-Act-A-Truly-Modern-Assessment.pdf>.

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ Alfred F. Conard, *Tender Offer Fraud: The Secret Meaning of Subsection 14(e)*, 40 BUS. LAW. 87, 88 (1984).

²⁰ *Id.*; Meredith M. Brown, *The Scope of the Williams Act and Its 1970 Amendments*, 26 BUS. LAW. 1637, 1637 (1971).

²¹ See Brown, *supra* note 20, at 1637.

²² 15 U.S.C.S § 78n(e) (2019).

²³ *Id.*

²⁴ Brown, *supra* note 20 at 1646.

amendment also granted the SEC the power to create regulations to enforce Section 14(e), and it became clear that the SEC intended to interpret the scope of activities and behaviors under the jurisdiction of Section 14(e) broadly.²⁵ The broad scope envisioned by the SEC in 1970 went well beyond the scope of disallowed conduct under Rule 10b-5.²⁶ However, legal commentators of the time questioned whether this scope would hold up in the courts.²⁷

Unlike Section 14(e), which is part of the Securities Acts, Rule 10b-5 is part of the Code of Federal Regulations and is promulgated under Section 10, entitled Manipulative and Deceptive Devices and Contrivances. Under Section 10, Rule 10b-5 is similarly entitled Employment of Manipulative and Deceptive Devices and States:

It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails or of any facility of any national securities exchange,

- (a) To employ any device, scheme, or artifice to defraud,
- (b) To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or
- (c) To engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person, in connection with the purchase or sale of any security.²⁸

One of the main debates in *Varjabedian* is whether the similar language of the two statutes justify similar treatment, or whether Rule 10b-5 placement under the Section governing Manipulative and Deceptive Devices constrains its application, while Section 14(e) is not so constrained.

Section 14(e) is unique in that it does not distinguish any particular type of securities covered by the section.²⁹ Instead, Section 14(e) applies to every kind of security: domestic, foreign, public, private, equity, debt, etc.³⁰ While one can read an implication into Section 14(e) to cover only those tender offers which are covered by other sections of the Exchange Act, the SEC has chosen to interpret it to mean all tender offers except those shielded by international laws.³¹

²⁵ See *id.* at 1647.

²⁶ *Id.* at 1648.

²⁷ See *id.*

²⁸ 17 C.F.R. § 240.10 (2018 issue of the Federal Register).

²⁹ See Conrad, *supra* note 19, at 88.

³⁰ *Id.*

³¹ See *id.* at 89.

To be clear, tender offers shielded by international laws will only include offers in which no U.S. interests are involved.³² However, the U.S. has historically placed limited restrictions on direct foreign investors.³³ The most recent trend places heightened restrictions on areas which countries deem “critical infrastructure” in an effort to keep control of those businesses within the host nation for security purposes.³⁴ It is not a coincidence that “[t]he U.S. is both the world’s largest foreign direct investor and the largest beneficiary of foreign direct investment.”³⁵ Consistent economic growth and recent corporate tax cuts have helped the U.S. maintain its position as one of the most appealing countries for foreign direct investors.³⁶

However, participating in a merger or acquisition in the U.S. has long carried the burden of more extensive litigation than in other countries.³⁷ In France, for example, stock exchange authorities pre-approve bids, and litigation is only useful to delay the transaction.³⁸ If the United States hopes to continue to attract foreign direct investors, broadening liability under Section 14(e) may lead foreign investors to justifiably hesitate investing in United States companies, despite lower taxes and limited restrictions.³⁹

III. FACTS OF THE CASE

In February 2015, Avago Technologies Wireless Manufacturing, Inc. (“Avago”) and Emulex Corp. (“Emulex”) issued a joint press release announcing their merger.⁴⁰ On April 7, 2015, Emerald Merger Sub (“Merger Sub”), a subsidiary of Avago, initiated a tender offer for Emulex's outstanding stock.⁴¹ Avago was offering \$8.00 per share, a 26.4% premium on the stock price before the merger was announced.⁴² In preparing to issue a statement recommending shareholders accept or reject the offer, Emulex hired Goldman Sachs to evaluate the merger's effects on its shareholders.⁴³

³² See *id.* at 106.

³³ See generally DAVID J. BENDANIEL & ARTHUR H. ROSENBLUM, *THE HANDBOOK OF INTERNATIONAL MERGERS & ACQUISITIONS* (1990).

³⁴ See Paul A. Laudicina, Erik R. Peterson & Courtney Rickert McCaffrey, *The 2018 A.T. Kearney Foreign Direct Investment Confidence Index, Global Business Policy Council: Research Report*, ATKEARNEY, <https://www.atkearney.com/foreign-direct-investment-confidence-index>.

³⁵ Jonathan Masters & James McBride, *Foreign Investment and U.S. National Security*, COUNCIL ON FOREIGN RELATIONS, <https://www.cfr.org/backgrounder/foreign-investment-and-us-national-security> (last updated Aug. 28, 2018).

³⁶ See Laudicina, *supra* note 34.

³⁷ Constraints on Cross Border Takeovers and Mergers: A Catalogue of Disharmony, 19 INT'L BUS. L. 51, 83-84 (1991).

³⁸ *Id.* at 84.

³⁹ See generally Masters, *supra* note 35 (“burdensome restrictions on FDI inflows could inspire retaliatory policies by other nations”).

⁴⁰ *Varjabedian v. Emulex Corp.*, 888 F.3d 399, 401 (9th Cir. 2018), *cert. granted*, (U.S., Jan. 4, 2019), *cert. dismissed*, (U.S., Apr. 23, 2019).

⁴¹ *Id.* at 402.

⁴² *Id.* at 401.

⁴³ *Id.* at 402.

Goldman Sachs determined the agreement was fair to shareholders and provided their findings to Emulex.⁴⁴ The report provided to Emulex included details of their process, analysis of four particular financial concerns, and a one-page chart analyzing the premium offered on the stock.⁴⁵ While the overall finding of Goldman Sachs was that the agreement was fair, the premium of 26.4% was below average, despite being within the range of normal premiums of semiconductor mergers.⁴⁶ Emulex used the report from Goldman Sachs to create a forty-eight page Recommendation Statement with the Securities and Exchange Commission (“SEC”) pursuant to 17 C.F.R. § 240.14d-101 Schedule 14D-9.⁴⁷ The Recommendation Statement enumerated reasons Emulex supported the tender offer and recommended the shareholders tender their shares.⁴⁸ The Recommendation Statement did not, however, include the one-page Goldman Sachs chart showing that the premium was below average.⁴⁹ Though several shareholders were unsatisfied with price offered per share, enough shareholders accepted the tender offer to consummate the merger, and on May 5, 2015, Merger Sub merged into Emulex and Emulex became a wholly owned subsidiary of Avago.⁵⁰

The shareholders that were unsatisfied with the tender offer brought suit against Emulex, Avago, Merger Sub, and the Emulex Board of Directors (collectively, “Defendants”).⁵¹ The shareholders alleged that the Defendants violated Section 14(e) of the Exchange Act by failing to include the one-page premium analysis chart from Goldman Sachs.⁵²

The District Court dismissed the case with prejudice, finding, among other things, that Section 14(e) claims require the plaintiff to show scienter.⁵³ The Court’s decision was in line with five other circuits and Supreme Court decisions touching on similar claims. The United States Court of Appeals for the Ninth Circuit reviewed the issue on appeal.⁵⁴

IV. SUMMARY AND ANALYSIS OF THE NINTH CIRCUIT’S HOLDING

The Court of Appeals for the Ninth Circuit reversed the District Court’s holding, emphasizing that the Ninth Circuit had yet to decide whether Section 14(e) claims required scienter and that following out-of-circuit authorities was not the solution.⁵⁵ The Court of Appeals reversed the District Court’s holding by determining that a showing of negligence and not scienter

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ *Varjabedian*, 888 F.3d at 402-03.

⁴⁷ *Id.* at 402.

⁴⁸ *Id.*

⁴⁹ *Id.* at 403.

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² *Varjabedian*, 888 F.3d at 403.

⁵³ *Id.*

⁵⁴ *Id.* at 404-05.

⁵⁵ *Id.* at 409-10.

was required for a successful claim under Section 14(e).⁵⁶ In coming to this conclusion, the Court analyzed prior Supreme Court decisions, the decisions of the five circuits that ruled on the issue, and the language and history of the statute itself.⁵⁷ The Court's reasoning will be broken down in this section and then analyzed.

A. Analysis of United States Supreme Court cases

The Ninth Circuit Court of Appeals discussed three Supreme Court cases: *Aaron v. SEC*,⁵⁸ *Ernst & Ernst v. Hochfelder*,⁵⁹ and *United States v. O'Hagan*.⁶⁰ The analysis of *Ernst* and *Aaron* play a particularly large part in the Ninth Circuit's holding in *Varjabedian*, as well as the holdings of the other circuits. In fact, as discussed in its analysis of the other circuit's holdings, the Ninth Circuit determined that several circuits improperly interpreted or simply ignored the precedent of *Ernst* and *Aaron* when they concluded that Section 14(e) required scienter.⁶¹

The first Supreme Court case discussed by the Ninth Circuit is *Ernst & Ernst v. Hochfelder*.⁶² The Court of Appeals determined the other circuits improperly interpreted *Ernst* as holding the language of Rule 10b-5 required a showing of scienter, when in fact, *Ernst* held that Rule 10b-5's language allowed for a broader range of culpability.⁶³ The confusion of the other circuits could stem from the distinction between Section 10(b) and Rule 10b-5. The *Ernst* Court spent a significant amount of time discussing the language and history of Section 10(b), which they firmly decided required a showing of scienter.⁶⁴ However, the discussion of Rule 10b-5, which is promulgated under Section 10(b) is quite brief.⁶⁵ The Supreme Court in *Ernst* stated:

Viewed in isolation the language of subsection (b), and arguably that of subsection (c), could be read as proscribing, respectively, any type of material misstatement or omission, and any course of conduct, that has the effect of defrauding investors, whether the wrongdoing was intentional or not.⁶⁶

However, the Supreme Court in *Ernst* pointed to the limited rulemaking powers of the SEC, which must "adopt regulations to carry into effect the will

⁵⁶ *Id.* at 407-08.

⁵⁷ *Varjabedian v. Emulex Corp.*, 888 F.3d 399 (9th Cir. 2018), *cert. granted*, (U.S., Jan. 4, 2019), *cert. dismissed*, (U.S., Apr. 23, 2019).

⁵⁸ *Aaron v. SEC*, 446 U.S. 680 (1980).

⁵⁹ *Ernst & Ernst v. Hochfelder*, 425 U.S. 185 (1976).

⁶⁰ *United States v. O'Hagan*, 521 U.S. 642 (1997).

⁶¹ *Varjabedian*, 888 F.3d at 401.

⁶² *Id.* at 405 (citing *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 191 (1975)).

⁶³ *Id.* at 405.

⁶⁴ *Ernst & Ernst*, 425 U.S. at 212 (1976).

⁶⁵ *Id.* at 212-15.

⁶⁶ *Id.* at 212.

of Congress as expressed by the statute.”⁶⁷ Therefore, since Rule 10b-5 was a regulation promulgated under Section 10(b), dealing with fraudulent practices, the rules made under the authority of this section must also deal with fraudulent practices.⁶⁸

The Ninth Circuit correctly notes that Rule 10b-5 is titled “Employment of manipulative and deceptive devices,” which, the *Ernst* Court reasonably inferred, limits the scope of culpable conduct under the rule.⁶⁹ No such restriction was placed on Section 14(e), which was an amendment added directly to the Securities Acts, and is not limited by the SEC’s power to regulate in the way that Section 10(b) and Rule 10b-5 are restricted.⁷⁰ It cannot be denied that the Ninth Circuit’s reading of *Ernst* is clear and well supported. As discussed *infra*, some of the other circuits’ holdings came before the *Ernst* decision and are effectively overruled by it. Other circuits seem to have latched on to the similarity of language in Section 14(e) and Rule 10b-5 and adopted *Ernst*’s holding that Rule 10b-5 requires scienter into their understanding of Section 14(e) without ever diving into the reasoning of the Court in establishing that holding.

The second Supreme Court case discussed is *Aaron v. SEC*, which dealt with Section 17(a)(2) of the Securities and Exchange Act, another section with nearly identical wording to section 14(e).⁷¹ Section 17(a)(2) makes in unlawful:

to obtain money or property by means of any untrue statement of a material fact or any omission to state a material fact necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading.⁷²

The Ninth Circuit observed that the Supreme Court in *Aaron* determined Section 17(a)(2) did not require a showing of scienter.⁷³

However, the holding in *Aaron* was more complicated than the Ninth Circuit implies. The Supreme Court in *Aaron* held that while the language of Section 17(a)(1) did require scienter, Sections 17(a)(2) and 17(a)(3) did not.⁷⁴ The Supreme Court compared the language of Section 17(a)(2) with Section 17(a)(1), which disallows acting “to employ any device, scheme, or artifice to defraud.”⁷⁵ In concluding this, the Supreme Court looked to the plain language of the rules, noting that the actions

⁶⁷ *Ernst & Ernst*, 425 U.S. at 212-215 (1976) (citing *Dixon v. United States*, 381 U.S. 68, 74 (1965)).

⁶⁸ *Id.*

⁶⁹ *Id.* at 191.

⁷⁰ 15 U.S.C.S § 78n(e).

⁷¹ *Aaron v. SEC*, 446 U.S. 680, 684 (1980).

⁷² 15 USCS § 77q(a)(2)

⁷³ *Varjabedian*, 888 F.3d at 406 (quoting *Aaron*, 446 U.S. at 695-96).

⁷⁴ *Aaron*, 446 U.S. at 695-96.

⁷⁵ 15 USCS § 77q(a)(2).

Congress was seeking to prevent under Section 17(a)(1) were made clear by their use of the words “deceptive,” “scheme,” and “artifice.”⁷⁶ The Supreme Court also discusses *Ernst* and the similarity in language between Rule 10b-5, and Section 17(a)(2), quoting their own decision in *Ernst* to say the section “could be read as proscribing . . . any type of material misstatement or omission . . . that has the effect of defrauding investors, whether the wrongdoing was intentional or not.”⁷⁷ In the absence of a conflict between reasonably plain meaning and legislative history, the words of the statute must prevail.⁷⁸ However, this reading does not completely clear up the issue, because while the language is similar, Section 14(e) has two distinct clauses, one of which clearly intends an element of scienter to be present.

In analyzing the final case, *United States v. O'Hagan*, the Ninth Circuit quoted the Supreme Court in *O'Hagan* as saying “[U]nder § 14(e), the [SEC] may prohibit acts not themselves fraudulent under the common law or § 10(b), if the prohibition is ‘reasonably designed to prevent . . . acts and practices [that] are fraudulent.’”⁷⁹ The Ninth Circuit concluded that “[i]f the SEC can prohibit ‘acts themselves not fraudulent’ under Section 14(e), then it would be somewhat inconsistent to conclude that Section 14(e) itself reaches only fraudulent conduct requiring scienter.”⁸⁰ This conclusion makes a bit of a leap. While *O'Hagan* allows for SEC prohibitions on acts not fraudulent on their own, it may only regulate such acts if the prohibition will prevent “acts and practices [that] are fraudulent.”⁸¹ This does not equate to a lack of scienter requirement, as the ultimate goal is still to prevent fraud and the cited authority provides no guidance on the issue of intent. There are plenty of actions a company may take which are not in and of themselves fraudulent acts but are undertaken with the intent to manipulate or defraud the investors, buyers, or sellers, thus fulfilling a scienter requirement.

B. Analysis of other Circuits

This section will explain the courts analysis on the five circuit courts who held that a showing of fraud is required: the Second Circuit⁸²; Fifth Circuit⁸³; Third Circuit⁸⁴; Sixth Circuit⁸⁵; and Eleventh Circuit.⁸⁶ The Ninth Circuit examined each circuits’ reasoning and determined all five circuit

⁷⁶ *Aaron*, 446 U.S. at 696.

⁷⁷ *Id.* (quoting *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 212-15 (1976)).

⁷⁸ *Id.* at 700.

⁷⁹ *Varjabedian*, 888 F.3d at 407 (quoting *United States v. O'Hagan*, 521 U.S. 642, 673 (1997)).

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² *Chris-Craft Indus. Inc. v. Piper Aircraft Corp.*, 480 F.2d 342, 362 (2d Cir. 1973).

⁸³ *Smallwood v. Pearl Brewing Co.*, 489 F.2d 579, 606 (5th Cir. 1974)

⁸⁴ *In re Digital Island Sec. Litig.*, 357 F.3d 322, 328 (3d Cir. 2004).

⁸⁵ *Adams v. Standard Knitting Mills*, 623 F.2d 422, 431 (6th Cir. 1980).

⁸⁶ *United States SEC v. Ginsburg*, 362 F.3d 1292, 1304 (11th Cir. 2004).

courts incorrectly analyzed the language or was later overruled by the Supreme Court.⁸⁷ The Ninth Circuit stated:

[W]e are persuaded that the rationale underpinning those decisions does not apply to Section 14(e) of the Exchange Act. At their core, the decisions from these five circuits rest on the shared text found in both Rule 10b-5 and Section 14(e). Yet important distinctions exist between [them]-distinctions that strongly militate against importing the scienter requirement from the context of Rule 10b-5 to Section 14(e).⁸⁸

The first relevant decision is *Chris-Craft Indus. Inc. v. Piper Aircraft Corp.* In *Chris-Craft*, the Second Circuit determined that since the language of Rule 10b-5 and Section 14(e) are nearly identical, and Section 14(e)'s only contribution to the Securities and Exchange Act is to extend protection to the tender offer stage of dealings, a requirement of scienter must exist in both Rule 10b-5 and 14(e).⁸⁹ The Fifth Circuit followed suit a year later in *Smallwood v. Pearl Brewing Co.*, sighting to *Chris-Craft*, and acknowledging they were adopting the same interpretation.⁹⁰ Two years after *Smallwood*, the Supreme Court decided *Ernst*, and affirmed a requirement of scienter under Rule 10b-5.⁹¹ However, the Ninth Circuit noted the Supreme Court's reasoning in *Ernst* directly contradicts the holdings in *Chris-Craft* and *Smallwood*.⁹² The Ninth Circuit explained the Supreme Court decisions, as discussed *supra*, and how *Aaron* and *Ernst* directly undermine the reasoning in *Chris-Craft* and *Smallwood*.⁹³ According to the Ninth Circuit, subsequent circuits were blindly following the others despite this contradiction, including the Third Circuit in *In re Digital Island Securities Litigation* in 2004.⁹⁴ The Ninth Circuit quotes the Third Circuit as stating "[W]e therefore join those circuits that hold that scienter is an element of a Section 14(e) claims."⁹⁵ Although the Ninth Circuit does not discuss the Third Circuits reasoning beyond stating that it cited *Smallwood*, the decision in *Digital Island* does warrant some discussion.⁹⁶

In *Digital Island*, Third Circuit first discussed the holding of its lower court, which found a requirement of scienter in Section 14(e), and noted that "both parties appear[ed] to agree."⁹⁷ It then quoted a 1985 Supreme

⁸⁷ *Varjabedian v. Emulex Corp.*, 888 F.3d 399, 407-08 (9th Cir. 2018), *cert. granted*, (U.S., Jan. 4, 2019), *cert. dismissed*, (U.S., Apr. 23, 2019).

⁸⁸ *Id.* at 405.

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² *Id.*

⁹³ *Varjabedian*, 888 F.3d at 405.

⁹⁴ *Id.* at 407.

⁹⁵ *Id.*

⁹⁶ *Id.* at 406-407.

⁹⁷ *In re Digital Island Sec. Litig.*, 357 F.3d 322, 328 (3d Cir. 2004).

Court decision, stating the Section 14(e) is “modeled on the antifraud provisions of § 10(b)... and Rule 10b-5.”⁹⁸ The Third Circuit found similarity in language and scope which, along with an assumption that Congress used the same language with full knowledge of Rule 10b-5’s standing interpretations, implied that scienter was also required in Section 14(e).⁹⁹ While the Third Circuit did reference *Smallwood* as an example of courts which have found a requirement of scienter, it did not rely on the *Smallwood* decision as the Ninth Circuit suggests.¹⁰⁰

The Ninth Circuit found a different flaw in the reasoning of the Sixth Circuit.¹⁰¹ In 1980, the Sixth Circuit in *Adams v. Standard Knitting Mills* held that Section 14(e) required a showing of scienter.¹⁰² The Ninth Circuit’s brief discussion on *Adams* is accurate, stating that the Sixth Circuit’s reliance on the words “fraudulent,” “deceptive,” and “manipulative” is unsupported, because it fails to consider the entire first clause of Section 14(e).¹⁰³ *Adams* was also decided one month prior to the Supreme Court’s decision in *Aaron*, and is thus overruled in some aspects based on the new understanding of the language common to Section 14(e) and Section 17(a)(2).¹⁰⁴

The final circuit decision discussed is the Eleventh Circuit’s holding in *United States SEC v. Ginsburg* in 2004.¹⁰⁵ It appears that the Eleventh Circuit simply cited to intra-circuit precedent, however, this intra-circuit precedent did not discuss Section 14(e).¹⁰⁶ Accordingly, the Ninth Circuit determined that *Ginsburg* must have simply relied on the common language between the two sections, which is improper, as “Section 14(e) differs fundamentally from Section 10(b).”¹⁰⁷

The Ninth Circuit was ultimately dissatisfied with every circuit decision which has considered Section 14(e). The Ninth Circuit paints a picture of lazy judicial opinions and a bandwagon or domino effect, in which circuits adopt the flawed or unsupported reasoning of the other circuits. Its analysis is convincing, and the interpretations of case law are accurate. Upon hearing that the Ninth Circuit split with five other circuits, one might be inclined to assume a political motive or a flaw in its argument which other circuits address. In this case however, it appears that the Ninth Circuit was simply the first to directly and comprehensively address the issue of intent requirement under Section 14(e). This is particularly clear in the Fifth, Sixth

⁹⁸ *Id.* (quoting *Schreiber v. Burlington Northern, Inc.*, 472 U.S. 1, 10 (1985)).

⁹⁹ *Digital Island*, 357 F.3d 322, 328.

¹⁰⁰ *Id.*

¹⁰¹ *Varjabedian v. Emulex Corp.*, 888 F.3d 399, 407 (9th Cir. 2018), *cert. granted*, (U.S., Jan. 4, 2019), *cert. dismissed*, (U.S., Apr. 23, 2019) (quoting *U.S. v. O’Hagan*, 521 U.S. 642, 673 (1997)).

¹⁰² *Adams v. Standard Knitting Mills, Inc.*, 623 F.2d 422, 431 (6th Cir. 1980).

¹⁰³ *Varjabedian*, 888 F.3d at 407.

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

and Eleventh Circuits, which followed the holdings in *Chris-Craft* and *Smallwood* even after the Supreme Court's decisions in *Aaron* and *Ernst* changed the understanding of language common between Sections 10(b), 14(e), and 17(a)(2).

V. ANALYSIS OF EFFECT OF THE HOLDING

A. *Effect on dismissed cases*

It has historically been very difficult for plaintiffs to reach the burden of proof required in Section 14(e) claims, resulting in the swift dismissal of claims.¹⁰⁸ The Ninth Circuit's lower threshold seemingly means that a large group of these cases will be harder to dismiss in the early stages.¹⁰⁹ Surviving the early stages will mean a longer delay in the merger or acquisition taking place and a stronger position for shareholders in settlement negotiations. It could also mean that more plaintiffs will try to seek recovery in the Ninth Circuit, while more companies will evaluate forum selection clauses in their M&A and Tender Offer proceedings.¹¹⁰ However, the statistics offered by the Securities Industry and Financial Markets Association, analyzed *infra*, suggests that, prior to the Ninth Circuit's holding, roughly 90% of all M&A deals were already challenged. It is difficult to see how the lowered standard will increase litigation which already occurs at an astronomically high percentage.

B. *Effect on International Tender Offers*

As discussed *supra* international investors are a large part of the United States economy. Two substantial factors that are appealing to foreign investors are the low corporate tax rate and historically lenient restrictions. However, should the Ninth Circuits decision stand, the increased risk and cost of litigation may deter some foreign investors. One possible solution is developing in Delaware, where the majority of corporations in the United States are incorporated.¹¹¹ Delaware courts have recognized a prominent problem of high cost litigation which results in expansive attorney's fees but little recovery.¹¹² The courts have developed a strategy to combat this issue, part of which involves forum selection clauses in contracts.¹¹³ In 2015, the state amended its law to allow companies to adopt an exclusive forum in its

¹⁰⁸ William F. Sullivan et al, *9th Circ. Lowers the Bar on Tender Offer Claims*, LAW360, (May 01, 2018, 11:21 AM), <https://www.law360.com/articles/1038386/9th-circ-lowers-the-bar-on-tender-offer-claims>.

¹⁰⁹ *See id.*

¹¹⁰ *See id.*; Helen Hershkoff & Marcel Kahan, *Forum-Selection Provisions in Corporate Contracts*, 93 WASH. L. REV. 265, 274 (2018).

¹¹¹ Hershkoff, *supra* note 110, at 269-270, 272.

¹¹² *See id.* at 270.

¹¹³ *See id.*

charter or bylaws, so long as Delaware is one of the provisioned forums.¹¹⁴ While the law's enforceability in other forums is questionable, it could still provide an effective strategy for companies to avoid some litigation.¹¹⁵ Should this strategy prove effective, foreign investors could be reassured that litigation cost and risk will not increase after the Ninth Circuit holding, and perhaps they can avoid the Ninth Circuit entirely.

VI. THE SUPREME COURT FILINGS

The Supreme Court received the Petition for Certiorari on October 11, 2018.¹¹⁶ Two Amicus briefs were filed on November 13, 2018: one by the Securities Industry and Financial Market Association and one by the Chamber of Commerce of the United States of America.¹¹⁷ The Brief in Opposition was filed by the respondents on November 30, 2018.¹¹⁸ Finally, a Reply Brief was filed by the petitioners on December 18, 2018.¹¹⁹ These briefs were distributed for the January 4, 2018 conference of the Supreme Court to determine if it would be heard.¹²⁰ While nine additional amicus briefs were filed prior to the Supreme Court hearing oral arguments in April, 2019, this section will focus on the filings on record when the Supreme Court granted certiorari.¹²¹ This article will not discuss the subsequent filings and oral arguments that led to the dismissal of the case by the Supreme Court, as they focus on an entirely different issue, irrelevant to this article.

A. *Petition for Writ of Certiorari*

The Petition for Writ of Certiorari strongly emphasizes the circuit split, identifying the question presented as:

Whether the Ninth Circuit correctly held, in express disagreement with five other courts of appeals, that Section 14(e) of the Securities Exchange Act of 1934 supports an inferred private right of action based on a negligent misstatement or omission made in connection with a tender offer.¹²²

The circuit split issue is mentioned often throughout: “Five different circuits, in an unbroken line of decisions dating back nearly half a century, have held

¹¹⁴ See *id.* at 269-270.

¹¹⁵ See *id.* at 270.

¹¹⁶ *Id.*

¹¹⁷ Hershkoff, *supra* note 110, at 270.

¹¹⁸ *Id.*

¹¹⁹ *Id.*

¹²⁰ *Id.*

¹²¹ *Id.*

¹²² Petition for a Writ of Certiorari at i, *Emulex Corp. v. Varjabedian*, 888 F.3d 399 (9th Cir. 2018), *cert. denied*, 139 S. Ct. 1407 (2019) (No. 18-459) [hereinafter *Petition*].

that mere negligence is insufficient.”¹²³ In section A of the argument, the petition states that the circuit split is “as square, obvious, and consequential as they come.”¹²⁴ This clearly acknowledged circuit split, along with the possible effects of the Ninth Circuit’s decision remaining in effect, are the two primary arguments in the Petition supporting a review by the Supreme Court.¹²⁵ The Petition also has two main arguments in support of the assertion the Ninth Circuit Court of Appeals was wrong: 1) the text and background of Section 14(e) supports an antifraud focus¹²⁶ and 2) Section 14(e) contains no express right of action, and inferring a right will shift the statute’s established balance between protecting investors and preventing frivolous litigation.¹²⁷

The Petition asserts that the Court of Appeals went against case law and provides its own analysis of the district court and Supreme Court decisions.¹²⁸ The Petition argues that the precedent allows for culpability in unintentional wrongdoing, but does not stretch so far as to create an inferred private right of action based on negligence.¹²⁹ The Brief reiterates that the Ninth Circuit went too far and broadened the statute too much.¹³⁰ For each of the five circuit’s holdings, the Petitioners Brief quotes the relevant portion to illustrate its undeniable place in case law.¹³¹ These have been discussed extensively *supra* in the section covering the Ninth Circuits analysis. The only new arguments not addressed by the Ninth Circuit’s reasoning are policy concerns, which were explored in slightly more detail in the Amicus Briefs and will be discussed *infra*.

B. Amicus Brief of Securities Industry and Financial Markets Association

The Securities Industry and Financial Markets Association (“SIFMA”) identifies itself as “the leading securities industry trade associations.”¹³² The SIFMA Brief predicts an increase in frivolous lawsuits that will arise from the lessened pleading standard adopted by the Ninth Circuit.¹³³ In support of this conclusion, the SIMFA Brief makes several policy arguments in support of the Court granting the Petition for Writ of

¹²³ *Id.* at 2.

¹²⁴ *Id.* at 15.

¹²⁵ *Id.* at 15, 23-25.

¹²⁶ *Id.* at 15-17.

¹²⁷ *Id.* at 18-20, 25.

¹²⁸ Petition, *supra* note 122, at 18-20.

¹²⁹ *Id.* at 20-21.

¹³⁰ *Id.* at 21.

¹³¹ *Id.* at 9, 11-14.

¹³² Brief for Securities Industry and Financial Market Association as Amici Curiae Supporting Petitioner at 1 [hereinafter SIFMA Brief].

¹³³ *Id.* at 5, 7.

Certiorari and reversing the decision of the Ninth Circuit Court of Appeals.
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The SIMFA Brief first examines the blight of “merger objection” cases which already overwhelm the courts and are so common they are considered “part of the cost of doing M&A transactions.”¹³⁵ The percentage of M&A deals which resulted in a lawsuit has risen from 54% in 2008 to 85-90% in 2015.¹³⁶ The SIMFA Brief paints a bleak picture of such lawsuits, describing the “typical case” as a broad complaint followed by a motion for a temporary restraining order and preliminary injunction enjoining the transaction, effectively holding the transaction hostage, while offering a settlement.¹³⁷ The SIMFA Brief asserts that the typical settlement proposal results in massive plaintiff’s attorneys fees being paid by the defendants, while the plaintiffs provide a broad class-wide release from liability to the defendant in exchange for supplemental or corrective disclosure.¹³⁸ Companies are usually tempted to accept these proposals regardless of the validity of the claim or the likelihood of the court granting the injunction, in order to avoid any risk to or delay of the transaction.¹³⁹ The Brief equates the Plaintiff’s Bar with a racket, in which attorneys routinely and easily make a fortune off of M&A transactions, at great expense to the transacting company, while providing little to no benefit to the stockholders.¹⁴⁰

According to the SIMFA Brief, the majority of these cases were filed in Delaware, until the Delaware Chancery Court, acknowledging the problems with these “disclosure-only” settlements, held in *In re Trulia, Inc. Stockholder Litigation* that such settlements would “be met with continued disfavor in the future unless the supplemental disclosures address a plainly material misrepresentation or omission.”¹⁴¹ Following this holding, there was a shift of “merger objection” claims to the federal courts.¹⁴² While some federal courts followed the *Trulia* decision and disfavored “disclosure-only” settlements, some allowed them.¹⁴³

¹³⁴ See *id.* at 18.

¹³⁵ *Id.* at 9 (citing Browning Jeffries, *The Plaintiff’s Lawyer’s Transaction Tax: The New Cost of Doing Business in Public Company Deals*, 11 Berkeley Bus. L.J. 55, 108 (2014)).

¹³⁶ *Id.* at 9 (citing Cornerstone Research, *Shareholder Litigation Involving Acquisitions of Public Companies: Review of 2017 M&A Litigation* (2018)).

¹³⁷ SIFMA Brief, *supra* note 132, at 8.

¹³⁸ *Id.* (citing *In re Walgreen co. Stockholder Litig.*, 831 F.3d 718, 724 (7th Cir. 2016); Matthew D. Cain & Steven Davidoff Solomon, *A Great Game: The Dynamics of State Competition and Litigation*, 100 Iowa L. Rev. 465, 478 (2015) (“Settlements which only require disclosure constitute 55.1% of the settlement types in the sample and are the most common type of settlement.”)).

¹³⁹ SIFMA Brief, *supra* note 132, at 8.

¹⁴⁰ *Id.* at 8-10.

¹⁴¹ *Id.* at 11 (quoting *In re Trulia, Inc. Stockholder Litig.*, 129 A.3d 884, 898 (Del. Ch. 2016)).

¹⁴² *Id.* at 12.

¹⁴³ *Id.* at 13 (citing *In re Walgreen Co. Stockholder Litig.*, 832 F.3d at 724-26 (following *Trulia*); *In re Hatteras Fin., Inc., S’holder Litig.*, 286 F. Supp. 3d 727, 730-31 (M.D.N.C. 2017) (allowing disclosure settlement despite immateriality of the supplemental disclosure)).

While this argument in the SIMFA Brief makes it clear that M&A transactions are routinely challenged, and that “disclosure-only” settlement should be disfavored in order to discourage frivolous lawsuits, this point misses the mark on the issue presented in this case. If, as the SIMFA Brief states, the majority of merger objection claims are already frivolous and usually settle before a judge considers any motions or issues of merit, how would a lessened standard create more frivolous suits than already exist? Furthermore, as 85-90% of mergers were challenged the year before the holding of the Ninth Circuit, the pleading standard does not seem to be relevant and no logical inference can be reached to that effect. The SIMFA Brief makes a strong argument against “disclosure-only” settlements, and then simply states in conclusion that the lowered standard of the Ninth Circuit “will burden the federal court system with an increasing number of frivolous ‘merger objection cases.’”¹⁴⁴ This hole in the Brief’s argument can be seen again in Section II, when it states that the negligence standard in the Ninth Circuit, along with the Exchange Acts loose jurisdiction requirements, will “encourage stockholder plaintiffs to *continue* filing frivolous ‘merger objection’ cases... to circumvent *Trulia*.”¹⁴⁵

The next major argument made in the SIMFA Brief is that the Ninth Circuit’s decision will create more risk for companies, who will then be encouraged to essentially overwhelm stockholders with information, whether it is relevant or not, to protect themselves and minimize risk.¹⁴⁶ The SIMFA Brief argues that courts have struck a balance over the years between ensuring stockholders are informed as to the material information necessary to accept or reject the tender offer, and avoiding over-disclosure which may overwhelm them.¹⁴⁷

The SIMFA Brief then asserts that the Ninth Circuit holding improperly broadens the scope of what companies and stockholders will consider material information, ensuring that the already voluminous tender offer documents become even more cumbersome in the future.¹⁴⁸ This is only a valid argument, as it pertains to companies who will not settle before any evaluation on the motions or merits. If it is indeed standard practice to accept “disclosure-only” settlement proposals, then it would seem useless to compile and distribute a massive amount of information to stockholders only to participate in the same process of suing and settlement. In other words, the choices presented to a company in this brief are to: (1) disclose the usual amount and face an 85-90% chance of being sued and settling before the claim is proved frivolous or not, or (2) provide a voluminous amount of tender offer information and documents, and face the same odds. It seems

¹⁴⁴ *Id.* at 13.

¹⁴⁵ SIFMA Brief, *supra* note 132, at 13-14 (emphasis added).

¹⁴⁶ *Id.* at 15, 17.

¹⁴⁷ *Id.* at 17.

¹⁴⁸ *Id.* at 18.

this issue could also be alleviated with a federal ruling on “disclosure-only” settlements, but not a ruling regarding the pleading standard.

After a short argument as to why financial institutions will face increased risk when participating in M&A transactions, the SIMFA Brief offers arguments as to why the Ninth Circuit’s adoption of a negligence standard was misguided.¹⁴⁹ The first argument is that other circuits have correctly understood the similarities between Section 10(b) and Section 14(e), including the Supreme Court in *Schreiber v. Burlington Northern, Inc.*¹⁵⁰ The Supreme Court in *Schreiber* did refer to Section 14(e) as an “antifraud provision.”¹⁵¹ However, *Schreiber* was concerned with whether or not a disclosure-based claim was required under the section, when the plaintiff claimed a non-disclosure related violation centered on the word “manipulative” in Section 14(e). The *Schreiber* court did not specifically rule on the intent requirement of § 14(e).¹⁵² Should the Court wish to overrule the Ninth Circuit, it would find supportive language in *Schreiber*, but it would not be overruling itself by upholding the negligence standard.

The remaining arguments against the Ninth Circuit’s interpretation are quite short, with four or less sentences on each assertion. The SIMFA Brief asserts: Congress was aware of previous judicial interpretation of Section 14(e) when it enacted PSLRA and SLUSA and chose not to modify Section 14(e)¹⁵³; by viewing Section 14(e) as two separate clauses, the Ninth Circuit violated “the principle that courts should not ‘construe statutory phrases in isolation’¹⁵⁴; even if viewed as two separate clauses, the first clause makes no reference to the mental state required¹⁵⁵; 14(e) does not fit the standards “Congress employs when expressly enacting a civil remedy for negligence”¹⁵⁶; and the Supreme Court has not yet ruled as to whether 14(e) provides a private right of action.¹⁵⁷

C. *Amicus Brief of Chamber of Commerce of the United States of America*

The Chamber of Commerce’s Brief (CoC Brief) identifies its interest in the matter as avoiding an increased litigation burden it believes its members will face if the Ninth Circuit holding is allowed to stand. The CoC Brief focuses on three reasons in favor of the Supreme Court granting the Petition for Writ of Certiorari: the decision splits with six other circuits, the

¹⁴⁹ *Id.* at 21.

¹⁵⁰ *Id.* at 22 (citing *Schreiber v. Burlington Northern, Inc.*, 472 U.S. 1, 10-11 (1985)).

¹⁵¹ *Schreiber v. Burlington Northern, Inc.*, 472 U.S. 1, 10 (1985).

¹⁵² *Id.* at 11.

¹⁵³ SIMFA Brief, *supra* note 132 at 22.

¹⁵⁴ *Id.* at 22-23 (quoting *United States v. Morton*, 467 U.S. 822, 828 (1984)).

¹⁵⁵ *Id.* at 23 (quoting *Varjabedian v. Emulex Corp.*, 888 F.3d 399, 408 (2018)).

¹⁵⁶ *Id.* (quoting *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 208-09 (1975)).

¹⁵⁷ *Id.* (citing *Ernst*, 425 U.S. at 208-09).

decision improperly recognized a private right of action under § 14(e), and the question presented is important.

The CoC Brief acknowledges that five other circuit decisions have been compared to the Ninth Circuit decision at length in the petitioner and respondent briefs. However, no other party has yet identified another circuit, the Eighth Circuit, which the Brief asserts has also held intentional conduct is required for a § 14(e) claim.¹⁵⁸ In support of this position, a quote from the Court in *Feldbaum v. Avon Products, Inc.* is extracted, which states: “some element of deception or misrepresentation[, or]... intentional... conduct designed to deceive or defraud investors... is essential to a valid Section (14)e claim.”¹⁵⁹ While this excerpt clearly supports the CoC Brief’s position, a full reading of the case provides a fuzzier picture. When the Court in *Feldbaum* made this statement, they were discussing whether or not the granting of a purchase option to the buyer was a “manipulative device” and was not considering a question of adequate disclosure.¹⁶⁰ The Eighth Circuit in *Feldbaum* separately evaluated adequate disclosure under § 14(e) and manipulative acts under § 14(e), effectively breaking the statute into two separate clauses, as the Ninth Circuit did.¹⁶¹ When discussing adequate disclosure, the Eighth Circuit was not so explicit, stating “federal securities law requires the accurate disclosure of material facts.”¹⁶² It disapproved of courts evaluating the underlying wisdom or fairness of such transactions, but held that “federal law ensures that shareholder approval is fairly sought and freely given.”¹⁶³ One possibility as to why the briefs of the Petitioner and SIFMA did not mention the *Feldbaum* case is that it actually supports the argument that Section 14(e) is two separate and distinct clauses, and the requirements that disclosure be “accurate” and “fairly sought” do not firmly support the assertion that disclosure violations under the first clause require scienter.

The next argument in the CoC Brief is that the Supreme Court should grant the Petition for Writ of Certiorari in order to bring decisions of the lower courts in conformity with previous Supreme Court holdings that prevent courts from inferring a private right of action when the statute does not “display an intent to create a private remedy.”¹⁶⁴ Along with a handful of Supreme Court cases, the CoC Brief offers a few policy arguments in support of this: the creation of a private right of action is a legislative not judicial

¹⁵⁸ Brief for Chamber of Commerce as Amici Curiae Supporting Petitioners at 4, *Emulex Corp v. Varjabedian*, 139 S. Ct. 782 (2019) (No. 18-459) [hereinafter Chamber of Commerce Brief] (citing *Feldbaum v. Avon Products, Inc.*, 741 F.2d 234, 237 (1984)).

¹⁵⁹ *Id.* at 4 (quoting *Feldbaum*, 741 F.2d at 237 (8th Cir. 1984)).

¹⁶⁰ *Feldbaum*, 741 F.2d at 237.

¹⁶¹ *Id.* at 236-37.

¹⁶² *Id.* at 236.

¹⁶³ *Id.* at 237.

¹⁶⁴ Chamber of Commerce Brief, *supra* note 158, at 5.

function¹⁶⁵; the courts task is to interpret the statute as written¹⁶⁶; and inferring a private right of action under § 14(e) would imply that nearly every provision of the Securities Acts also inferred a private right of action.¹⁶⁷

The final and arguably strongest argument asserted by the Brief is that the question presented is important and the Supreme Court should grant the Petition in order to provide clarity and uniformity across the circuits.¹⁶⁸

D. *Brief in Opposition*

The Brief in Opposition asserts three simple points: (1) the decision below does not create a square circuit conflict; (2) the decision is correct; and (3) the petition does not present an important question for review.¹⁶⁹

In support of the argument that a circuit split has not been created by the Ninth Circuit's decision, the Respondent's Brief examines each circuit holding presented by the Petitioner.¹⁷⁰ The Brief ultimately determines that no other circuit has directly analyzed the issue of the state of mind requirement under Section 14(e) since the Supreme Court's holdings in *Ernst* and *Aaron*, which it argues completely changed the analysis after *Chris-Craft*.¹⁷¹

The argument that no circuit split exists starts with two marks against *Chris-Craft*, the case proffered as the Second Circuit's holding that scienter is required.¹⁷² The Respondent's Brief points out that *Chris-Craft* did not break down the text of Section 14(e) in order to analyze it and simply treated it the same as Rule 10b-5 because the language was so similar.¹⁷³ This treatment of Section 14(e) is incorrect for three reasons.¹⁷⁴ First, the Supreme Court clarified in *Ernst* that Rule 10b-5 is limited by Section 10(b), the fraud statute under which it is promulgated, while Section 14 is not so restricted.¹⁷⁵ Second, while the Second Circuit stated more than negligence was required, the actual standard it gave reads like a negligence standard; holding that a party would be liable if they "failed or refused to ascertain such facts when they were available to him or could have been discovered by him with reasonable effort."¹⁷⁶ Finally, there is no conflict between the Ninth Circuit's

¹⁶⁵ *Id.*

¹⁶⁶ *Id.* at 7.

¹⁶⁷ *Id.*

¹⁶⁸ *Id.* at 16.

¹⁶⁹ Brief for Respondent's in Opposition to Petition for Writ of Certiorari at III, *Emulex Corp v. Varjabedian*, 139 S. Ct. 782 (2019) (No. 18-459) [hereinafter Respondent's Brief].

¹⁷⁰ *Id.* at 7-13.

¹⁷¹ *Id.* at 13-14.

¹⁷² *See id.* at 8.

¹⁷³ *Id.*

¹⁷⁴ *Id.* at 8-9.

¹⁷⁵ Respondent's Brief, *supra* note 169, at 8.

¹⁷⁶ *Id.* (quoting *Chris-Craft Indus. Inc. v. Piper Aircraft Corp.*, 480 F.2d 342, 364 (2d Cir. 1973)).

holding and the Second Circuit, because neither *Chris-Craft* nor *Connecticut Nat'l Bank v. Fluor Corp.* (the only other Second Circuit cases cited by the petition) directly addressed the legal question at issue here, namely whether a scienter requirement exists within the first clause of Section 14(e).¹⁷⁷

E. Reply Brief

The Reply Brief filed by the Petitioners focuses on the Supreme Courts duty to resolve circuit splits: “For now, it suffices that the Ninth Circuit consciously and expressly rejected the position of every prior court of appeals to have considered the Question Presented.”¹⁷⁸ The Brief contests the Respondent’s position that other circuits have not properly considered this issue, and “further percolation” is needed.¹⁷⁹ The Petitioner boldly states that the Respondent’s argument that a genuine circuit split is not present “cannot be taken seriously.”¹⁸⁰ The Brief further argues that the Respondent’s evaluation of other circuits reasoning as “thin” and “sparse” are erroneous, because no amount of dissection on their reasoning will change the fact that the other circuits unmistakably held that negligence was not enough to support a claim under Section 14(e).¹⁸¹ The Petitioner also reiterates several points regarding the analysis of Section 14(e) as a whole and not as isolated clauses; the policy concerns and increased litigation; and the issue of an implied private right of action.¹⁸² It ends by urging the Supreme Court to “resolve the Question Presented and restore uniformity and predictability to Section 14(e) litigation” by holding that the Ninth Circuit erred both in its holding on inferred private rights, and its holding that a Section 14(e) claim can be supported by mere negligence.¹⁸³

VII. CONCLUSION

The Ninth Circuit’s holding is supported by the plain language of the statute and by viewing the Code as a whole. Additionally, the Ninth Circuit’s interpretation of Supreme Court cases are well reasoned and supported and the Court correctly identified flaws in the reasoning of the other circuits. While the Petitioner’s Brief and both Amicus Briefs address serious social, economic, and political concerns surrounding M&A litigation, the issues they present are appropriate problems for the legislature and not the judiciary. To use a well-known axiom, it is the court’s task to interpret the law, not to make it. Furthermore, because the substantial problems with

¹⁷⁷ *Id.* at 9 (citing *Chris-Craft*, 480 F.2d at 364; *Connecticut Nat'l Bank v. Fluor Corp.* 808 F.2d 957, 961 (1987)).

¹⁷⁸ Brief for Petitioners in Reply to Respondent’s Brief at 1, *Emulex Corp v. Varjabedian*, 139 S. Ct. 782 (2019) (No. 18-459) [hereinafter Reply Brief].

¹⁷⁹ *Id.* at 1.

¹⁸⁰ *Id.* at 2.

¹⁸¹ *Id.* at 5.

¹⁸² *Id.* at 9-10.

¹⁸³ *Id.* at 10

M&A litigation are longstanding and occurred at such high percentages before the Ninth Circuit's ruling, it is difficult to see how the decision will truly make anything worse and, indeed, how overruling the Ninth Circuit would improve anything.

The Supreme Court ultimately dismissed the case, effectively upholding the Ninth Circuit's finding that Section 14(e) only requires a showing of negligence and not scienter. Some argue that this leaves the circuits in chaos.¹⁸⁴ However, the Respondent's Brief in Opposition made convincing arguments that two circuits were already overruled by *Ernst* and *Aaron* and that no other circuits have specifically addressed the issue, making it impossible to overrule anything.¹⁸⁵ Despite the strength of this reasoning, the issue of the circuit split is widely accepted by the circuits, M&A companies, attorneys, etc. and we have certainly not reached the conclusion of this issue.

Ultimately, as a result of this case, serious problems have come to the forefront of consideration for both the courts and, hopefully, the legislature. It is clear that there are serious concerns with the current state of M&A litigation which go beyond the Court's authority to interpret laws and cross into the territory of policy. By dismissing this case, the Supreme Court has appropriately placed the issue at the feet of the legislature, who possess the authority to make changes and improvements to benefit the economy and provide stable and enticing opportunities for both domestic and foreign investors.

¹⁸⁴ *Emulex Corp. v. Varjabedian*, 139 S. Ct. 1407 (2019).

¹⁸⁵ Respondent's Brief, *supra* note 169, at 7.