



AFRICA POLICY BRIEF

The uncertain promise of hybrid justice in the Central African Republic

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The decision taken by the Central African Republic government earlier in 2015 to create a Special Criminal Court to prosecute crimes committed during the recent conflict offers promises of long-delayed justice. Faced with a legacy of long running armed conflict, poor governance structures, and numerous human rights violations – especially during the most recent bout of fighting in 2012-2014 – a Special Criminal Court can significantly contribute to promoting accountability and redress for victims and support peace-building in the country. However, significant challenges face the future court if it is to fulfil this promise. This policy paper highlights four such challenges, relating to capacity needs, ongoing insecurity, the Court's relationship with the ICC, and its investigative focus. Addressing these from the outset may prove crucial in ensuring the court's effectiveness and legitimacy.

INTRODUCTION

Successive crises have beset the Central African Republic (CAR) since its independence in 1960, marked by military coups, despotic rule, and national and regional rebel activities. The most recent crisis, which followed the removal of then President François Bozizé by the northern-based Séléka rebel group in March 2013, resulted in deadly confrontations in the capital Bangui, increased insecurity in provincial areas, and the displacement of at least 9000,000 people. But while the virulence of the violence which shook the country in 2013–2014 was unprecedented – in particular the religious dimension around which it crystalized – the events constituted just one episode in a long running political and security crisis. Faced with a weak state – one could even say a largely absent state in vast parts of the country – and a mode of governance characterised by exclusion and monopolisation of economic resources by a small elite, central authorities in the CAR have often been contested and suffered weak legitimacy. The inability of the state and the national army to exercise their sovereign functions and impose a minimum of security has also encouraged the creation of armed groups and the pervasiveness of violence as a mode of governance. Spill-over of security crises in

neighbouring Chad, Sudan, the Democratic Republic of the Congo, and Uganda have further contributed to destabilising the country.

With the conclusion of the Bangui Forum on 11 May 2015 – a national forum bringing together close to 600 state and non-state delegates to address the country’s political, economic and security challenges – the CAR seems determined to engage on a path towards rebuilding peace. If declarations are anything to go by, justice and reconciliation will form part and parcel of this process. The Republican Pact for Peace, National Reconciliation and Reconstruction adopted at Bangui sets out a list of future measures to promote these, including a truth commission, local peace and reconciliation committees, an investigative commission on transboundary crimes, and the appointment of a national mediator. Most notably, the agreement reaffirms support for the creation of a Special Criminal Court for the CAR. Earlier in April 2015, the National Transition Council adopted a law establishing such a court, which is to operate as a hybrid entity composed of national and international officials within the domestic judiciary. It will have competence to investigate gross violations of human rights and international humanitarian law committed on CAR territory since 1 January 2003. The law states that the court will have a five year, renewable mandate and that it will be automatically dissolved once all the procedures before it have been judged. On 3 June, the law was promulgated by interim President Catherine Samba-Panza.ⁱ

Although the International Criminal Court (ICC) is already active in the country and Prosecutor Fatou Bensouda declared in September 2014 that she was opening an investigation into crimes allegedly committed in the CAR since 2012, the creation of a Special Criminal Court has been welcomed as a useful

complement to the ICC’s activities. This is founded on beliefs that hybrid courts hold promises of greater local ownership of justice processes and closer proximity to victims, thereby enhancing their ability to positively impact society. In addition, hybrid courts are expected to contribute to building domestic judicial capacity and insulating judicial officials from political and military interference – a consideration which seems to drive local civil society’s support for the Special Criminal Court.ⁱⁱ The court, it is hoped, will deliver long-delayed justice for mass human rights abuses in the CAR. This, however, is not a given, as important challenges exist to the pursuit of hybrid justice in the CAR and key aspects concerning the design and workings of the Special Criminal Court remain to be clarified. This policy brief discusses four such central challenges facing the future Special Criminal Court.

ENSURING CAPACITY

Experiences with other hybrid courts (e.g., East Timor, Sierra Leone, Cambodia, Kosovo, or Lebanon) caution against expectations that hybrid courts are naturally a more legitimate and effective justice option than either international or domestic courts. Rather, experiences in these countries show that many hybrid courts have failed to deliver on their justice promises because of insufficient resources and a lack of political commitment.ⁱⁱⁱ This can result in excessive delays in the establishment of courts, judicial proceedings that take years to materialise in indictments, and the production of limited investigations and indictments. In the long term, this has had corrosive effects on the legitimacy and public support for these courts. In this light, it is good that the law provides for a phased implementation of the Special Criminal Court, allowing for investigations to get underway before the entire court is set up. This, it is

hoped, might enable the court to proceed with indictments and prosecutions relatively rapidly once it is established. However, such a ‘quick start’ option needs to be complemented with a commitment to provide the Special Criminal Court with full capacities to ensure the process doesn’t run out of steam.

The effectiveness of the Special Criminal Court will depend significantly on the financial and human resources at its disposal. While hybrid courts are assumed to be more cost effective than international courts, they nevertheless require a substantial and long-term financial commitment. Courts require well kitted-out and secure premises, experienced staff (which, usually, come at a cost), and resources for victim and witness protection. Furthermore, trials tend to be spread over several years. For instance, the Special Court for Sierra Leone’s total budget amounted to \$300 million (it was in operation for 11 years, during which it issued 13 indictments and conducted 11 trials), while that of the Extraordinary Chambers in the Courts of Cambodia (ECCC) reached \$204.5 million between 2006 and 2014 (for the prosecution of five accused). This is not to advocate against the creation of a hybrid court in the CAR, but rather to point out that it is illusory to think that the delivery of comprehensive justice by a hybrid court can be done in a just a few years and on a minimal budget.

The law establishing the court provides that its funding will entirely come from voluntary contributions by donors. It is promising that the UN Peacebuilding Fund has committed \$10 million for project funding in the CAR while the European Commission pledged €72 million in additional funding in May 2015, as it demonstrates donor willingness to support reconstruction and peace efforts in the CAR. However, funding needs in the CAR are huge across the board and much of the above funding

will likely be geared towards other, higher priority policy areas. While contributions from the budget of the UN mission, MINUSCA, or ad hoc donations could help kick-start the court, the establishment of a specific donor-funding structure for the Special Criminal Court will be essential to ensure sustainable funding and long-term donor commitment to the court.

Alongside financial resources, appropriate capacity will also rely on a careful selection of court staff (both national and international) to guarantee appropriate expertise, effective leadership of the court, and a strong supportive administrative structure. The law provides that internationals will work alongside national staff though a majority of staff, including judges, will be nationals. Avoiding an international-heavy court presents an opportunity for the Special Criminal Court to sustainably contribute to domestic capacity building and encourage greater local ownership. But only on the condition that sufficient guarantees are in place for appointment procedures of national staff, in particular those at senior level, to be free from political interference. The ECCC illustrates how excessive and politicised domestic control over appointments can fatally undermine the independence and legitimacy of a court.^{iv} Finding the appropriate balance between promoting local ownership and judicial independence probably constitutes one of the greatest challenges for hybrid courts.

Lastly, the ability of the Special Criminal Court to operate effectively will depend on the degree of political commitment it receives from national and international actors. At present, support for the court appears strong amongst Central African political actors, as illustrated by their backing for the proposal for a Special Criminal Court at the Bangui Forum. However, with presidential and legislative elections slated for October and November 2015, the political

landscape is likely to change significantly. Under the terms of the transition accord, the current President Catherine Samba-Panza, who is a strong advocate of accountability, and other members of the transition government are not eligible to run in the elections. Moreover, experience in the DRC shows that political support expressed for a special court in the context of a broad-based national conference does not necessarily translate into active political support in the implementation phase. As the Special Criminal Court will not be established prior to the elections (though phased implementation through the appointment of a core advance team could begin),^v pressure from civil society and interested donors will be important to ensure that the current domestic goodwill towards a Special Criminal Court persists under the post-election government. Support from MINUSCA will also be essential. The law expressly provides for MINUSCA's involvement and the mission has pledged to cooperate with the future court. It is important that this translates not only into logistical and financial support but also into genuine political support, i.e., a commitment to properly prioritise the pursuit of justice through the Special Criminal Court within its operations and mission mandate. To avoid conflicts and ensure appropriate ownership of the Court, discussions should also take place between MINUSCA and national authorities to clarify the sharing of responsibilities concerning issues such as the execution of arrest warrants, security provisions for the Court and its staff, and the provision of witness protection.

TACKLING INSECURITY

Another important challenge facing the future Special Criminal Court is the insecurity and lawlessness which continues to affect large parts of the country. Although fighting in the capital has largely subsided (though even there the

security situation remains fragile), non-state armed groups continue to operate and abuse local populations in other parts of the country, while inter-community tensions also remain rife. A recent flare up of violence in and around Bambari in August 2015, resulting in the reported killing of at least 20 people, offers a stark illustration of this.^{vi} In the short term, there is a limited prospect for strengthened security provisions by the national army, which lacks equipment, professionalism, and motivation. Security sector reform is due to be implemented as part of the Bangui accords, with the support of the EU's military advisory mission (EUMAM RCA), but its effects on the operational capabilities of the national army will only be felt in the long term. MINUSCA's deployment is similarly unlikely to be expanded significantly in the short term. The security situation in remote and rural areas is therefore likely to remain unstable, with a real possibility of renewed escalation if presidential and legislative elections are contested. Furthermore, the fragmentation of both the Séléka alliance of northern rebel groups and the nebulous anti-Balaka militias will make restoring security that much more difficult, and poses the risk that not all armed actors will feel bound by the disarmament agreements concluded at the Bangui Forum.

Persistent insecurity will create a challenging environment for the Special Criminal Court to operate in and potentially limit its ability to conduct investigations and gain custody of the accused. It may also discourage people from working for the court and undermine the impartiality of the Court if investigators and judges become vulnerable to threats and intimidation. That such security risks to court personnel and premises are very real, even in Bangui where the court will have its seat, is illustrated by a recent incident in which supporters of the former ruling party, Kwa na

Kwa, and alleged anti-Balaka members forcefully entered court premises in Bangui to extract the party's secretary-general, Bertin Bea, who was on trial for inciting hatred and troubling public order.^{vii} This again underscores the importance for clear arrangements between the Central African authorities and MONUSCO for putting in place adequate security measures for the court.

An additional consideration, closely linked to the insecurity problem, is how the Special Criminal Court will operate alongside the planned disarmament, demobilisation and reintegration (DDR) process. The latter will be essential to improving security but could find itself at odds with justice efforts if the latter involves carrying out arrests of individuals considered key facilitators of DDR. Moreover, fear of the Special Criminal Court could reduce the incentives for combatants to disarm. At the same time, prioritising the DDR process over justice efforts could impose significant operational limits on the Special Criminal Court, effectively rendering it powerless. And as the case of the DRC shows, pursuing DDR in the absence of substantial efforts to promote accountability can serve to feed cycles of violence. It is therefore important that proper consideration is given from the outset on how to build synergies and complementarities between the DDR process and the Special Criminal Court, especially if they operate concurrently.

CLARIFYING RELATIONSHIPS WITH THE INTERNATIONAL CRIMINAL COURT

The ICC has been active in the CAR since 2005, when the government requested the Court investigate crimes committed in the country since July 2002. This has so far resulted in the indictment and arrest of a single individual, former Congolese rebel leader and Vice-

President Jean-Pierre Bemba (whose rebel group had provided support to late CAR President Ange-Félix Patassé).^{viii} In May 2014, the CAR transitional government made a second referral to the Court, requesting it to investigate crimes committed in the country since 1 August 2012. Consequently, a judicial mechanism is already in place to investigate atrocities committed in the CAR. The Special Criminal Court has nevertheless been welcomed as a much-needed complement to the ICC, as the latter will only be able to try a small number of individuals. While this is a lofty ideal on paper, particularly in light of the increasing emphasis placed on the need for the ICC to pursue positive complementarity, it remains less clear how exactly this will operate in practice.

The law sets out a framework for the relationship between different jurisdictional levels. Article 37 states that the ICC has priority jurisdiction over the Special Criminal Court when the ICC Prosecutor “is seized of a case entering concurrently in the jurisdiction of the ICC and the Special Criminal Court”.^{ix} In turn, the law provides that the Special Criminal Court, once fully established, will have primacy over other domestic courts for crimes falling under the jurisdiction of the Special Criminal Court. It thus sets out a hierarchical structure of jurisdiction and creates a system of “reverse complementarity” between the ICC and the Special Criminal Court. Interestingly, the law does not define a burden-sharing between both courts on the basis of a differentiation between perpetrators. It has become commonplace to envision complementarity between the ICC and domestic (or hybrid) courts as entailing that the former focuses on the ‘most responsible’ perpetrators while domestic (or hybrid) courts focus on mid- or lower-level perpetrators. Nowhere, however, does the law state that the focus of the Special Criminal Court should be restricted to mid-level or lower ranking

perpetrators. In fact, Article 37 expressly mentions that the ICC and SCC have ‘concurrent jurisdiction’ rather than ‘complementary jurisdiction’. Under the law, nothing prevents the Special Criminal Court from focusing its investigations and prosecutions on those ‘most responsible’, thereby creating a blurred line between ICC and Special Criminal Court jurisdiction.

The extent to which conflicts may emerge as a result of this will largely depend on the prosecutorial strategies pursued by both courts. Considering that the ICC is already overburdened and the ICC Prosecutor’s new strategic plan outlines an intention to focus on limited but higher quality investigations,^x it is reasonable to assume that the ICC will be happy, initially, to leave the initiative to the Special Criminal Court. In this light, Article 37 would allow for the ICC to step in at a later stage if the prosecutions before the Special Criminal Court fail or prove otherwise unsatisfactory – without prejudice, however, of the *ne bis in idem* principle. The ICC would thus function as a kind of ‘safety net’. Furthermore, Article 37 was probably also included out of consideration for the ICC’s already active investigations based on the 2005 referral, enabling the ICC to proceed with these. However, if the ICC opts to actively pursue new investigations in the CAR situation, the broad provisions in the law on the Special Criminal Court’s personal jurisdiction could create competition and tensions between both courts. Even if the law provides for a means to address these (by stating the primacy of the ICC), such conflicts could negatively impact the effectiveness and perceptions of the Special Criminal Court and should thus, where possible, be avoided.

Consequently, if the conclusion of a Memorandum of Understanding between the

ICC and the future SCC is on the agenda, it would be important to consider in greater detail the exact nature of their relationship. Another point that would need to be addressed is information-sharing between both courts. At present, the law only addresses bottom-up information sharing, from the Special Criminal Court (or other domestic courts) to the ICC. It remains silent on modalities for the ICC to share information with the Special Criminal Court, or otherwise support the investigative activities of the latter. Yet this will be essential for ensuring constructive relations between both institutions. The need to clarify responsibilities and relationships will be even more important if the planned truth and reconciliation commission comes into being. While adopting a comprehensive approach to justice can serve to prevent the emergence of an impunity gap, it requires clear engagements from the outset on how these different mechanisms should coordinate or align their work.

INVESTIGATIVE FOCUS

The last challenge the Special Criminal Court will need to address – which is also connected to the other three points discussed above – is the question of the scope of the court’s planned investigations. To be functional and effective, it will be important for the court (more specifically, the court’s prosecutor) to develop a clear and transparent strategy on case selection – that is, which incidents will it investigate and which individuals will it (in priority) target for prosecutions. While in an ideal world, the court would try all perpetrators, limited resources will likely prevent it from doing so. A clear strategy for case selection is therefore important to organise the work of the court, but also to manage perceptions about what the Court can or cannot realistically achieve. How the Court chooses to orient its work – whether case selection is seen as fair and reflecting local

experiences of the conflict or, in contrast, as overly selective and politicised – will affect perceptions of the Court’s legitimacy.

The law itself provides limited guidance on this as it sets broad parameters for the Special Criminal Court’s personal and temporal jurisdiction. As already discussed, in principle, the court can investigate senior, mid- or lower-level perpetrators – whether they are members of state or non-state armed groups (though the presupposition is that the Special Criminal Court will focus on non-state armed groups, the law does not limit its jurisdiction to these). In defining its investigative scope in practice, the Court might be inclined to focus on more senior level perpetrators. However, identifying these might not be that easy, despite preliminary investigative work done by the UN’s International Commission of Inquiry,^{xi} due to the fragmented nature of the rebel and militia groups. Going after the nominative leaders of the various factions of the rebel groups might not reflect command realities on the ground. In addition, there might be a politically motivated temptation to only go after some renowned rebel leaders or even former presidents François Bozizé and Michel Djotodia, which might serve political purposes first and the cause of justice second. Accountability efforts through the Special Criminal Court should aim to find a balance between going after symbolically important cases and those combatants who directly led devastating attacks which resulted in mass atrocities. Most importantly, in light of the highly volatile political and security situation on the ground, the court’s case selection should take care to avoid undue selectivity (whether in terms of the persons indicted or the events investigated) so as to prevent perceptions of political, ethnic, or religious bias.

A central observation here is that efforts should be made towards ensuring that justice will be

delivered beyond Bangui. The capital suffered large-scale bouts of violence and massacres during the 2012–2014 conflict, but it is the countryside and provincial towns which have suffered the brunt of the violence since armed conflict broke out in 2004. For reasons of ongoing insecurity, operational ability and expediency, the Special Criminal Court may opt to (at least initially) focus on events in Bangui, thereby delivering incomplete justice to victims and reproducing a partial historical reading of the country’s conflicts. Moreover, as the court will be based in Bangui it will have limited visibility and reach to victims in remote areas. For these reasons, a form of decentralised Special Criminal Court should be considered, for instance, by allowing the court to hold in situ trials beyond Bangui. It is important to highlight that the law provides for such a possibility in its Article 2. While this would certainly entail important logistical challenges and financial constraints, it may prove crucial in ensuring that the Special Criminal Court delivers a justice that is (perceived as) fair and balanced.

A final point relates to the SCC’s broad temporal jurisdiction. The Court has a mandate not only to try crimes committed during the 2012–2014 conflict, but also crimes perpetrated during earlier phases of the conflict and Bozizé’s coup d’état in 2003. This significantly expands the potential workload of the court, further highlighting the need for a clear policy on case selection. Furthermore, decisions on which episodes of violence to focus on could have significant political repercussions. This broad scope also raises challenges because of a 2008 amnesty law which could *partially* protect some combatants and rebel leaders from prosecution (some of the groups comprising the Séléka rebel coalition, for instance, were also involved in the earlier conflict phase covered by the amnesty law). The amnesty law did include restrictive conditions. Thus, war crimes, crimes against

humanity, and genocide are expressly excluded from the amnesty. Moreover, the 2008 law states that the amnesty granted to members of rebel groups would be revoked in cases of recidivism and if they failed to disarm and accept cantonment within 60 days of the adoption of the law. However, with regards to individuals involved in the 2003 coup d'état that brought Bozizé to power and to members of the national security forces, the law provides a restricted but unconditional amnesty.^{xiii} Although the exclusion of international crimes will significantly limit the invocability of the amnesty before the Special Criminal Court, the existence of the law nevertheless risks creating some confusion as to who may or not be entitled to the amnesty for crimes committed prior to 13 October 2008 (apart from prisoners who were released under the law, it does not appear that individuals were given amnesty certificates). It is also as yet unclear whether the removal of the exclusion of the immunities provision from the law would leave room for these amnesties to be taken into consideration. Any kind of differentiated treatment of perpetrators that might result from the amnesty law would need to be clearly communicated, both to support the disarmament process and to protect public support for the Court. The status of the 2008 amnesty law and its relation to the Special Court should therefore be clarified as a matter of priority.

CONCLUSION

After decades of conflict and human rights abuses, the proposed creation of a Special Criminal Court in the CAR constitutes a welcome development. Considering the lack of capacity of domestic courts and the likely restricted scope of ICC investigations in the CAR, the creation of a hybrid justice mechanism through the Special Criminal Court offers an alternative or complementary means to end

impunity. But, as this policy brief has highlighted, important challenges exist to the successful pursuit of hybrid justice in the CAR. Tackling these from the outset will be essential to ensuring the Special Criminal Court can operate with independence, produce a justice that is fair and equitable, and enjoys a sufficient degree of legitimacy. The following elements warrant special consideration:

- To guarantee sufficient capacity for the court, the deployment of an advance team of experts to kick start investigations should be accompanied by discussions for the rapid establishment of a dedicated mechanism for court funding and transparent staff recruitment procedures.
- Appropriate security measures need to be put in place, in cooperation between the national authorities and MINUSCA, to ensure the court can carry out its activities with impartiality.
- Due consideration should be given from the outset on how best to build synergies and complementarities between the planned DDR process and the Special Criminal Court.
- The Special Criminal Court needs to develop a clear prosecutorial strategy, to facilitate constructive cooperation with the ICC and prevent perceptions of political, ethnic or religious bias on the part of the court. To this end, it will be particularly important that the court not restrict its investigations to events in Bangui.

Additionally, it is important to keep in mind that the pursuit of justice in the CAR needs to be locally embedded. This means not only ensuring local ownership of the court itself, but also that the court focuses on prosecuting those crimes and events that are most relevant to victims and local communities. It also requires that public communication about the court is taken seriously in order to manage expectations about what it can or not achieve. Lastly, it also entails

the need to recognise that a Special Criminal Court is not necessarily the beginning and end all of justice efforts in the CAR. Broad-based engagement with victims will still be needed to assess whether other measures – such as reparations (which could be directly linked to the Special Criminal Court or be set up as a separate process), truth-telling, or community-based reconciliation and conflict resolution mechanisms – should also be mobilised to respond to local justice needs.

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Endnotes

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- ^{viii} For more information on the case, see <http://www.icc-cpi.int/iccdocs/PIDS/publications/BembaEng.pdf>
- ^{ix} Translation by author. The original French text reads : 'Lorsqu'en application du Traité de Rome de la Cour Pénale Internationale ou des accords particuliers liant l'Etat centrafricain à cette juridiction internationale, il est établi que le Procureur de la Cour Pénale Internationale s'est saisi d'un cas entrant concurremment dans la compétence de la Cour Pénale Internationale et de la Coup Pénale Spéciale, la seconde se dessaisit au profit de la première'
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- ^{xi} United Nations (2014) *Report of the International Commission of Inquiry on the Central African Republic*. 22 December. UN Doc.S/2014/928.
- ^{xii} *Agence de Presse Africaine* (2008) Le parlement centrafricain a voté une loi d'amnistie ouvrant la porte au dialogue inclusif. 30 September. Available at: <http://centrafrique-presse.over-blog.com/article-23283263.html>.



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