



INTERNATIONAL  
NUREMBERG  
PRINCIPLES  
ACADEMY

Occasional Paper No.2

**The Special Criminal  
Court and Other Options  
Of Accountability in the  
Central African Republic:  
Legal and Policy  
Recommendations**

by Godfrey M Musila



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## Imprint

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## List of Abbreviations

|         |  |
|---------|--|
| AU      | African Union (AU)   |
| BINUCA  | Integrated Peace Building Office in the Central African Republic                                 |
| CAR     | Central African Republic   |
| CAVR    | <i>Commission centrafricaine de vérité et réconciliation</i>                                     |
| DDR     | Disarmament, demobilization and reintegration  |
| DRC     | Democratic Republic of the Congo (DRC)   |
| ECCAs   | Economic Community of Central African States   |
| EU      | European Union   |
| EUFOR   | European Force   |
| FOMUC   | Multinational Force in Central African Republic  |
| ICC     | International Criminal Court   |
| ICGLR   | International Conference on the Great Lakes  |
| ICICR   | International Commission of Inquiry on Central African Republic                                  |
| MICOPAX | <i>Mission de consolidation de la paix en Afrique Centrale</i>                                   |
| MINUSCA | United Nations Multidimensional Integrated Stabilization Mission in the Central African Republic |
| MISCA   | <i>Mission internationale de soutien en Centrafrique</i>   |
| MLA     | Mutual Legal Assistance  |
| MLC     | Mouvement de libération du Congo   |
| LRA     | Lord's Resistance Army   |
| OTP     | Office of the Prosecutor   |
| RtoP    | Responsibility to Protect  |
| SCC     | Special Criminal Court   |
| SGBV    | Sexual and Gender-Based Violence   |
| UN      | United Nations   |
| UNDP    | United Nations Development Programme   |
| UNGA    | United Nations General Assembly  |
| UNSC    | United Nations Security Council  |
| UNSG    | United Nations Secretary General   |
| UPDF    | Ugandan Peoples Defence Forces   |
| RTF     | Regional task Force  |

# The Special Criminal Court and Accountability in the Central African Republic: Legal and Policy Recommendations

## Abstract

*This paper examines the proposed options for justice and reconciliation in the Central African Republic and proposes policy recommendations on how mechanisms identified should be implemented. It provides a detailed analysis of the relationship between various options for justice, including the International Criminal Court and the proposed Special Criminal Court considered within the national transitional justice framework – the Republican Pact for Peace, National Reconciliation and Reconstruction – agreed on by the Bangui Forum on 11<sup>th</sup> May 2015. With respect to the Special Criminal Court, it reflects on its operation based on the current text of the law, and proposes policy recommendations drawn in part from the experience of similar courts as they relate to subject matter jurisdiction, the prosecutorial function, victims’ rights, witness protection, the court’s relationship with other courts, and non-judicial accountability mechanisms. The paper discusses how mechanisms of accountability relate to the broader transitional justice project, including constitutional reforms and others aimed at establishing peace and stability. Adopting a broad conception of justice – one that is not restricted to retributive justice – the paper locates victims within the transitional justice and criminal accountability project and argues that peace and stability as long term goals will remain elusive if the concerns of victims – however defined – are not addressed. The paper consequently argues that policy makers must fashion responses that address a multiplicity of concerns and interests in the Central African Republic.*

## 1. Introduction

Between the 4<sup>th</sup> and 11<sup>th</sup> May 2015, a national forum on national reconciliation and reconstruction of key stakeholders (Bangui Forum) consisting of 600 people (including 120 women) drawn from government officials, organised civil society, ethnic communities, religious groups, and citizens convened in the Central African Republic’s (CAR) capital Bangui to map the country’s post conflict future. Following days of deliberations that focused on four key themes – peace and security, justice and reconciliation, governance, and social and economic development – a pact known as the Republican Pact for Peace, National Reconciliation and Reconstruction (National Pact) was signed.<sup>1</sup> The National Pact adopted by

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<sup>1</sup> See Security Council Report ‘Chronology of Events: Central African Republic’ at <http://www.securitycouncilreport.org/un-documents/central-african-republic/>. See also UNSC Press Statement on CAR commenting CAR actors for Bangui Forum, available at <http://www.franceonu.org/UNSC-Press-statement-on-the-CAR>; United Nations, *Report of the Secretary General on the situation in the Central African*

the Forum recommended various transitional justice-related measures; in particular, constitutional reform, prosecutions, and security sector reform (essentially disarmament, demobilisation, and reintegration, or DDR).<sup>2</sup> The forum was the culmination of local consultations conducted around the country with the financial and technical support of the United Nations Multidimensional Integrated Stabilisation Mission in the Central African Republic (MINUSCA) and the United Nations Development Programme (UNDP).<sup>3</sup> The National Pact, which commands support among all sectors of CAR society, should thus be regarded as the blue-print for transitional justice in that country.

The National Pact sets out a broad vision and details the mechanisms to be created and measures to be undertaken to achieve set transitional justice goals. This paper provides a brief but succinct analysis of the options for justice and accountability, essentially focusing on the elements of the National Pact that relate to accountability for crimes and human rights violations committed during the armed conflict that began on 1<sup>st</sup> August 2012. Where appropriate, reference is made to crimes and human rights violations committed during the conflict that preceded the current one, dating back to 2003, which forms the subject of investigation in the first ICC situation (Situation in CAR I), and the commencement date of the temporal jurisdiction of the Special Criminal Court (SCC).

The paper proposes policy recommendations for the various options of justice in general, but also on specific aspects relating to the operationalisation of each mechanism: the proposed SCC, ordinary criminal courts, the truth commission, and traditional justice mechanisms that could play a supportive role in establishing accountability for crimes committed. With respect to the SCC, for instance, recommendations relate to, *inter alia*: subject matter and temporal jurisdiction; relationship between the court, the ICC and ordinary national courts and the truth commission; procedure; charging policy of the SCC, including prioritisation of crimes and incidents; cooperation and mutual legal assistance, including extradition; and the rights of victims and witness protection.

## 2. Conceptual Framework

The interventions in the CAR, including those relating to justice and reconciliation, can be understood and analysed through various frameworks including responsibility to protect (RtoP), transitional justice, and complementarity. While international actors tend not to make public claims to be acting under or to frame their actions in a particular intellectual or

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*Republic of July 29, 2015* (UNSG Report on CAR of July 2015) para 2-3. Available at [http://www.un.org/ga/search/view\\_doc.asp?symbol=S/2015/576](http://www.un.org/ga/search/view_doc.asp?symbol=S/2015/576) (Accessed on 20<sup>th</sup> September 2015).

<sup>2</sup> On the agreed principles to govern DDR, see 'Accord sur les principes de désarmement, démobilisation, réintégration et repatriement dans les corps en uniforme de l'état centrafricain entre gouvernement de transition et les groupes armés' May 2015 available at [http://www.hdcentre.org/uploads/tx\\_news/Accord-Desarmement-DDRR-RCA-groupes-armes-10-Mai-2015.pdf](http://www.hdcentre.org/uploads/tx_news/Accord-Desarmement-DDRR-RCA-groupes-armes-10-Mai-2015.pdf) (Accessed on 10<sup>th</sup> July 2015).

<sup>3</sup> UNSG Report on CAR of July 2015 (n 1 above), para 4.



conceptual framework,<sup>4</sup> these frameworks are useful as they provide the basis for a fuller appreciation and analysis of interventions made in their proper context. For our purposes, the all-encompassing RtoP and transitional justice provide the best analytical tools for understanding interventions by international and national actors, their motivations, prospects of achieving set objectives, and the political environment in which they unfold. With respect to prosecutions, the relationship between the proposed SCC and other local options is analysed from the perspective of complementarity, a principle that regulates the interaction between the International Criminal Court (ICC) and national criminal jurisdiction,<sup>5</sup> but which can also be located in the transitional justice (TJ) framework.

## 2.1 RtoP as Theoretical Framework

As a doctrine, RtoP holds that sovereignty as an attribute of the state entails responsibility to protect civilians from mass atrocities and gross human rights violations, and that when the state fails or is unwilling to act, the international community acting in various formations – collectively through the UN, regional organisations, a group of states or a state acting unilaterally – has the right and responsibility to take action, which may extend to military intervention.<sup>6</sup> The norm of RtoP, which was adopted by United Nations General Assembly's High Level Plenary Meeting of Heads of State and Government at the World Summit in 2005<sup>7</sup> bundles three main obligations – the responsibility to prevent, to react, and to rebuild – which in turn entail a range of activities and actions. Each action responds to a particular set of circumstances in the target state, and the choice to deploy should be driven by appropriateness, although this is not always the case.

Based on the RtoP, states have an obligation to take appropriate measures to prevent atrocities, and may, depending on the context, undertake diplomatic demarches, deploy peace keeping missions, and sanction destructive actors, be they individuals or organisations. When prevention fails, and once atrocities have occurred, states have a duty to react by exerting diplomatic pressure through sanctions (individual or collective), prosecutions, and military action, which is the last resort. The responsibility to rebuild consists of a long-term project of

<sup>4</sup> See Phillipe Polopion, 'The Central African Republic facing its RTOP moment of truth' available at <https://www.hrw.org/news/2013/12/20/central-african-republic-facing-its-RtoP-moment-truth>. See however in the case of Kenya, Elizabeth Lindenmayer and Josie L Kaye, 'A choice for peace? A Story of Forty-One Days of mediation in Kenya' (2009) p iii (where it has been claimed that Kofi Annan, the Chief Mediator in the Kenyan crisis in 2007-2008 saw the AU-UN intervention in Kenya's 2007-2008 post-election violence through the lens of RtoP and that Kenya was the first successful RtoP intervention).

<sup>5</sup> On complementarity generally, see Arts 1 and 17 Rome Statute; William Burke-White, 'Implementing a policy of positive complementarity in the Rome Statute System' *Criminal Law Forum* Volume 19, Issue 1, (2008) pp 59-85.

<sup>6</sup> On responsibility to protect, International Commission on Intervention and State Sovereignty *The Responsibility to Protect: Report of the International Commission on Intervention and State Sovereignty* (2001) available at <http://responsibilitytoprotect.org/ICISS%20Report.pdf> (Accessed on 19<sup>th</sup> September 2015).

<sup>7</sup> United Nations, *Outcome Document of the High-level Plenary Meeting of the General Assembly in September 2005*, paras 138-139 available at [http://responsibilitytoprotect.org/world%20summit%20outcome%20doc%202005\(1\).pdf](http://responsibilitytoprotect.org/world%20summit%20outcome%20doc%202005(1).pdf) (accessed on 12<sup>th</sup> January 2016).

stabilisation, and reconstruction of institutions and the state. The set of activities and the endeavour for reconstructing post conflict states have come to be known as peace building, which could be understood, in its narrowest sense, to refer to a long-term process that occurs after violent conflict has slowed down or ended and consists of ‘a wide range of activities associated with capacity building, reconciliation, and societal transformation’.<sup>8</sup>

Since 2003, international actors have undertaken – with varying degrees of success – various measures in the CAR that fall in the continuum of RtoP at different times during the multiple conflicts that have ravaged the CAR. Of these, the main ones include diplomatic interventions by the Economic Community of Central African States (ECCAS), the African Union (AU), the United Nations (UN) and individual states including France, Chad, Democratic Republic of the Congo (DRC) and Gabon; self-trigger of the jurisdiction of the International Criminal Court; deployment of observer and peacekeeping missions and the creation, by the UNSG of Integrated Peace-building Office in the Central African Republic (BINUCA) in 2010 (its mandate revised in 2013), which drove peace-building activities in that country until its absorption into MINUSCA in 2014.<sup>9</sup> BINUCA’s mandate extended to providing support for the implementation of the transition process; support for conflict prevention and humanitarian assistance; support for stabilisation of the security situation; promotion and protection of human rights; and the coordination of international actors.

While a comprehensive review of relevant activities is beyond the scope of this paper, BINUCA and subsequently MINUSCA undertook several activities that fulfil elements of three RtoP obligations to prevent, react, and rebuild. On the responsibility to rebuild, BINUCA has undertaken various activities in respect of which the United Nations Secretary General (UNSG) states:

‘MINUSCA signed a memorandum of understanding for quick-impact projects in October and November for the light rehabilitation of key infrastructure, including the rehabilitation of the *prefecture* building in Bria and of the building of the office for the administration of social affairs of Haute-Kotto, also in Bria, and for the construction of a sports and cultural centre for the youth of the fourth district of Bangui’.<sup>10</sup>

While this falls outside the focus of this paper, it is noteworthy that subsequent reports by the UNSG routinely review in detail ongoing activities by UN agencies on the ground in the

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<sup>8</sup> On the meaning of peace building see generally, Boutros-Ghali, Boutros, *An Agenda for Peace* (1995); Haugerudbraaten, Henning ‘Peacebuilding: Six dimensions and two concepts’ *African Security Review* Vol 7 No 6, 1998; Musila, Godfrey ‘The role of African regional and sub-regional bodies in international criminal justice’ [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2391140](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2391140) (reviewing the literature on the subject).

<sup>9</sup> UNSC Resolution 2121 (2013) BINUCA was integrated into MINUSCA on 15 September 2014, the date of MINUSCA’s creation on the orders of the UNSC through UNSC Resolution 2149 of April 2014.

<sup>10</sup> UNSG Report on CAR of November 2014, para 37. See Cinq-Mars, Evan ‘Too little too late: failing to protect in the Central African Republic’ Occasional Paper Series No. 7, September 2015 (which has analysed the intervention of the international community in CAR through the lens of RtoP) available at [http://www.globalr2p.org/media/files/occasionalpaper\\_car\\_final.pdf](http://www.globalr2p.org/media/files/occasionalpaper_car_final.pdf) (Accessed on 11<sup>th</sup> October 2015)

CAR.<sup>11</sup> As our discussion of the options of accountability in the CAR shows, each of the measures adopted to prevent or react to atrocities and to rebuild a post conflict state elicit varying degrees of support from the international community. The CAR situation perhaps also shows that some measures are preferred over others, in part due to cost implications, political acceptability, or the level of engagement it demands of leading state actors. Equally, the lack of coherence in international policy to intervene fails to address the root causes of the conflict and yields a patchwork of results when quick gains are prioritised and long-term commitment of resources is not guaranteed.

## 2.2 Transitional Justice as Theoretical Framework

Transitional justice connotes the totality of possible measures that can be taken by societies transitioning from conflict or illiberal regimes to address violations of human rights and other challenges associated with repressive regimes and the legacy of conflict. These measures include institutional reforms (including the constitution and security sector), prosecutions, gender justice, reparations, and truth-seeking mechanisms.<sup>12</sup>

The Bangui Forum convened in May 2015 to map the country's post-conflict future. Following days of deliberations that focused on four key themes – peace and security, justice and reconciliation, governance, and social and economic development – the Republican Pact for Peace, National Reconciliation, and Reconstruction was adopted.<sup>13</sup> The Pact recommends the institution of various transitional justice related measures, namely constitutional reforms, prosecutions, security sector reform (DDR), and the creation of a truth commission. It is regarded as the broad policy framework for transitional justice in the CAR, sets out a broad vision, and details the mechanisms to be created and measures to be undertaken to achieve set transitional justice goals. The rest of this paper examines the elements of the Republican Pact that relate to accountability for crimes and human rights violations committed during the conflict and, where appropriate, going back to 2003.

## 3. Background to the Conflict and Key Actors

The CAR has known only a few years of peace and stability since it attained independence from France in 1960, having been ruled by illiberal regimes with changes in government dominated by coups d'état rather than democratic transitions. Self-styled 'Emperor' Jean-

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<sup>11</sup> See note 34 below.

<sup>12</sup> See International Centre for Transitional Justice, 'What is transitional justice' available at <https://www.ictj.org/sites/default/files/ICTJ-Global-Transitional-Justice-2009-English.pdf> (accessed on 15<sup>th</sup> August 2015); Teitel, Ruti 'Transitional justice genealogy' *Harvard Human Rights Journal* Vol 16 (2003) 69-94.

<sup>13</sup> See Security Council Report 'Chronology of Events: Central African Republic' at <http://www.securitycouncilreport.org/un-documents/central-african-republic/>. See also UNSC Press Statement on CAR commenting CAR actors for Bangui Forum, available at <http://www.franceonu.org/UNSC-Press-statement-on-the-CAR> (Accessed on 15<sup>th</sup> July 2015).

Bedel Bokassa's dictatorship between 1965 and 1979 is perhaps the most infamous of these regimes because of its brutality and gross human rights violations committed during that period. Following two unstable regimes led by independence President David Dacko in his second stint in power (1979-1981) and General André Kolingba (1981-1993), the transition to multiparty politics in the early 1990s brought Ange Félix-Patassé to power in 1993. His rule lasted until his ouster in 2003 in a coup orchestrated by General Francois Bozizé, whose rule lasted until 2012 when he was deposed by the Russian-educated rebel leader Michel Djotodia's Muslim-dominated Séléka rebels.

The current conflict in the CAR pits the predominantly Muslim Séléka rebels against the mostly Christian Anti-Balaka militias. Members of the Armed Forces of the CAR (FACA) are also involved in the conflict. The Séléka had assumed power under President Djotodia in March 2013 and before they were subsequently compelled by ECCAS to relinquish it with Djotodia's resignation in January 2014. As the predominantly Muslim Séléka led by Michel Djotodia fought to entrench themselves in power after the March 2013 takeover, the conflict had spread into the general population, and mutated into one between the largely Christian farmers and Muslim herders and nomads in the countryside and villages, turning these into sites of violence and suffering. In 2014, some referred to this inter-communal fighting as the 'hidden conflict' or 'conflict within the conflict', and it has caused a massive internal dislocation of populations and externally into Cameroon and Chad.<sup>14</sup> Following the forced resignation of President Djotodia on 10<sup>th</sup> January 2014<sup>15</sup> and the establishment of a transitional government of national unity led by President Catherine Samba-Panza, many ex-Séléka fanned out into the countryside, intensifying the fight between Muslim herders associated with them and the farmers and the predominantly Christian anti-Balaka militias. The Séléka is said to have subsequently split into three groups, occasioned for the most part by a disgruntled Fulani membership protesting Séléka's extortion of their communities and theft of their livestock by a group close to Djotodia to finance the war effort.<sup>16</sup>

During many of its conflicts, the CAR has also been a theatre for foreign fighters, consisting of formal armies, rebels and mercenaries. Faced with rebellion and the imminent collapse of his government in 2002, President Félix-Patassé allegedly recruited the services of Jean-Pierre Gombo Bemba, Congolese strongman, former Vice President of the DRC, and leader of the Mouvement de libération du Congo (Movement for the Liberation of Congo; MLC), which fought in the Congolese civil war.<sup>17</sup> The MLC's alleged involvement in CAR would later lead

<sup>14</sup> International Crisis Group (ICG), 'The Central African Republic's Hidden Conflict' Africa Briefing No 105 December 12, 2014.

<sup>15</sup> See 'CAR interim President Michel Djotodia resigns' *BBC January 11, 2014 available at* <http://www.bbc.com/news/world-africa-25683279>; United Nations, *Report of the Secretary-General on the Central African Republic submitted pursuant to paragraph 48 of Security Council resolution 2127* of March 2014 (UNSG Report of March 2014) para 40. Available at [http://www.un.org/ga/search/view\\_doc.asp?symbol=S/2014/142](http://www.un.org/ga/search/view_doc.asp?symbol=S/2014/142).

<sup>16</sup> International Crisis Group, (n 14 above) p 9-10.

<sup>17</sup> See Situation in the Republic of Central Africa, *Warrant of Arrest for Jean-Pierre Bemba Gombo replacing the warrant of arrest issued on 23<sup>rd</sup> May 2008* available at Commander-in-chief of the Mouvement de libération du Congo (Movement for the Liberation of Congo) (MLC).

to the indictment, trial and conviction of Bemba by the ICC on charges of war crimes and crimes against humanity.<sup>18</sup> Chadian soldiers have also been active in the current conflict<sup>19</sup> and the ranks of Séléka rebels was said, at least at the beginning, to partly consist of independent fighters recruited in Chad, and possibly Darfur.<sup>20</sup> Chadian and Sudanese support for Séléka is said to have been instrumental in uniting three disparate groups and ousting President Bozizé.<sup>21</sup> In recent years, a Ugandan Peoples Defence Force (UPDF) task force supported by a reported 100 members of the US Special Forces has also been reportedly active in the CAR as part of the AU's Regional Task Force (RTF), a component of the Regional Cooperation Initiative for the Elimination of the Lord's Resistance Army (RCI-LRA) created to pursue and apprehend the leader of Uganda's LRA who is sought by the ICC for war crimes and crimes against humanity.<sup>22</sup> The roles of other states, grouped either as the ECCAS, AU or the UN are discussed below.

#### 4. Overview of Alleged Crimes and Human Rights Violations

Serious violations of human rights and crimes, including international crimes have been committed repeatedly during the CAR's multiple conflicts, coups, and during periods of dictatorial rule. A culture of impunity is seemingly entrenched, since these crimes tend to go unpunished, and key perpetrators have often been granted amnesty.<sup>23</sup> The International Commission of Inquiry established by the UNSG under UNSC Resolution 2127 to investigate

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<sup>18</sup> For the judgement of Pre-Trial Chamber III, see Situation in the Central African Republic, *The Prosecutor v. Jean-Pierre Bemba Gombo* ICC-01/05-01/08 of March 21, 2016 available at <https://www.icc-cpi.int/iccdocs/doc/doc2226759.pdf> (accessed on 22<sup>nd</sup> March 2016). A summary of the judgement is available at [https://www.icc-cpi.int/iccdocs/PIDS/publications/2016.03.21\\_Summary\\_of\\_the\\_Judgment-Eng.pdf](https://www.icc-cpi.int/iccdocs/PIDS/publications/2016.03.21_Summary_of_the_Judgment-Eng.pdf) (accessed on 22<sup>nd</sup> March 2016).

<sup>19</sup> See ICG (n 14 above) p 11 on the role of Chadian soldiers in the conflict; Townsend, 'Raped, plundered, ignored: central Africa state where only killers thrive' *The Guardian*, July 23 2013 on Séléka drawing its fighters from Chad and Darfur; Foreign & Commonwealth Office, 'Central African Republic: Background Brief and Analysis of the Crisis' at <https://www.gov.uk/search?q=Central+African+Republic%3A+Background+Brief+and+Analysis+of+the+Crisis> (on Séléka recruiting and obtaining arms from Sudan).

<sup>20</sup> See ICG (n 14 above) on presence of Chadians and Darfuris among the ranks of Séléka fighters.

<sup>21</sup> Evan Cinq-Mars and Global Centre for the Responsibility to Protect (n 11 above) at 8.

<sup>22</sup> Amnesty International 'Central African Republic: Human Rights Crisis Spiralling out of Control' October 23 2013, available at <http://www.amnesty.org/en/documents/AFR19/003/2013/en/> (accessed on October 10, 2015). The regional initiative was authorised by the AU Peace and Security Council in 2011. See AU Press Release, 'African Union welcomes progress made in eliminating the Lord's Resistance Army' available at <http://www.peaceau.org/uploads/auc-com.rci.pdf> (accessed on 22<sup>nd</sup> March 2016).

<sup>23</sup> Amnesty International, 'Central African Republic: Action Needed to Address Decades of Abuse' October 20, 2011, Index number: AFR 19/001/2011 available at <http://www.amnesty.org/en/documents/AFR19/001/2011/en/>. The report at pp 18-23 discusses decades of non-prosecution of serious human rights violations and the adoption of measures to shield perpetrators including the grant of amnesties.

crimes committed since 1<sup>st</sup> January 2013 has lamented that ‘impunity has a long and tragic history’ in the CAR.<sup>24</sup>

In recent times, crimes committed during the conflict that involved the removal of the late Ange Félix-Patassé by rebels led by François Bozizé in 2002 led to the triggering of the jurisdiction of the ICC in December 2004 by Bozizé, who had taken power in March 2003. The ICC subsequently indicted former Congolese Vice President Jean Pierre Bemba in his capacity as the alleged leader and commander-in-chief of the MLC which came to the aid of the embattled President Félix-Patassé. The MLC is said to have committed war crimes and crimes against humanity during that conflict.<sup>25</sup>

The latest round of human rights violations began with the outbreak of violence in 2012 between the mostly Muslim Séléka rebels that eventually seized power from François Bozizé on 24<sup>th</sup> March 2013. The Séléka waged a brutal pseudo-religious campaign targeting mostly Christian members of the population and supporters of Bozizé, and the violence continued after their takeover of power. Various reports, including that of the International Commission of Inquiry on Central African Republic (ICICR) have documented the egregious crimes committed in this period as Christian vigilantes and supporters of the deposed President fought back. These violations, as concluded by the ICICR and others, amount to war crimes and crimes against humanity. They include killings, torture, and other forms of inhuman and degrading treatment, widespread sexual violence including rape, forced marriages, recruitment of children as fighters, attacks on humanitarian workers including killings and looting, and pillage of private property.<sup>26</sup>

As the predominantly Muslim Séléka led by Michel Djotodia fought to entrench themselves in power after the March 2013 takeover, the conflict spread into the general population, and became one between the largely Christian farmers and Muslim herders and nomads in the countryside and villages, turning these into sites of violence and suffering. Following the forced resignation of the President Djotodia on 11<sup>th</sup> January 2014,<sup>27</sup> and the establishment of a transitional government of national unity, many ex-Séléka fanned out into the countryside, intensifying the fight between Muslim herders associated with them and the farmers and the allied mostly Christian anti-Balaka militias. This conflict has generated over a million Internally Displaced People (IDPs) and refugees (a quarter of the population), and led to

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<sup>24</sup> United Nations, *Report of the International Commission of Inquiry on Central African Republic*, forwarded by UNSG on December 19, 2014 available at [http://www.un.org/ga/search/view\\_doc.asp?symbol=S/2014/928](http://www.un.org/ga/search/view_doc.asp?symbol=S/2014/928). The Commission was appointed on Dec 5 2013 pursuant to UNSC resolution 2127 to probe crimes committed since January 1, 2013.

<sup>25</sup> See Situation in the Republic of Central Africa, *Warrant of Arrest for Jean-Pierre Bemba Gombo replacing the warrant of arrest issued on 23 May 2008* available at Commander-in-chief of the Mouvement de libération du Congo (Movement for the Liberation of Congo) (MLC).

<sup>26</sup> See ICICR, (n 24 above); also Amnesty International (n 22 above); UNSG Report on CAR of March 2014 (n 15 above) para 14.

<sup>27</sup> See ‘CAR interim President Michel Djotodia resigns’ *BBC January 11, 2014* available at <http://www.bbc.com/news/world-africa-25683279>.

economic collapse due to paralysis in the farming and livestock sectors.<sup>28</sup> Attacks on communities and reprisals from those attacked continue to produce many deaths. Torture and the use of sexual violence as a weapon of war is rampant, and cases of looting and destruction of property belonging to rival communities and groups have been recorded throughout the conflict.<sup>29</sup>

Sexual violence and exploitation of women and girls, including by UN peacekeepers, has been widespread. The UN has reported that vulnerable groups, including women and children, have been the main targets, and that cases of rape, including gang rapes, and forced marriages have occurred.<sup>30</sup> In August 2015, allegations against peacekeepers of the abuse of children led to the removal by the UNSG of General Babacar Gaye, the Special Representative of the Secretary General.<sup>31</sup> He was replaced by Parfait Onanga-Anyanga, a seasoned UN diplomat from Gabon. As of 24<sup>th</sup> September, 17 cases of sex crimes committed by MINUSCA had been reported, a majority implicating military and police.<sup>32</sup> In 2015, the last reported case of allegations against a civilian member of MINUSCA was brought to MINUSCA's attention on 12<sup>th</sup> September. In line with the UNSG's zero tolerance of this class of crimes, an inquiry by MINUSCA's Internal Affairs Unit was launched. The UN High Commissioner for Human Rights Zeid Ra'ad Al-Hussein and the UN under Secretary for Peace Operations Hervé Ladsous were promptly informed.<sup>33</sup> The UNSG subsequently appointed an independent panel of experts to investigate the abuse of children in the CAR.<sup>34</sup> The panel returned a report critical of the UN's handling of the affair.<sup>35</sup> The allegations of sexual abuse of boys and girls, which also implicated members of the French peacekeeping force, *Operation Sangaris*, led to

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<sup>28</sup> International Crisis Group (n 14 above) 8-9.

<sup>29</sup> On human rights violations and crimes committed during the conflict, United Nations, UNSG Report on CAR of March 2014 (n 15 above); United Nations, Report of the Secretary-General on the situation in the Central African Republic of 1 August 2014 submitted pursuant to Security Council resolution 2149 (2014); United Nations, Report of the Secretary-General on the situation in the Central African Republic of 28 November 2014 submitted pursuant to Security Council resolution 2149 (2014); United Nations, Report of the Secretary General on the situation in the Central African Republic of 29 July 2015 and; United Nations, Report of the Secretary-General of 1 April 2015 on the situation in the Central African Republic from November 28, 2014. All available at <http://www.un.org/en/peacekeeping/missions/minusca/reports.shtml> (accessed on various dates in 2015 and early 2016).

<sup>30</sup> See for instance United Nations, UNSG Report on CAR of March 2014 (n 15 above) para 14.

<sup>31</sup> 'Le chef de l'ONU en Centrafrique limogé' *Le Figaro*, August 12, 2015 available at <http://www.lefigaro.fr/international/2015/08/12/01003-20150812ARTFIG00307-le-chef-de-l-onu-en-centrafrique-limoge.php> (accessed on 15<sup>th</sup> December 2015).

<sup>32</sup> See 'Centrafrique: nouveau cas d'abus sexuel' *Le Figaro*, September 15, 2015 available at <http://www.lefigaro.fr/flash-actu/2015/09/15/97001-20150915FILWWW00357-centrafrique-nouveau-cas-d-abus-sexuel.php> (Accessed on 1<sup>st</sup> October 2015).

<sup>33</sup> As above.

<sup>34</sup> UNSG 'Secretary-General Appoints Independent Review Panel on UN Response to Allegations of Sexual Abuse by Foreign Military Forces in Central African Republic' UNSG Press Release of June 22, 2015 available at <http://www.un.org/press/en/2015/sgsm16864.doc.htm> (accessed on 1<sup>st</sup> October 2015).

<sup>35</sup> 'Viols d'enfants: l'ONU aurait «échoué» en Centrafrique' *Le Monde*, December 17, 2015 available at [http://www.lemonde.fr/afrique/article/2015/12/17/viols-d-enfants-l-onu-aurait-echoue-en-centrafrique\\_4834314\\_3212.html?xtmc=operation\\_sangaris&xtcr=1](http://www.lemonde.fr/afrique/article/2015/12/17/viols-d-enfants-l-onu-aurait-echoue-en-centrafrique_4834314_3212.html?xtmc=operation_sangaris&xtcr=1) (accessed on 15<sup>th</sup> January 2016).

the opening of investigations in France in September 2014,<sup>36</sup> culminating in a trial in Paris of several members of the force.<sup>37</sup>

## 5. Proposed and Current Options for Justice and Accountability

The Bangui Forum recommended the creation of a Special Criminal Court and truth and reconciliation commission, which are discussed in the following sections. The options of accountability are discussed, taking into consideration the conceptual framework developed in the introduction. This part of the paper first considers the role of the ICC followed by the SCC in prosecuting international crimes committed by those who bear the greatest responsibility. It conducts a detailed review of key provisions of the Organic Law establishing the SCC and proposes policy recommendations on a variety of themes surrounding the SCC. The paper then conducts a brief analysis on the potential contribution of other criminal courts in CAR, in particular ordinary criminal courts and traditional justice mechanisms, before sketching the proposed truth commission. The discussion of each option is conducted in context and in relation to other mechanisms, taking into account the potential contribution of each to the accountability project.

By way of introduction, a review of past accountability measures in the CAR reveals a dismal picture, defined by half-hearted measures, amnesties, and a lack of political will, which has entrenched impunity for serious crimes and human rights violations dating back decades. The trial in 1986 of former President Jean Bedel Bokassa and his subsequent imprisonment for life for the killing of students during his rule is the only reported high profile prosecution of past atrocities in the CAR. He was released in 1993 as part of a general amnesty instituted by President Patasse.<sup>38</sup> Other than this trial, no other prosecutions ever took place and several accountability measures undertaken by successive governments including a truth commission failed.<sup>39</sup>

The pattern followed over the years seems to be that every leader since President Dacko would commit to prosecuting crimes and rendering accounts soon after taking power, but their

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<sup>36</sup> Bensimon, Cyril and Seelow, Soren 'Treize soldats français accusés d'avoir violé des enfants en Centrafrique' *Le Monde* April 30, 2015 available at [http://www.lemonde.fr/international/article/2015/04/30/seize-soldats-francais-accuses-d-avoir-viole-des-enfants-en-centrafrique\\_4625586\\_3210.html](http://www.lemonde.fr/international/article/2015/04/30/seize-soldats-francais-accuses-d-avoir-viole-des-enfants-en-centrafrique_4625586_3210.html); 'Centrafrique : enquête pour viol après des accusations contre un soldat français' *Le Monde* September 5, 2014 available at [http://www.lemonde.fr/afrique/article/2015/09/04/centrafrique-la-justice-saisie-apres-de-nouvelles-allegations-d-abus-sexuel-contre-un-militaire-francais\\_4746394\\_3212.html](http://www.lemonde.fr/afrique/article/2015/09/04/centrafrique-la-justice-saisie-apres-de-nouvelles-allegations-d-abus-sexuel-contre-un-militaire-francais_4746394_3212.html) (accessed on 15<sup>th</sup> January 2016).

<sup>37</sup> 'Accusations de viols en Centrafrique: quatre soldats français entendus par la justice' *Le Monde* December 8, 2015 available at [http://www.lemonde.fr/police-justice/article/2015/12/08/accusations-de-viols-en-centrafrique-premieres-auditions-de-militaires-francais\\_4826921\\_1653578.html](http://www.lemonde.fr/police-justice/article/2015/12/08/accusations-de-viols-en-centrafrique-premieres-auditions-de-militaires-francais_4826921_1653578.html) (accessed on 15<sup>th</sup> January 2016).

<sup>38</sup> On the trial of Bokassa, see ICICR (n 24 above) para 31.

<sup>39</sup> See Amnesty International, (n 23 above) pp 18-23 (discussing decades of non-prosecution of serious human rights violations and the adoption of measures to shield perpetrators including the grant of amnesties).



drive would soon fizzle out as they entrenched themselves and new rebellions coalesced against them. Known examples of initiatives include: the Truth Commission; the *commission centrafricaine de vérité et réconciliation* (CAVR) created by Patasse in 2002; the National Dialogue he instituted in 2002, months before he was ousted by Bozizé in a coup in March 2003; and the Mixed Commission of Inquiry announced by President Michel Djotodia in April 2013 to probe human rights violations committed since 2004.<sup>40</sup> By the time the SCC was proposed in May 2015, a Special Investigation Unit *cellule spéciale d'enquête et d'instruction* had been created in April 2014 to investigate human rights violations committed largely by Séléka rebels.

This backdrop of seemingly deep-rooted impunity forms the context for our analysis, and the implementation of accountability measures foreseen in the National Pact. The wanton commission of atrocities by different parties to the conflict largely targeting civilians can be rationalised by a history of amnesia and a lack of political will to prosecute crimes and should serve as motivation for all actors to take accountability seriously. It is unlikely that any other measures aimed at stabilising CAR, including bringing the conflict to an end and holding democratic elections, will work unless a systematic effort is made to address the legacy of violence and amnesia.

The following sections analyse key vehicles of accountability in the CAR: preventive diplomacy; prosecutions before the ICC, SCC and ordinary national courts; truth and reconciliation commissions; and traditional justice mechanisms.

## 5.1 RtoP in Action: An Overview of Interventions in the CAR

Preventive diplomacy and peacekeeping constitute two critical facets of the first limb of the RtoP norm: prevention. Since 2003, regional and international actors have undertaken various measures that fall in the framework of RtoP at different times during the multiple conflicts that have ravaged the CAR. Of these, the main ones include diplomatic interventions by individual states of which there are many: interventions by ECCAS,<sup>41</sup> the AU, the European Union (EU), and the UN; triggering of the jurisdiction of the ICC; deployment of observer and peacekeeping missions; and the creation by the UNSG of the Integrated Peace Building Office in the Central African Republic (BINUCA) in 2010. BINUCA served as the UN's vehicle for peace building activities and human rights protection. Its mandate was revised in 2013. BINUCA led peace-building activities in CAR until its absorption into the UN's peacekeeping mission, MINUSCA in 2014.<sup>42</sup>

<sup>40</sup> On the Mixed Commission of Inquiry announced by President Michel Djotodia in April 2013 soon after he took power. See Amnesty International Report (n 23 above) 5 to probe human rights violations committed since 2004.

<sup>41</sup> The intervention by ECCAS led to the adoption of the Libreville Accords that paved the way for the installation of the Transitional Council headed by Michel Djotodia and later the Transitional National Government headed by President Catherine Samba Panza.

<sup>42</sup> UNSC Resolution 2121 (2013). BINUCA was integrated into MINUSCA on 15 September 2014, the date of MINUSCA's creation on the orders of the UNSC through UNSC Resolution 2149 of April 2014.

With respect to peacekeeping, ECCAS deployed the *Mission de consolidation de la paix en Afrique Centrale* (MICOPAX) consisting of troops from its member states (Gabon, Cameroon, Chad and DRC) to secure Bangui, and to protect civilians from attacks by both Séléka and Anti-Balaka. This was with the financial support of the EU,<sup>43</sup> before the 2,600 strong mission was replaced and absorbed into the AU's 3,600 troop peacekeeping mission known by its French acronym *Mission internationale de soutien en Centrafrique* (MISCA).<sup>44</sup> As discussed below, the AU force transitioned into the UN mission, MINUSCA, authorised by the UNSC by Resolution 2149 in 2014.

With respect to peace building, BINUCA's mandate extended to providing support for the implementation of the transition process; support for conflict prevention and humanitarian assistance; support for stabilisation of the security situation; promotion, protection of human rights; the rehabilitation of social infrastructure; and the coordination of international actors.<sup>45</sup> Pledges totalling \$496 million made by several international actors<sup>46</sup> after a European Commission meeting in Brussels on 20<sup>th</sup> January 2014 for stabilisation programmes that include humanitarian relief and the restoration of basic services, and for cash-for-work programmes, should be seen as contributing to building peace in CAR and thus fall under the RtoP's framework's second and third limbs on *responsibility to react and rebuild*.<sup>47</sup> At another donors' conference convened by the AU on 1<sup>st</sup> February 2014, a total of \$316 million was pledged for CAR and MISCA.<sup>48</sup> From the perspective of accountability for human rights violations and crimes, donor contribution facilitates the creation a conducive environment for the mounting of prosecutions and for the initiation of long term processes of reconciliation and institutional reforms.

As the discussion of the options of accountability in the CAR shows, each of the measures adopted to prevent or react to atrocities and to rebuild a post conflict state elicits varying degrees of support from the international community. In our view, it is critical for these actors to develop a coherent and coordinated approach, particularly in the implementation of agreed or pledged support as lack of coherence in 'international policy to intervene,' results in duplication of efforts and yields a patchwork of results from the perspective of addressing

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<sup>43</sup> Amnesty records that the European Union (EU) through its African Peace Facility (APF), has supported MICOPAX and its predecessor the Multinational Force in Central African Republic (FOMUC) since 2008 with funding amounting to 90 million euros. See Amnesty International, (n 22 above) 9.

<sup>44</sup> The deployment of MISCA was authorised by the AU Peace and Security Council on 19<sup>th</sup> July 2013 and subsequently on 5<sup>th</sup> December 2013 by the UNSC Res 2127. See in this regard, African Union Peace and Security Council '1er Rapport Intérimaire de la Commission de l'Union Africaine sur la situation en République Centrafricaine et les activités de la Mission Internationale de Soutien à la Centrafrique sous conduite Africaine' available at <http://www.peaceau.org/fr/article/1er-rapport-interimaire-de-la-commission-de-l-union-africaine-sur-la-situation-en-republique-centrafricaine-et-les-activites-de-la-mission-internationale-de-soutien-a-la-centrafrique-sous-conduite-africaine> (accessed on 15<sup>th</sup> October 2015).

<sup>45</sup> UNSG Report on CAR of November 2014 ( n 29 above) para 37.

<sup>46</sup> EU, UN, the US, the World Bank and the African Development Bank.

<sup>47</sup> 'Donors pledge €360 million to Central African Republic' <http://www.euractiv.com/sections/development-policy/donors-pledge-eu360-million-central-african-republic-269623> (Accessed on 15<sup>th</sup> October 2015).

<sup>48</sup> UNSG Report on CAR of March 2014 (n 29 above) para 45.

root causes of a conflict when quick gains become the mainstay of responses and long-term commitment of resources is not guaranteed.

## 5.2 The International Criminal Court: A Review and Prospects

On 30<sup>th</sup> May 2014, President Samba-Panza formally referred the situation to the ICC. The ICC, having determined that the situation was different from the first one, has designated it ‘Situation in Central African Republic II’ in order to distinguish it from ‘Situation in Central African Republic I’, which was referred by President Bozizé in 2004. In September 2014, the Office of the Prosecutor (OTP) announced, following a period of preliminary examination,<sup>49</sup> the opening of a second investigation in relation to crimes committed in the conflict in the CAR since 1<sup>st</sup> August 2012.<sup>50</sup>

## 5.3 The Relationship between the ICC and the SCC

With respect to subject matter jurisdiction, the ICC and the SCC can prosecute the same crimes arising out of the conflict in the CAR (genocide, war crimes and crimes against humanity), although the SCC can additionally prosecute the distinct crime of torture. Equally, the law establishing the SCC could be amended with greater ease to try lesser crimes under the penal code if the need ever arose. With respect to temporal jurisdiction, the SCC can reach much further back than the ICC, whose temporal jurisdiction was delimited by President Panza in her referral letter to 1<sup>st</sup> August 2012 and subsequently endorsed by the ICC Prosecutor in her Article 53 Report. The SCC has also a greater geographical reach than the ICC with respect to crimes linked to the conflict in the CAR. While the ICC’s territorial jurisdiction is limited to the territory of the CAR, the SCC can prosecute crimes committed in neighbouring countries in circumstances described below.

Based on this preliminary comparison between the jurisdiction of the ICC and that of the SCC, the latter could be said to reflect, deceptively, that it is better suited to the situation in the CAR. While there are some strong elements which should inform how the SCC is operationalised in relationship to other options for prosecutions, this description belies a more complex state of affairs.

As a national court, the SCC’s relationship with the ICC is governed by the principle of complementarity in Article 17, the cooperation framework anchored on Article 86, and other

<sup>49</sup> See Office of the Prosecutor (ICC), *Situation in the Central African Republic Report: Article 53(1) report* dated September 24, 2014 available at [http://www.icc-cpi.int/en\\_menus/icc/structure%20of%20the%20court/office%20of%20the%20prosecutor/reports%20and%20statements/statement/Documents/Art\\_53\\_1\\_Report\\_CAR\\_II\\_24Sep14.pdf](http://www.icc-cpi.int/en_menus/icc/structure%20of%20the%20court/office%20of%20the%20prosecutor/reports%20and%20statements/statement/Documents/Art_53_1_Report_CAR_II_24Sep14.pdf) (accessed on 20<sup>th</sup> October 2015).

<sup>50</sup> See Office of the Prosecutor (ICC), ‘Statement of the Prosecutor of the International Criminal Court on opening a second investigation in the Central African Republic’ doc no ICC-OTP-20140924-PR1043 available at [http://www.icc-cpi.int/EN\\_Menus/icc/press%20and%20media/press%20releases/pages/pr1043.aspx](http://www.icc-cpi.int/EN_Menus/icc/press%20and%20media/press%20releases/pages/pr1043.aspx) (accessed on 12<sup>th</sup> January 2016).

related provisions in the Rome Statute.<sup>51</sup> The relationship between the two courts is likely to be more complicated than the SCC's relationship with other national courts, in the absence of a provision in the Organic Law of the SCC regulating how the ICC and the SCC should relate. In reality, this relationship is based on the Rome Statute principle of complementarity, in which national jurisdictions have the first opportunity to investigate and prosecute core international crimes, and the ICC's intervention only follows a determination that the state is unable or unwilling to investigate or prosecute relevant crimes.<sup>52</sup> In her letter to the Prosecutor of the ICC, President Samba Panza appears to obviate the need to conduct a detailed analysis of the complementarity test, and thus to unreservedly open the door for the ICC. She declared unequivocally the lack of capacity of CAR institutions to investigate and prosecute perpetrators of international crimes:

‘The Criminal Justice System in the CAR, ravaged by violence and crisis experience by the country for many years lacks the capacity to effectively conduct the necessary investigations and prosecutions. The intervention of the ICC appears today indispensable to the prosecution of those who bear the greatest responsibility as these crimes should not go unpunished’.<sup>53</sup>

The Report of the Prosecutor on preliminary examinations (Article 53.1 Report) conducted following the referral reaches the same verdict on the capacity of national institutions. It concludes that the CAR government's own admission as to their weakness, coupled with the findings of the OTP's preliminary examination, partly informed the OTP's decision to open formal investigations. In the OTP's view, it will be easy subsequently to furnish the requirements of admissibility should the ICC prefer charges for crimes committed in the CAR.<sup>54</sup>

The ICC's assumption of jurisdiction in relation to the ‘Situation in the Car II’ is unlikely to be an adequate response to the mass criminality witnessed in CAR. The OTP's history shows that only a handful of perpetrators will be indicted from the armed formations it identifies in its Article 53.1 Report. Thus, notwithstanding the primacy of national jurisdiction in the context of Article 17 on complementarity, it is likely that the majority of many perpetrators, will have to be tried in the CAR, primarily by the SCC. This heavy burden will necessitate unprecedented horizontal cooperation between the ICC and the SCC to facilitate prosecutions by the SCC whether contemporaneous or not to those of the ICC. The ICC's long involvement in the CAR should be leveraged by the SCC. President Panza's admission of CAR's inability to prosecute ICC crimes implies that the burden falls on the ICC to prosecute at least the key perpetrators, but budgetary considerations on the ICC's side are likely to force

<sup>51</sup> See Articles 86-93 Rome Statute.

<sup>52</sup> On complementarity generally, see Burke-White (n 5 above) 53-108.

<sup>53</sup> Translation from French: ‘Les juridictions centrafricaines durablement affectés par la violence et les crises qu'a connue le pays depuis plusieurs années, ne sont pas en mesure de mener à bien les enquêtes et les poursuites nécessaires sur ces crimes. L'intervention de la Court Pénale Internationale paraît aujourd'hui indispensable à la poursuite et jugement des acteurs des plus graves de ces crimes qui ne sauraient rester impunis.’ See Annex for the letter of referral.

<sup>54</sup> Situation in the Central African Republic II: Article 53(1) Report (n 48 above), para 250.

a different reality, demanding that the international community must provide appropriate support to national actors to enable the SCC to shoulder the bulk of the burden or to contribute its fair share to the prosecution of crimes committed in the ongoing conflict.

As is usually the case, the ICC will make demands on the CAR to cooperate fully with the Court in its investigations and prosecutions in a wide range of areas detailed in Article 93 of the Rome Statute. This demands that the CAR should establish the requisite institutional framework, including designating political and technical focal points for cooperation exchanges, and to develop the capacity to respond to cooperation requests on, *inter alia*: investigations; access to sites and locating evidence; arrest and surrender of those indicted; witness protection; support for victims; and freezing of assets. In terms of the law that governs cooperation, the CAR Criminal Procedure Code provides for an adequate legislative framework.<sup>55</sup>

#### 5.4 Special Criminal Court (Hybrid Court): A Review of Legislation

Following the recommendation by the Bangui Forum that an SCC be created as a part response to commission of international crimes, the Senate subsequently enacted legislation establishing the Special Court on 22<sup>nd</sup> May 2015.<sup>56</sup> The SCC, which is *not* a hybrid court but rather a special national court with participation of international actors, is established *within* the judiciary of the CAR. The following sections analyse various aspects of the SCC, including jurisdiction (temporal, subject matter), operation of various chambers and organs of the court as well as the role of MINUSCA.

##### 5.4.1 Subject Matter Jurisdiction

Article 3 of the Organic Law states that the SCC is competent to investigate and prosecute:

‘gross violations of human rights and serious violations of international humanitarian law [...] as defined by the *Central African Penal Code* and by virtue of international law obligations undertaken by the CAR ... particularly genocide, crimes against humanity and war crimes’.

The CAR Penal Code (Code Penal) of the CAR criminalises the crime of genocide, war crimes, and crimes against humanity.<sup>57</sup>

For genocide, the definition in Article 152 of the Penal Code mirrors Article 6 of the Rome Statute on the crime of genocide, which can be summarised as follows: commission of one or more listed acts (acts of genocide) against a protected group (ethnic, racial, national or religious) with the intention to destroy in whole or in part, that group. The main difference is

<sup>55</sup> See CAR Criminal Procedure Code, chapter XVI.

<sup>56</sup> See Loi Organique No 15, 003 Portant Création, Organisation et Fonctionnement de la Cour Pénal Spécial (Organic Law on the Establishment of the Special Criminal Court, No 15, 003).

<sup>57</sup> See Arts 152 to 161 CAR Penal Code.

that the CAR Penal Code extends the protection to ‘*any other group defined by specific criteria*’ (the formulation in French being *groupe déterminé à partir de tout critère arbitraire*). Arguably, this could extend protection to any group, including political, cultural and social groups, although social-cultural characteristics are often associated with individuals or people of particular ethnic or racial extraction. Scholars and states resist and counsel against the expansion of the groups protected to include, for instance, political groups as such an approach can result in the trivialisation of genocide, universally regarded as the most serious international crime. In only one known instance, that of Ethiopia, national law includes a political group as a protected group in the definition of genocide, and it is on the basis of this that former members of the *Derg* regime led by Mengistu Haile Mariam were tried for genocide for the murder of an estimated 500,000 to 2 million political opponents of the communist regime during the ‘Red Terror’. Mengistu’s reign lasted for 16 years between 1975 and 1991 when he was deposed by rebels at the end of a bloody civil war.<sup>58</sup>

The formulation of genocide in the CAR Penal Code mirrors and could pass for the crime against humanity of *persecution*, in terms of which prohibited acts such as murder, torture, and sexual violence targeting any group. The key criteria are that the offending acts are discriminatory and that the group whose rights are violated are singled, including on grounds proscribed in major human rights treaties.<sup>59</sup> With respect to the identity of the protected group, some situations could present one with a choice in the CAR situation. For instance, the Peuhl, a northern ethnic community that is spread over several countries in Central and West Africa, tend to be Muslim. They are cattle herders and practice pastoralism as their main economic activity, which is associated with a particular social or cultural way of life. As is customary, the identity of a group (which is protected), as well as the number of victims is germane to the characterisation of certain conduct as genocide. In the CAR, if acts of genocide targeted individuals from several ethnic backgrounds that have embraced Christianity or Islam, the protected group could either be a religious one (in which case acts targeting two or more ethnic groups can be prosecuted as one case) or ethnic, in which a case of genocide would have to be constructed in relation to each ethnic group, irrespective of their religious background.

Unlike genocide, crimes against humanity target *any civilian population* that is identifiable or defined by a number of characteristics including ethnic, political, geographic, social, cultural, or even economic activity (Article 7 Rome Statute). The defining criterion is *civilian*. The commission of prohibited acts such as murder, different forms of sexual violence, or persecution need not to be accompanied by the special *intent to destroy* the group, as is the case for the crime of genocide. However, to qualify as crimes against humanity, these acts have to be committed in a certain context: there has to be a widespread or systematic attack on the group (civilian population) performed pursuant to a policy originated by the state or an

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<sup>58</sup> See in this regard, Kebede, Firew ‘The Mengistu Genocide Trial in Ethiopia’ *Journal of International Criminal Justice* Volume 5, Issue 2 pp 513-528.

<sup>59</sup> On the requirement for a discriminatory intent for the crime against humanity of persecution, HRW Genocide, War Crimes and Crimes Against Humanity: A Digest of the Case Law of the International Criminal Tribunal for Rwanda pp 98 et seq.

organisation that fulfils particular criteria<sup>60</sup> and the individual charged had knowledge that his/her conduct was part of the broader attack on the civilian population targeted.<sup>61</sup>

With respect to crimes against humanity, Article 153 of the CAR's Penal Code reproduces Article 7(1) of the Rome Statute including the *chapeau*, but omits the most important *chapeau* element, namely the policy requirement in Article 7(2), a *sine qua non* for establishing commission of crimes against humanity. Neither does Article 153 define any of the key terms relating to crimes against humanity, similar to those found in the rest of Article 7(2) of the Rome Statute and the Elements of Crimes. The policy requirement is read in Article 7(2), which provides that:

‘Attack directed against any civilian population’ means a course of conduct involving the multiple commission of acts referred to in paragraph 1 against any civilian population, *pursuant to or in furtherance of a State or organisational policy to commit such attack*’.

It is thus clear that, should the SCC apply Article 153 of the CAR's Penal Code without reference to international law (Rome Statute) as foreseen the Organic Law, it would prosecute as crimes against humanity crimes that fall short of the standard definition of the crime as envisioned in international law. The result is that in the absence of this critical threshold element (state or organisational policy), any attack on civilians by any entity could pass as a crime against humanity, which denudes the crime of its essence.

Chapter III of the Penal Code deals with war crimes. Articles 154-156 when read together broadly reflect, albeit with a critical omission, the content of Article 8 of the Rome Statute, which details war crimes committed in both international and non-international armed conflicts. Articles 154 to 156 cover respectively, crimes detailed in: Article 8.2.a (grave breaches of the Geneva Conventions); Article 8.2.b (other serious violations of the laws and customs applicable in international armed conflict, within the established framework of international law) and; Article 8.2.c (serious violations of Article 3 common to the four Geneva Conventions of 12 August 1949 against listed persons taking no active part in hostilities including members of armed forces who are *hors de combat*). The Penal Code thus omits crimes listed in Article 8.2.e, which are ‘serious violations of the laws and customs applicable in armed conflicts not of an international character [civil wars], within the established framework of international law’. This is the longest list of war crimes in the Rome Statute, which are committed in civil wars, and are drawn from Additional Protocol II of the

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<sup>60</sup> On the definition of organisation that is capable of originating the criminal policy, see Situation in Kenya, Prosecutor v William Ruto and Joshua Sang, Decision on the Confirmation of Charges Pursuant to Article 61(7) (a) and (b) of the Rome Statute No. ICC-01/09-01/11 January 23, 2012 paras 184-208 confirmation of Chares Decision in which the majority's took that view that ‘any organisation capable of committing acts that offend against human values’ qualified while in dissent, the late Judge Hans Peter Kaul's held that the organisation must be a ‘state-like organisation’ decision available at <https://www.icc-cpi.int/iccdocs/doc/doc1314535.pdf> (accessed on 10th February 2016).

<sup>61</sup> On crimes against humanity generally, see Bassiouni, Cherif *Crimes Against Humanity in International Law* (The Hague, 1999); Cryer, R et al, *An Introduction to International Criminal Law and Procedure* (2010) pp 230-266.

Geneva Conventions and customary international humanitarian law.<sup>62</sup> Based on reports relating to the current conflict in the CAR, this is the category of war crimes that is likely to be of most interest to the SCC, and its omission in part III of the Penal Code must elicit attention of the Special Prosecutor and the judges of the SCC. This view is taken based on my conclusion that Article 157 of the Penal Code neither reproduces nor provides the possibility of importing Article 8(2)(e) of the Rome Statute, but applies Common Article 3 of the Geneva Conventions to non-international armed conflicts pitting governmental forces against rebels or rebels between themselves (in this case Anti-Balaka and Séléka). The SCC must, when called on to do so, rely on Article 3 of the Organic Law that authorises it to rely on international law in three instances: when national law does not make provision on a particular issue; when its interpretation results in ambiguity; and when questions of its compatibility with international law arise. However, reliance on international law could in some instances elicit concerns about legality and fair trial, to which, if I am right, solutions must be sought.

#### 5.4.1.1 Charging Torture

Other than the three core international crimes, it is arguable that based on the language in Article 3 of the Organic Law, subject matter jurisdiction could and should include torture and any other ‘gross violation of human rights’. There is textual basis in Article 3 for the inclusion of torture as a freestanding crime in the Special Court’s jurisdiction. The crime of torture, which is a discrete international crime subject to the obligation *aut dedere aut judicare* (prosecute or extradite),<sup>63</sup> is defined in Article 118 of the Central African Penal Code. The list of crimes detailed in Article 118 also includes inhuman, cruel, and degrading treatment, which could amount to a discrete international crime, although this position is not settled.<sup>64</sup> To prosecute these forms of conduct as international crimes – particularly torture – provides the court an additional, perhaps easier option, as the mandatory requirement for establishing contextual factors *widespread or systematic* as well as *state or (organisational) policy* that is necessary for crimes against humanity is not relevant. Prosecuting torture in this way would not be unprecedented; the extraordinary African Chambers established in Senegal to try former Chadian ruler Hissène Habré for crimes committed during his rule in Chad is a good example of where a special court has jurisdiction over torture as a discrete international crime, in addition to genocide, war crimes, and crimes against humanity.<sup>65</sup>

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<sup>62</sup> On rules of customary IHL, see Henckaerts, Jean-Marie and Doswald-Beck, Louise *Customary International Humanitarian Law* (2009).

<sup>63</sup> See Article 5 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Adopted on December 10, 1984 Convention Against Torture, ratified by CAR in 1987. On the status of torture in international law, see Gaeta, Paola ‘When is the Involvement of State Officials a Requirement for the Crime of Torture?’ *Journal of International Criminal Justice*, 6 (2008) pp. 183-193; Burchard, Christoph ‘Torture in the Jurisprudence of the Ad Hoc Tribunals: A Critical Assessment’ *Journal of International Criminal Justice* (2008) 6 (2): 159-182.

<sup>64</sup> On Cruel, inhuman and degrading as international crimes, see OHCHR, ‘Definition of torture from the practice and jurisprudence of international tribunals’ as a CAT General Comment 32.

<sup>65</sup> See Article 8, the Statute of the Extra-Ordinary African Chambers in Senegal, Available at <https://www.hrw.org/fr/news/2013/01/30/statut-des-chambres-africaines-extraordinaires>.



### 5.4.1.2 Temporal and Territorial Jurisdiction

With respect to temporal jurisdiction, the SCC will prosecute crimes committed from 1<sup>st</sup> January 2003, which proposes an open ended temporal jurisdiction a few months shorter than the ICC, whose jurisdiction commenced on 1<sup>st</sup> July 2002.

The SCC's territorial jurisdiction extends to crimes committed in the CAR and 'to acts of co-perpetration and complicity committed on the territory of neighbouring states with which CAR had signed mutual legal agreement assistance agreements' (Article 4 Penal Code). The extension of territorial jurisdiction to neighbouring states in circumstances described, is a pragmatic response to the fact that certain neighbouring states have been sources of combatants and may have been sites for planning attacks, or the hostilities have spilled over to those countries. Equally, the apparent link between prosecution by the SCC of crimes committed, planned or concluded in neighbouring countries to the conclusion of MLA agreements is informed by pragmatism rather than principle: that the SCC should only indict where it can obtain cooperation and assistance of foreign governments, including the access to evidence and suspects residing beyond the CAR borders.

CAR is a member of the International Conference on the Great Lakes (ICGLR). Under Article 13 of the *Protocol to the ICGLR Pact for the Prevention and the Punishment of the Crime of Genocide, War Crimes and Crimes against Humanity and all forms of Discrimination*, member states have undertaken:

'to mutually assist one another through cooperation of their respective institutions with a view to preventing, detecting and punishing the perpetrators of genocide, war crimes, and crimes against humanity'.

In the absence of bilateral MLA agreements, this treaty obligation should form the basis for the SCC's general requests in relevant cases for cooperation from neighbouring states that are members of the ICGLR. With respect to the extradition of suspects, the same protocol makes genocide, war crimes, and crimes against humanity extraditable offences (Articles 14.3 and 14.4) and dispenses with the need for specific extradition agreements between and among member states or for national legislation (Article 14.2). CAR's Criminal Procedure Code includes provisions on MLA in relation to crimes committed in CAR (Chapter XII), and in relation to crimes committed outside the CAR (Chapter XIII) by nationals and foreigners.

### 5.4.2 Institutions and Structures of the SCC

The SCC is a hybrid court established *within the judiciary of the CAR* and is composed of the following chambers and institutions: Pre-trial chamber (*Chambre d'Instruction*); Confirmation of charges (*Chambre d'Accusation Special*); Trial Chamber (*Chambre d'Assises*); Appeals Chamber (*Chambre d'Appel*); the Office of the Special Prosecutor (*Procureur Special*); and the Registry (*Greffe*). These are discussed in detail below.

It is immediately apparent that the Organic Law does not provide for a defence office, which has become a feature of modern international courts and tribunals. Many will agree that, as experience has shown since the International Military Tribunal at Nuremberg, the legitimacy of international criminal justice tends to depend, in part, on how defendants are treated, and to what extent they enjoy guarantees of a fair trial. In Sierra Leone, the Defence Office was created within the registry of the Special Court for Sierra Leone after the Court's establishment in response to concerns about the fairness of the process.<sup>66</sup> In CAR, a hybrid court grafted onto a criminal justice system beset with multiple problems, including those related to standards, should set an example by affording those accused – who are likely to be in their tens or hundreds depending on how wide the net is cast – ample facilities to mount their defence. Most are likely to be indigent, and many lacking the knowledge to navigate the system and to defend themselves adequately. This paper makes recommendations in this regard in Part 7.

#### 5.4.2.1 *Chambre d'Instruction*

The *chambre d'instruction*, which is the lowest chamber of the SCC, is responsible for the supervision or overseeing of investigations, and pronounces, on a preliminary basis, on whether the evidence available meets legal thresholds to sustain the charges. The judges of the *chambre d'instruction*, the *juges d'instruction*, are in essence investigating judges and are supported by the judicial police or *police judiciaire*, the investigating department in relation to the criminal justice system. The judicial police work closely with, and are supervised by the prosecutor.<sup>67</sup>

The Organic Law creates a special unit of the judicial police, the *Unité Spéciale de Police Judiciaire*, with a national reach to support the SCC in its investigations (Article 8 Organic Law). Members of the Unit are drawn from the paramilitary police (*gendarmarie*) and the Central African Police (Article 30 Organic Law). The leadership of the *Unité Spéciale de Police Judiciaire* is exclusively Central African (Article 9 Organic Law). Working under the overall supervision of the judges of the three chambers of the SCC but directly under the prosecutor, the Unit is responsible for investigations, identification of perpetrators, and the collection of evidence (Article 28 Organic Law).

Typically, cases are referred to *the juge d'instruction* by the prosecutor (Article 51 Criminal Procedure Code) or by a victim through *partie civile* or civil party, a procedure by which the criminal jurisdiction is triggered by a victim by presenting a complaint to an investigating judge in cases where the crime suffered by the victim goes un-remedied, or is not investigated or prosecuted. The *plainte avec constitution de partie civile* is presented to the *juge d'instruction*, who then informs the prosecutor to take appropriate action (Article 56 Criminal Procedure Code).

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<sup>66</sup> Charles C Jalloh, 'Special Court for Sierra Leone: Achieving Justice?' *Michigan Journal of International Law*, Vol. 32, No. 3, pp. 395-460, April 2011 at 337-440.

<sup>67</sup> See in relation to the French legal system, on which the system in CAR is modelled Ministry of Justice, 'The French legal system' p 10 available at [http://www.justice.gouv.fr/art\\_pix/french\\_legal\\_system.pdf](http://www.justice.gouv.fr/art_pix/french_legal_system.pdf).

In terms of its placement within the institutional structure of the judiciary in the CAR, Article 10 of the Organic Law provides that the *chambre d'instruction of the SCC* is equivalent to, or at the same level as the *tribunal de grande instance*, which is a superior court that exercises both civil (in complex cases) and criminal jurisdiction.<sup>68</sup> In essence, the *tribunal correctionnel*, which is the criminal chamber of the *tribunal de grande instance*, is the counterpart to the SCC's *chambre d'instruction*, which is divided into three *cabinets* presided over by two judges each (one national and one foreign judge). The President of the *chambre d'instruction* is, as is the case for all chambers of the SCC, a national of the CAR, and is elected (by a simple majority vote) by the judges of the *chambre*.

In terms of Article 359 of the Criminal Procedure Code, the *Tribunal Correctionnel de Bangui*, is vested with the exclusive jurisdiction in relation to asset forfeiture and reparations orders from the ICC due for execution in the CAR:

‘Lorsque la Cour Pénale Internationale en fait la demande, l'exécution des peines d'amende et de confiscation ou des décisions concernant les réparations prononcées par celle-ci est autorisée par le tribunal correctionnel de Bangui, saisi à cette fin par le Procureur de la République, la procédure suivie devant le tribunal correctionnel obéit aux règles du présent code’.

This provision states that when the ICC asks the CAR to give effect to orders of fines, asset forfeiture or reparations, and the Attorney General approaches the *tribunal correctionnel de Bangui* to give effect to these orders, the relevant rules of procedure provided for in the Criminal Procedure Code shall apply. Theoretically therefore, the *chambre d'instruction of the SCC* (which is at the same level as the *tribunal correctionnel*, the criminal chamber of the *tribunal de grande instance* could play the same role.

#### 5.4.2.2 Chambre d'Accusation Spéciale

The *chambre d'accusation* hears and determines appeals relating to decisions of *cabinets* of the *chambre d'instruction*. In terms of Article 12 of the Organic Law, the Chamber has three judges, one CAR national and two foreign judges. Within the judiciary of the CAR, the *chambre d'accusation* is at the same level as the *chambre d'accusation* of the Court of Appeal of the CAR, and applies the rules of procedure applied by the latter.<sup>69</sup> By taking a decision on orders made by the *chambre d'instruction*, the Chambre d'accusation essentially confirms the charges, which are then tried before the *chambre d'assises*.

#### 5.4.2.3 Chambre d'Assises

The *chambre d'assises*, which has nine judges (six nationals and three foreigners), serves as the trial chamber of the SCC. Headed by a CAR national, the chamber has three sections with

<sup>68</sup> On *tribunal de grande instance* see Ministry of Justice, 'The French legal system' *tribunal d'instance*, are courts of first instance.

<sup>69</sup> Art 45 Organic Law of the SCC.

three judges each (one foreigner and two nationals). This means that the SCC can try three cases at the same time, which is laudable in view of the likelihood that the Court could be called on to try many perpetrators, given the patterns of violence and preliminary reports of alleged crimes committed during the conflict. Article 13 also provides that the *chambre d'assises*, which has the same status as the criminal courts *or cours criminelles de la République Centrafricaine*, determines appeals emanating from the *chambre d'accusation*. Procedurally, the indictment prepared by the *chambre d'instruction* is sent directly to the trial chamber, and the case proceeds to trial unless an appeal is lodged in the *chambre d'accusation spéciale* against the decisions of the *cabinets* of the *chambre d'instruction* and perhaps subsequently in the *chambre d'assises* itself.

#### 5.4.2.4 Chambre d'Appel

The Appeals Chamber considers appeals from the trial chamber, the *chambre d'assises* and the Indicting Chamber, the *chambre d'accusation*.<sup>70</sup> It has three judges, two of these being non-nationals of the CAR. In case of a vacancy in the Appeals Chamber, occasioned by removal of one of the judges, a temporary replacement is sought from the trial chamber of a judge that has not previously presided over the case. Within the judiciary of the CAR, the Appeals Chamber is at the same level as the *Chambre Criminelle de la Cour de Cassation* of the CAR, the apex court in the CAR.

#### 5.4.2.5 Procureur Special

Article 18 creates the Office of the Special Prosecutor, headed by an International Prosecutor and deputised by a national of the CAR. They are assisted by at least two other prosecutors. The law requires that, should several prosecutors be recruited, fairness is observed when designating the national and international part, with the latter forming a majority of the prosecution complement of the SCC. The Secretariat of the Special Office of the Prosecutor is headed by the Special Secretary, who is a national of the CAR.<sup>71</sup> The Special Prosecutor is independent and may not take orders or act under the influence of political or other interests. The Special Prosecutor may be required to submit periodic reports to the Minister of Justice on the activities of the Special Court.<sup>72</sup>

#### 5.4.2.6 Greffe

The *greffe* (registry) is the central administrative organ of the SCC and services all the chambers of the court as well as the Office of the Special Prosecutor. It is composed of the Chief Registrar who is a national of the CAR, a deputy registrar (a foreign national), and an appropriate number of registrars, all nationals of the CAR.<sup>73</sup>

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<sup>70</sup> Art 14 Organic Law of the SCC.

<sup>71</sup> Art 19 Organic Law of the SCC.

<sup>72</sup> Art 34 Organic Law of the SCC.

<sup>73</sup> Art 15-17 Organic Law of the SCC.

## 5.5 The Structure of the Court

For comparative purposes, it is immediately apparent that the SCC has a structure similar to that of the Extraordinary Chambers in the Criminal Courts of Cambodia (ECCC), which was established to prosecute serious crimes committed between 1975 and 1979 by the Khmer Rouge regime led by Pol Pot.<sup>74</sup> The ECCC's judicial section is composed of four chambers (essentially three chambers and an investigating chamber linked to the prosecution), as is the case for the SCC, albeit with fewer judges than the SCC. It has two investigating judges in the investigating chamber; three in the pre-trial chamber; five in the trial chamber; and seven in the Appeals Chamber. The concerns arising from the complexity of the court structure, some of which were expressed by the Secretary General in relation to the SCC in 2003, are that it has a convoluted decision making process, and suffers prolonged adjudication and elevated cost of justice, with some potential questions about defence rights. These apply with equal force to the SCC, which with 25 judges (13 CAR nationals and 12 internationally recruited),<sup>75</sup> almost double the number of judges than the ECCC has.<sup>76</sup> In the CAR, it is critical that the structure of the Court is not cumbersome, and that it can conduct efficient, cost effective trials, with most probably a large number of perpetrators. These factors, when coupled with other interests, particularly victims' right to participate, could produce an expensive, slow process in which defence rights are at risk, but also with potential for obstruction due to multiple appeals and interlocutory procedures. Overall, this could result in an insignificant number of successful prosecutions in a context of entrenched impunity, where the need for swift justice is obvious.

In Cambodia, the Secretary General and the government of Cambodia tussled over, among others, the number of chambers, particularly the provision for a three tiered court (that included a Supreme Chamber as a court of last instance), as well as the role and decision making process of the pre-trial chamber.<sup>77</sup> While compromise was found on the Supreme Chamber, which was fused with the Appeals Chamber, it appears that disputes over structure were resolved in favour of the government of Cambodia, as the elaborate structure was retained.

## 5.6 Sources of Law and Procedure for SCC

The Organic Law contains a significant number of clauses that govern the procedure of the SCC. It fills potential gaps in its text by applying the Criminal Procedure Code, where the

<sup>74</sup> Law on the Establishment of the Extraordinary Chambers, with inclusion of amendments as promulgated on 27 October 2004 (NS/RKM/1004/006). Available at [http://www.eccc.gov.kh/sites/default/files/legal-documents/KR\\_Law\\_as\\_amended\\_27\\_Oct\\_2004\\_Eng.pdf](http://www.eccc.gov.kh/sites/default/files/legal-documents/KR_Law_as_amended_27_Oct_2004_Eng.pdf).

<sup>75</sup> UNSG Report on CAR of July 2015 (n 1above), para 54.

<sup>76</sup> See United Nations, *Report of the Secretary-General on Khmer Rouge trials* March 31, 2003 Doc A/57/769 available at [http://cambodia.ohchr.org/WebDOCS/DocReports/4-Other-Reports/Other\\_CMB31032003E.pdf](http://cambodia.ohchr.org/WebDOCS/DocReports/4-Other-Reports/Other_CMB31032003E.pdf). See an early reflection on the negotiations and initial law on the ECCC, Ernestine Meijer 'The Extraordinary chambers in the criminal courts of Cambodia' in Cesare Romano et al (eds) *Internationalised criminal courts: Sierra Leone, East Timor, Kosovo and Cambodia* (2004) 207-232 at 217-218.

<sup>77</sup> As above.

Organic Law makes no provision in respect of a particular procedural matter (Article 5). The Court may also ‘refer to rules of procedure established at the international level’ which presumably, and perhaps logically, should be read as referencing the ICC’s Rules of Procedure and Evidence in view of the SCC’s relationship with the ICC. The SCC will refer to ‘rules of procedure established at the international level’ when the Organic Law and Criminal Procedure Code do not make provision on a particular procedural question. This is also necessary where there is a lack of clarity as to the meaning of substantive and procedural provisions, and where questions arise as to the conformity of provisions of national law with international law (Article 3 Organic Law). Evidently, where reference is made to international law sources (eg. ICC RPE), these have to be customised to the SCC, which has a different structure, among other unique features.

With respect to the procedural aspects of themes and issues reviewed or analysed in this paper, I have outlined or analysed the rules of procedure as appropriate, referring to the sources of SCC procedure. As those rules come from several sources, and in some cases it is unclear which rules are applicable, including to some key issues not specifically provided for in the Organic Law (such as the rights of victims), a more systematic analysis of the rules of procedure must be conducted, guided by the needs of the SCC. Subsequently, this analysis can be forged into a unified body of rules as subsidiary legislation (or judge made law) to regulate all aspects of the work of the SCC.

## 5.7 The Rights of Victims and Witnesses

The Organic Law provides with respect to the rights of victims and witnesses that:

‘The Court shall take measures to protect victims and witnesses and adopt special procedural steps including the use of in camera hearings and protection of the identity of victims and witnesses’ (Art 3).

This provision, which demands the adoption of witness and victim-sensitive procedures, covers measures adopted *within* the trial to protect the identity of witnesses when they testify and security measures for witnesses generally. The former have the twin objectives of protecting witnesses from possible harm by shielding them from the public when they give their testimony, and preventing re-exposure to traumatic experiences, for instance when they are forced to confront their former tormenters. They are usually implemented in favour of child witnesses and victims of sexual and gender-based violence (SGBV) on request, following counselling and advice. These are easy to implement, but could be expensive depending on the circumstance as they require a particular design of the court room (but a simple barrier should be adequate) and supporting psychosocial experts to provide pre- and post-trial counselling to witnesses and in some cases to accompany the witness to court.<sup>78</sup>

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<sup>78</sup>On psychosocial support for witnesses, the SCC can rely on specialist NGOs (intermediaries), where appropriate.

The second set of measures – witness protection proper – can be an expensive and engaging exercise, particularly when the circumstances demand extreme measures that could involve permanent relocation of witnesses within the CAR or abroad. Intermediate measures where the threat to a witness is not too serious could consist of a police guard during the trial or for a period of time afterwards. All these have budgetary implications, and the right institutional framework has to be created, including cultivating partnerships with states that could host witnesses should the need to relocate arise. Previous studies indicate that there are but a small number of African states that have full blown witness protection programmes, but they tend to be beset with multiple challenges due to lack of funds and political interference, particularly in contexts of mass atrocity.<sup>79</sup>

It is critical that, from the start, the SCC develops protocols and procedures that have a strong focus on the security and welfare of witnesses and victims. This would require capacity building. In UNSC Resolution 2127 cited earlier, the UNSC requested MINUSCA to provide technical assistance and capacity building for the SCC and national actors in a variety of areas including security for witnesses and victims.

It is notable however, that the interests of witnesses are broader than physical security. They extend to the right to participate in proceedings in their capacity as victims, and the right to reparations and assistance during the period of interaction with the SCC.<sup>80</sup> Although the Organic Law does not provide for *partie civile*, the right of victims to participate in criminal proceedings forms part of the CAR criminal justice system, and is imported into the work of the SCC from the Criminal Procedure Code.<sup>81</sup> It is also implied in the structure of the SCC, which includes a *juge d'instruction* and in Article 3 of the Organic Law, which obliges the court to take measures to 'to protect victims and witnesses and adopt special procedural steps including the use of in camera hearings and protection of the identity of victims and witnesses'.

The right of victims to participate, which is also provided for in the Rome Statute, cannot be excluded entirely by the SCC. What should be sought is an appropriate modality for *partie civile* that ensures that the law enforcement functions of the court are not negatively affected, that the court remains efficient, and that the right of the accused to an expeditious trial is

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<sup>79</sup> See Chris Mahoney, The justice sector afterthought: Witness protection in Africa (ISS, 6 May 2010) available at <https://www.issafrica.org/publications/books/the-justice-sector-afterthought-witness-protection-in-africa> which reviewed witness protection in South Africa, Kenya, Uganda and Sierra Leone as well as the Ad hoc international tribunal and the International Criminal Court.

<sup>80</sup> On the right to participation and reparations, including various models for designing and implementing reparations funds, see Godfrey M Musila, *Rethinking International Justice: Restorative Justice and the Rights of Victims in the International Criminal Court*, Chapter 6 pp 169-228 (Lap Lambert, 2010) available at <http://www.amazon.com/RETHINKING-INTERNATIONAL-CRIMINAL-LAW-International/dp/3843368104>.

<sup>81</sup> On *partie civile* see arts 2 and 3 Criminal Procedure Code (providing that direct victims of crime have a right to bring a civil action for reparation and such an action may be brought at the same time as the public action (prosecution in the case of crime); arts 56-62 of the Criminal Procedure Code (which relate to 'constitution' of *partie civile* and other related issues).

respected.<sup>82</sup> For its part, the right to reparations includes compensation, restitution, and rehabilitation.<sup>83</sup>

In view of the inclusion of these rights, which are no less important than the imperative to prosecute at least those who bear the greatest responsibility for international crimes, it is vital to raise the awareness of relevant actors in the CAR and for the international community to commit to support the SCC with the knowledge of the financial commitments that the SCC has to make.

## 5.8 Other National Courts as Option for Prosecution

In terms of Article 3 of the Organic Law, the SCC has *primacy* over ordinary national criminal courts in relation to crimes committed during the conflict. In this regard, the Organic Law provides that:

‘in case of conflict relating to jurisdiction, with another national jurisdiction, the Special Criminal Court has primacy to investigate and prosecute crimes over which it has competence’.

This provision has a bearing on the types and scope of crimes that ordinary criminal courts can try, although as noted earlier, a policy decision informed by the huge burden to be borne by the SCC could dictate a wider role for ordinary criminal courts.

The decision to recruit ordinary national courts into the accountability project to supplement the SCC’s efforts must be determined not only by mass criminality in the CAR, but also by the capacity of these courts to conduct fair trials. Yet, current assessments of the criminal justice system paint a dim picture, and the incapacity of these courts to investigate and prosecute international crimes informed both the referral to the ICC of Situation II and the creation of the SCC. A past assessment of the criminal justice system and the judiciary in general by the United Nations Special Rapporteur on extrajudicial, summary, or arbitrary executions notes as follows:

‘The justice system is plagued by a lack of resources, severely limiting its capacity to address impunity. Human resources are minimal in the capital, and nearly non-existent in the rest of the country. In Bangui, the public prosecutor’s office has just two prosecutors for criminal cases ... Across the country, there are not enough buildings to

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<sup>82</sup> For a discussion of participation in the context of the ICC, see Godfrey Musila, above, chapter 5 and; in relation to the ECCC Cedric Ryngaert, ‘Victim participation and bias in the Cambodian Courts: The Pre-Trial Chamber’s decisions in the case against Nuon Chea’ *Hague Justice Journal* vol 3 no 1 (2008) 68-82.

<sup>83</sup> See generally Godfrey M Musila, ‘Rethinking International Criminal Law: Restorative Justice and the Rights of Victims in the International Criminal Court’ (Lap Lambert, 2010) available at <http://www.amazon.com/RETHINKING-INTERNATIONAL-CRIMINAL-LAW-International/dp/3843368104>. See also, Redress *La participation des victimes aux poursuites pénales: enquête sur les pratiques nationales pour leur application aux poursuites des crimes internationaux* (2015) (available at [http://www.redress.org/downloads/publications/1510Victim%20Rights%20Report\\_FR.pdf](http://www.redress.org/downloads/publications/1510Victim%20Rights%20Report_FR.pdf)).



house courtrooms and offices of judges and key personnel. Basic equipment is in short supply'.<sup>84</sup>

The state of affairs has not changed since this assessment was made in 2009, and has indeed worsened taking into account war, looting, pillage, and insecurity that negatively impacts the delivery of judicial services. In an article published following the resumption of violence in Bangui in September 2015, Pierre Hazan writes as follows about the justice system, and why what he calls 'non-judicial efforts' must play a major role in reconciliation in CAR.<sup>85</sup>

'This episode of violence is the latest symptom of a crisis in a country where governmental authority is virtually nonexistent and the judicial system destroyed. Few of the 120 judges in the Central African Republic – one for every 35,000 people in a country 15 times the size of Switzerland – ever venture outside of Bangui, while the Ministry of Justice, looted long ago, has never been set right. In any case, the people of CAR have great mistrust in their nation's courts, seeing them as a tool of the rich and powerful – a suspicion which has unfortunately proven to be well-founded'.

These assessments notwithstanding, the Organic Law contemplates and seems to presume the existence of functioning criminal justice system. In terms of Article 35 the Organic Law, the Prosecutor of the SCC has to make a determination in relation to evidence made available to them, of whether it implicates the jurisdiction of the SCC or ordinary criminal courts. Where the evidence cannot support jurisdiction for the SCC, they transfer the dossier to the prosecutor responsible for the nearest court within the criminal justice system. Article 36 of the Organic Law makes provision for primacy of the SCC over national courts, and the Prosecutor of the SCC is empowered to take over a case under investigation by a prosecutor in a national court if, based on evidence available, they conclude that it points to the commission of international crimes. It may be necessary for the Prosecutor of the SCC to develop guidelines to govern these situations, including the movement of cases between the SCC and ordinary courts. A flexible inter-institution liaison mechanism which will, among other tasks, be responsible for resolving disputes relating to jurisdiction should be created.

## 5.9 Truth, Justice and Reconciliation Commission

As noted above, a truth commission is one of the mechanisms recommended by the National Pact adopted in Bangui in May 2015. The justifications for a truth commission in the CAR are many, and this paper cites but the main ones. Criminal prosecutions address only limited aspects of effects and consequences of violence, human rights violations, and crimes. They

<sup>84</sup> Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, Mr. Philip Alston, Mission to the Central African Republic, A/HRC/11/2/Add.3 (27 May 2009), para 59.

<sup>85</sup> Hazan, Pierre 'Centrafrique: fausses promesses et véritable occasion de justice' En savoir plus sur [http://www.lemonde.fr/afrique/article/2015/10/30/centrafrique-fausses-promesses-et-veritable-opportunite-de-justice\\_4800318\\_3212.html#5EtTGVuy95dFmZ2J.99](http://www.lemonde.fr/afrique/article/2015/10/30/centrafrique-fausses-promesses-et-veritable-opportunite-de-justice_4800318_3212.html#5EtTGVuy95dFmZ2J.99) (accessed on 22<sup>nd</sup> October 2015). See also the ICC's assessment of the criminal justice system, Office of the prosecutor (ICC) Article 53(1) Report (n 48 above) para 230-251.

focus on establishing truth about who committed which crimes, adopting as they do a narrow approach demanded by the principle of individual criminal responsibility. Thus, while truth about the broader context sometimes emerges in rulings and judgments, they leave untold narratives that are deemed only incidental to the criminal responsibility of those charged. Yet, these narratives may explain why the violence took place, why impunity is entrenched, and how individuals and communities disconnected from the trials suffered. These are factors and aspects of the conflict that have to be addressed to begin to create an environment for peaceful coexistence among communities and to promote healing and reconciliation.

Truth commissions offer forums where, collectively, a society can construct a common narrative of contested history, to give spaces where a broader community of victims than trials can accommodate can express freely their loss and suffering, affirm desired values, and honour forgotten heroes. Trials may disclose the rot in the criminal justice system, but they say little, if anything, about weaknesses in other institutions that promote or create the right environment for human rights to be respected. All these are critical to establishing stability in a fragile post conflict state such as CAR.

In terms of the objectives of a truth and reconciliation commission, the following elements are relevant:

- It provides a forum to discover the truth about past violations, who was responsible, who the victims were, and what factors created the environment and facilitated the human rights violations.
- It serves as a forum for victims to tell their stories, to obtain justice by learning about violations they suffered, to gather evidence to support prosecutions, and to make claims of reparations for injury and loss sustained.
- It establishes a historical record, particularly where the past is unknown to many, or where successive regimes have denied violations or created alternative truths about what occurred.
- It probes the role of institutions, and finds ways to reform these institutions linked to human rights violations, and also to recreate state institutions that had decayed to such a degree as to render them unable to effectively perform their normal functions while observing the tenets of good governance and the rule of law.
- It facilitates the process of national healing and reconciliation through all the above, charting a new future as for society by collectively agreeing on new values and ethos based on the respect for human rights, democratic elections and the rule of law.

Some broad aspects have to be considered when establishing a truth commission. First, it is vital that acts draw lessons from the past efforts that failed, because reconciliation has been elusive, and violence seemingly a permanent feature in CAR life. Secondly, the timing of the establishment of a truth commission is critical. Experience shows that a process that previously commanded support of huge sections of society sometime becomes unpopular with the lapse of time for a variety of reasons. It may be that the replacement of the *ancient regime* or removal of influential elements of such a regime is key to rendering a full account of past atrocities. When these actors find their way back into power, or embed themselves in places

of influence, the likely success of a truth commission and for accountability generally reduces considerably. Equally, as the case of the CAR illustrates, passage of time before a truth commission is created results in a situation where the victims become perpetrators (and *vice versa*) as conflict recurs. The passage of time could also erode international goodwill and support, which has a direct bearing on the access to guarantors of the transitional justice project, and the resources at the disposal of national actors.<sup>86</sup> Third, truth commissions typically are entrusted with the duty of leading the process of probing human rights violations over long periods of time, and in Africa this often means periods coinciding with the life of the post-independence state reckoned from date independence. With respect to subject matter jurisdiction, their mandate extends to gross human rights violations (civil and political rights, as well as socio-economic and cultural rights). National actors will be counselled to define a modest scope of work for the truth commission, as one that is too wide saddles a truth commission with a huge burden, and stretching itself too thin could result in less than adequate investigation and account of past events. Fourth, membership of a truth commission is critical, and the credibility of those chosen to lead the process is as important as an adequate representation of women and key sectors of society, including minorities.

### 5.10 Envisioning a Role for Traditional Justice

As the case of Rwanda's *gacaca* illustrates, traditional justice and conflict resolution mechanisms can play a critical role in contributing to establishing accountability for past human rights violations. In Rwanda, *gacaca* courts, an ancient institution deployed to resolve disputes between individuals, families, and communities was modernised and clothed with legal force through an Act of Parliament and used to prosecute individuals responsible for crimes committed during the genocide. Although the law categorised offenders such that those deemed to bear responsibility akin to that of International Criminal Tribunal for Rwanda (ICTR) indictees would be transferred for trial to ordinary criminal courts, in the end, some of those tried before *gacaca* had played a significant role in the genocide and could have been tried in those courts as well.<sup>87</sup>

In the CAR, it seems from the discussion above that the law, if not the overall approach, is to reserve the prosecution of international crimes for the ICC and the SCC, while the ordinary criminal courts prosecute crimes as penal code offences (i.e. those falling short of international crimes). It appears thus that no role is reserved for traditional justice and conflict mechanisms which currently play a critical role in the delivery of justice in a context where

<sup>86</sup> For brief reflections on some factors, see Hazan, Pierre 'Transitional justice in the Central African Republic: is the time right for a Truth and Reconciliation Commission?' available at <http://hirondelleusa.org/news/transitional-justice-in-the-central-african-republic-timing-is-critical-for-the-creation-of-a-truth-and-reconciliation-commission/> (accessed on 16<sup>th</sup> January 2015).

<sup>87</sup> On *gacaca* see Gaparayi, Idi 'Justice and Social reconstruction in the aftermath of the genocide in Rwanda: an evaluation of the possible role of Gacaca tribunals' 1 (2000) *African Human rights Law Journal* 78-106, Sarkin, Jeremy 'Promoting justice, truth and reconciliation in transitional societies: evaluating Rwanda's approach in the new millennium of using community based Gacaca tribunals to deal with the past' (2000) 2 *International Law Forum* 112-121 117; On *Gacaca* and victims see Goldstein-Bolocan, M 'Rwandan Gacaca: an experiment in transitional justice' (2005) *Journal of Dispute Resolution* 355-363.

formal justice has limited reach beyond Bangui. Accounts suggest that traditional justice is the staple in herding and farming communities in the CAR.<sup>88</sup> For this reason, it may be important that, as national actors reflect on an overall strategy of accountability fleshing the National Pact of May 2015, traditional justice should as of necessity feature in their calculations. Yet, this form of justice falls short in many respects, and their lack of sophistication may not recommend them for an endeavour as complex as the one at hand.

First, the nature of traditional justice is such that it tends not to adhere or meet strict edicts of human rights, including fair trial guarantees. For instance, *gacaca* attracted criticism for its exclusion of representation, including by lawyers. Second, traditional justice and conflict resolution are not bastions of equality as they are often exclusionary of women. In these cases, women cannot serve as judges or adjudicators or are in some cases denied audience (they have to be represented by a male relative when they are complainants). Third, they often adjudicate ‘simple’ disputes relating to land and property ownership, succession and inheritance among others and adjudicators lack the learning and sophistication to handle international crimes. Fourth, in the CAR, it has been suggested that traditional justice mechanisms were appropriated by Séléka in areas of their control, militarised and ‘Islamised’, and in some cases became part of a criminal enterprise of extortion to fund the war effort. This is problematic at many levels, but particularly so when they have to adjudicate disputes involving members of non-professing communities.<sup>89</sup>

It can be argued that, partly because of the state of the justice system in the CAR as well as the nature of the society, any accountability project built entirely on western notions and institutions of justice will fall short. Equally, there are perfectly good and pragmatic reasons why an attempt has to be made to deploy traditional justice with respect to certain crimes or disputes resulting from the conflict. A good example relates to disputes between farming and herding communities in rural areas of the CAR, which currently form the epicentre of ongoing violence. For this to occur, the following measures, which need further study, have to be implemented. First, minimum human rights standards should be decreed. Second, where affected, they should be de-Islamised, rendered less adversarial, and de-militarised. Lastly, they must be adapted and usefully deployed as part of the process to be instituted by the future truth and reconciliation commission to facilitate intercommunity dialogues between warring communities at the local level, with eventual national dialogues such as those that preceded the National Forum of Stakeholders that was held in Bangui in May 2015. Their mandate could cover, among other things, stolen and looted property, including cattle.

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<sup>88</sup> See International Crisis Group, (n 14 above) 7 on ex-Séléka ‘appropriation’ of traditional mechanisms to provide judicial services through arbitration of farmer-pastoralist conflicts.

<sup>89</sup> See International Crisis Group (n 14 above) 7 on ex-Séléka ‘appropriation’ of traditional mechanisms to provide judicial services through arbitration of farmer-pastoralist conflicts but also to extort. See also UNSG Report on CAR of March 2014 para 24 (on ex-Séléka providing services, levying taxes and extortion). See also UNSG Report on CAR of March 2014 (n 15 above) para 24.

## 6. The Role of the International Community

In this section, the paper highlights some of the key roles that the international community can or has played in the ongoing conflict in the CAR with respect to the accountability and the SCC. So far, individual states such as France and ECCAS members, as well as ECCAS, AU, EU and UN have undertaken measures, with the initial focus being on establishing a transitional government, bringing an end to the conflict, providing security, and protection of civilians through the deployment of peace keepers and observers organising democratic elections.

ECCAS deployed MICOPAX to secure Bangui, and to protect civilians from attacks by both Séléka and Anti-Balaka, before the 2,600 strong mission was replaced by the AU's peacekeeping mission MISCA on 13<sup>th</sup> December 2013,<sup>90</sup> absorbing the ill-equipped MICOPAX along the way. France deployed Opération Sangaris on 5<sup>th</sup> December 2014 to prepare for the deployment of and provide support for MISCA. The initial contingent of 600 uniformed personnel would eventually rise to 2,000.<sup>91</sup> On 15<sup>th</sup> September 2014, the AU force formally transitioned into the UN mission, MINUSCA, consisting of 10,000 personnel authorised by UNSC Resolution 2149 of April 2014. Before this, in April 2014 EUFOR RCA, an EU rapid response military force authorised by UNSC Resolution 2134 of 28<sup>th</sup> January 2014 was deployed for an initial period of six months to help manage the transition to MINUSCA by providing protection for civilians and security in parts of Bangui. The mission, consisting of 750 troops from Spain, Finland, Georgia, Latvia, Luxembourg, the Netherlands, Poland, and Romania lasted for 11 months (from April 2014 to 13<sup>th</sup> March 2015). A residual force will participate in the training and restructuring of the CAR armed forces.<sup>92</sup> ECCAS was also instrumental, with the support of individual states – notably France and the USA – and the EU, in negotiating the Libreville Accord that led to the creation of the Transitional National Council, and put in place a roadmap for the transition. Subsequently, ECCAS and AU through its special representative and head of MISCA, Général Jean-Marie Michel Mokoko, stepped in to resolve the wrangling within the 135 member transitional council, compelling the resignation of President Michel Djotodia at the ECCAS Extraordinary Summit in Djamena on 10<sup>th</sup> January 2014 an event that paved the way for the constitution, on 11<sup>th</sup> January 2014, of National Transitional Council led by President Samba-Panza.

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<sup>90</sup> The deployment of MISCA was authorised by the AU Peace and Security Council on July 19, 2013 and subsequently on December 5, 2013 by the UNSC Res 2127. The deployed numbers rose from 4,500 on December 13, 2013 to 6,032 uniformed personnel as of February 21, 2014 following the decision of the AU Peace and Security Council in Paris on 7<sup>th</sup> December 2013. See UNSG Report on CAR (n 15 above) para 42-43.

<sup>91</sup> For more on Operation Sangaris, Ministère de la Défense 'Sangaris : de l'intervention en urgence à l'appui à la communauté internationale' available at <http://www.defense.gouv.fr/operations/centrafrique/dossier-de-presentation-de-l-operation-sangaris/operation-sangaris> (accessed on 22<sup>nd</sup> February 2016); 'France extends and expands Sangaris' *The Economist* February 27, 2014.

<sup>92</sup> See EU Council Decision 2014/73/CFSP of February 10, 2014 and EU Council Decision 2014/775/CFSP of 7 November 2014 (extending Decision 2014/73/CFSP) on a European Union military operation in the Central African Republic (EUFOR RCA). For more on EUFOR RCA, see [http://www.eeas.europa.eu/csdp/missions-and-operations/eufor-rca/index\\_en.htm](http://www.eeas.europa.eu/csdp/missions-and-operations/eufor-rca/index_en.htm) (accessed on 22<sup>nd</sup> February 2016).

## 6.1 Interventions Relating to Accountability

The international community has played critical roles by undertaking measures that will anchor the eventual process of establishing accountability for human rights violations and crimes. Several entities have documented crimes or provided information to institutions responsible for documentation. BINUCA and MINUSCA's role cannot be gainsaid in this regard. MINUSCA's presence in many parts of the country where these crimes are taking place make it perhaps the most important body from the perspective of documentation. Other than their role in prevention of crimes by constantly issuing warnings to warring parties and other perpetrators, the UNSG and the UNSC through the International Commission of Inquiry on the CAR documented crimes committed over a one year period.<sup>93</sup>

One major factor that is likely to determine whether the SCC succeeds or not is the adequacy of funds made available to it. The Organic Law states, rather optimistically, that the budget of the SCC will be raised by the international community:

The budget of the SCC is the responsibility of the international community, and funds will be sourced through voluntary contributions, including from MINUSCA and any other sources mandated by the UNSC or the UN, in consultation with the government [of the CAR].<sup>94</sup>

The provision appears to capture both voluntary and assessed contribution, should the UNSC mandate the latter. The SCC's character as a special *national* court suggests that assessed contributions are an unlikely funding source. The CAR's likely inability to fund the court means that in reality, the SCC will in all likelihood rely on voluntary contributions of a small group of states to fund its operations, a model adopted for the Special Court for Sierra Leone. It is unclear whether this provision was drafted in consultation with the UNSG, MINUSCA, UNSC, or at least the core group of states engaged in finding solutions to the conflict.<sup>95</sup> It demonstrates however, that the justifications for moving beyond the ad hoc tribunal model funded from the UN budget may be at play.<sup>96</sup> The experience of the SCSL shows that the voluntary contributions modality is unreliable as it starves the tribunal of funds, or could result in the improper or disproportionate wielding of influence by donor states. Operating on a 'volatile and uncertain funding structure', the SCSL dispensed what one author has called 'shoe string justice' and the prosecutor was forced to narrow his focus to limit the number of people that could be indicted and tried.<sup>97</sup> This also affected the defence, as the Defence Office established within the registry faced a more acute shortage of resources. Contribution from

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<sup>93</sup> ICICR 24 above.

<sup>94</sup> Art 53 Organic Law.

<sup>95</sup> Note however that the UNSG has reported that he dispatched a team of experts to Bangui to assist in the operationalisation of the SCC, including in matters relating to its budget. See United Nations (n 1 above) para 54.

<sup>96</sup> See Raub, Lindsey 'Positioning hybrid tribunals in International Criminal Justice' *International Law and Politics* Vol 41 (2009) 1013-1053.

<sup>97</sup> Jalloh, Charles 'Special Court for Sierra Leone: Achieving Justice?' *Michigan Journal of International Law*, Vol. 32, No. 3, pp. 395-460, April 2011 at 337-440.

the CAR itself, as foreseen in Article 52 of the Organic Law, is likely to be minimal, and the SCC could suffer a chronic lack of resources, achieving less as a result than hoped if a more reliable funding modality is not found.

The experience of the SCSL and other subsequent courts shows that while the choice to establish mixed tribunals is driven in part by budgetary considerations and the desire to establish accountability ‘on the cheap’, it is also indicative of the low priority given to a particular enterprise. It is unclear whether the fact that CAR is already an ICC situation country and that the Office of the Prosecutor of the ICC has expressed not only interest but has opened formal investigations into CAR II could have a bearing on how seriously the SCC is considered as an accountability option and whether, as a result, it will receive adequate funding.<sup>98</sup> Experience shows that prosecuting international crimes is an expensive affair, and the Organic Law establishes several chambers with a large retinue of staff, including 25 judges, an international prosecutor assisted by several prosecutors and legal advisers, and a registry which has to recruit an as yet unknown number of staff with core competencies in witness protection, the rights of victims, and defence.

## 6.2 MINUSCA and the SCC

MINUSCA has a wide mandate. In relation to the work of the SCC, in terms of UNSC Resolution 2127 mandated work for MINUSCA relates to providing assistance to the CAR authorities to establish the court and secondly, to the provision of technical assistance and capacity building once the court is in place. In relation to the first aspect, UNSC Res 32g(i) mandated MINUSCA to:

‘assist the Transitional Authorities and subsequent elected authorities and facilitate other bilateral and multilateral support to the Transitional Authorities and subsequent elected authorities in the establishment of the national Special Criminal Court (SCC) consistent with CAR laws and jurisdiction and in line with the CAR’s international humanitarian law and international human rights law obligations with the aim of supporting the extension of State authority’.

With respect to the second mandate, MINUSCA was required to provide technical assistance and capacity building for the CAR authorities:<sup>99</sup>

‘in order to facilitate the functioning of the SCC, in particular in the areas of investigations, arrests, detention, criminal and forensic analysis, evidence collection and storage, recruitment and selection of personnel, and the establishment of a legal aid system, as appropriate, as well as, within existing resources, to provide security for magistrates, and take measures to enhance the security of victims and witnesses as conditions allow, in line with the CAR’s international human rights obligations, including with respect to fair trials, and due process’.

<sup>98</sup> Office of the Prosecutor (n 49 above).

<sup>99</sup> UNSC Resolution 2127, para 32(g) (ii).

In line with UNSC Resolution 2127, the Organic Law foresees MINUSCA's role on four issues: appointment of judges; investigations and provision of information; identification of perpetrators; and arrest and surrender of suspects.

On *investigations*, Article 28 of the Organic Law provides that MINUSCA or organs of the national investigating police in general can provide information to the Special Unit of the *Police Judiciaire* attached to the Special Court (through or with agreement of the Ministry of Justice) to facilitate the identification of perpetrators or to build a case against an accused. MINUSCA may also assist the SCC in the identification of perpetrators, which makes the documentation work of its Human Rights Section particularly relevant and indispensable to the work of the SCC. MINUSCA has been in place since 2014 (longer, considering the role of BINUCA it absorbed at creation),<sup>100</sup> has presence in many parts of the country (particularly those ravaged by the civil war), and possesses assets (specialised unit on sexual and gender based violence, human rights documentation including children) that the CAR investigating agencies and police do not have.

On request from the Commander of the *Unité Spéciale de Police Judiciaire*, MINUSCA may also furnish technical assistance on collection, analysis and conservation of information and evidence (Article 31 Organic Law). In terms of Article 32 of the Organic Law, MINUSCA may, on request from the Special Prosecutor, put at the disposal of the OTP, the investigating chamber, and the judges, such number of police officers as they consider appropriate to support their investigative work.

## 7. Conclusion: Findings and Recommendations

### 7.1 Findings

1. The CAR has seen decades of conflict and instability since it attained independence in 1960. Experience shows that serious human rights violations and crimes committed during these conflicts have gone unpunished, and a culture of impunity has taken root. The wanton commission of atrocities largely targeting civilians by different parties to the current conflict can be rationalised in part by a history of amnesia and a lack of political will to prosecute crimes. Absent any credible threat of sanction, the established culture of impunity has contributed to instability, as those that take up arms, sometimes against democratic government, operate with apparent lack of fear of retribution. For this reason, it is unlikely that any measures aimed at stabilising the CAR, including holding democratic elections will work, unless a systematic effort is made to address the legacy of violence and establish accountability for crimes and human rights violations committed in recent years.

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<sup>100</sup> See the work of United Nations Integrated Peacebuilding Office in the CAR (BINUCA) that was integrated into MINUSCA. See UNSC Resolution 2121 (2013) adopted by the Security Council at its 7042nd meeting, on October 10, 2013 on the reinforced mandate of BINUCA, paras 10.



2. States have individually or collectively intervened in the CAR since the start of the violence there in 2012. Some of the measures adopted include preventive diplomacy, and deployment of peacekeeping mission (initially by the ECCAS, before it transitioned into an AU mission and subsequently into a UN Mission). Achievements have been modest, and violence has continued in varying degrees of intensity.
3. The Bangui Forum on reconciliation and reconstruction, adopted in May 2015, constitutes the transitional justice blueprint for the CAR. It recommended institutional reforms, including security sector reforms, the creation of a Special Criminal Court, and a truth and reconciliation commission. The Organic Law establishing the SCC was adopted by the Senate while the appointment of judges – 13 nationals of the CAR and 12 foreign nationals alongside an international prosecutor – is awaited.

## 7.2 Policy Recommendations

### 7.2.1 On Intervention Generally

1. From the perspective of accountability for human rights violations and crimes, various interventions contribute to the creation of an environment conducive to the mounting of prosecutions and for the initiation of the long term processes of reconciliation and institutional reforms. It is critical for relevant actors to develop a coherent and coordinated approach, particularly in the implementation of agreed or pledged support as lack of coherence in ‘international policy to intervene’, results in duplication and yields a patchwork of results leaving root causes of conflict unaddressed when quick gains are made the mainstay of responses and long-term commitment of resources is not guaranteed.
2. Given that some groups have remained outside the peace process, and the armed conflict continues to fester, it is expected that there will be an eventual settlement that complements the Libreville Accords to finally bring the violence to an end and chart the future for the CAR. If a future peace agreement takes up accountability questions, it must build on Libreville and commitments of the National Forum, having as the central objective, fashioning accountability responses for all aspects of the conflict. These should focus on criminal, civil, and administrative accountability for all violations including sexual and gender based crimes, as well as guaranteeing non-recurrence by affirming institutional reforms of the security sector and organs of state through a broad-based participatory constitutional review process.
3. Due to the multiplicity of actors, and the number and complexity of issues, there is a need for coherence in intervention policy both within the UN but also within the Group of Five (G5) – UN, EU, AU, USA and France. On the UN side, UNSG through the SRSG and MINUSCA should continually work to coordinate responses and to ensure coherence in responses on particular areas of concern, including on accountability options. It could be useful, in furtherance of coherence and as a starting

point, for all UN agencies involved and for other G5 members to coordinate their responses to avoid duplication, and to ensure that the most important justice and accountability needs are prioritised.

## 7.2.2 On the Special Criminal Court

### 7.2.2.1 On Subject Matter Jurisdiction of the SCC

4. It is recommended to align CAR law with international law and that national prosecutors including those of the SCC as well as judges presiding over trials make the Rome Statute, its *Elements of Crime* and ICC jurisprudence a point of reference on relevant issues. It is our view that first, Article 3 of the Organic Law makes it possible for the SCC to rely on these instruments, when national law does not make provision on a particular issue, its interpretation results in ambiguity and; when question of its compatibility with international law arises. In addition to the express authorisation to apply international law in the cited provision, it is thought that that recourse to international law should not pose legal challenges as this is for the most part an interpretive exercise, and CAR follows the monist tradition in relation to the place and application of international treaties in domestic law.
5. Flexibility in charging policy by the SCC prosecutor is recommended. While political pressure and popular narratives alleging the commission of genocide might exist, and it is critical to assign the right name and stigma to criminal conduct, the difficulties entailed in prosecuting genocide should give one pause and dictate a more tempered, evidence led approach. Such an approach could rightly result in the conclusion that crimes against humanity and war crimes should be the preferred categories of crimes to be prosecuted by the SCC and national courts in the CAR.
6. It is recommended that, partly to address challenges likely to be encountered in the prosecution of crimes against humanity, and to reflect the patterns of commission of crimes during the ongoing conflict, the SCC could consider expanding the list of crimes to include torture as a discrete international crime and to charge this separately from crimes against humanity.

### 7.2.2.2 On Temporal Jurisdiction

7. To reflect the true pattern of crimes committed during the current conflict, and to contribute to establishing accountability for international crimes beyond the ICC's CAR II jurisdiction, SCC investigations should take advantage of the permissive provision on territorial scope of its jurisdiction and stretch the jurisdiction of the SCC beyond CAR II.
8. While it is unlikely that there will be a shortage of perpetrators with respect to the period covered by CAR I (from 1<sup>st</sup> August 2012) the total lack of prosecutions relating

to CAR I that stretches to 1<sup>st</sup> January 2003 (only one case so far, that of Jean-Pierre Bemba), should encourage SCC prosecutors to take advantage of the scope of temporal jurisdiction offered by the SCC to close an impunity gap and provide a measure of justice for victims of that conflict.

### 7.2.2.3 On Structure and Procedure for the SCC

9. With respect to the procedural aspects of SCC jurisdiction, the paper outlined and analysed the rules of procedure, referring to the sources of SCC procedure. The study established that rules of procedure are scattered in several sources, and in some cases there is no clarity on which rules are applicable, including to some key issues not specifically provided for in the Organic Law (e.g., the rights of victims). It is recommended that a more systematic analysis of the rules of procedure drawn from the Organic Law and the Criminal Procedure Code as well as and an assessment of the likely relevance of the ICC's RPE be conducted in comparative perspective.
10. It is further recommended that following such assessment, a unified body of rules of procedure and evidence be developed as subsidiary legislation (or judge made law) to regulate all aspects of the work of the SCC, some of which have been flagged in this paper.
11. In relation to the structure of the SCC, it was noted that the three tier structure of the SCC and provision for investigating judges and mandatory *partie civile* portends obfuscation and obstructionist approaches on the part of the defence that could render SCC justice slow and expensive. It is recommended that, should it be impossible to amend the Organic Law with a view to simplifying the structure, procedural rules should be developed to abridge, particularly the pre-trial processes, where there is great potential for obstruction and paralysis of the SCC.
12. The structure of the Court is cumbersome as it replicates the structure and criminal procedure of CAR criminal courts with multiple levels and appeals: this could be a lengthy and expensive process and could paralyze the SCC and militate against the expressed need for an efficient criminal process. Locating trials *in situ* in the CAR is unlikely to offset inefficiencies brought on by a complicated structure, and by extension procedures. It is recommended that if the Organic Law cannot be amended to establish a simpler structure, rules of procedure should be used to creatively circumvent structural problems.

### 7.2.2.4 On the Rights of the Defence

13. Experience has shown that legitimacy of international criminal justice depends in part on how the accused are treated. A hybrid court grafted on a criminal justice system beset with multiple problems, including those related to fair trial standards, should set an example by affording those accused the facilities to mount their defence. Most are

likely to be indigent, and many lacking the knowledge to navigate the system and to defend themselves adequately. It is recommended that consideration should be given to amending the law to create, at the earliest opportunity, an independent Public Office for the Defence to secure the interests of the accused, and to facilitate the provision of legal and representation before the SCC.

#### 7.2.2.5 On the Relationship between SCC and National Courts

14. Article 34 of the Organic Law seems to suggest that the *Procureur de la République* or the prosecutor of the relevant area of Bangui would play a role in the activities of the SCC. It is recommended that the principle of independence of the Special Prosecutor of the SCC must be adhered to, and that any relationship formed or required for the proper functioning of the SCC should not compromise their ability to act independently, free of any influence or improper persuasion.
15. Article 36 of the Organic Law makes provision for primacy of the SCC over national courts, and the Prosecutor of the SCC is empowered to take over a case under investigation by a prosecutor in a national court if, based on evidence available, they conclude that it points to the commission of international crimes. It is recommended that consideration should be given to development of guidelines to govern these situations, including the movement of cases between the SCC and ordinary courts and the sharing of evidence between the SCC and national courts.
16. It is further recommended that a flexible inter-institution liaison mechanism (SCC and other courts, perhaps the TRC as appropriate) be created. It would, among other things, resolve jurisdictional disputes and facilitate cooperation.

#### 7.2.3 On Complementarity and the Relationship between SCC and ICC

17. Notwithstanding the principle of complementarity and the admitted incapacity of national authorities to investigate and prosecute international crimes prior to the establishment of the SCC, it is expected that the large number of perpetrators will have to be tried in the CAR, primarily by the SCC. The temptation to regard the ICC as ‘the solution’ should be tempered, as budgetary considerations are likely to force a different reality on the ICC. It is recommended that the ICC and the international community support national actors to enable the SCC to contribute to the prosecution of crimes committed in the ongoing conflict by shouldering the bulk of the burden.
18. Several factors – the large number of perpetrators, the admitted lack of capacity on the part of CAR authorities to investigate and prosecute and overlapping jurisdiction between ICC and SCC – necessitate collaborative approaches between institutions to share the burden of prosecuting perpetrators. Notwithstanding the principle of complementarity, a horizontal and collaborative rather than a vertical and competitive

relationship between the ICC and SCC in CAR is needed. It also recommended that the SCC should leverage the ICC's long period of operation in the CAR.

19. It is recommended that the charging policy of the ICC's OTP and SCC should take into consideration the totality of concerns relating to jurisdiction and seek to take advantage of and leverage the strength of the other with the aim of eliminating 'impunity gaps'. This is based on the assessed reality that although both the ICC and SCC prosecute the same crimes, the SCC possesses several advantages: it can also prosecute the crime of torture, its temporal jurisdiction reaches further back than the ICC (in relation to CAR II), and unlike the ICC, it can prosecute crimes committed beyond the borders of the CAR.
20. In the context of other ICC situations, some situation countries have expressed that the OTP has been less than forthcoming with assistance and information when requested. In refusing assistance, The OTP has typically cited, and perhaps rightly so, legal constraints (that the ICC is not obliged to assist states in a cooperation framework that appears unidirectional), concerns about security of potential witnesses and the integrity of its investigations. Admittedly, some of the requests from states have not been genuine, and may have been made by states that have demonstrated a lack of political will to prosecute, and may have indeed been for ulterior motives been calculated to 'discover' information and evidence in the custody of the OTP.
21. It is recommended that the ICC and the SCC sign a memorandum of understanding to govern cooperation and assistance aspects of their work including disputes relating to the choice of suspects to be prosecuted by either court. One can foresee the possibility that there would arise contestation over a suspect wanted by either court which a judicial determination by the ICC cannot resolve, particularly where the accused is in the custody of the state and it wishes to prosecute that perpetrator at the national level,<sup>101</sup> or the politics at national level do not allow for surrender to the ICC and the outcome is not favourable for either party.<sup>102</sup>
22. It is likely that the SCC could fail to mount a significant number of cases due to lack of resources. For this reason, ordinary criminal courts which suffered neglect and lack capacity to deliver justice emerge as a major factor in post conflict accountability in the CAR. For this reason, ordinary criminal courts must be made the object of reforms to build up their capacity to investigate and prosecute crimes, including international crimes in appropriate cases. It is recommended that the international community support efforts to reform the criminal justice system as a whole and that MINUSCA,

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<sup>101</sup> While I endorse neither the process nor outcomes, it is thought that the case of Simone Gbagbo in Cote d'Ivoire is instructive.

<sup>102</sup> Consider, for instance, reputational costs for Libya and ICC in the Saif Al Islam saga, where on the one hand ICC has insisted on prosecuting Saif while on the other, Tripoli authorities are unable to secure his release from Zintani rebels.

which is charged with assisting in building the capacity of the SCC, expands its efforts to include ordinary criminal courts.

#### 7.2.4 On Mutual Legal Assistance

23. The SCC's territorial jurisdiction extends to crimes committed in the CAR and 'to acts of co-perpetration and complicity committed on the territory of neighbouring states with which CAR had signed mutual legal assistance agreements'. On extradition, analysis of existing legal framework shows that there is an adequate legal framework to support MLA requests to neighbouring states, particularly those that are members of the International Conference on the Great Lakes (ICGLR). It is recommended that in the absence of bilateral MLA agreements, Article 13 of the Protocol (to the ICGLR Pact) for the Prevention and the Punishment of the Crime of Genocide, War Crimes and Crimes against Humanity and all forms of Discrimination, should be used to anchor MLA and extradition requests to neighbouring states. The protocol makes genocide, war crimes and crimes against humanity extraditable offences (Articles 14.3 and 14.4) and dispenses with the need for both national legislation and specific extradition agreements between and among member states.

#### 7.2.5 On Investigations, Technical Assistance and the Role of MINUSCA

24. It is recommended that any role for the Ministry of Justice in the technical assistance to be provided by MINUSCA to the SCC, particularly in the area of collection and transmission of evidence, should be limited to political facilitation or liaison, and should not extend to an evaluation or vetting of information for onward transmission to the SCC.
25. While it is unclear what capacity MINUSCA possesses, it is recommended that it enhances its capacity on documentation of human rights violations and crimes and for the provision of technical assistance and capacity building which it has already begun to provide.
26. Although the Organic Law reserves the leadership of *Unité Spéciale de Police Judiciaire*, the special unit of police attached to the SCC for a national of the CAR, it is advisable that MINUSCA participates at the level of leadership to provide a link between local and international elements. It could be advisable that police seconded by MINUSCA to the unit constitute a significant number of the members of the unit to provide options in respect of assignments deemed inappropriate for CAR members, including those relating to the protection of certain witnesses.
27. Witness protection and rights of victims, the other critical areas of the SCC's work for which MINUSCA's technical assistance and capacity building should make provision, are not detailed in the law. It is recommended that MINUSCA and the SCC should study past experiences and apply best practices. Partnerships and cooperation

arrangements including with states and organisations should be cultivated in advance in this critical area of concern, particularly witness protection.

28. If ordinary criminal courts are to play a role in sharing the burden of prosecuting perpetrators alongside the ICC and SCC, it is recommended that MINUSCA should intensify capacity building of critical actors in the criminal justice system.

#### 7.2.6 On Victims' Rights and Witnesses

29. It is recommended that the SCC should develop protocols and procedures that have a strong focus on the security and welfare of witnesses. This would require capacity building of staff with the support of MINUSCA, as requested and directed in UNSC Resolution 2127.
30. It is recommended that an adequately resourced Witness Protection Unit be established within the registry, with priority given to assembling a small, lean, and cost-effective mechanism that responds to the needs of the SCC, which includes victims that interact with the SCC, particularly because of their *partie civile* role.
31. It was noted that victims have the right to participate in criminal proceedings, and that *partie civile*, which is provided in the criminal procedure of the CAR, should be the vehicle for the exercise of this right. There could be reason to tweak the operation of *partie civile* before the SCC, as mass atrocity situations do not appear to have been contemplated in the current law on *partie civile*. What should be sought, therefore, is an appropriate modality for *partie civile* that takes into consideration the efficient SCC operations and respect for the accused's right to an expeditious trial.
32. With respect to reparations and assistance, it is recommended that a modality for providing assistance for witnesses and victims who interact with the SCC be established. Consideration should also be given to a reparations scheme necessitated by and that builds on *partie civile*. A broader reparations programme could be linked to the proposed truth and reconciliation commission, taking into consideration the need to provide assistance and support to witnesses and victims (or at least those that interact with the SCC) in the interim.<sup>103</sup> A future agreement or working modality concluded between the SCC and truth commission should address this question.
33. It is recommended that a Victim Support Unit be created within the registry of the SCC. This unit, which would be charged with facilitating participation of victims in the trials, including access to legal representatives and reparations could be merged with witness services, into an appropriately structured Victims and Witnesses Unit, with due attention paid to each broad area of concern in terms of expertise and

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<sup>103</sup> On the various models for designing and implementing reparations funds, see Musila, Godfrey *Rethinking International Justice: Restorative Justice and the Rights of Victims in the International Criminal Court*, Chapter 6 pp 169-228 (Lap Lambert, 2010).

resources, taking into consideration the fact that witness protection, assistance for victims and reparations are resource intensive activities. Such a unit must, as of necessity, have a staff complement with core competencies in victims' rights (reparations and participation), witness protection, gender and SGBV and psychosocial assistance.

### **7.2.7 On Traditional Justice and Conflict Resolution Mechanisms**

34. Informal or traditional justice and conflict resolution mechanisms form an important part of the delivery of justice in the CAR. In the current conflict, these mechanisms have been hijacked, militarised and in some cases 'Islamized' by combatants, transforming them into a criminal enterprise of extortion. It is recommended that to expand access to justice, consideration should be given to designing a role for traditional justice and conflict resolution mechanisms in a context of mass atrocities and where formal justice has limited reach. It is further recommended that minimum human rights standards should be decreed for the operation of these mechanisms. Traditional mechanisms should be de-Islamised, rendered less adversarial, and demilitarised, particularly where they are to adjudicate inter-community disputes. It is equally recommended that they must be adapted and usefully deployed as part of the process to be instituted by the future truth and reconciliation commission to facilitate intercommunity dialogues between warring communities at the local level, with eventual national dialogues such as those that preceded the National Forum of May 2015. Their mandate could cover, among other things, stolen and looted property, including cattle.

### **7.2.8 On the Role of the International Community**

35. It is recommended that the ICC and the international community support national actors to enable the SCC to contribute to the prosecution of crimes committed in the ongoing conflict in the CAR.
36. It is further recommended that donors support other accountability measures – ordinary criminal courts, the truth and reconciliation commission as well as traditional justice mechanisms – given that an approach that overly privileges the SCC and prosecutions would constitute an inadequate response to the effects of the violence and crimes witnessed in the CAR.
37. The SCC could suffer a chronic lack of resources in the face of enumerable challenges and resource needs, and it is unlikely achieve its goals if a more reliable funding modality than pure voluntary contribution is not considered. It is recommended that a stable source of funding for the SCC be secured, and that direct budgetary allocation by the UN should be considered in addition to voluntary contribution. Assessed contribution from the UN could be channelled through MINUSCA's budget.



38. The funding arrangements adopted should have, as a key consideration, preserving the independence of the SCC. Both the government of the CAR and the international community have a responsibility to ensure that the SCC is free from undue influence that could compromise its work and legacy, operating as it will in a deeply divided and polarised society.
  
39. It is recommended that the impact and responses to mass atrocities should not be viewed solely from the lens of criminal law. Taking into consideration the fact that victims are affected by crime in multiple ways and that for this reason, the international community should support other mechanisms foreseen in the Republican Pact, which sets out a comprehensive approach to establishing accountability for crimes and human rights violations committed in the CAR.

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