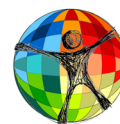


The Special Criminal Court in the Central African Republic: Progress and Challenges for the Hybrid Tribunal

Jessica Michelin

McGill Centre for
Human Rights
and Legal Pluralism



Centre sur les droits de la
personne et le pluralisme
juridique de McGill



McGill

Faculty of Law Faculté de
Droit

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ABSTRACT

The hybrid tribunal integrates domestic and international law elements into a special court to seek accountability for grave crimes. In post-conflict societies, the hybrid tribunal can serve as an effective rule of law development tool and enjoy greater legitimacy than a purely domestic or purely international court. In 2015, the hybrid model was adopted in the Central African Republic to create a new tribunal known as the Special Criminal Court. This paper provides a detailed overview of the structure and functioning of the Special Criminal Court and examines whether the conditions necessary for the court's success are present in the Central African Republic. Drawing on lessons from previous iterations of the hybrid tribunal (the Special Court for Sierra Leone, the Extraordinary Chambers in the Courts of Cambodia and the Special Tribunal for Lebanon), the author identifies six key domains (legitimacy, norm development, capacity building, informed and engaged population, political will, and governance and security) that will influence the court's success as a justice mechanism and rule of law development tool. The author argues that the Special Criminal Court is an example of the progress that has been made in the international justice endeavor. Its design shows that the international justice community is continuing to learn from the experiences of past hybrid tribunals. However, the precarious security situation in the Central African Republic poses significant challenges to the Special Criminal Court's long-term success in providing justice for victims and contributing to rule of law development in the Central African Republic.

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Introduction

The corollary of recognizing that all people are endowed with human rights is that all people must also be afforded a way to protect and vindicate these rights. For this reason, ensuring accountability for rights violations is essential for building and maintaining respect for human rights. Without accountability, the normative force of the human rights framework is undermined. Accountability for crimes is an essential element of the rule of law and thus a necessary foundation for a peaceful, rights-based society. Rule of law is the principle that every individual, institution, and organization, including the government, is accountable to the law.¹ A lack of accountability leads to a culture of impunity. When a person knows that they will not be punished for committing a crime, then they have little disincentive from abstaining from criminal actions, especially if they stand to gain power or resources from that behaviour.² In contrast, the knowledge that criminals will face punishment through accountability mechanisms deters people from breaking the law. Accountability helps to change a culture of impunity by signaling the unacceptability of certain behaviours.³

Criminal accountability is usually a matter of local interest and under to the doctrine of state sovereignty criminal prosecutions have historically fallen within the exclusive domain of the State.⁴ The problem is that in post-conflict societies the rule of law is often weak or non-existent. When countries are unwilling

¹ UN Secretary-General, *The rule of law and transitional justice in conflict and post-conflict societies*, 59th Sess, UN Doc S/2004/616, 23 August 2004 at para 6.

² See Dawn L Rothe & Victoria E Collins, "The International Criminal Court: A Pipe Dream to End Impunity?" in Dawn L Rothe, James Meernik & Pórdís Ingadóttir, eds, *The Realities of International Criminal Justice* (Leiden: Martinus Nijhoff Publishers, 2013) 191 at 194–97 (for overview of deterrence theory of criminal law); David Luban, "After the Honeymoon: Reflections on the Current State of International Criminal Justice" (2013) 11:3 J Intl Crim Justice 505 at 511.

³ See Payam Akhavan, "Beyond Impunity: Can International Criminal Justice Prevent Future Atrocities?" (2001) 85:1 Am J Intl L 7 at 8.

⁴ See generally Hugh M Kindred et al, *International Law: Chiefly as Interpreted and Applied in Canada*, 8th ed (Toronto: Emond Montgomery, 2014) at 100–04, 250–59 (for overview of the theory of state sovereignty); Jack Donnelly, *Universal Human Rights in Theory and Practice*, 3rd ed (Ithaca: Cornell University Press, 2013) at 32–35 (explaining that states are responsible for implementing human rights protections for their own nationals).

or unable to hold perpetrators accountable, it sends a message that abusers can continue violating human rights with impunity. Moreover, victims who are denied access to justice lose confidence in their country's public institutions, breeding unrest and often leading to further abuses. For these reasons, impunity is often cited as a driving factor in armed conflicts.⁵

Impunity for human rights violations has become a matter of concern not only for individual states but also for the international community. The entire human rights framework is undermined by continued violations of human rights norms and when such violations occur at a large scale these crimes can threaten global peace and security.⁶ Thus in response to mass atrocities, the international community developed the field of international criminal law.⁷ International criminal law is the body of rules defining the behaviour that constitutes an international crime and making the perpetrators of those crimes criminally liable.⁸ Often referred to as grave crimes, international crimes are crimes which, due to their nature and gravity, violate the norms and values of the international community.⁹ The "international" aspect of the crime comes not from the fact that the offence crosses borders or involves a dispute between States but rather because

⁵ See e.g. Human Rights Watch, *Selling Justice Short* (New York: Human Rights Watch, 2009); Luban, *supra* note 2 at 511; OHCHR, *Report of the Mapping Project documenting serious violations of international human rights law and international humanitarian law committed within the territory of the Central African Republic between January 2003 and December 2015* (Geneva: United Nations Publications, 2017) at 319 [OHCHR, *Mapping Project*].

⁶ See Harry Hobbs, "Towards a Principled Justification for the Mixed Composition of Hybrid International Criminal Tribunals" (2017) 30 *Leiden J Intl L* 177 at 189 [Hobbs, "Principled Justification"]; Frédéric Mégret, "In Defence of Hybridity: Towards a Representational Theory of International Criminal Justice" (2005) 38:3 *Cornell Intl L J* 725 at 738. See also *Rome Statute of the International Criminal Court*, 17 July 1998, 2187 UNTS 38544 (entered into force 1 July 2002) ("Recognizing that such grave crimes threaten the peace, security and well-being of the world" in the Preamble) [*Rome Statute*].

⁷ See *Rome Statute*, *supra* note 6 ("Conscious that all peoples are united by common bonds, their cultures pieced together in shared heritage and concerned that this delicate mosaic may be shattered at any time" in the Preamble); Mégret, *supra* note 6 at 736–37 (arguing that international community's failure to prosecute international crimes weakens the perception that these crimes are 'international').

⁸ See Antonio Cassese et al, *Cassese's International Criminal Law*, 3rd ed (Oxford: Oxford University Press, 2013) at 3.

⁹ See Hobbs, "Principled Justification", *supra* note 6 at 189; Gideon Boas & Pascale Chifflet, *International Criminal Justice* (Cheltenham, UK: Edward Elgar, 2017) at 222.

the international community has decided to characterize the crimes as affecting international interests.¹⁰ By labelling crimes as “international”, the international community becomes a victim of these crimes and gains a legitimate interest in prosecuting the perpetrators, unlike under the traditional doctrine of sovereignty.¹¹

The hybrid tribunal is an accountability mechanism that seeks to balance local and international interests in seeking accountability for grave crimes. The Office of the High Commissioner for Human Rights defines the hybrid tribunal as a court “of mixed composition and jurisdiction, encompassing both national and international aspects, usually operating within the jurisdiction where the crimes occurred.”¹² In other words, it is a criminal prosecution mechanism that includes elements of both international and domestic law. National and international judges sit together in a court located where the atrocities occurred. International and local lawyers prosecute the crimes together, usually under domestic law or a special law drafted to meet international law standards. In effect, a hybrid court reflects a desire to have a court that is neither domestic nor international.¹³ It helps to close the gap between the purely domestic and purely international trial.

In 2015, the hybrid model was adopted in the Central African Republic to create a specialized tribunal for trying serious crimes committed in the country since 2003.¹⁴ With this new tribunal, known as the Special Criminal Court, the government and the international community are seeking to end years of impunity and deliver justice to scores of victims. Additionally, there is hope that the court will strengthen the rule of law in the Central African Republic in order to contribute to more sustainable peace.

¹⁰ See Mégret, *supra* note 6 at 733.

¹¹ See Cassese et al, *supra* note 8 at 3; Hobbs, “Principled Justification”, *supra* note 6 at 191–94 (explaining that international crimes are both local and international crimes).

¹² OHCHR, *Rule-of-Law Tools for Post-Conflict States: Maximizing the Legacy of Hybrid Courts* (Geneva: United Nations Publications, 2008) at 1 [OHCHR, *Hybrid Courts*].

¹³ See Cassese et al, *supra* note 8 at 264; Elizabeth M Bruch, “Hybrid Courts: Examining Hybridity Through a Post-Colonial Lens” (2010) 28:1 BU ILJ 1 at 5 (describing the blended nature of hybrid tribunals).

¹⁴ See *Loi organique No 15.003 du 3 juin 2015, portant création, organisation et fonctionnement de la Cour pénale spéciale*, JO de la République centrafricaine, 5 June 2015, Special Edition [SCC Statute].

However, a court's ability to successfully deliver justice and strengthen the rule of law in a post-conflict society is affected by many factors, both directly and indirectly related to the accountability mechanism.¹⁵ This paper seeks to examine whether the conditions necessary for the Special Criminal Court's success are present in the Central African Republic. In Section I, I review the theory underpinning hybrid tribunals, explaining the key benefits these courts offer over other accountability mechanisms. In Section II, I examine earlier iterations of the hybrid court, shedding light on some of the shortcomings of previous hybrid tribunals. Section III provides an overview of the situation in the Central African Republic and outlines the Special Criminal Court's structure. Finally, in Section IV, I identify six domains that will influence the court's success and analyze the specific conditions in the Central African Republic underlying each domain to draw conclusions about the court's likely success.

A Better Tool for Accountability: The Theory of Hybrid Tribunals

In a post-conflict society where domestic authorities have historically been unable to uphold the rule of law, the hybrid tribunal theoretically offers two main advantages as an option for justice in comparison with domestic or international mechanisms. Firstly, the hybrid tribunal is able to achieve greater overall legitimacy than alternative prosecution mechanisms. Secondly, the hybrid tribunal advances the human rights agenda by strengthening the rule of law in post-conflict societies. This section describes the reasoning supporting these claims. In next section, it will become evident that these advantages do not automatically come to fruition in all situations.

Legitimacy

A tribunal's legitimacy significantly impacts its deterrent effects. Criminal prosecution is not an effective deterrent when the arbiter of justice is perceived to lack legitimate authority.¹⁶ In

¹⁵ See UN Secretary-General, *supra* note 1 at para 3; Boas & Chifflet, *supra* note 9 at 203.

¹⁶ See Rothe & Collins, *supra* note 2 at 196–97; Hobbs, "Principled Justification", *supra* note 6 at 180; Dale Stephens & Thomas Wooden, "War Crimes: Increasing Compliance with International Humanitarian Law through International Criminal Law?" in Philipp Kastner, ed, *International Criminal Law in Context* (New York: Routledge, 2017) 109 at 125.

countries with weak judiciaries, domestic accountability mechanisms are often perceived as illegitimate due to concerns about government interference and biased judges.¹⁷ However, purely international mechanisms also lack legitimacy for a number of reasons, including physical and cultural distance from the local population, and distrust of international actors due to historic colonial or exploitative relationships between states.¹⁸ Hybrid tribunals offer a compromise between these extremes: a joint-enterprise between the state and the international community.¹⁹ The host state's role as a partner in justice creates a feeling of national ownership in the accountability effort while the presence of international personnel helps bolster perceptions of independence and impartiality.²⁰

Moreover, in contrast with purely international mechanisms, a hybrid tribunal can also achieve greater legitimacy through its ability to incorporate local customs and values into its framework. Remote tribunals, including the International Criminal Court (ICC), face challenges with having their work resonate with the population and thus are less impactful in contributing to the reconciliation often necessary for peace-building.²¹ Relying on local knowledge helps investigators and adjudicators to appreciate the complex drivers of conflicts, which are often influenced by years of ethnic, linguistic and/or religious divides not immediately evident to foreigners.²² Demonstrated understanding of such complexities, as well as other social and cultural mores, renders the institution more credible and thus more effective in compelling citizens to comply with human rights law.²³

Strengthening the Rule of Law

The rule of law is notoriously difficult to define. For the sake of clarity, I use the World Justice Project's (WJP) conception of

¹⁷ See Laura A Dickinson, "The Promise of Hybrid Courts" (2003) 97:2 Am J Intl L 295 at 301.

¹⁸ *Ibid* at 302–03. See also Eric Witte & Claire Duffy, *Options for Justice: A Handbook for Designing Accountability Mechanisms for Grave Crimes* (New York: Open Society Foundations, 2018) at 36.

¹⁹ See Harry Hobbs, "Hybrid Tribunals and the Composition of the Court: In Search of Sociological Legitimacy" (2016) 16 Chicago J Intl L 482 at 492 [Hobbs, "Hybrid Tribunals"].

²⁰ See Dickinson, *supra* note 17 at 306.

²¹ See Witte & Duffy, *supra* note 18 at 32.

²² See Aaron Fichtelberg, *Hybrid Tribunals: A Comparative Examination* (New York: Springer Science, 2015) at 181.

²³ See OHCHR, *Hybrid Courts*, *supra* note 12 at 6.

rule of law as an operating definition. I opted to use WJP's framework because it focuses on the core element of rule of law articulated in the introduction, namely ensuring respect for fundamental human rights guaranteed under international law, while seeking to balance various formal and substantive definitions of rule of law.²⁴ WJP defines the rule of law as a system of laws, institutions, norms and community commitment that delivers accountability, just laws, open government, and accessible and impartial dispute resolution.²⁵ The WJP rule of law framework identifies eight indicators of rule of law: constraints on government powers, absence of corruption, open government, fundamental rights, order and security, regulatory enforcement, civil justice and criminal justice.²⁶

As can be gleaned from these eight rule of law indicators, upholding the rule of law depends on a myriad of factors, such as popular and political will, governance and security, and resource availability. Some of these factors will be addressed below in Section IV. Given this wide range of variables, policies addressing rule of law reforms are necessarily broader than international criminal justice initiatives. Hybrid accountability mechanisms should thus be understood as one measure for strengthening the rule of law within a larger rule of law development context. More specifically, hybrid tribunals help to strengthen the rule of law through norm development and justice sector capacity building.

Norm Development

Hybrid tribunals promote norm development by facilitating norm integration into post-conflict societies. Professor Sally Engle Merry describes how the process of integrating international human rights norms into local communities depends on translators who can integrate these abstracted norms into new social and cultural contexts.²⁷ Translators put global rights ideas into local

²⁴ See World Justice Project, *World Justice Project Rule of Law Index 2020* (Washington, DC: World Justice Project, 2020) at 9. See generally Brian Z Tamanaha, *On the Rule of Law: History, Politics, Theory* (New York: Cambridge University Press, 2004) at 91–113 (for an overview of formal and substantive theories of rule of law).

²⁵ See World Justice Project, *supra* note 24 at 10.

²⁶ *Ibid* at 11.

²⁷ See Sally Engle Merry, "Transnational Human Rights and Local Activism: Mapping the Middle" in René Provost & Colleen Sheppard, eds, *Dialogues on Human Rights and Legal Pluralism* (Netherlands: Springer, 2013) 207 at 211 [Merry].

terms and show citizens how the human rights framework offers new perspectives on local problems.²⁸ International tribunals often fail to achieve meaningful norm penetration because the physical distance between the population and the court limits the degree of local engagement with the criminal prosecution process.²⁹ There is no opportunity for translators to close the space between the international and local communities in these situations. In contrast, hybrid courts help to bridge the gap between local and international discourses by creating a space for translation to occur.³⁰ When investigations and trials are closer to the societies affected by the crimes, there is greater opportunity for local engagement with the rights discourse articulated in the courtroom. Specifically, criminal trials publicly denounce human rights violations within a context familiar to the community.³¹ They also vindicate rights by providing an official record of events and by making it easier for victims to participate in proceedings, as they do not need to travel far for the hearings.³² These elements are all important for victims seeking to have their dignity restored by seeing perpetrators answer for their crimes.³³

Translation also occurs through events related to the hybrid tribunal's work, such as press conferences, outreach activities, and victim mobilization, all of which help to foster a human rights dialogue and ensure that the community feels that justice is done.³⁴ The perception that justice is being rendered is an incredibly important sentiment and arguably more impactful than achieving actual justice.³⁵ This feeling not only reinforces

²⁸ Merry, *supra* note 27 at 213.

²⁹ See Dickinson, *supra* note 17 at 305; Witte & Duffy, *supra* note 18 at 32.

³⁰ See Philipp Kastner, "Hybrid Tribunals: Institutional Experiments and the Potential for Creativity within International Criminal Law" in Philipp Kastner, ed, *International Criminal Law in Context* (New York: Routledge, 2017) 221 at 231.

³¹ See UN Secretary-General, *supra* note 1 at para 39; Cassese et al, *supra* note 8 at 266.

³² See UN Secretary-General, *supra* note 1 at para 39; Witte & Duffy, *supra* note 18 at 74.

³³ See UN Secretary-General, *supra* note 1 at para 39; Mégret, *supra* note 6 at 730.

³⁴ See OHCHR, *Hybrid Courts*, *supra* note 12 at 18; Janine Natalya Clark, "International War Crimes Tribunals and the Challenge of Outreach" (2009) 9 *Intl Crim L Rev* 99 at 102.

³⁵ See OHCHR, *Rule-of-Law Tools for Post-Conflict States: Prosecution Initiatives* (Geneva: United Nations Publications, 2006) at 19 [OHCHR, *Prosecution Initiatives*]. See generally Kieran McEvoy & Kirsten McConnachie, "Victims and Transitional Justice: Voice, Agency and Blame" 2013) 22:4 *Soc & Leg Stud* 489 at 491-94; Raquel Aldana-Pindell, "An Emerging Universality of

human rights norms but also increases confidence in local justice institutions, which contributes to a more sustainable peace.³⁶

Capacity Building

Hybrid tribunals also contribute to rule of law development by strengthening the capacity of domestic institutions. Strong and accountable institutions that apply the rule of law equitably are crucial for conflict prevention and peacebuilding.³⁷ However, conflicts limit the ability of justice sector actors such as judges, prosecutors and police to receive adequate training and access proper resources. Post-conflict, these actors often lack the requisite skills to effectively investigate and prosecute offenders.³⁸ Hybrid tribunals provide opportunities for local personnel to build their skills by working in partnership with more experienced international personnel.³⁹ They can also promote the development of new institutions, such as witness protection agencies.⁴⁰

Furthermore, developing local capacity contributes to the norm development discussed above. When local legal professionals lack the requisite experience to investigate mass atrocities, they are unable to properly address the magnitude of the crimes committed, which limits norm development by minimizing the gravity of the crimes.⁴¹ Training local justice sector actors to properly address the gravity of war crimes and crimes against humanity helps to reinforce the seriousness of such crimes. Finally, although it is rarely addressed in the literature, hybrid tribunals can contribute to a sense of solidarity among local and international jurists as they work together to advance the international human rights agenda.

Justiciable Victims' Rights in the Criminal Process to Curtail Impunity for State Sponsored Crimes" (2004) 26:3 Hum Rts Q 605 at 609–14.

³⁶ See UN Secretary-General, *supra* note 1 at para 39; Witte & Duffy, *supra* note 18 at 28, 39; Fichtelberg, *supra* note 22 at 181.

³⁷ See World Justice Project, *supra* note 24 (see factor 8.4 – criminal justice system is timely and effective, which measures “whether criminal judges and other judicial officers are competent” at 14).

³⁸ See UN Secretary-General, *supra* note 1 at para 27.

³⁹ *Ibid* at para 44. See also Dickinson, *supra* note 17 at 304; Witte & Duffy, *supra* note 18 at 41; Fichtelberg, *supra* note 22 at 181.

⁴⁰ See Witte & Duffy, *supra* note 18 at 41.

⁴¹ See Dickinson, *supra* note 17 at 305.

The Shortcomings of Previous Hybrid Tribunals

Despite the hybrid model's theoretically sound framework, in practice hybrid tribunals have generally failed to live up to expectations.⁴² In this section, the three main earlier hybrid tribunals, the Special Court for Sierra Leone, the Extraordinary Chambers in the Courts of Cambodia, and the Special Tribunal for Lebanon are considered.⁴³ By examining these tribunals, it is possible to identify some of the challenges that have emerged implementing the theory of the hybrid model into practice.

The Special Court for Sierra Leone

Between 1991 and 2002, Sierra Leone experienced a brutal civil war.⁴⁴ Following a violent protest in 2000 led by civil society organizations that culminated in the capture and arrest of a prominent rebel group leader, the government requested the UN's assistance in establishing a hybrid court.⁴⁵ Subsequently, the Special Court for Sierra Leone (SCSL) was created in 2002 by an agreement between the UN and Sierra Leone's government.⁴⁶

The SCSL's mandate was to investigate violence committed in Sierra Leone during the latter half of the civil war, with jurisdiction over crimes committed after November 30, 1996.⁴⁷ It was a hybrid court in a dual sense, staffed by national and international judges, and with a mandate to apply a mix of international and national law.⁴⁸ However, in practice the court

⁴² See e.g. Padraig McAuliffe, "Hybrid Tribunals at Ten: How International Criminal Justice's Golden Child Became an Orphan" (2011) 7:1 J Intl L & Intl Relations 1.

⁴³ Given that there is no definitive consensus about what characteristics make a tribunal sufficiently hybrid, these tribunals were selected because it is generally agreed upon that these tribunals are appropriately classified as hybrid. For discussion of other hybrid-type tribunals see Fichtelberg, *supra* note 22.

⁴⁴ See generally Fichtelberg, *supra* note 22 at 8–12 (for overview of conflict in Sierra Leone).

⁴⁵ See UNSC, Alhaji Ahmad Tejjan Kabbah, *Letter Dated 2000/08/09 from the Permanent Representative of Sierra Leone to the United Nations Addressed to the President of the Security Council*, 55th Sess, UN Doc S/2000/786, 10 August 2000; Witte & Duffy, *supra* note 18 at 250.

⁴⁶ See *Agreement between the United Nations and the Government of Sierra Leone on the establishment of a Special Court for Sierra Leone*, 16 January 2002, 2178 UNTS 137 (entered into force 12 April 2002).

⁴⁷ *Ibid*, art 1.

⁴⁸ See *Statute for the Special Court for Sierra Leone, Annex, Agreement between the United Nations and the Government of Sierra Leone on the*

almost exclusively applied international law.⁴⁹ Although the SCSL's decisions contributed to the development of international criminal law, the norms articulated in the judgments were not successfully incorporated into the domestic legal system.⁵⁰

The SCSL's mixed staffing structure favoured international judges, who made up the majority in each chamber.⁵¹ National judges perceived their international counterparts as looking down on them, leading to tension between the judges.⁵² Although the court offered many trainings develop the capacity of the national judges, it was criticized for failing to create a framework that effectively allowed international and national staff to learn from each other.⁵³ The SCSL also did not offer adequate capacity building for lawyers, despite the fact that shortly after the end of the civil war there were only an estimated one hundred lawyers remaining in the entire country.⁵⁴

Although the SCSL was the first international criminal tribunal located in the country where the crimes it was trying had been committed, the trial of one of the most notorious perpetrators, former Liberian President Charles Taylor, was held in The Hague, in the Netherlands due to security concerns.⁵⁵ This decision was made in response to worries that trying Taylor in Sierra Leone would contribute to political instability, but was highly criticized by human rights activists for undermining the SCSL's project of delivering justice for victims within their own community.⁵⁶ The SCSL's Appeals Chamber was also located in The Hague for many years.⁵⁷

One of the SCSL's strengths was its successful outreach campaign. Although securing funding for outreach was challenging due to an emphasis on prosecutions as the court's primary goal, the SCSL worked closely with civil society to

establishment of a Special Court for Sierra Leone, 16 January 2002, 2178 UNTS 137 (entered into force 12 April 2002) [SCSL Statute], arts 2–5.

⁴⁹ See Witte & Duffy, *supra* note 18 at 252.

⁵⁰ *Ibid* at 258.

⁵¹ See SCSL Statute, *supra* note 48, art 12.

⁵² See Witte & Duffy, *supra* note 18 at 258.

⁵³ *Ibid*.

⁵⁴ See Vivek Maru, "Between Law and Society: Paralegals and the Provision of Justice Services in Sierra Leone and Worldwide" (2006) 31 Yale J Intl L 427 at 441.

⁵⁵ See Witte & Duffy, *supra* note 18 at 250.

⁵⁶ See Fichtelberg, *supra* note 22 at 141–42.

⁵⁷ See Witte & Duffy, *supra* note 18 at 252.

develop innovative outreach programs designed to engage broad sections of society.⁵⁸ Since the SCSL, outreach is generally regarded as an essential component for the success of any international tribunal.⁵⁹

The Extraordinary Chambers in the Courts of Cambodia

During the reign of the Khmer Rouge, officially known as the Communist Party of Kampuchea, millions of Cambodians died as a result of their policies of forced migration and strict political oppression.⁶⁰ The Extraordinary Chambers in the Courts of Cambodia (ECCC) was created in 2003 by the Cambodian government to investigate crimes committed between April 17, 1975 and January 6, 1979 by the senior leaders of the Khmer Rouge.⁶¹ The UN and the Cambodian government negotiated extensively over the ECCC's structure, with the final design outlined in an bilateral agreement.⁶²

The ECCC is staffed by local and international judges, with a majority of Cambodian judges in each chamber.⁶³ There are also two prosecutors and two investigative judges, one international and one Cambodian for each team.⁶⁴ This design aims to maintain the court's Cambodian character while ensuring judicial independence.⁶⁵ However, there is no formal international mechanism for monitoring the activities of the ECCC, which is concerning given the absence of a culture of impartiality and independence within the Cambodian judicial system.⁶⁶

⁵⁸ *Ibid* at 255. See also Fichtelberg, *supra* note 22 at 89–92.

⁵⁹ See Clark, *supra* note 34 at 100, 106; OHCHR, *Hybrid Courts*, *supra* note 12 at 17.

⁶⁰ See generally Fichtelberg, *supra* note 22 at 2–8 (for overview of rise and fall of the Khmer Rouge).

⁶¹ See *Law on the Establishment of the Extraordinary Chambers, with inclusion of amendments as promulgated on 27 October 2004*, art 1, NS/RKM/1004/006, Cambodia, online (pdf): <www.eccc.gov.kh/sites/default/files/legal-documents/KR_Law_as_amended_27_Oct_2004_Eng.pdf> [ECCC Statute].

⁶² See *Draft Agreement between the United Nations and the Royal Government of Cambodia concerning the Prosecution under Cambodian Law of Crimes Committed during the Period of Democratic Kampuchea*, UNGAOR, 57th Sess, Annex, Agenda Item 109(b), UN Doc A/Res/57/228 B (2003) 2.

⁶³ See ECCC Statute, *supra* note 61, art 9.

⁶⁴ *Ibid*, arts 18 new, 23 new.

⁶⁵ See Fichtelberg, *supra* note 22 at 77.

⁶⁶ See UNHRC, Surya P Subedi, *Report of the Special Rapporteur on the situation of human rights in Cambodia*, 15th Sess, Agenda Item 10, UN Doc

Unfortunately, since the ECCC's establishment, few perpetrators have been brought to justice. Many died of old age before they could be brought to trial. The delays are largely attributed to bureaucratic wrangling and stalling tactics driven by Cambodia's authoritarian government, which controls the judiciary and continues to perpetuate human rights abuses.⁶⁷ There have also been concerns that the Cambodian government has made politically-motivated appointments to the ECCC's judiciary, which has led numerous international personnel to resign from the court.⁶⁸

Another purpose of the ECCC's hybrid staffing structure was to help rebuild the capacity of Cambodia's judicial system, which was devastated by the Khmer Rouge's regime.⁶⁹ However, similarly to the SCSL there are no formal skills-sharing programs and any information exchange depends on initiatives undertaken by individual staff members.⁷⁰

Another challenge has been changing cultural expectations about judicial independence and accountability. Despite the Cambodian government's stated policy goals of improving the rule of law, there is a lack of political will to effect real change, undermining efforts to evolve justice sector norms.⁷¹ In particular, as mentioned above, the executive continues to exert pressure on the judiciary. This lack of norm penetration is also hindered by the limited interaction between the ECCC and the domestic judiciary.⁷² Nonetheless, the ECCC has led to public dialogue about the crimes of the past, which could be indicative

A/HRC/15/46, 16 September 2010 at paras 40–59 [UNHRC, *Cambodia Report*].

⁶⁷ *Ibid.* See also Witte & Duffy, *supra* note 18 at 459.

⁶⁸ See Fichtelberg, *supra* note 22 at 114; Witte & Duffy, *supra* note 18 at 448.

⁶⁹ See UNHRC, *Cambodia Report*, *supra* note 66 at para 59–60.

⁷⁰ See Olga Martin-Ortega & Johanna Herman, "The Impact of Hybrid Tribunals: Current Practice in Bosnia and Herzegovina and Cambodia" in Michael Reed & Amanda Lyons, eds, *Contested Transitions: Dilemmas of Transitional Justice in Colombia and Comparative Experience* (Bogotá: International Center for Transitional Justice, 2010) 230 at 242–45; Witte & Duffy, *supra* note 18 at 454; Christoph Sperfeldt, "From the Margins of Internationalized Criminal Justice: Lessons Learned at the Extraordinary Chambers in the Courts of Cambodia" (2013) 11:5 J Intl Crim Justice 1111 at 1126; Witte & Duffy, *supra* note 18 at 454, 458.

⁷¹ See UNHRC, *Cambodia Report*, *supra* note 66 at paras 40–41; Martin-Ortega & Herman, *supra* note 70 at 242; Witte & Duffy, *supra* note 18 at 458.

⁷² See Martin-Ortega & Herman, *supra* note 70 at 247; Witte & Duffy, *supra* note 18 at 458.

of some progress towards the integration of human rights norms into Cambodian society.⁷³ In particular, civil society has played a vital role as “intermediaries”, or translators as Merry would describe them, between the ECCC and affected communities.⁷⁴

The ECCC was initially lauded for offering innovative means for victims to participate in the trial as civil parties (*parties civiles*).⁷⁵ This feature of civil law criminal justice systems allows victims to participate as a third party to the proceedings, in addition to the prosecution and the defence. The hope was that civil parties would allow citizens to take on a more active role in the trials, thereby allowing them to feel like stakeholders in the ECCC.⁷⁶ Civil parties thus offered a potential solution to criticisms that traditional internationalized justice mechanisms were insufficiently attentive to victims’ interests.⁷⁷ However, the procedural rules for civil parties’ participation in trials have been narrowly interpreted and applied. Functionally, the ECCC does not address victims’ rights better than any other international tribunal.⁷⁸

The Special Tribunal for Lebanon

The Special Tribunal for Lebanon (STL) is a hybrid tribunal created to investigate the assassination of former Prime Minister Rafiq Hariri, which occurred on February 14, 2005, as well as related criminal acts that occurred up to five months before and up to ten months following the assassination.⁷⁹ This mandate is relatively narrow in comparison to other hybrid tribunals and notably provides no recourse for victims of grave crimes committed during the country’s twenty-five year civil war that ended in 1990.⁸⁰

⁷³ See Witte & Duffy, *supra* note 18 at 458. See also Sperfeldt, *supra* note 70 at 1126 (noting that the ECCC led to civil society development).

⁷⁴ See Sperfeldt, *supra* note 70 at 1130–32.

⁷⁵ See UNHRC, *Cambodia Report*, *supra* note 66 at para 60; Martin-Ortega & Herman, *supra* note 70 at 238.

⁷⁶ See Fichtelberg, *supra* note 22 at 80.

⁷⁷ See Boas & Chifflet, *supra* note 9 at 216.

⁷⁸ See Witte & Duffy, *supra* note 18 at 453.

⁷⁹ See UNSC, *Statute of the Special Tribunal for Lebanon*, 62nd year, Annex, UN Doc S/Res/1757 (2007), art 1 [STL Statute].

⁸⁰ See International Center for Transitional Justice, *Handbook on the Special Tribunal for Lebanon* (New York: ICTJ, 2008) (describing the STL’s mandate as “the narrowest of any international or hybrid tribunal” at 10) [ICTJ, *Handbook on STL*]; Witte & Duffy, *supra* note 18 at 644.

The STL was developed as a joint initiative between the UN and the Lebanese government, with an agreement signed between the two in 2007. However due to challenges implementing the necessary domestic legislation, the STL was ultimately created using the Security Council's Chapter VII authority.⁸¹ This distinguishes the STL from the SCSL and the ECCC as those tribunals were created without resorting to the Security Council's coercive powers. The government's support has fluctuated since the STL's creation due domestic politics and at various moments there have been concerns that the government would cease cooperation with STL investigators.⁸² Both the STL's narrow mandate and the lack of government cooperation could undermine the STL's legacy as a norm-building institution, since questions about selective justice and failures to secure arrests could reinforce public perceptions that justice institutions and the rule of law are ineffective.⁸³ The challenges of establishing a positive long-term legacy are further exacerbated by divided opinions about the STL's desirability and legitimacy.⁸⁴

The STL applies a mix of national and international law. The Lebanese Criminal Code is the primary source of law, but it is interpreted in the context of Lebanon's international obligations.⁸⁵ The STL employs mixed national and international staff, with a majority of international judges in each chamber.⁸⁶ There is an international prosecutor, assisted by a Lebanese deputy prosecutor.⁸⁷ The STL also allows victims to participate as civil

⁸¹ See *STL Statute*, *supra* note 79. See also Nicolas Michel, "The Creation of the Tribunal in its Context" in Amal Alamuddin, Nidal Nabil Jurdi & David Tolbert, eds, *The Special Tribunal for Lebanon: Law and Practice* (Oxford: Oxford University Press, 2014) 10 at 23–26.

⁸² See Witte & Duffy, *supra* note 18 at 638 (observing that the Hezbollah political party strongly opposes the STL).

⁸³ *Ibid* at 644. See generally Harmen van der Wilt, "The Legacy of the Special Tribunal for Lebanon" in Amal Alamuddin, Nidal Nabil Jurdi & David Tolbert, eds, *The Special Tribunal for Lebanon: Law and Practice* (Oxford: Oxford University Press, 2014) 268.

⁸⁴ See ICTJ, *Handbook on STL*, *supra* note 80 at 45.

⁸⁵ See *STL Statute*, *supra* note 79, art 2; Witte & Duffy, *supra* note 18 at 640. But see Nidal Nabil Jurdi, "The Crime of Terrorism in Lebanese and International Law" in Amal Alamuddin, Nidal Nabil Jurdi & David Tolbert, eds, *The Special Tribunal for Lebanon: Law and Practice* (Oxford: Oxford University Press, 2014) 73 at 73–86 (for critique of this interpretation of the STL's applicable law).

⁸⁶ See *STL Statute*, *supra* note 79, art 8.

⁸⁷ *Ibid*, art 11.

parties, however their participation is more circumscribed than in the regular Lebanese court system.⁸⁸

Unlike other hybrid tribunals, the STL is located in the Netherlands, with only a satellite office in Beirut. This distance weakens the possibility of capacity building for the domestic justice system, significantly reducing one of the main advantages of the hybrid tribunal's design.⁸⁹ The STL's satellite office houses the public relations and investigations departments, facilitating outreach to the public and local cooperation with investigators.⁹⁰

Lessons Learned Thus Far

As the SCSL, ECC and STL demonstrate, the theoretical advantages of a hybrid tribunal do not automatically translate into results. The promise of legitimacy depends largely on assuring sufficient local input and political support. Fetishizing the expertise of international judges and prosecutors leads to resentment from local staff and ignores the valuable information they can contribute about the complexities of the conflict, and local customs and values.⁹¹ Additionally, a lack of political support undermines legitimacy by reducing local ownership of the court and potentially fueling the perception that the tribunal is an unwelcome international incursion into domestic affairs.⁹² Legitimacy is also undermined when the government is not committed to respecting key rule of law values such as judicial independence.⁹³

Norm development is also impeded by lack-luster political support, which risks creating a "reverse legacy" for the court.⁹⁴ A

⁸⁸ *Ibid*, art 17. See also ICTJ, *Handbook on STL*, *supra* note 80 at 28; Howard Morrison, "Victim Participation at the Special Tribunal for Lebanon" in Amal Alamuddin, Nidal Nabil Jurdi & David Tolbert, eds, *The Special Tribunal for Lebanon: Law and Practice* (Oxford: Oxford University Press, 2014) 153 at 161–74.

⁸⁹ See David Tolbert, "Introduction: A Very Special Tribunal" in Amal Alamuddin, Nidal Nabil Jurdi & David Tolbert, eds, *The Special Tribunal for Lebanon: Law and Practice* (Oxford: Oxford University Press, 2014) 1 at 2.

⁹⁰ See Witte & Duffy, *supra* note 18 at 641. See also ICTJ, *Handbook on STL*, *supra* note 80 at 12 (noting the importance of outreach given that the STL is not located in Lebanon).

⁹¹ See Bruch, *supra* note 13 at 35–36; Kastner, *supra* note 30 at 233–34; Hobbs, "Hybrid Tribunals", *supra* note 19 at 519.

⁹² See McAuliffe, *supra* note 42 at 34.

⁹³ *Ibid* at 42. See also Witte & Duffy, *supra* note 18 at 75.

⁹⁴ OHCHR, *Hybrid Courts*, *supra* note 12 at 15. See also Witte & Duffy, *supra* note 18 at 28, 40.

reverse legacy occurs when the hybrid tribunal further entrenches the perception that justice is unattainable or corrupt. Reverse legacies can also arise when outcomes do not align with the population's expectations, which is often the result of poor communication about the court's mandate and lack of transparency about prosecutorial decisions.⁹⁵

Finally, capacity building is limited when there are no formal measures in place to facilitate skill and knowledge transfer. The sometimes-tense relationships between national and international staff also impedes capacity building.⁹⁶ The power dynamics within the tribunals themselves need to be addressed in order to foster an environment more conducive to cross-cultural learning.⁹⁷

Despite these challenges, hybrid tribunals should not be rejected as a failed accountability mechanism. In each case study discussed in this section, the hybrid tribunal helped societies to move towards a standard of accountability in law and governance where impunity had previously dominated.⁹⁸ Rather, the shortcomings of previous tribunals should inform policy makers' choices about the design and operation of future tribunals, who must also remain attentive to the fact that the particular context of each environment will present new and unique challenges.⁹⁹ Moreover, the continued deterioration of the relationship between the ICC and many African states means that relying exclusively on the ICC for internationalized prosecution is not a realistic possibility.¹⁰⁰ With these lessons in mind, I turn now to the most recent hybrid tribunal project.

⁹⁵ See Fichtelberg, *supra* note 22 at 178–79; McAuliffe, *supra* note 42 at 41; Witte & Duffy, *supra* note 18 at 25; Sperfeldt, *supra* note 70 at 1128.

⁹⁶ See Fichtelberg, *supra* note 18 at 181; McAuliffe, *supra* note 42 at 39–40; Witte & Duffy, *supra* note 18 at 97.

⁹⁷ See Bruch, *supra* note 13 at 36–37; Etelle R Higonnet, "Restructuring Hybrid Courts: Local Empowerment and National Criminal Justice Reform" (2006) 23:2 *Arz J Intl & Comp L* 347 at 369.

⁹⁸ See McAuliffe, *supra* note 42 at 51; Sperfeldt, *supra* note 70 at 1136.

⁹⁹ See Hobbs, "Hybrid Tribunals", *supra* note 19 at 520; Hobbs, "Principled Justification", *supra* note 6 at 179; Witte & Duffy, *supra* note 18 at 18.

¹⁰⁰ See Mutoy Mubiala "Africa and International Criminal Justice" (2013–2014) 20 *African YB Intl L* 37 at 43; Hobbs, "Hybrid Tribunals", *supra* note 19 at 486.

A New Hybrid Tribunal: The Special Criminal Court in the Central African Republic

The Special Criminal Court was created through a special law by the transitional government of the Central African Republic in June 2015.¹⁰¹ This justice mechanism combines numerous functions across the judicial chain into one entity, including investigations and prosecutions, defense, adjudication, and witness and victim support services. It is mandated to investigate genocide, war crimes, and crimes against humanity committed in the country since January 1, 2003.¹⁰²

History of the Conflict in the Central African Republic

The Central African Republic is a former French colony that has experienced ongoing instability since it achieved independence in 1961.¹⁰³ It is the only country with inquiries into two situations ongoing at the ICC. Continuous violence is driven in part by complex ethnic and religious divisions. Additionally, porous borders allow conflicts from other countries to spill into the Central African Republic as well facilitate the recruitment of mercenaries from other countries to participate in the country's internal conflicts.¹⁰⁴ Impunity is consistently cited as a key driver of the ongoing violence in the Central African Republic.¹⁰⁵

In 2002, a failed coup led to widespread rape, murder, and pillage by both rebels and foreign militia called in to quell the uprising. A year later, rebels successfully overthrew the government and took control of Bangui, the nation's capital city. The new government subsequently referred the situation to the

¹⁰¹ See SCC Statute, *supra* note 14.

¹⁰² *Ibid*, art 3.

¹⁰³ See Human Rights Watch, *State of Anarchy: Rebellion and Abuses Against Civilians* (New York: Human Rights Watch, 2007) at 25 [Human Rights Watch, *State of Anarchy*].

¹⁰⁴ *Ibid* at 25–26. See also International Crisis Group, *Central African Republic: The Roots of Violence* (Brussels: International Crisis Group, 2015) at 2–23; Witte & Duffy, *supra* note 18 at 152.

¹⁰⁵ See e.g. OHCHR, *Mapping Project*, *supra* note 5 at 319; International Commission of Inquiry on the Central African Republic, *Final Report*, UNSCOR, 2014, Annex, UN Doc S/2014/928 (2014) 5 at paras 30–38; Human Rights Watch, *Killing Without Consequence: War Crimes, Crimes Against Humanity and the Special Criminal Court in the Central African Republic* (New York: Human Rights Watch, 2017) at 75–77 [Human Rights Watch, *Killing Without Consequence*].

ICC.¹⁰⁶ The ICC's mandate in this first investigation is to look into alleged war crimes and crimes against humanity that occurred during peak violence in 2002 and 2003.¹⁰⁷ The Office of the Prosecutor has noted that this is the first investigation at the ICC where crimes of sexual violence outnumbered alleged killings.¹⁰⁸ In 2018, the ICC's Appeals Chamber acquitted former rebel leader Jean-Pierre Bemba Gombo from charges of crimes against humanity and war crimes.¹⁰⁹ Gombo and others were convicted of corruptly influencing witnesses in 2016.¹¹⁰

In 2012, a second rebellion occurred when a coalition of rebel forces overthrew the new government.¹¹¹ This rebel coalition, known as "Séléka" (meaning "union" or "alliance" in Sango, the official language of the Central African Republic), went on widespread rape and killing sprees mainly targeting Christians. In response, mostly Christian vigilante groups known as the "anti-Balaka" (meaning "anti-bullet" in Sango) committed similar crimes against mostly Muslim civilians.¹¹² Rebels continue to regularly commit grave crimes against civilians of all groups.¹¹³ This situation was referred to the ICC in 2014 and an investigation

¹⁰⁶ See Human Rights Watch, *State of Anarchy*, *supra* note 103 at 26–27; Witte & Duffy, *supra* note 18 at 152. See generally OHCHR, *Mapping Project*, *supra* note 5 at 38–78 (for detailed account of violence in Central African Republic between 2003 and 2008).

¹⁰⁷ See Office of the Prosecutor, Press Release, "Prosecutor opens investigation in the Central African Republic" (22 May 2007), online: *International Criminal Court* <www.icc-cpi.int/Pages/item.aspx?name=prosecutor%20opens%20investigation%20in%20the%20central%20african%20republic>.

¹⁰⁸ *Ibid.*

¹⁰⁹ See *The Prosecutor v Jean-Pierre Bemba Gombo*, ICC-01/05-01/08 A, Judgment on the appeal of Mr Jean-Pierre Bemba Gombo against Trial Chamber III's "Judgment pursuant to Article 74 of the Statute" (International Criminal Court), online: *International Criminal Court* <www.icc-cpi.int/CourtRecords/CR2018_02984.PDF>.

¹¹⁰ See *The Prosecutor v Jean-Pierre Bemba Gombo, Aimé Kilolo Musamba, Jean-Jacques Magenda Kabongo, Fidèle Babala Wandu and Narcisse Arido*, ICC-01/05-01/13, Public Redacted Version of Judgment pursuant to Article 74 of the Statute (International Criminal Court), online: *International Criminal Court* <www.icc-cpi.int/CourtRecords/CR2016_18527.PDF>.

¹¹¹ See Human Rights Watch, *Killing Without Consequence*, *supra* note 105 at 17.

¹¹² *Ibid.* at 18. See also Witte & Duffy, *supra* note 18 at 152–53. See generally OHCHR, *Mapping Project*, *supra* note 5 at 79–205 (for detailed account of violence from late 2008 to 2015).

¹¹³ See International Commission of Inquiry on the Central African Republic, *supra* note 105 at paras 293–354; Human Rights Watch, *Killing Without Consequence*, *supra* note 105 at 77.

is ongoing.¹¹⁴ Since 2014, there has been a UN authorized peacekeeping mission deployed in the country, known as the Multidimensional Integrated Stabilization Mission in the Central African Republic (MINUSCA).¹¹⁵

A transitional government was formed in 2014 and in March 2016, Faustin-Archange Touadéra was democratically elected as president.¹¹⁶ The transitional government also organized a national consultation in 2015, known as the Bangui Forum. The forum brought together over 800 representatives of community and nongovernmental organizations, political parties, and armed groups.¹¹⁷ A recommendation emerged from the Bangui Forum that a new court should be established to address ongoing impunity for grave crimes throughout the country.¹¹⁸ Previously, no criminal trials had occurred between 2009 and 2014.¹¹⁹ The Special Criminal Court was created through a special law by the transitional government in June 2015.¹²⁰ It is the first hybrid court to be created exclusively by a national government.

Structure and Functioning of the Special Criminal Court

The Special Criminal Court is a national court situated within the domestic judicial system of the Central African Republic.¹²¹ Its hybrid nature comes from its design, which includes national and international staff in all departments save within the investigative police team.¹²² It also benefits from international

¹¹⁴ See Witte & Duffy, *supra* note 18 at 155.

¹¹⁵ See UNSC, Res 2149 (2014), 7153rd meeting, UN Doc S/Res/2149 (2014), art 18.

¹¹⁶ See Human Rights Watch, *Killing Without Consequence*, *supra* note 105 at 27.

¹¹⁷ See Human Rights Watch, Extended Press Release, “Central African Republic: New Court Should Step Up Effort” (24 July 2019), online: *Human Rights Watch*, <www.hrw.org/news/2019/07/24/central-african-republic-new-court-should-step-effort> [Human Rights Watch, “New Court”].

¹¹⁸ See OHCHR, *Mapping Project*, *supra* note 5 at 281–83; Human Rights Watch, *Looking for Justice* (New York: Human Rights Watch, 2018) at 8 [Human Rights Watch, *Looking for Justice*].

¹¹⁹ See Jocelyn Ngoumbango, Jules Soh & Franck Petit, *Guide de sensibilisation sur la CPS*, 2nd ed, (Bangui: Cour Pénale Spéciale, 2019) at 5, online (pdf): *Cour pénale spéciale de la République centrafricaine* <www.cps-rca.cf/documentation.php?idcategorie=20>.

¹²⁰ See SCC Statute, *supra* note 14.

¹²¹ *Ibid*, art 1.

¹²² *Ibid*, art 9.

funding assistance.¹²³ The court has a five-year renewable mandate to investigate and prosecute grave violations of human rights and international humanitarian law committed in the country since January 1, 2003.¹²⁴ It applies domestic law that has been modified to conform with international standards.¹²⁵ The court has primacy over the regular criminal courts and works complementarily with the ICC, deferring to the ICC in cases of overlap.¹²⁶ Given that the Central African Republic uses a civil law system, criminal investigations follow the inquisitorial process.

The special prosecutor's office is responsible for conducting the first phase of investigations. It is staffed by an international prosecutor, a national deputy prosecutor and at least two substitute prosecutors.¹²⁷ Investigations may be opened by the prosecutor *ex officio* or in response to a complaint or denunciation made by a citizen.¹²⁸ An investigation must be completed within six months unless an extension is approved by a judge.¹²⁹ Following the investigation, the prosecutor refers cases with sufficient information to the investigating judges.

The judicial chambers are made up of an investigative chamber, an indictment chamber, a trial chamber and an appeals chamber.¹³⁰ The investigative chamber conducts the second phase of the investigation following a case's referral to the court by the special prosecutor. Victims may also bring complaints directly to the investigative chamber by filing a complaint as a civil party (*partie civile*).¹³¹ If the investigative chamber deems that the complaint is reasonably founded, it can order the special prosecutor to investigate the complaint.¹³² In the investigative chamber, a two-judge panel, composed of one international judge and one national judge, investigates cases for up to two years.¹³³

¹²³ See SCC Statute, *supra* note 14, art 53.

¹²⁴ *Ibid*, arts 3(1), 70.

¹²⁵ *Ibid*, art 3(1).

¹²⁶ *Ibid*, arts 3(3), 37(1).

¹²⁷ *Ibid*, art 18.

¹²⁸ See Loi No 18.010 du 2 juillet 2018, portant règlement de procédure et de preuve devant la Cour pénale spéciale de la République centrafricaine, JO de la République centrafricaine, 1 August 2018, Special Edition, arts 62-63 [SCC Rules of Procedure].

¹²⁹ *Ibid*, art 70.

¹³⁰ See SCC Statute, *supra* note 14, art 7.

¹³¹ *Ibid*, art 40(2). See also SCC Rules of Procedure, *supra* note 128, art 74(A).

¹³² See SCC Rules of Procedure, *supra* note 128, art 70(C).

¹³³ *Ibid*, art 106(A). See also SCC Statute, *supra* note 14, art 11.

Following the investigation, the investigative chamber can refer the case to the trial chamber, where it is judged on its merits.¹³⁴ The indictment chamber and the appeal chamber hear appeals from the investigative chamber and trial chamber respectively.¹³⁵

A special investigative police force assists the prosecutors and the investigating judges with their investigations.¹³⁶ Members are selected from the national police and the gendarmerie, and are detached from their squads for the duration of their mandate at the Special Criminal Court.¹³⁷ In order to increase the court's independence, they work under the exclusive authority of court officials.¹³⁸ MINUSCA can also make peacekeepers available as supplementary police for the court, however these individuals remain part of the UN's chain of command.¹³⁹

The registry is responsible for a wide range of undertakings necessary for the court's proper functioning, including case management, security, translation services, execution of judgments, outreach, and coordination with the legal aid service.¹⁴⁰ It is overseen by a Central African chief registrar who is assisted by an international deputy chief registrar.¹⁴¹ Notably, the registry is responsible for witness and victim protection. To this end, a victim and witness support and protection unit was created within the registry, which will include experts in protection measures, a clinical psychologist and a confidential financial account specialist.¹⁴²

Finally, the law establishes a special corps of Central African defense lawyers to assist defendants and civil parties throughout any investigations and trials.¹⁴³ The lawyers are to be selected from the Central African bar and will be given supplementary trainings, organized in collaboration with Avocats

¹³⁴ See SCC Rules of Procedure, *supra* note 128, art 104(C).

¹³⁵ See SCC Statute, *supra* note 14, arts 13, 24.

¹³⁶ *Ibid*, art 8.

¹³⁷ *Ibid*, art 30(1).

¹³⁸ *Ibid*, art 30(2).

¹³⁹ *Ibid*, art 32.

¹⁴⁰ See SCC Rules of Procedure, *supra* note 128, arts 43–44.

¹⁴¹ See SCC Statute, *supra* note 14, art 15.

¹⁴² See SCC Rules of Procedure, *supra* note 128, art 46; Special Criminal Court, Press Kit, "Grande conférence de presse de cour pénale spéciale" (20 June 2019) at 10, online (pdf): Cour pénale spéciale de la République centrafricaine <www.cps-rca.cf/espace-presse/dossier_presse/> [Special Criminal Court, "Grande conférence de presse"].

¹⁴³ See SCC Statute, *supra* note 14, arts 64–65.

Sans Frontières and the UN Office on Drugs and Crime.¹⁴⁴ In highly sensitive cases, an international lawyer may be assigned to assist the national defense lawyers.¹⁴⁵

Conditions for the Special Criminal Court's Success

In order to successfully contribute to the fight against impunity, the Special Criminal Court must not repeat the same structural and operational mistakes of previous hybrid tribunals. However, the court will also face unique challenges arising from the particular situation in the Central African Republic. Scholars repeatedly observe that the specific factors influencing a hybrid tribunal's success are highly-context specific.¹⁴⁶ To properly evaluate the likely impact and legacy of the Special Criminal Court, consideration of factors beyond the specific structure and operation of the court is necessary.

Given that the Special Criminal Court serves not only as an accountability mechanism but also as a rule of law development mechanism, its success will depend on the presence of factors conducive to rule of law development. In the discourse of law and development, "good enough governance" is the theory that there is a minimally acceptable level of government performance and civil society engagement that is necessary for development to progress.¹⁴⁷ Exporting this idea to the rule of law development context, there is similarly a minimum set of conditions necessary for successful rule of law development. The WJP's rule of law indicators, which were conceptualized to measure rule of law in practice, can also provide insight into what the necessary conditions are for rule of law development.¹⁴⁸

This section examines some factors which could influence the court's success and conducts a preliminary assessment as to whether the minimum necessary conditions are present in the Central African Republic. Specifically, I look at the issues of legitimacy, norm development, and capacity building that are typically considered when evaluating hybrid courts, as well as

¹⁴⁴ *Ibid*, art 21. See also Special Criminal Court, "Grande conférence de presse", *supra* note 142 at 11.

¹⁴⁵ See SCC *Statute*, *supra* note 14, art 67.

¹⁴⁶ See e.g. Witte & Duffy, *supra* note 18 at 29; Hobbs, "Hybrid Tribunals", *supra* note 19 at 493-94; Bruch, *supra* note 13 at 38.

¹⁴⁷ See Merilee S Grindle, "Good Enough Governance: Poverty Reduction and Reform in Developing Countries" (2004) 17:4 *Governance* 525 at 526.

¹⁴⁸ See footnote 26 and surrounding text.

addressing other rule of law considerations such as citizen engagement, political will, and governance and security.

Legitimacy

Unless the local justice system is discredited as valid source of authority, mechanisms more deeply integrated into the domestic legal system enjoy greater legitimacy with the local population than external justice mechanisms.¹⁴⁹ However, in the Central African Republic, the justice sector is weak and “rife with corruption at all levels.”¹⁵⁰ Criminal proceedings in Bangui are generally viewed as illegitimate due to this widespread corruption.¹⁵¹ Furthermore, since the start of the 2013 crisis, fear of reprisals by armed groups has become an additional driver of corruption.¹⁵²

In the face of such challenges, the inclusion of international actors in accountability mechanisms can partially neutralize negative perceptions of the domestic justice system by enhancing public trust in the mechanism’s objectivity and impartiality.¹⁵³ The Special Criminal Court incorporates international staff in key positions, such as judges, prosecutors and registrars, and the number of international and national judges on each panel is set out by law.¹⁵⁴ These clear rules should mitigate against the risk of corruption and political interference.

The objective of eliminating corruption in the judicial process is also reflected in the Special Criminal Court’s statute which requires that all personnel are “persons of good character, with demonstrated impartiality and integrity” and which sets out

¹⁴⁹ See Witte & Duffy, *supra* note 18 at 36. See generally World Justice Project, *supra* note 24 at 12–14 (see factor 2.2 – government officials in the judicial branch do not use public office for private gain, factor 2.3 – government officials in the police and military do not use public office for private gain and factor 8.5 – criminal justice system is free of corruption).

¹⁵⁰ See International Commission of Inquiry on the Central African Republic, *supra* note 105 at para 57.

¹⁵¹ See Cheyanne Scharbatke-Church et al, *Pity the man who is alone: Corruption in the criminal justice system in Bangui, Central African Republic* (Cambridge, MA: CDA Collaborative Learning Projects, 2017) at 39.

¹⁵² *Ibid* at 35.

¹⁵³ See Witte & Duffy, *supra* note 18 at 96; Hobbs, “Principled Justification”, *supra* note 6 at 179. See also Hobbs, “Hybrid Tribunals”, *supra* note 19 at 511.

¹⁵⁴ See SCC Statute, *supra* note 14, arts 9, 11(2), 12(2), 13(2), 14(2).

prohibited conflicts of interest.¹⁵⁵ Furthermore, the independence of each branch of the Special Criminal Court is explicitly set out in law.¹⁵⁶

Legitimacy is also affected by the international judges' backgrounds. Selecting international judges who have particularized knowledge, either of the region, the legal tradition or the language helps to increase legitimacy.¹⁵⁷ All of the internationally appointed magistrates come from French-speaking countries with civil law systems, and the majority of internationally appointed magistrates come from other African countries.¹⁵⁸ This particularization should also increase the court's legitimacy.

Other decisions related to the Special Criminal Court have also been made with the issue of legitimacy in mind. For example, the *Rules of Procedure* were enacted through legislation by Parliament after activists expressed worries that rules adopted exclusively by the judges would be perceived as illegitimate.¹⁵⁹ Similarly, after concerns were raised about the process used to select officers for the special police force, the appointments were annulled and an additional international advisor was added to the selection committee.¹⁶⁰

However, the slow process of rendering the court operational has made the population impatient and risks undermining their confidence in the court.¹⁶¹ Although the court was created in 2015, it only began investigations in 2018. The special prosecutor has acknowledged these challenges and held a big press conference in June 2019 to give updates on the Court's progress.¹⁶² Ongoing communication will be key to maintaining the transparency that is vital for the court's legitimacy.

Ultimately, there is a strong desire for nationally driven justice in the Central African Republic that justifies the Special

¹⁵⁵ *Ibid*, art 20 [translated by author].

¹⁵⁶ See SCC *Rules of Procedure*, *supra* note 128, arts 31, 38–39, 48, 57, 61.

¹⁵⁷ See Hobbs, "Hybrid Tribunals", *supra* note 19 at 513; Witte & Duffy, *supra* note 18 at 101.

¹⁵⁸ The magistrates come from Burkina Faso, Democratic Republic of Congo, Togo, Canada and France.

¹⁵⁹ See Human Rights Watch, *Looking for Justice*, *supra* note 118 at 17.

¹⁶⁰ *Ibid* at 26.

¹⁶¹ See Human Rights Watch, "New Court", *supra* note 117.

¹⁶² See Special Criminal Court, "Grande conférence de presse", *supra* note 142.

Criminal Court's design as a more domestically integrated accountability mechanism. The court was created in response to consultations with stakeholders throughout the country and has been described as reflecting "the will of the population".¹⁶³ As one victim explained: "We trust in the Special Criminal Court because it is the national justice, it is based here and knows the perpetrators."¹⁶⁴ Despite the significant challenges associated with integrating an accountability mechanism into a weak domestic justice system, the desire for local justice would likely have undermined the legitimacy of a more externalized and internationalized tribunal.

Norm Development

Norm development depends on effectively adapting global human rights norms to local environments, largely through the work of translators. Specifically, translators use the human rights framework to help reframe local problems.¹⁶⁵ As it stands, normative respect for human rights is virtually non-existent in the Central African Republic. An example of this is evidenced by the "impunity bonus", wherein rebels who commit particularly egregious violence against civilians are rewarded by their superiors.¹⁶⁶ There is a lot of hope that the Special Criminal Court will help change society's perception of violence against civilians. One local lawyer identified the justice process as an important educational tool for teaching people that such behaviour is not acceptable in society that upholds the rule of law.¹⁶⁷

Effective outreach will be key for translating and propagating human rights norms. The Special Criminal Court has developed numerous innovative outreach initiatives that emphasize both victims' and due process rights.¹⁶⁸ Unlike previous hybrid tribunals, outreach is included in the court's mandate, with a designated communication and awareness department in the registry.¹⁶⁹ One notable outreach initiative was the development of a play about the court, "Kota dati Ngbanga", which was

¹⁶³ Human Rights Watch, "New Court", *supra* note 117.

¹⁶⁴ *Ibid.*

¹⁶⁵ See Merry, *supra* note 27 at 213.

¹⁶⁶ HRW, *Looking for Justice*, *supra* note 118 at 13.

¹⁶⁷ *Ibid* at 11.

¹⁶⁸ See generally Special Criminal Court, "Grande conférence de presse", *supra* note 142 at 8-9.

¹⁶⁹ See SCC Rules of Procedure, *supra* note 128, art 45(D).

performed over 80 times to a total of over 82,000 spectators.¹⁷⁰ Additionally, the outreach team has created radio programs and informative comic strips about the court.¹⁷¹ These initiatives are illustrative of a legal information campaign designed specifically for the Central African population, where many citizens are illiterate.¹⁷² The Special Criminal Court has also developed outreach guidebooks to transmit key information to local civil society and partnered with grassroots organizations to bolster outreach initiatives.¹⁷³ Echoing the translation vocabulary used by Merry, the court describes outreach staff as working like a “transmission belt between the Special Criminal Court and Central Africans.”¹⁷⁴

However, Merry cautions that whether the rights framework endures in communities also depends on the institutional response victims receive.¹⁷⁵ When rights-affirming institutions like the police, prosecutors, and courts fail to recognize the harm endured by victims, norm development is not sustainable even when translators effectively communicate the human rights message to citizens. The Special Criminal Court’s legacy as a norm-building institution will therefore depend not only on the discourse it engenders but also on its substantive responses to crimes.

One structure within the Special Criminal Court that could increase the likelihood that victims feel that their rights are being treated seriously is the civil party feature. As explained above, civil parties allow victims to be placed “more squarely at the center of the accountability process” by advocating for themselves during trials.¹⁷⁶ Civil parties are also eligible for legal aid, which both sends a message that the court is taking their claims seriously and increases the likelihood that civil parties will feel they that meaningfully participated in the justice process.¹⁷⁷ The effectiveness of the civil party process will be affected by how the

¹⁷⁰ See “Du théâtre pour la justice et contre l’impunité en Centrafrique.” (17 July 2019), online: *Cour pénale spéciale de la République centrafricaine* <cps-rca.cf/actualites/Du-theatre-pour-la-justice-et-contre-l%E2%80%99impunite-en-Centrafrique./13/>.

¹⁷¹ See Human Rights Watch, “New Court”, *supra* note 117.

¹⁷² *Ibid.*

¹⁷³ See e.g. Ngoumbango, Soh & Petit, *supra* note 119.

¹⁷⁴ *Ibid* at 9 [translated by author]. Cf Merry, *supra* note 27 at 214.

¹⁷⁵ See Merry, *supra* note 27 at 214.

¹⁷⁶ Human Rights Watch, *Looking for Justice*, *supra* note 118 at 13.

¹⁷⁷ See Ngoumbango, Soh & Petit, *supra* note 119 at 20.

court handles the potentially substantial number of civil parties. Countless individuals have experienced serious rights violations throughout the conflict and the court will need to develop tools to allow them access justice. Presently, outreach documents available for civil society and victims' rights organizations are instructing them to encourage victims to organize themselves into groups to be represented collectively at trials.¹⁷⁸ Another challenge will be ensuring adequate security for witnesses and victims, which will be discussed when considering Governance and Security below.

An additional factor impacting successful norm development is ensuring that the populations' expectations align with the court's mandate. If citizens expect more from the court than it is being asked to deliver, then they are doomed to be disappointed, which can ultimately reinforce negative perceptions of courts as justice mechanisms.¹⁷⁹ The sheer volume of crimes committed means that most perpetrators will not be tried. Outlining a prosecution strategy and conducting clear outreach about the court's mandate is imperative for setting realistic expectations.¹⁸⁰ The Court's outreach guide specifically cautions civil society advocates against creating false hopes.¹⁸¹ Additionally, the prosecutor's office has publicized a detailed prosecution strategy that outlines case selection and prioritization criteria.¹⁸² Cases will be prioritized based on the gravity of crimes committed, while also considering other relevant factors such as security available for conducting investigations and ensuring representation of victims, perpetrators and geographic location throughout the country.¹⁸³ This effort to set clear expectations is positive but must be maintained throughout the duration of the Special Criminal Court's mandate.

In addition to creating a space for translation between the court and the population, cross-fertilization of rule of law norms occurs within the institution itself. A culture of judicial

¹⁷⁸ *Ibid* at 19.

¹⁷⁹ See Witte & Duffy, *supra* note 18 at 25; Human Rights Watch, *Looking for Justice*, *supra* note 118 at 26–27.

¹⁸⁰ See UN Secretary-General, *supra* note 1 at para 46; Fichtelberg, *supra* note 22 at 178.

¹⁸¹ See Ngoumbango, Soh & Petit, *supra* note 119 at 18.

¹⁸² See Special Criminal Court, "Stratégie d'enquêtes, de poursuites et d'instruction" (2018), online (pdf): *Cour pénale spéciale de la République centrafricaine* <cps-rca.cf/fichiers_joints/Strategie_de_poursuite_CPS.pdf>.

¹⁸³ *Ibid* at 12–20.

independence is an important condition for rule of law to succeed.¹⁸⁴ The widespread corruption within the justice system is fueled by social norms that are antithetical to judicial independence and impartiality.¹⁸⁵ If international magistrates maintain the importance of upholding judicial independence at the Special Criminal Court, then they will also become translators by showing that these values can function within local culture. However, the effectiveness of successful judicial norm development is highly dependent on the ethical convictions of the international personnel themselves. For this reason, Witte and Duffy emphasize the importance of selecting international officials with outstanding ethics records on issues of independence, impartiality, integrity, equality, propriety and diligence.¹⁸⁶ This ethics information is not easily accessible for the international magistrates at the Special Criminal Court and thus it is not possible to draw conclusions about the likely success of judicial norm development.

Capacity Building

In their review of numerous accountability mechanisms, Witte and Duffy conclude that the extent to which a mechanism fosters capacity building is largely dependent on the attitude of international staffers. Specifically, international personnel must be open-minded, respectful of national colleagues and willing to learn from their national counterparts.¹⁸⁷ It is difficult to assess whether international staffers at the Special Criminal Court have these characteristics, particularly because internal politics lead many conversations between staff and external monitoring organizations like Human Rights Watch to be 'off the record'. However, certain external factors risk creating tensions between international and national staff. Finding qualified personnel has been a challenge given the continued instability in the country.¹⁸⁸ Higher pay is often needed to recruit international staff, which

¹⁸⁴ See World Justice Project, *supra* note 24 at 12–14 (see factor 1.2 – government powers are effectively limited by the judiciary, factor 2.1 – government officials in the judicial branch do not use public office for private gain, factor 8.4 – criminal justice system is impartial and factor 8.5 – criminal justice system is free of improper government influence); Tamanaha, *supra* note 24 at 112; UN Secretary-General, *supra* note 1 at para 35.

¹⁸⁵ See Scharbatke-Church et al, *supra* note 151 at 30–31.

¹⁸⁶ See Witte & Duffy, *supra* note 18 at 100.

¹⁸⁷ See Witte & Duffy, *supra* note 18 at 98

¹⁸⁸ *Ibid* at 103.

could fuel resentment from national counterparts.¹⁸⁹ Furthermore, only international magistrates have thus far been assigned twenty-four hour security details, despite such protection being promised to all judges and prosecutors.¹⁹⁰

To maximize capacity building, international judges should have experience in international criminal law.¹⁹¹ “Experienced” must be distinguished from “international”, as judges without the requisite expertise cannot contribute to capacity building with respect to investigating complex crimes like war crimes and crimes against humanity.¹⁹² The Special Criminal Court relies in part on secondments from other countries to fill the international magistrate positions. Although the relevant expertise of seconded magistrates at other tribunals has varied,¹⁹³ the international staff at the Special Criminal Court all have specific experience in international criminal law matters. These qualifications will hopefully contribute to improved capacity building for local judges.

The Special Criminal Court is designed to promote capacity building across its structures, rather than only within the judiciary. For example, by recruiting members of the national police and the gendarmerie to join the investigative police force, these officers will be able to disseminate the specialized training they receive back to their units after the court’s mandate is complete. This deliberately created ‘pipeline’ between the Special Criminal Court and the domestic justice system will contribute positively to justice sector development.¹⁹⁴ Additionally, partnering international and national personnel at the registry will be especially important for developing victim and witness protection services, which are foreign to the Central African justice sector.

Furthermore, the Special Criminal Court has created capacity building opportunities for a broader scope of justice system actors. With these initiatives, the court is following

¹⁸⁹ See OHCHR, *Hybrid Courts*, *supra* note 12 at 27; Witte & Duffy, *supra* note 18 at 102.

¹⁹⁰ See Human Rights Watch, *Looking for Justice*, *supra* note 118 at 23.

¹⁹¹ See Witte & Duffy, *supra* note 18 at 101. See also OHCHR, *Hybrid Courts*, *supra* note 12 at 26.

¹⁹² See Hobbs, “Hybrid Tribunals”, *supra* note 19 at 519; Kastner, *supra* note 30 at 235–37.

¹⁹³ See Witte & Duffy, *supra* note 18 at 97.

¹⁹⁴ See Witte & Duffy, *supra* note 18 at 41.

emerging best-practice policy of promoting skill development for a wider range of people.¹⁹⁵ Workshops have been offered to civil society activists, women's groups, lawyers, journalists and students.¹⁹⁶ These types of initiatives can have a positive effect on strengthening the justice sector generally and reflect a shift away from previous practices of focusing exclusively on developing the skills of judges and lawyers working at the court. While it is difficult to predict how much the court will contribute to capacity building, the reality is that given the extremely weak justice sector in the Central African Republic, even limited skill and knowledge transfer will be an improvement on the current situation.¹⁹⁷ At the very least, the Special Criminal Court appears to be taking all the necessary steps for effective capacity building and consciousness-raising. Capacity building is a long-term investment whose legacy will hopefully extend far beyond the mandate of the Special Criminal Court.

Informed and Engaged Population

One condition necessary for the rule of law to succeed is the presence of an informed and engaged population.¹⁹⁸ The population plays an important role in a strong justice system by demanding protection for their human rights from both other citizens and from the government.¹⁹⁹ As Clark explains, the relationship between a court and the population is "critical" for its success.²⁰⁰ A necessary precondition to this type of engagement is that the population be aware of the rights that they are entitled to have protected and of the availability of accountability mechanisms to vindicate their rights. The importance of transmitting this information to the population through outreach

¹⁹⁵ See OHCHR, *Hybrid Courts*, *supra* note 12 at 30, 32–33.

¹⁹⁶ See Special Criminal Court, "Grande conférence de presse", *supra* note 142 at 8–9; Human Rights Watch, *Killing Without Consequence*, *supra* note 105 at 87.

¹⁹⁷ See Human Rights Watch, *Killing Without Consequence*, *supra* note 105 at 75–76.

¹⁹⁸ See World Justice Project, *supra* note 24 at 13 (see factor 3.1 – publicized laws and government data, which measures in part whether information on legal rights is accessible and available in simple language and factor 3.3 – civic participation).

¹⁹⁹ See Tamanaha, *supra* note 24 at 112; OHCHR, *Hybrid Courts*, *supra* note 12 at 17.

²⁰⁰ See Clark, *supra* note 34 at 100.

initiatives in post-conflict situations has been widely accepted in the international justice community since the SCSL.²⁰¹

In terms of creating increased rights awareness within the population, outreach is included within the Special Criminal Court's mandate. As discussed above, the court engaged early in outreach initiatives, both on its own and through partnerships with local civil society. Local representatives of nongovernmental groups say that outreach is progressing well and there is increased awareness about the court.²⁰²

There is also been a high level of citizen engagement with respect to the push for justice. The catalyst for the creation of the Special Criminal Court was the grassroots-organized Bangui Forum.²⁰³ Successive reports published by Human Rights Watch demonstrate that Central Africans have an unequivocal desire to see justice done.²⁰⁴ Victims' groups, civil society activists and other citizen stakeholders continue pushing the court to fulfill its mandate. They also consistently repeat that there cannot be amnesty for former militants, refusing to sacrifice (short-term) peace for justice.²⁰⁵ This level of citizen engagement is a very positive factor that will favour the Special Criminal Court's impact on rule of law development.

Political Will

A successful rule of law mechanism also requires a strong political will to respect the rule of law's underlying values.²⁰⁶ A domestic accountability mechanism is more likely to succeed when domestic authorities genuinely seek to hold all perpetrators to account, including across ethnic and religious lines.²⁰⁷ Additionally, politicians must be willing to respect the independence of the judiciary.²⁰⁸ In the Central African Republic,

²⁰¹ *Ibid* at 100. See also OHCHR, *Hybrid Courts*, *supra* note 12 at 18–19.

²⁰² See Human Rights Watch, "New Court", *supra* note 116.

²⁰³ *Ibid*. See also OHCHR, *Mapping Project*, *supra* note 5 at 282–83.

²⁰⁴ See Human Rights Watch, *Killing Without Consequence*, *supra* note 105 at 78–79; Human Rights Watch, *Looking for Justice*, *supra* note 118 at 9–11; Human Rights Watch, "New Court", *supra* note 116.

²⁰⁵ See e.g. Human Rights Watch, *Killing Without Consequence*, *supra* note 105 at 77; Human Rights Watch, "New Court", *supra* note 116.

²⁰⁶ See Tamanaha, *supra* note 24 at 112; Fichtelberg, *supra* note 22 at 179–80; UN Secretary-General, *supra* note 1 at paras 17, 20. See also OHCHR, *supra* note 12 at 9.

²⁰⁷ See Witte & Duffy, *supra* note 18 at 37.

²⁰⁸ See Tamanaha, *supra* note 24 at 112.

there is strong political will for the Special Criminal Court to succeed. This tribunal marks the first time that a sovereign national government has passed a law to create a hybrid court,²⁰⁹ demonstrating the government's commitment to the justice initiative.

However, victims and human rights activists have questioned whether the government is wavering on its commitment to the court after the February 2019 peace accord signed between the government and fourteen armed groups.²¹⁰ In line with the deal, three armed group leaders were named as special military advisors to the prime minister's office, although two of these individuals subsequently resigned from their positions in the fall of 2019.²¹¹ Although the Special Criminal Court's statute excludes the possibility of amnesty, including for government officials,²¹² the presence of these armed group leaders raises concerns about the possibility of undue government pressure on the court. The government will need to continue reaffirming its strong will to respect the independence of the judiciary in fulfilling its mandate, including allowing the court to potentially investigate and prosecute government officials. Furthermore, if the court appears to be granting amnesty to government officials, this could undermine the rule of law and create a reverse legacy for the court. Conversely, successfully upholding the bar on amnesty could strengthen the perceived legitimacy of the court and the rule of law.

Governance and Security

Order and security is a key factor for strengthening and upholding the rule of law because it ensures that crime and civil conflict is limited and that people do not resort to violence to

²⁰⁹ See Human Rights Watch, *Killing Without Consequence*, *supra* note 105 at 81.

²¹⁰ See Fédération Internationale pour les Droits Humains, Press Release, "L'accord de paix de Khartoum constitue une chance pour la paix, la justice et la réconciliation" (20 February 2019), online : FIDH, <www.fidh.org/fr/regions/afrique/republique-centrafricaine/l-accord-de-paix-de-khartoum-constitue-une-chance-pour-la-paix-la> (on the peace deal); Human Rights Watch, "New Court", *supra* note 116 (on concerns about the deal).

²¹¹ See Human Rights Watch, *World Report 2020* (New York: Human Rights Watch, 2020) at 119 [Human Rights Watch, *World Report*].

²¹² See SCC Statute, *supra* note 14, art 56.

resolve their grievances.²¹³ The Central African Republic does not have a stable security situation, which will significantly limit the Special Criminal Court's potential to have any long-term positive impact on sustainable peace and respect for rule of law. According to Human Rights Watch, an estimated seventy percent of the country continues to be controlled by armed groups.²¹⁴ The government effectively only controls Bangui and its outskirts. There are over one million internally displaced people and refugees, and nearly half the population requires humanitarian assistance.²¹⁵

This situation will create significant challenges for the Special Criminal Court. In interviews, investigators have confessed that the security situation has limited where they have conducted investigations.²¹⁶ Particularly given that the conflict is divided along ethnic and religious lines, limiting investigations only to secure areas could undermine the legitimacy of the court because if atrocities experienced by certain communities are not investigated, then these communities will not feel that justice has been delivered. Additionally, victims and witnesses participating in the trial may be threatened or experience retaliation for their role.²¹⁷ Although the victim and witness protection unit was created to help avoid these situations, it is still in its early phases of becoming operational. Some victims organizations have expressed hesitation to participate in trials as civil parties until security measures are guaranteed by the court.²¹⁸

Furthermore, weak governance contributes to violence because communities cannot rely on the government to ensure their security. Instead, communities rely on vigilante forces to protect their populations, leading to cycles of violence.²¹⁹ The situation presents a difficult challenge: unless the security situation

²¹³ See World Justice Project, *surpa* note 24 at 13 (see factor 5.1 – crime is effectively controlled, 5.2 – civil conflict is effectively limited and 5.3 – people do not resort to violence to redress personal grievances).

²¹⁴ See Human Rights Watch, *World Report*, *surpa* note 211 at 119.

²¹⁵ *Ibid* at 121.

²¹⁶ See OHCHR, *Mapping Project*, *surpa* note 5 at 286; Human Rights Watch, *Looking for Justice*, *surpa* note 118 at 22; Human Rights Watch, “New Court”, *surpa* note 116.

²¹⁷ See OHCHR, *Mapping Project*, *surpa* note 5 at 286; Witte & Duffy, *surpa* note 18 at 72; Human Rights Watch, *Killing Without Consequence*, *surpa* note 105 at 90.

²¹⁸ See Human Rights Watch, “New Court”, *surpa* note 116.

²¹⁹ See OHCHR, *Mapping Project*, note 5 at 288; Human Rights Watch, *Killing Without Consequence*, *surpa* note 105 at 19.

improves, violence will likely continue even with greater justice and accountability within society. However, peace-making deals that have delayed justice by granting amnesty to perpetrators have continuously failed and the population continues to reject any potential amnesties.²²⁰ The Special Criminal Court will realistically only contribute to long-term progress for sustainable peace if other peace building and security initiatives, such as disarmament, demobilization and reintegration efforts are successfully implemented at the same time.²²¹

Conclusion

Human rights violations in the Central African Republic are committed with near-total impunity.²²² The Special Criminal Court has been given the challenging task of replacing this impunity with accountability and strengthening the rule of law to contribute to sustainable peace. In many ways, the court reflects the wisdom of lessons learned from previous hybrid tribunals. The court's design is better suited to maximize the core advantages of hybrid tribunals as an accountability mechanism, namely enjoying greater legitimacy, and achieving more significant inroads strengthening the rule of law through norm development and capacity building.

Specifically, by recruiting particularized international magistrates while also ensuring a clear space for national magistrates, the court is poised to achieve greater perceived legitimacy from the population, particularly given their strong desire for local justice. Maintaining the court's legitimacy will also depend on ensuring that all justice sector actors involved with the

²²⁰ See Human Rights Watch, *Killing Without Consequence*, *supra* note 105 at 77 (on the failures of previous deals that delay justice); Human Rights Watch, "New Court", *supra* note 116 (on the population's strong opposition to amnesties). See generally Bertie Ahern, "Peace agreements normally fail within five years. Bougainville is a lesson to us all", *The Guardian* (20 November 2019), online: *The Guardian* <www.theguardian.com/world/commentisfree/2019/nov/21/peace-agreements-normally-fail-within-five-years-bougainville-is-a-lesson-to-us-all?CMP=Share_iOSApp_Other> (on failures of peace agreements generally).

²²¹ See OHCHR, *Mapping Project*, *supra* note 5 at 286. See generally UN Secretary-General, *supra* note 1 at para 32; Wendy Lambourne, "The Idea of Transitional Justice: International Criminal Justice and Beyond" in Philipp Kastner, ed, *International Criminal Law in Context* (New York: Routledge, 2017) 46.

²²² See International Commission of Inquiry on the Central African Republic, *supra* note 105 at paras 30–38.

court respect the values of independence and impartiality given the widespread culture of corruption within the domestic justice system.

The Special Criminal Court has also initiated proactive measures to contribute to rule of law development, such as integrating outreach as a core function of the court and offering capacity building workshops to a broad range of actors. These initiatives will hopefully strengthen norm development and the justice sector generally. Nonetheless, as the court's work progresses, its legacy as a norm-building institution will depend not only on the discourse it engenders at a theoretical level but also on its substantive responses to crimes. Prosecutors, outreach staff and civil society activists will need to remain dedicated to setting clear expectations about what the court will be able to achieve. In the end, prosecution strategy decisions and judicial outcomes will undoubtedly impact citizens' responses to discourse of the universal human rights framework.

One of the strongest factors that could support the Special Criminal Court's impact as a rule of law development mechanism is the community's engagement. There is a clear, unequivocal desire for justice from the population. Central Africans continue to push for justice within their society and have already demonstrated that they will advocate to hold both the government and the Special Criminal Court accountable when the path to justice is perceived to be moving too slowly or at risk of political interference. Although there are some concerns about the government's political will, it must be borne in mind that the Special Criminal Court is still the first hybrid tribunal created exclusively by a national government, demonstrating greater political will than most other hybrid tribunals. If the government and the Special Criminal Court successfully uphold the bar on amnesty, they could strengthen the perceived legitimacy of the court and the rule of law and potentially begin to end the countless cycles of violence that have dominated the lives of Central Africans for decades.

Ultimately, the biggest obstacle impeding the Special Criminal Court's success is the ongoing violence throughout the country. Justice and peace are mutually reinforcing.²²³ Without a minimum level of stability within the country, the Special Criminal

²²³ See UN Secretary-General, *supra* note 1 at paras 2, 21.

Court's impact will be severely hindered. The OCHCR's *Mapping Project* identified security as a necessary precondition for any justice mechanism to operate effectively.²²⁴ Despite the many conditions for success present in the Central African Republic, this key condition is still missing.

The Special Criminal Court is an example of the progress that has been made in the international justice endeavor, reflecting the increasing rejection of impunity internationally and at the local level. The Special Criminal Court's design shows that the international justice community is continuing to learn from the experiences of past hybrid tribunals. As we shall see, the Special Criminal Court will likely provide more lessons to incorporate into future accountability mechanisms, particular with respect to the minimum level of security needed for success.

²²⁴ See OHCHR, *Mapping Project*, *supra* note 5 at 286.

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