



# The Special Criminal Court and the challenge of criminal accountability in the Central African Republic

Robert Kosho Ndiyun<sup>1</sup> 

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## Abstract

States which encounter massive human rights violations usually implement various mechanisms of achieving accountability. There exists documented evidence of conflict-related international crimes in the Central African Republic (CAR). Still, the perpetrators enjoy impunity as no appropriate measures were adopted to guarantee criminal accountability. The Special Criminal Court (SCC) was established in the CAR in 2015 as a hybrid criminal accountability mechanism. This article with the aid of a qualitative method and a narrative approach aims at investigating the activities of the SCC in the fight against the culture of impunity in a country experiencing persistent human rights violations. As conflict and impunity persist in the socially and politically unstable CAR, a comprehensive synopsis of the SCC and a preliminary assessment of the court and its challenges seven years after creation constitute a domain of investigation that urgently requires a deeper investigation to halt impunity, recurrent hostilities and human rights violations. Why has impunity and violations persisted in the CAR despite the creation of the SCC? The paper identifies critical factors to the success of the SCC, based on previous experiments with hybrid courts. The outcome of this research reveal that the fragile security situation in the country and other factors significantly hinder the court's objective of serving justice and contributing to durable peace in the CAR.

**Keywords** Special Criminal Court · Criminal accountability · Central African Republic · Impunity · Justice · Conflict

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✉ Robert Kosho Ndiyun  
ndiyun2@gmail.com

<sup>1</sup> Department of Politics and International Relations, University of Johannesburg, Johannesburg, South Africa

## Introduction

There has been a surge in international criminal law enforcement institutions since the creation of the International Military Tribunal for Nuremberg (Sands 2003). Stahn (2018) posits that these institutions in the fight against impunity tend to clash with the interest of sovereign states. The established courts range from ad hoc tribunals to hybrid or internationalised tribunals. The hybrid tribunals reflect novel experimentation of a mixed judicial institution characterised by international and national judicial personnel (Nouwen 2006). Criminal accountability is often an issue of local interest and embedded into the principle of state sovereignty and, as such, falls within the exclusive competence of the state (Hugh et al. 2014). In most post-conflict countries with weak and rather inexistent justice systems, coupled with the fact that some tend to be unwilling to prosecute perpetrators, the clear message is that wrongdoers can continue enjoying impunity in violating human rights. Victims and their families have been denied access to justice and tend to distrust state justice institutions, leading to unrest and causing further abuses (International Federation for Human Rights—FIDHH 2022). Impunity is a crucial driver of armed conflict. Impunity has become a significant concern for the international community as the grave violations of international human rights law (IHRL) and international humanitarian law (IHL) seriously threaten international peace and security (Hobbs 2016).

Hybrid courts have emerged as accountability tools that balance international and domestic interests in pursuing accountability for serious crimes. Such courts are considered embedded with a mixed composition of national and international elements and operate within the country where the atrocities were committed (United Nations High Commissioner for Human Rights—UNHCHR 2008). The hybrid tribunal thus represents a judicial institution that is neither purely international nor national (Cassese 2013) but one that fills the gap between a purely national and completely international court.

The Special Criminal Court (SCC) in the Central African Republic (CAR) is an example of a hybrid tribunal established to investigate and prosecute international crimes committed in the CAR since January 2003. Working together with the International Criminal Court (ICC) and national courts, the SCC represents practical experimentation with the complementarity regime of the ICC. The SCC's establishment in the CAR in 2015 ignited high expectations within the country and the international community, who have waited patiently for justice to be served and the fight against the culture of impunity in the CAR. Created with a five-year mandate, the court, which is a creation of the CAR government and integrated into the country's justice system, enjoys the status of a hybrid tribunal since it's a mixture of national and international staff and also its application of a blend of CAR national laws and international law (Labuda 2017).

The establishment of the SCC intervened at a period when the ICC had received a lot of criticisms from African countries, for its perceived bias against African countries (Keppler 2012), its obstruction of post-conflict reconciliation efforts (Austin and Thieme 2016), limited resources and dependence on state

cooperation (Mutua 2010; Werle et al. 2014). Some authors (Du Plessis 2010; Werle and Vormbaum 2017; Omorogbe 2019) carry the African voice on the need for African alternatives to the ICC which will be well suited and African context sensitive to promoting accountability and peacebuilding. Others like Cannon et al. (2016) posit that African countries should work closely with the ICC in shaping the court's approach to handling African cases. The CAR seems to have heeded to the arguments of the two camps, by resorting to the SCC as an African alternative to the ICC, and maintaining an active cooperation with the ICC through its two referrals to the court. Notwithstanding, the neo-colonialists still maintain grip over the SCC as principal funding entities, a criticism raised against the ICC for its selecting target on Africa.

The contribution of the SCC to the transitional justice process in the CAR warrants, an assessment of its functioning to date, to examine the hybrid court's effectiveness as it opened its first trial on April 25, 2022. This trial was held seven years after its inception and four years after the launch of investigations before the court. The court's creation is a positive move for accountability in the CAR as no international crimes have been prosecuted in the country for decades, many Central Africans believe that the conflict will persist in the country until fair and impartial justice is administered (Michelin 2020). Moreover, the collaborative framework existing between the SCC and the ICC and national criminal courts is innovative in the hybrid model and presents prospects for the court's success (Ibid). Still, the SCC's success in serving justice, reinforcing the rule of law and promoting sustainable peace in the CAR is hindered by multiple factors that are overtly and covertly linked to the judicial mechanism.

Some studies exist on the SCC in the CAR (Musila 2016; Labuda 2017; Akandji-Kombe 2017; Detchou 2018; Grebenyuk 2018; Michelin 2020). Most of the studies focus on the institutional and legal framework of the court (Musila 2016; Akandji-Kombe 2017), and the complementarity relationship between the ICC and the SCC (Labuda 2017; Grebenyuk 2018), while others emphasise on the specificities and structural limitations of the court (Detchou 2018; Michelin 2020). This article provides a comprehensive analysis of the SCC, with focus on the *raison d'être* for its creation, investigations undertaken, impediments and recommends a way forward for the SCC and other future hybrid accountability mechanisms. It offers a primary and broad assessment of the SCC, whose mandate and activities are in progress. The study examines the progress and impacts of its activities in achieving its aims in the CAR while highlighting the challenges encountered by this accountability mechanism and some factors that can guarantee effective accountability before the court. What justifies the creation of a hybrid tribunal in the CAR, a country in which the ICC is currently carrying out investigations on the basis of two referrals, and wherein trials are in progress before national criminal courts? Why has impunity persisted in the CAR despite the creation of a novel accountability mechanism—the SCC? The SCC is one of the recent hybrid tribunals established, just like those created or recommended in Kosovo, Sri Lanka, Sierra Leone, Lebanon, Chad and South Sudan (the Hybrid Project). As a hybrid court conducting investigations concurrently with the ICC in and on-going conflict and politically fragile society, its activities necessitate an inquiry to relate its experience with the existing literature

in the field, as a novel experiment in international criminal law. The SCC handles moderately recent and on-going violations against victims, involving several cases in terms of numbers and groups of victims of atrocities in the CAR as opposed to the Extraordinary Chambers in the Courts of Cambodia (CCC), which involved cases of victims of atrocities committed decades ago, and the Extraordinary African Chambers (EAC) which was only established to handle the alleged atrocities by Hissène Habré. The SCC stands unique among other hybrid tribunals concerning its composition, the context of its operations and its submission to national law (Elderfield 2021).

## Methodology

This paper adopts a qualitative method and employs a narrative approach to assess the effectiveness of the SCC in fulfilling its mandate. This approach is appropriate in studying complex social phenomena like the activities of the SCC. Data for this study was collected through document analysis and semi-structured questionnaire. Document analysis involved a review of primary and secondary sources including books, legal documents, journal articles and other relevant internet sources in order to establish a contextual base to the study and situate the major concerns challenges facing the SCC in achieving criminal accountability in the CAR. Semi-structured interviews were conducted with a purposive sample of major stakeholders involved in the creation and operation of the SCC. The first part of this article presents a background of the SCC, and proceeds with analysing the theory of hybrid tribunals. The next section presents the court's jurisdiction, organisation and functioning. The following sections of the article explore into activities of the court in the pursuit of accountability, the challenges encountered and culminate with recommended factors for an effective fight against impunity before the SCC.

## Background to the creation of the Special Criminal Court in the CAR

With a long history of military coups and unsuccessful transitions, the CAR has witnessed a long period of socio-political instability and violence since it attained independence from France in 1960 (Labuda 2017). The unconstitutional government changes since the death of the country's pioneer president Barthelemy Boganda have characterised CAR's history giving way to military coups (1965, 1979, 1981, 2003 and 2013) (Aboudi 2021). These have deprived the country of political stability and peace due to the recurrence of civil wars and mutinies. The CAR has, for the past 60 years, experienced six republics with five military coups, eight constitutions and three major civil wars (2004–2007; 2012–2013; 2013–2014) (Aboudi 2021). The most recent conflict erupted in the country in 2013 between the Muslim-dominated Seleka rebels and the predominantly Christian vigilante militia groups, the anti-Balaka. French troops, in December 2013, amidst the warnings of an imminent genocide, intervened in the CAR to halt the bloodshed (The Guardian 2013). In the wake of independence, these hostilities have been the stage for severe violations of

IHRL and IHL against the civilian population by the successive regimes or armed groups who fight against the government (Detchou 2018). The authors of violations have benefitted from impunity, as justified by the adoption of amnesty laws in the country.

The CAR justice system is guided by the principle of dual jurisdictions, including the judicial (criminal and civil) and administrative orders. The judicial organisation in the CAR takes the form of a pyramid, comprising of the Constitutional Court, the *Cour de Cassation* (Supreme Court), the *Conseil d'Etat* (with appellate competence in administrative and audit litigations), the *Cour des Comptes* (Audit Court), *Tribunal des conflits* (a non-permanent court with competence to handle matters of conflict of jurisdiction among judicial and administrative courts), as highest courts, and with the following as ordinary law courts: Courts of Appeal, Criminal Courts, High Courts, Juvenile Courts, Commercial Courts, Labour Courts, Administrative Courts and Magistrate Courts.<sup>1</sup> These courts which are expected to operate in a decentralised manner covering the entire territory have been largely invisible and ineffective beyond the boundaries of the political capital, Bangui due to insecurity, lack of infrastructure and insufficient personnel.

The CAR government with its recurrent military coups and violence since independence had opted for political settlement and compromise with armed groups through amnesty laws, after the commission of heinous atrocities (Ndiyun 2023). Bagayoko (2018) holds that with the limited resources, there existed a system of courts that handled matters and pronounced sanctions on defaulters in the post-independence CAR, until the 1980s. These operated alongside traditional courts which survived due to the attachment of the local population to their traditions, regarding modern courts as alien. A 2017 assessment of the CAR judiciary by the United Nations revealed that the justice system is plagued by inadequate human and infrastructural resources, limiting its capacity to combat impunity in the country (Ndiyun 2022b). While Musila (2016) contends that the high rate of insecurity has hindered the administration of justice in the CAR, Hazan (2015) holds that the upsurge and persistence of violence in the CAR after 2015 reflects limited state authority, continuous impunity and a destroyed justice system of less than one hundred and twenty judicial and legal personnel. This adds to the high mistrust in the judiciary by Central Africans who consider it a mechanism by the rich and powerful to oppress the poor (Ndiyun 2022b). The two referrals of the situation in the CAR to the ICC in 2004 and 2014 validate these arguments, and justify the need for a hybrid court. The 2004 invitation for ICC investigations into international crimes committed in the CAR was followed by a statement by the CAR's Supreme Court, that the justice system was incapable of investigating and prosecuting international crimes under the Rome Statute (Bagayoko 2018). Apart from the 2007 ICC procedure into crimes committed in the CAR by Jean Pierre Bemba, no other criminal accountability mechanism was triggered in the CAR for international crimes, until the second referral to the ICC in 2014. The advent of the SCC introduced a new spirit,

<sup>1</sup> See article 83 of the December 13, 2015 constitution of the Central African Republic; Article 1 of Law No. 95.0010 of December 22, 1995 to lay down the judicial organisation of the Central African Republic.

as national criminal courts in Bangui started prosecuting conflict related offences. These courts prosecuted and pronounced judgments on conflict related offences against anti Balaka commander and Seleka rebels on January 22, 2018 and February 19, 2020 respectively (El Gantri and Yaliki 2022; Ndiyun 2023).

In order to end the culture of impunity for violations of IHRL and IHL, the Transitional president of the CAR, Catherin Samba-Panza, promulgated the organic law no. 15-003 on June 3, 2015, establishing the SCC (Musila 2016). This hybrid court embodies all the necessary functions across a judicial chain into one, including examination, investigation, trial, appeals, defence, and witness and victims assistance facilities. The Special Prosecutor for the SCC was appointed in May 2017. In July 2018, the Rules of Procedure were adopted by Law No. 18-010, while Law No. 18-009 promulgated some modifications to the SCC statute. The court's inaugural session, held on October 22, 2018, paved the way for the publication of the court's investigation and prosecutorial strategy, leading to the formal opening of investigations.

## Hybrid courts as a mechanism of ensuring accountability: a review of literature

In the aftermath of conflict where the national justice system is ineffective, the hybrid court presents prospects in pursuing accountability compared to international or national mechanisms (Michelin 2020). Firstly, the hybrid court strengthens the rule of law in post-conflict states by promoting the local justice system's human rights and capacity building. Secondly, the hybrid court has the potential to achieve greater legitimacy and promote participation and local ownership of the entire process. This section examines the strengths and shortcomings of hybrid tribunals as an accountability tool.

Hybrid tribunals strengthen the capacity of the national justice system of post-conflict states. Solid, accountable and impartial institutions that uphold the rule of law are essential for peacebuilding and prevention of relapse to conflict (World Justice Report 2020). Conflicts destabilise a justice system's functioning and prevent the critical actors from obtaining adequate training and resources to investigate and prosecute serious violations (Annan and Secretary-General 2004). With a mixed composition of international and national personnel, hybrid courts offer opportunities for domestic justice personnel to ameliorate their skills by working and sharing experiences with the international personnel (Dickinson 2003; Fichtelberg 2015). Cooperation and solidarity are encouraged between national and international actors in promoting IHRL within the hybrid court. Witte and Duffy (2018), contend that hybrid courts give rise to new institutions in post-conflict situations like witness protection mechanisms. By enhancing the capacity of trained judicial personnel to deal with international crimes, hybrid courts provide an opportunity for the adequate pursuit of accountability through domestic norms development (Dickinson 2003).

Norm development constitutes a vital benefit for a domestic justice system from hybrid courts. Establishing a hybrid court in a post-conflict state enhances the integration of new norms into such states. According to Engle Merry (2006), this

process entails the integration of abstract norms into a novel socio-cultural context. The translators adapt the global idea of human rights into the domestic context, which is applied to local problems due to the proximity between the court and the population, a task that international courts fail to achieve because of the disconnection between the courts and the population (Dickinson 2003). Local engagement is enhanced when investigations and prosecutions occur closer to the affected population as they closely follow up on the process. According to the Annan and Secretary-General (2004), Criminal prosecutions publicly condemn human rights abuses in a familiar context to the affected society. Such trials also ensure a record of all events of atrocities and ease the participation of victims in the proceedings as they do not need to travel long distances to participate in the hearings. These factors are crucial for victims seeking perpetrators' accountability and restoring their dignity (Mégret 2005). The various activities of the hybrid court and its transparency make the community feel justice is being administered. According to the UNHCHR (2006), this perception that justice is being done is crucial and possibly more impactful than attaining true justice. This conception of justice underpins human rights law and increases trust in the domestic justice system, thereby contributing to durable peace. Trust in the CAR justice system is crucial as the nationals hold great distrust for the judiciary. The SCC holds the prospects of rekindling such trust.

The presence of a hybrid tribunal in a post-conflict country promotes the legitimacy of the entire justice system. A court's legitimacy is essential in deterring the future occurrence of crimes. National accountability tools are often viewed as illegitimate in states with weak justice systems due to fear of government interference and the partiality of the magistrates (Dickinson 2003). For international tribunals, Witte and Duffy (2018) hold that international justice mechanisms lack legitimacy because of the distance (cultural and physical) from the affected community and mistrust of the mechanism due to exploitative and colonial links between states. The hybrid court thus stands as a joint venture between the international community and the state, offering a compromise between the two extremes (Hobbs 2016). Dickinson (2003) corroborates that the presence of international actors in a hybrid court enhances the perception of independence and impartiality, while the host state as a partner promotes a feeling of local ownership of the accountability process. The ability of a hybrid court to integrate domestic values and customs into its process and framework increases its legitimacy. It contributes to reconciliation and peacebuilding, as opposed to remote tribunals (Witte and Duffy 2018). Fichtelberg (2015) posits that local knowledge permits the court personnel to understand better the complex sources of conflicts, usually driven by religious, ethnic or linguistic divides. As such, a better appreciation of these factors and other socio-cultural aspects renders the judicial mechanism more credible and effective in causing the populations to comply with IHRL norms (UNHCHR 2008).

Moreover, the Hybrid court can potentially reinforce the rule of law in a post-conflict state. The rule of law entails respecting fundamental rights in a system characterised by institutions, laws, and a population committed to delivering accountability, adopting just laws, transparent government, and an accessible and impartial justice mechanism (World Justice Project 2020; Tamanaha 2004). WJP (2020) outlines eight indicators of the rule of law: absence of corruption, human



rights, constraints on government powers, open government, regulatory enforcement, order and security, and criminal and civil justice. Achieving these indicators in a state necessitates many factors, such as resource availability, good governance, security, and political will (Michelin 2020). This proves that hybrid tribunals enhance the rule of law through capacity building, the development of norms, and the fight against impunity.

Despite the theoretical merits of the hybrid model, the implementation of this model has not adequately fulfilled the expectations for its creation. This makes it important to briefly examine the failure of hybrid courts based on the experiences of the Special Court for Sierra Leone (SCSL), the Special Tribunal for Lebanon and the Extraordinary Chambers in the Courts of Cambodia (ECCC).

The promise of legitimacy within hybrid courts significantly relies on the host state's popular support and political will. Favouring international judicial personnel to the detriment of their national counterparts creates tension and resentment, undermining national judges' role in providing information necessary to address the complexities of the conflict (Michelin 2020). In Sierra Leone, with the SCSL, the national judicial personnel felt that their international counterparts overlooked them, leading to tension, thus failing to achieve solidarity and collaboration, as well as sharing of experiences between the judges (Witte and Duffy 2018). Also, the absence of adequate government assistance weakens the legitimacy of the hybrid court by wiping off the local ownership perception of the court and building the conception that it is a sort of international interference in national affairs (McAuliffe 2011). The Special Tribunal for Lebanon (STL) received very little or no government cooperation in its activities, and added to its limited mandate, the court's role as a norm creation organ was jeopardised (Michelin 2020). Also, in the context of the ECCC, the government undermined the court's legitimacy by failing to respect its independence, interfering in the appointment of ECCC personnel, and exerting pressure on the court, causing some international personnel to resign (Ibid).

Secondly, capacity building is undermined when appropriate measures have not been adopted to facilitate skill and experience transfer between the judges of a hybrid court. Also, a tense relationship between international and national personnel erupts when there is no collaboration, and kills solidarity between the judges and hinders capacity building (Fichtelberg 2015) as was the case in Sierra Leone with the SCSL (Michelin 2020). According to Bruch (2010), for solidarity to reign and for the hybrid tribunal to achieve its objective of cross-cultural learning, the power dynamics within the courts must be handled diligently.

Finally, within the activities of a hybrid court, norm building is hindered by a lack of political will and support, with the potential of leading to a reverse legacy for the tribunal (UNHCHR 2008). Such reverse legacy occurs when the court's activities leave the impression that justice is corrupt and unattainable. This is mostly in circumstances where the court's objectives do not conform with the community's expectations due to poor communication and outreach campaigns about the court's activities, mandate and prosecution strategy (Fichtelberg 2015).

The preceding analysis of literature on hybrid courts is essential to this study, as it provides the basis for assessing the functioning and recorded successes of the SCC in the CAR. While the few cases of hybrid courts examined above operated



alongside domestic courts, the case of the SCC is unique, as it was created in a context characterised by ICC investigations and trials before domestic courts on the same subject matter jurisdiction. While the literature provides a better understanding of the SCC, it is however limited, as the terrain on which the SCC operates is a novel one, with double complementarity.

## **The mandate of the SCC: operational structures and prosecutorial strategy**

The SCC as a hybrid court is distinct from other tribunals established through an international agreement between the United Nations (UN) and the host state like the Special Tribunal for Lebanon (STL) and the Special Court for Sierra Leone (SCSL).<sup>2</sup> The legal foundation for establishing and functioning of the SCC is sourced from the organic law approved by the CAR parliament on May 24, 2015, validated by the country's constitutional court and promulgated by the transitional head of state. The SCC, from the legal perspective, constitutes part of the judicial order of the CAR concerning other courts with criminal subject matter jurisdiction in the country (Labuda 2017) and is an integral part of the CAR's legal system (art. 1 SCC statute).

### **Subject matter jurisdiction**

The SCC is empowered with a broad subject matter jurisdiction, as it is authorised by the organic law to “investigate, prosecute and try serious violations of human rights and serious violations of IHL...in particular the crime of genocide, crimes against humanity, and war crimes” (art. 3, SCC statute). These international crimes are equally penalised under the CAR penal code, whose definition of these crimes is a near reflection of that provided by the Rome Statute of the ICC (art. 152 to 161, CAR Penal Code). Apart from these three core international crimes, the SCC is empowered to prosecute torture as a discrete international crime (Musila 2016). The legislator of the Organic law abstained from generating new norms and opted for cross-references of the existing wide range of domestic laws in the CAR, notably the CAR Penal Code and the Criminal Procedure Code. Other remarkable issues related to the SCC's subject matter jurisdiction include the powers of the Special Prosecutor to initiate charges not necessarily linked with the scope of international criminal law, such as economic, social and cultural rights violations (UNHCHR 2017), and isolated acts of rape involving individual victims or perpetrators, as opposed to rape as part of a systematic and widespread attack (Labuda 2017).

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<sup>2</sup> The Agreement between the United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone, January 16, 2002, available at: [www.refworld.org/docid/3fbdda8e4.html](http://www.refworld.org/docid/3fbdda8e4.html) (last visited: 1 October 2020); Agreement between the United Nations and the Lebanese Republic on the Establishment of a Special Tribunal for Lebanon, Annex to UNSC Resolution 1757, May 30, 2007, S/RES/1757.

The temporal jurisdiction of the SCC, which extends back to January 1, 2003, gives room for investigations by the Special Prosecutor into crimes committed during the rule of Francois Bozizé as president of the CAR from 2003 to 2013 (SCC statute, art. 3.1; UNHCHR 2017). The jurisdiction has an unlimited future span, permitting the court to prosecute gross human rights violations that continue to occur in the CAR territory, with armed groups continuously carrying out attacks (Detchou 2018).

The territorial jurisdiction of the SCC covers crimes committed on the CAR territory and also “acts of co-perpetration and complicity committed on the territory of neighbouring states with which CAR had signed mutual legal assistance agreements” (Art. 4, Penal Code). This extension of the SCC’s jurisdiction to CAR’s neighbouring states is a reasonable response that some of the neighbouring states have been sources of militiamen or may have been hosts of planning attacks, or the hostilities in the CAR spilled over to those countries (Labuda 2017). Nevertheless, this innovation is restrictive as the SCC can only prosecute crimes committed, planned or executed in neighbouring states based on Mutual Legal Assistance agreements.

### **The organisation and functioning of the Special Criminal Court**

The SCC statute outlines its composition to include four judicial chambers and organs. The judicial chambers include the investigative chamber, the Special Indictment Chamber, the Trial Chamber and the Appeals Chamber. The other court organs include the registry, the Office of the Special Prosecutor (OSP) and a Special Corps of the Judicial Police. The Organic law also established a particular unit of defence counsels and allowed suspects, defendants and victims to apply for and obtain legal aid. The model of the SCC is derived from the French inquisitorial system, which empowers the Prosecutor and judges with co-wide powers to investigate offences (Labuda 2017). The composition of the court reflects a gender biased judiciary, with only three female judges out of 22 judges of the court, one female out of the 10 registrars and secretaries, four women out of eighty members of the special judicial corps, eight women out of the 51 lawyers who constitute the special unit of defence counsels. Amongst the 22 judges of the court, a majority are sourced from trained civilian magistrates, with some law professors, lawyers, and one military magistrate, occupying the position of Special Prosecutor.

The OSP is mandated to carry out first-degree criminal investigations. It is under the authority of an international Prosecutor, deputised by a CAR national, both assisted by at least two other prosecutors (Art. 8 SCC statute). An investigation here must be completed within six months except with authorisation from the Judge, and can either be initiated by the Prosecutor *ex officio* or as a result of a complaint from a victim or denunciation from a third party (art 18 SCC statute).

The judicial chambers of the SCC include the investigative chamber, the special indictment chamber, the trial chamber and the appeals chamber. The investigative chamber is responsible for conducting second-degree investigations on cases referred to it by the OSP, as well as complaints with civil claims submitted directly

by victims. In the latter case, the investigative chamber can order the OSP to investigate the complaint submitted. The panels in this chamber comprise two judges, one national Judge and one international Judge, who conduct investigations for a maximum duration of two years (Art. 11, SCC statute). At the end of its investigations, the chamber can, based on the available evidence, decide to refer a case before the trial chamber, where it is adjudicated on its merits (Art. 104, SCC Rules of Procedure). The indictment and appeals chambers receive and examine appeals from the investigative and prosecuting chambers (Art. 8, SCC statute). The calendar of court sessions at the SCC is fixed by the Minister of Justice of the CAR.

The SCC statute has established a special police corps to assist the OSP and the investigative chamber in the conduct of investigations, with its members from the gendarmerie and the national police force (Art. 8, SCC statute). These investigative agents work under the exclusive powers of the court authorities throughout their mandate to secure the court's independence (Art. 30, SCC statute). Nevertheless, the United Nations Multidimensional Integrated Stabilisation Mission in the Central African Republic (MINUSCA) has also been mandated to offer the services of peacekeepers as police agents for the court, though they remain under the UN's command chain (Art. 42, SCC statute).

According to articles 43 and 44 of the SCC rules of procedure, the registry handles the administrative operations of the court, including the management of case files, translation services, security, legal aid and outreach services. The registry also hosts a unit in charge of witness and victim support and protection composed of a financial account expert and a clinical psychologist (Art. 46, SCC Rules of Procedure). This organ is placed under the authority of a Registrar-in-Chief of CAR nationality and a Deputy Registrar-in-Chief who is a foreigner. The registry personnel comprising court registrars and other administrative personnel are deployed to the various chambers of the court by the Registrar-in-Chief to perform their respective tasks (Art. 15 SCC statute).

The SCC statute has also provided a special corps of defence lawyers to assist defendants, accused, and civil parties throughout the judicial process (Arts. 64–66, SCC statute). Members of this corps are sourced from the Central African Bar association and given necessary training with the assistance of the UN Office on Drugs and Crime and *Avocats Sans Frontières*. The SCC statute has also provided an international lawyer to assist the national defence counsel in handling sensitive matters (Art. 67, SCC statute).

### **The prosecutorial strategy of the court of the SCC**

The prosecutorial strategy of the SCC, which constitutes its *modus operandi*, was made public, unlike those of other hybrid courts like the International Criminal Tribunals for Rwanda and the former Yugoslavia and the Special Court for Sierra Leone. The strategy contains general principles of prosecution before the court and the criteria for selecting and prioritising cases. Labuda (2017) holds that the motive of the SCC to publish its prosecutorial strategy was a step to redefine its broad mandate and uphold the principles of independence, impartiality, and objectivity.

The strategy endorses the commencement of criminal actions through the OSP and a direct petition to the investigative Judge only as a secondary option. The strategy adopts a selective approach for cases to be handled before the SCC, guided by critical factors like the degree of responsibility in the incriminating acts, the actual role within the armed groups or government institutions and the element of a repeat offender. The jurisdiction over international crimes in CAR is shared between the ICC, and the national courts.

Regarding ICC's complementarity principle, jurisdictional primacy is accorded to the SCC and the national courts of CAR, with the ICC only intervening when the former are unwilling or unable to prosecute. On the contrary, article 37 of the SCC statute indirectly relegates the SCC to a secondary position by purporting to grant primacy jurisdiction to the ICC. The prosecutorial strategy also reiterates the top position of the ICC on the jurisdictional pyramid in CAR, attributing to it the function of investigating and prosecuting those most responsible for international crimes. The existing memorandum of understanding between the ICC and the SCC and the ongoing ICC's second investigations in CAR should not restrict the Special Prosecutor from investigating top-ranking perpetrators of crimes due to the belief that priority is granted to the ICC or that the SCC lacks jurisdiction to do so.

### **The quest for accountability in the CAR: criminal trials before the SCC**

The SCC officially went operational on October 22, 2018, with the holding of its inaugural session in Bangui and the court's prosecutorial strategy announcement a few weeks later by the OSP, Col. Toussaint Muntazini. By August 2021, the OSP had received 237 individual complaints from victims, with 11 cases under preliminary examination, one matter under preliminary investigation including sexual violence allegations. Twelve cases were referred to the investigative judges by the OSP and seven cases transferred to the national criminal courts after preliminary investigations by the OSP for alleged crimes not falling under the jurisdiction of the SCC as enshrined in article 35(3) of the SCC statute and Article 35(a)(c) of its Rules of Procedure (Elderfield 2021; HRW 2022).

The Investigating Judges also received 22 complaints with civil claims submitted by victims who indicated the wish to be taken as victims in subsequent trials. This chamber investigates nine cases, including four from the ordinary courts, with six emanating from the OSP. These cases include crimes committed in Bangui and out of the capital city and two alleged conflict-related sexual violence. With no statistics on the number of investigations or cases before the court on its website, very little information is available or communicated about proceedings before the court.

The SCC announced charges of crimes against humanity against the former captain of the presidential guards, Ngaikosset, on September 10, 2021. The Pre-Trial Chamber ruled on December 17, 2021, committing the first case in the SCC to trial. This case involved alleged international crimes (war crimes and crimes against humanity) perpetrated in May 2019 in the localities of Koundjili and Lemouna committed by Issa Sallet Adoum, Ousman Yaouba, and Tahir Mahamat, members of the

3R<sup>3</sup> (Return, Reclamation and Rehabilitation) rebel group (Mudge 2021). The first trial for this case, initially scheduled for April 19, 2022, was adjourned to April 25 because of an apparent boycott by the counsels for the defence parties (Ochab 2022). On October 31, 2022, the three accused persons were sentenced by the SCC to life imprisonment for Issa Adoum, and twenty years imprisonment for the other two for war crimes and crimes against humanity. The conduct of proceedings leading to this judgement took place between April 19, and August 19, in public, except for cases relating to rape that were heard *in camera*. From the foregoing, a typical SCC trial case can take 4 months, excluding the investigation phase.

### Challenges encountered by the Special Criminal Court

Despite the positive strides recorded, the SCC faces significant setbacks in its quest for accountability since it became functional. While prosecuting international crimes is cumbersome for most judicial systems, the task is more difficult in the CAR with a weak and underequipped judicial system. The SCC has been criticised for its slowness and the absence of accountability in its process (FIDHH, 2022). A special court with no guaranteed source of budget and a limited lifespan affects the conduct of proceedings. This is further complexified by a context of persistent violence and human rights violations in the country, and political interference into the activities of the court by the CAR government.

### The difficulties linked to the context of the CAR and violations

One of the major challenges of the SCC relating to the repression of severe violations of IHRL and IHL involves the difficulties of conducting investigations in a country in conflict, where violence persists, and in a country where seventy percent of the territory is controlled by armed groups. To add to the list, the weak governance in the CAR has promoted hostilities, as the failure of the government to provide security has caused some communities to form armed vigilante groups to ensure their protection, promoting cycles of violence in and around the country. The investigating teams of the SCC face difficulties in confirming violations committed in some areas due to the displacement of victims or witnesses or as a result of the trauma, shame, and fear that some of the victims of violations feel, as in the case of victims of rape and other forms of conflict-related sexual violence to seize the court of their offences. Due to persistent instability, some of the perpetrators of violations have departed from the CAR, while some of them and their victims have died. In some areas under the control of hostile armed groups, investigations by SCC are difficult to conduct, especially for those who continue to commit violations falling under the jurisdiction of the SCC (UNHCHR 2017). Some documentary and material evidence necessary for prosecuting offenders have been destroyed or tampered

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<sup>3</sup> This militia is one of the most powerful armed group in the CAR mainly constituted of the Fulani ethnic group.

with by time lapses or the offenders to wipe off any form of evidence that will incriminate them (Ibid). With the precarious security situation, the scope of SCC investigations has been limited. This limitation can jeopardise the legitimacy of the court's legitimacy as the conflict in the country operates along with ethnic and religious positions. If violations experienced by particular groups are not investigated, they will have a feeling of injustice and revenge.

In addition, the challenge of an ongoing conflict is linked to the diversity of conflicts and multiple armed groups in the CAR. The UN affirmed in its report of serious IHRL violations and breaches of IHL in the CAR between 2003 and 2015 that there existed multiple armed conflicts, opposing more than fourteen armed groups on the territory of the CAR, with the protagonists changing subsequently (UNHCHR 2017). The UNHCHR report (2017) concomitantly identified multiple conflicts occurring in the CAR territory. Some opposing government forces (assisted by foreign troops) and rebel groups in the country, while others occurred between Central African armed groups and another category between foreign actors on Central African territory. Multiple fusions, factions, and alliances have occurred within the armed groups that operated in the CAR between 2012 and the present. The Seleka alliance, the principal protagonist in the 2012 conflict, was disbanded in 2014, leading to the emergence of many sections, some of which continue to operate in the CAR, while new armed groups emerged as a result of the coalition of some armed groups, like the case of the Union for Peace in the Central African Republic (UPC). These factors present a challenge for the SCC both at the level of the qualification of the crimes and the conflicts within which they were committed and at the level of the determination of criminal responsibility of their authors (Ibid).

Another factor that stands as a challenge to the SCC's fight against impunity emanates from the magnitude of violations of human rights and international humanitarian law that have occurred in the CAR during the court's investigations from January 1, 2003. The UN mapped out 620 human rights violations and violations of international humanitarian law in CAR, covering January 2003 and December 2015 (UNHCHR 2017). The authors of the Mapping Report indicated the incomplete nature of the collation of violations due to the difficulty of access to some areas of breaches and the displacement of victims and witnesses as a result of the trauma they underwent. Looking at subsequent abuses committed after the publication of the mapping report, from 2015 to the present, with ongoing hostilities, the SCC has a broad number of cases to investigate, which poses a challenge, requiring the prioritisation of cases.

### **Short lifespan and timeframe for investigations and limited financial resources**

The short and limited lifespan of the SCC seems to be incompatible with the nature of investigations and trials of IHRL violations and violations of IHL which generally take longer duration than common law offences. Therefore, this limited mandate constitutes an obstacle regarding the magnitude of crimes committed on the territory of the CAR from January 2003 and the duration of investigations of international crimes (Detchou 2018). Similarly, some Central Africans believe that

comprehensive accountability for atrocities in the CAR can only be achieved if the SCC's mandate extends far back to 1959, when Barthelemy Boganda, the pioneer president of the CAR, died (El Gantri and Yaliki 2022). This start date of investigations is crucial because since independence, the CAR has witnessed enduring conflicts with violations of IHRL and IHL for decades, and the perpetrators have enjoyed impunity. However, the limitation of the SCC's jurisdiction to 2003 aims at permitting the court to investigate into some of the heinous atrocities committed in the country from the Bush war till date. The Truth, Justice Reparation and Reconciliation Commission in the CAR has been mandated to investigate the truth about occurrences in the country from 1959, hence covering the vacuum of the SCC.

Also, the SCC has no reliable source of financing. Its budget is principally sourced from freewill donations from some developed countries and international organisations.<sup>4</sup> The quota of contribution by the CAR government to the court's budget is minimal and primarily through human resources and structures hosting the court offices. The management of the funds of the court is entrusted to the UNDP. This affects the court's smooth functioning and purports to tamper with its impartiality and independence, as it has no budgetary autonomy (Elderfield 2021). The overdependence of the court to financial donations from western countries jeopardises its credibility as there are risks of manipulations from the donors.

The SCC has a relatively small budget compared to other hybrid tribunals, despite the significance of its mandate. The budget which stood at 12 million US dollars only represents 30% of the SCSL's and the ECCC's annual budgets and 20% of the STL's budget (Ibid). Human Rights Watch (2022) pointed out that the financial situation of the SCC is composite and represents the many difficulties encountered by justice efforts for international crimes in different countries in recent years. With an irregular budget sources and uncertain guarantee of continued funding, the SCC is made more vulnerable, as it can easily fall under the dictate of the funding nations and institutions. With an estimated annual budget of 12 million dollars, the court only mobilised between 6 and 8 million dollars for 2022 (Maxence 2022).

### Political interference in the SCC's fight against impunity

CAR's history has been characterised by a weak judicial system flawed by corruption and political interference in judicial processes due to the successive repressive and military regimes. The SCC was created to secure accountability for international crimes while promoting national ownership and including international judicial standards and personnel. At an early stage of its activities, the court has faced allegations of political interference, disclosing elements of impropriety. One instance before the court that attracted public criticism about its independence involved the case of Bouba Hassan, incumbent Minister of Livestock and former number two in the UPC rebel group. Bouba was arrested on November 19, 2021, by the SCC on several charges, including crimes against humanity for murder, torture

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<sup>4</sup> MINUSCA, the European Union, the United States, The United Nations Development Programme and the Netherlands.



and inhumane acts, and taken by the CAR special forces to Camp de Roux central prison in Bangui (Maxence 2022). He was later exfiltrated from the prison where he was detained awaiting trial on November 26, 2021, and taken back to his home by presidential guards before his first appearance before the Special Prosecutor. This incident brought to light what some critics termed the political instrumentalisation of the SCC, which significantly affected the court's credibility, independence and impartiality. This move by the government corroborates Oko's (2007) argument that African heads of states are adamant to push for the trial of their tribesmen, warlords or benefactors who possess the means to jeopardised the activities of their inexperienced government. Hamilton and Ramsden (2014) consider such interference not unique to the SCC, for the previous hybrid and international tribunals experienced similar incidents, reflecting the tension between politics and justice, pervading the designing of all international criminal tribunals (McAuliffe 2011). There are also high fears that the government may obstruct the court's investigations into crimes committed by other armed group leaders who have integrated into the government, government forces, and the Wagner company's Russian mercenaries fighting alongside government forces.

## **Prospective for an effective criminal accountability before the SCC**

Hybrid tribunals in the fight against impunity generally encounter challenges. These include the case of the SCC as discussed above. However, context-specific factors could contribute to the SCC's success in fighting against impunity. As a court whose mission focuses on criminal accountability and restoration of the rule of law, the SCC's success primarily relies on elements that promote the development of the rule of law, independence and transparency of the court's proceedings. This section examines the factors which could contribute to the court's success. Such factors include political will, communication and public participation, adequate security, and empowerment of national judicial personnel of the court.

### **Political will**

Political will is an essential component of the rule of law mechanism, which contributes to the success of the fight against impunity in a state (Michelin 2020). Political will here entails the commitment of political stakeholders to implement policies and perform actions to attain a set of objectives (Ndiyun 2022a). The success of a national accountability mechanism is guaranteed when national authorities genuinely support holding the perpetrators accountable for their atrocities irrespective of their political, ethnic or religious filiation (Witte and Duffy 2018). Domestic politicians must wilfully accept and respect the justice system's independence and avoid interference to attain this goal. The various strides leading to establishing the SCC indicate the strong political will for the court's success. This commitment to fight impunity is demonstrated through a state's unprecedented creation of a hybrid court through national legislation supported by the population's will (HRW, 2022).

However, the political will of the CAR authorities has been questioned by victims of atrocities and human rights groups. To them, the February 6 2019, peace agreement signed between the government and fourteen armed groups indicates the government's move to tilt away from its initial commitment to the court (FIDHH, 2022). As an outcome of the peace deal, three armed group leaders were appointed as special military advisers to the Prime Minister, although two later resigned. The appointment of armed group leaders into top government positions raises concerns about possible government pressure on the court, even though the court's statute expressly excludes amnesty, including for government officials (Art. 56 SCC statute). The exfiltration of Bouba Hassan from prison without the knowledge of the SCC also flaws the political will and manifests interference. For the SCC to succeed in its mission, the government needs to respect the independence of the judiciary in prosecuting perpetrators of atrocities, including government officials and forces. Also, any attempt by the court to grant amnesty to government officials will distort the rule of law and discredit the court's activities.

### **Legitimacy and local ownership of the court proceedings**

Participation and local ownership constitute the core elements of the legitimacy of public institutions and justice mechanisms. Judicial mechanisms fully integrated into the national legal system benefit from greater legitimacy with the country's citizens than foreign justice mechanisms (Witte and Duffy 2018). The justice sector in the CAR has been criticised as being weak and marred with corruption at all stages (UN, 2014). The widespread corrupt practices within the justice institutions in Bangui have deprived criminal proceedings in the town of legitimacy and credibility (De Coster et al. 2017). This adds to the fear of reprisals by armed groups whose members are prosecuted, intensifying the corruption (Ibid).

With these challenges, the SCC, with the participation of international actors in its fight against impunity, has high prospects. These external actors' presence can neutralise the CAR judiciary's ill perception. This will also promote public trust in the court's impartiality and objectivity (Witte and Duffy 2018). The mixed composition of the court with international staff occupying important positions can reduce the risk of corruption and political influence. The SCC's statute stipulates that the court's personnel shall be recruited from amongst persons of good character and who have demonstrated a high level of integrity and impartiality (Articles 9, 12(2), 13(2), 14 SCC statute). The law also guarantees the independence of each court organ and outlines the prohibited conflict of interest within the court (Art. 20, SCC statute). These legal safeguards can enhance transparency and impartiality in the court's transactions. The selection of all the international Magistrates of the court from French-speaking countries with a civil law background and a majority from African countries can increase the SCC's legitimacy. The designation of these judges with particular knowledge of legal practice, religion, or the CAR language helps enhance legitimacy and promote local participation in the court's accountability activities (Hobbs 2016).

The high thirst for justice for atrocities in the CAR attests to establishing and integrating the SCC as a domestic accountability mechanism, though with international elements. Some victims of atrocities in the CAR expressed their trust in the SCC because it is a national justice mechanism with a seat in Bangui and can easily access the perpetrators and the sites of offences to collect evidence (HRW 2022).

### **Improved communication and public relations**

An informed and participative population is essential in a robust justice mechanism in requesting the respect and protection of their fundamental rights from the state and other citizens (UNHCHR 2008). Clark (2008) holds that the success of the activities of every court relies on its cordial relationship with the population. This relationship is enhanced when the population is informed of the rights they are bestowed with and the existence of accountability mechanisms to protect these rights. The experience of the Special Court for Sierra Leone attests to the vital role of transmitting information to the population in post-conflict situations dealing with the prosecution of international crimes (UNHCHR 2008). The SCC, to achieve this goal of awareness creation, can intensify its outreach information initiatives on its own and through collaboration with the civil society in the CAR. The few outreach initiatives of the court have created awareness about its activities, attracting more victims to the court (HRW, 2022). Most non-governmental organisations in the country have also sensitised the population about the court and its activities, gathering evidence and information on victims, and witnesses, constituting good cases before the SCC.

### **Provision of adequate security to the court premises and personnel**

Despite the numerous peace deals concluded between the CAR government and armed groups, the country still faces a significant challenge of insecurity. This is because most of the short-lived deals have ignored justice by offering amnesty to the perpetrators against the population's will, hence failing to achieve peace. This insecurity constitutes a significant obstacle to the activities of the SCC. Conducting investigations and administering justice in an environment of instability and insecurity is daunting. The SCC investigators face difficulties in accessing some crime sites to collect evidence. Some victims and witnesses fear approaching the court to seek justice because of insecurity. For the SCC to credibly achieve long-term progress for durable peace, other security and peacebuilding initiatives like disarmament, demobilisation and reintegration programmes should effectively be implemented simultaneously (UNHCHR 2017). The UN peacekeepers have provided security to SCC investigators, especially as they move out of Bangui to gather evidence. This security should be extended to the court personnel to create a conducive environment for them to perform their duties. In some localities, victims and their tormentors live in the same vicinities, making it difficult for those victims to bring complaints before the courts. This also presents the need for protection to be accorded to victims and witnesses because of their vulnerability and exposure to the tormentors. Although

provided for in the legal texts regulating the court, witness and victim protection mechanisms are still inexistent due to a lack of personnel, logistics and psycho-social assistance (HRW, 2022).

## Conclusions

The SCC has been mandated to end impunity in the CAR, promote accountability, break the cycle of violence, and achieve durable peace. The court's architecture is well framed with greater legitimacy, and the mixed personnel of the court enhance its legitimacy and impartiality before the population who have desired domestic justice. Despite its snail paced activities, the SCC has successful commence trials, giving hopes of justice for victims of violations. The core values of impartiality and independence are essential to the court's success. The SCC needs to gain the local population's support and assert itself in the fight against impunity in the CAR. In that case, it is essential to investigate and prosecute the financiers, instigators and rebel group leaders who are the principal culprits of the violence and atrocities in the CAR. This task is further complexified by lack of political will, the fact that some armed group leaders are an integral part of the government as per the Khartoum peace agreement of 2019—the case of UPC leader Ali Darassa, military adviser to the Prime Minister—and the ongoing conflict.

The SCC reflects the resolve of the international community and the CAR government to reject impunity and is a symbol of lessons learnt from previous experiences of hybrid tribunals. The success of the SCC in achieving accountability for international crimes relies mainly on the current and future efforts, including the goodwill, the willingness and the commitment of the CAR government. The activities will possibly offer more lessons for future accountability mechanisms experiments. The findings of this research reveal that the conduct of investigations by the hybrid SCC alongside the ICC and national criminal courts of crimes on the same geographical space constitute a new experience in the field of international criminal law. While the court's creation is justified by the high thirst of the central Africans and international community for justice to be served in every aspect in the CAR, the findings reveal that the court's activities have been far from satisfying this desire due to factors analysed in the preceding sections. However, the court still holds the potentials of serving the desired justice and promoting sustainable peace in the 'phantom state' of the CAR.

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