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THE SPECIAL CRIMINAL COURT IN THE FIGHT AGAINST ILLICIT FLOWS OF WEALTH AND THE REALISATION OF THE RIGHT TO DEVELOPMENT IN CAMEROON: PROSPECTS AND CHALLENGES

SUMMARY

Cameroon is party to the African Charter on Human and Peoples' Rights and as such, is compelled to give effect to the right to development enshrined therein. To this end, it has incorporated the right to development in its *Constitution*. Aware that the achievement of the right to development necessitates an effective mobilisation of resources by the state, the government has established a number of institutional mechanisms such as the National Anti-Corruption Commission (CONAC), the National Financial Investigations Agency (ANIF), the High State Audit Agency (CONSUPE), and the Special Criminal Court (SCC) in the fight against corruption. Yet, the illicit flows or illegal acquisition, use or transfer of wealth and natural resources from the country through corruption continues to thrive. This article explores the extent to which the SCC, which is the central focus of this article, could protect the country's wealth and resources from illicit flows. It further examines the extent of illicit flows in Cameroon, the mandate of the SCC, its functioning and its ability to tackle the scourge. The article finds that, in spite of good prospects based on its mandate, the SCC is not able to shield the country's wealth and natural resources from illicit flows because of its dependence on, and control by the executive arm of the state that pulls the strings of its operation. It calls for an effective separation of powers with a fully independent judiciary if the plundering of wealth and natural resources is to be addressed through the SCC to ensure the enjoyment of the right to development in the country.

1. INTRODUCTION

In compliance with its binding obligation under the African Charter on Human and Peoples' Rights (art. 22), Cameroon has enshrined the right to development in its *Constitution* in these terms: "Resolved to harness our natural resources in order to ensure the well-being of every citizen without discrimination, by raising living standards, [we, the people of Cameroon] proclaim our



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right to development as well as our determination to devote all our efforts to that end”.¹

Most importantly, recognising that the realisation of the right to development entails an effective mobilisation of resources by the states, the government of Cameroon has designed a vigorous anti-corruption framework comprising the National Anti-Corruption Commission (CONAC), the National Financial Investigations Agency (ANIF), the High State Audit Agency (CONSUPE), *opération épervier* (Sparrow Hawk), and the Special Criminal Court (SCC) adopted by Law No. 2001/028 of 14 December 2011. The question posed in this article therefore is: To what extent can the SCC shield the country's resources from corrupt activities such as illicit financial flows (IFFs) from the country? The term “IFFs” refers to “the money that is illegally earned, transferred or utilised”.² To answer the question relating to the prospects of addressing the illicit flows of Cameroon's wealth and resources, this article examines the historic place of the SCC in the Cameroonian legal architecture, its mandate, composition, proceedings and independence, in determining its aptitude to win the battle against corruption.

The article illustrates that, despite good prospects based on its mandate, the SCC does not have the potential to protect the country from IFFs of wealth because of its overdependence on the executive that pulls the strings of its operation. It calls for an effective separation of powers with a strong independent judiciary if the corrupt practice of illicit flows is to be redressed through the SCC to ensure the enjoyment of the right to development in the country. This article is divided into six sections: the introduction; an assessment of the magnitude of IFFs in Cameroon; a consideration of the impact of illicit flows of wealth on the right to development; views as to the prospects of addressing illicit flows of wealth through the SCC; an evaluation of the significance of the SCC, and the concluding remarks.

2. ILLICIT FLOWS OF WEALTH FROM CAMEROON: SCALE OF THE PROBLEM

The African continent loses approximately USD80 billion every year through IFFs.³ This figure includes a good amount from Cameroon. In fact, Cameroon is seriously deflated by illicit flows of its wealth and resources.⁴ This is the

1 *Constitution of the Republic of Cameroon* 1996:preamble, par. 3.

2 The Joint UNECA/AU High Level Panel Report on Illicit Financial Flows (HLP Report 2015:9).

3 Sixtus 'Illicit financial flows in Cameroon: Over FCFA 4.2 billion lost annually' 25 June 2019. <https://www.cameroon-tribune.cm/article.html/26430/fr.html/illlicit-financial-flows-in-cameroon-over-fcfa-4.2-billion-lost-annually> (accessed on 17 January 2020).

4 'Cameroun: Plus de 94 milliards de flux de blanchiment de fonds détectés en 2016' *Business News*, 12 January 2018. <https://www.camerounweb.com/CameroonHomePage/business/Cameroun-plus-de-94-milliards-de-flux-de-blanchiment-de-fonds-d-tect-s-en-2016-430314#> (accessed on 17 January 2020).

position of the ANIF, which reveals, in its ten years' activities report,⁵ that the country has lost 794.7 billion FCFA to various forms of IFFs during that period. This loss can be divided as follows: 47.45 per cent (embezzlement of public funds); 40.29 per cent (various trafficking activities); 6.33 per cent (terrorism financing); 2.03 per cent (other forms of corruption), and 1.25 per cent (fraud and various other unethical activities).⁶ In quantifying the annual loss of wealth and resources through IFFs in Cameroon, it was reported that the country loses 40.2 billion FCFA annually, approximately USD7 billion.⁷

Given the gravity of the problem, civil society organisations, together with some Cameroonian government departments, embarked on a six-month campaign termed "stop the bleeding of Cameroonian resources", hoping to raise awareness on the issue in their attempt to resolve it. While waiting to assess the impact of this campaign, it is important to recognise that the country is on the verge of collapsing because of the plundering of its resources by politicians and multinational companies.⁸

3. IMPACT OF ILLICIT FLOWS OF WEALTH ON THE RIGHT TO DEVELOPMENT

As the main duty bearer of the right to development, the Cameroonian government needs wealth and resources in the treasury to give effect to this right. This means that looting these resources from the state's coffers hinders the government's ability to invest in securing freedom from fear and from want. Put differently, the government is deprived of money that could otherwise be used for training judges to secure fair trials, ensure freedoms of association, and train police officers on how to respect suspects' rights or deliver other civil and political rights. In this perspective, the International Council on Human Rights Policy⁹ observes:

5 'Cameroun: Plus de 94 milliards de flux de blanchiment de fonds détectés en 2016' *Business News*, 12 January 2018. <https://www.camerounweb.com/CameroonHomePage/business/Cameroun-plus-de-94-milliards-de-flux-de-blanchiment-de-fonds-d-tect-s-en-2016-430314#> (accessed on 17 January 2020).

6 'Cameroun: Plus de 94 milliards de flux de blanchiment de fonds détectés en 2016' *Business News*, 12 January 2018. <https://www.camerounweb.com/CameroonHomePage/business/Cameroun-plus-de-94-milliards-de-flux-de-blanchiment-de-fonds-d-tect-s-en-2016-430314#> (accessed on 17 January 2020).

7 Sixtus 'Illicit financial flows in Cameroon: Over FCFA 4.2 billion lost annually' 25 June 2019. <https://www.cameroon-tribune.cm/article.html/26430/fr.html/illicit-financial-flows-in-cameroon-over-fcfa-4.2-billion-lost-annually> (accessed on 17 January 2020).

8 Sixtus 'Illicit financial flows in Cameroon: Over FCFA 4.2 billion lost annually' 25 June 2019. <https://www.cameroon-tribune.cm/article.html/26430/fr.html/illicit-financial-flows-in-cameroon-over-fcfa-4.2-billion-lost-annually> (accessed on 17 January 2020).

9 International Council on Human Rights Policy 'Corruption and human rights: Making the connection' 61. <https://assets.publishing.service.gov.uk/media/57a08b6540f0b64974000b10/humanrights-corruption.pdf> (accessed on 17 January 2020).

Embezzlement or misappropriation of assets may also affect the right to a fair trial and to an effective remedy.¹⁰ Embezzlement deprives the justice system of resources and this will affect its quality and effectiveness. The same lack of resources may mean that insufficient staff are employed, which in turn may create a backlog of cases and slow procedures, infringing the right to be tried without undue delay as provided under Article 14(3)(c) of the ICCPR and consequently violating the right to a fair trial and an effective remedy.

Similarly, because of IFFs, there are no resources to build schools, hospitals and roads; to create employment; and to provide housing and other socio-economic rights. The 2016 human development report on Cameroon demonstrates that, although the country is endowed with wealth and resources, it is far from achieving its constitutional promise on the right to development.¹¹ The report shows that, although oil prices have increased and led to a growth rate of 5.6 per cent and an anticipated 5.0 per cent in 2013 and 2014, respectively,¹² corruption, including IFFs, has frustrated the economy, despite the imprisonment of many government officials for embezzlement of public funds.¹³

More proof that the right to development is yet to become a reality in Cameroon appears in the form of the country's report on the achievement of the United Nations Millennium Development Goals (MDGs). This report reveals that the only MDG attained by Cameroon is the goal on "fighting HIV, Malaria and other transmissible diseases".¹⁴ Furthermore, the country is ranked 152nd on the human development index, and only qualifies as a country with "low human development", with roughly 30 per cent of the population living below USD2 per day, and a poverty rate approaching the 40 per cent mark.¹⁵ This disquieting data can also be observed on the gender development index, where Cameroon's index is 0.622, one of the lowest in the world.¹⁶ The other disturbing factor is the unemployment rate. Between 2011 and 2012, approximately 67 per cent of youth aged 16 years and older were unemployed.¹⁷

However, the government of Cameroon provides evidence of its efforts to achieve the right to development through the implementation of civil and political rights, sanitising the business environment and prioritising good governance, with special attention given to dealing with corruption and embezzlement of

10 International Covenant on Civil and Political Rights:art. 14 and 2(3).

11 BTI: Cameroon Country Report 2016. https://www.bti-project.org/fileadmin/files/BTI/Downloads/Reports/2016/pdf/BTI_2016_Cameroon.pdf (accessed on 17 January 2020).

12 BTI: Cameroon Country Report 2016:3.

13 BTI: Cameroon Country Report 2016:3.

14 BTI: Cameroon Country Report 2016:12.

15 BTI: Cameroon Country Report 2016:12.

16 BTI: Cameroon Country Report 2016:12.

17 BTI: Cameroon Country Report 2016:17. See also Concluding Observations of the African Commission on the 3rd Periodic Report of the Republic of Cameroon, adopted at its 15th Extraordinary Session held from 7 to 14 March 2014 in Banjul, The Gambia.

public funds.¹⁸ Nevertheless, given the high level of poverty in the country, it could be argued that the country is far from achieving the right to development, and this could be a consequence of lack of resources often stolen through IFFs. The impact of IFFs summarised in a study by the Independent Expert on the Effects of Foreign Debt and other related international financial obligations of states on the full enjoyment of all human rights, particularly economic, social and cultural rights, reads as follows:

[I]llicit financial flows divert resources away from activities that are critical for poverty eradication and sustainable economic and social development, as well as for realizing economic, social, cultural, civil and political rights and *the right to development*. Illicit financial flows also contribute to the build-up of unsustainable debt as Governments lacking domestic revenue may resort to external borrowing.¹⁹

While it could be argued that, perhaps, even if money was not looted through IFFs, it was not to be used for implementation of the right to development or development programmes, it is important to note that, as the main duty bearer of human rights, the state has the obligation to use this money or at least part thereof to improve the standard of living of its citizens to secure their right to development. Tapping into the international regime of socio-economic rights, which compel state parties to the Covenant to realise these rights “progressively” with consideration to “the availability of resources”,²⁰ the looting of the country’s wealth delays their realisation, to say the least. Therefore, the importance of shielding resources from embezzlement or looting through IFFs or other means cannot be overemphasised. To stop poverty and achieve the right to development in Cameroon, the government needs to comply with art. 8(1) of the UN Declaration on the Right to Development which provides that

[s]tates should undertake, at a national level, all necessary measures for the realisation of the right to development and shall ensure ... equality of opportunity for all in their access to basic resources, education, health services, food, housing, employment and fair distribution of income.

Amongst the measures to be taken, it is imperative to establish governance institutions to address corruption and many other forms of unethical behaviours that often frustrate development efforts. Cameroon has indeed taken action in this regard by setting up the SCC. The next section explores the prospects of addressing the theft of Cameroon’s wealth and resources through IFFs.

18 Cameroon: Third Periodic Report, 2008 – 2011, presented at 53rd Session of the African Commission on Human and Peoples’ Rights of the African Union in Banjul, The Gambia, from 9 to 24 April 2013; paras. 579-590 available at file:///C:/Users/dkamgsa/Downloads/staterep3_cameroon_2013_eng.pdf. (accessed on 24 April 2020)

19 United Nations Human Rights 2016:par. 2.

20 Moyo 2017:18.

4. THE PROSPECTS OF ADDRESSING ILLICIT FLOWS OF WEALTH THROUGH THE SPECIAL CRIMINAL COURT

Established by Law No. 2001/028 of 14 December 2011, the SCC is the latest Cameroonian response to addressing the corruption that bedevils the country. It is imperative to explore whether the establishment of the SCC in the country's legal landscape, its mandate, composition, proceedings and modalities for the restitution of the *corpus delicti* can enable the institution to fight corruption without fear, favour or interference. The question is whether the SCC provides a credible, effective and sustainable solution to the problem.²¹ From this standpoint, the examination of the SCC's aptitude to deal with corruption considers four main issues, namely the historic place of the SCC in the Cameroonian legal architecture, and its mandate, composition and proceedings.

4.1 Historic place of the SCC in addressing corruption

Although set up by virtue of Law No. 2001/028 of 14 December 2011, the SCC is not new in the Cameroonian legal landscape. The first SCC was established by the Law of 4 April 1961, published in the Official Journal of 1961 and amended by the ordinance of 31 March 1962 with the aim of fighting against embezzlement of public funds.²² It was specifically aimed at addressing the embezzlement of public funds by corporations mandated to buy high-quality cocoa and collecting taxes (from traditional rulers) to be deposited in the national treasury.²³ Nevertheless, in 1972, the economic environment was considered sufficiently clean and the government decided to repeal the 1961 law establishing the SCC through Ordinance No. 72/4 of 26 August 1972 related to the organisation of the judiciary.²⁴ In addition, the drastic powers of the SCC were no longer in line with the 1972 *Constitution* and as such violated the rule of law at the national level as well as the international agreements and treaties that Cameroon was party to at the international level.²⁵

However, given that the SCC is not new in the country's legal landscape, it is likely to inspire public confidence on its ability to address corruption in general. The prior existence of this institution provides an institutional memory, in which to seek ideas to address IFFs, and thus increase the prospects of addressing the problem of corruption.

4.2 Mandate of the SCC

To grapple with the mandate and jurisdiction of the SCC, it is imperative to understand the criminal procedure and the judicial organisation of Cameroon. While art. 184 of the *Penal Code* prohibits the misappropriation of public

21 Fombad 2007:233.

22 Minkada 2012:140.

23 Minkada 2012:140.

24 Minkada 2012:140.

25 Minkada 2012:140.

funds, this offence has various sanctions depending on the amount of money embezzled. Furthermore, under the *Criminal Procedure Code*, the amount of money defines the qualification of the offence that is allocated to specific courts. In this respect, under art. 184 of the *Penal Code*,²⁶ when the value of the property is more than half a million CFA Francs, the sanction is imprisonment for life; when the value is half a million CFA Francs or less, but over one hundred thousand, the sanction is imprisonment for a period of fifteen to twenty years. In both cases, the offences are punished with at least fifteen years' imprisonment qualified as felonies and, as such, are under the jurisdiction of the high courts, which actually deal with crimes of above ten years' imprisonment.²⁷ When the value of property is less than 100,000 CFA Francs, the term of imprisonment is five to ten years and a fine.²⁸ In this case, the offence is qualified as a misdemeanour, because the sanction is below ten years' imprisonment and is within the jurisdiction of the court of first instance.²⁹

How does the SCC come into play? Its mandate is to address the misappropriation of public funds when the prejudice incurred by the state is equal to or above 50 million CFA Francs. This suggests that it takes control of some felonies and, therefore, reduces the burden of the high courts, which focus only on cases where the embezzlement is less than 50 million CFA Francs.³⁰ In reality, as correctly observed by Agbor, "the creation of the SCC in Cameroon did nothing more than introduce a new court into the country's court system to exercise jurisdiction over conduct that had been criminalized by the country's existing laws".³¹ Nevertheless, it could be argued that the introduction of the SCC underlines the gravity of the prejudice suffered by the state and the seriousness of its commitment to address embezzlement of above 50 million CFA Francs. This commitment is also a deterrent for would-be criminals. Furthermore, tasking the SCC with only addressing cases of over 50 million CFA Francs may ensure that its judges are not subjugated by the workload. This is likely to ensure their effectiveness, integrity and proficiency.

However, although the illicit flow of resources is an act of corruption, it would have been appropriate to expressly record it as an offence to be dealt with by the SCC, provided the amount of stolen resources is above 50 million CFA Francs. Although the SCC would qualify to address such an offence, expressly providing for this would help raise awareness on the issue and demystify it so as to enhance the prospects of the court to deal with it successfully.

26 *Penal Code*:sec. 184(1)(a) and (b), respectively.

27 Law No. 2006/015 of 29 December 2006 (*Law on Judicial Organisation*):sec. 18(1)(a); Law No. 2005/007 of 27 July 2005 (*Criminal Procedure Code*):sec. 407(1).

28 *Penal Code*:sec. 184(1)(c).

29 Law No. 2006/015 of 29 December 2006 (*Law on Judicial Organisation*):sec. 15(1)(a); Law No. 2005/007 of 27 July 2005 (*Criminal Procedure Code*):sec. 289(1).

30 Agbor 2017:9-10.

31 Agbor 2017:10.

4.3 Composition of the SCC

Under sec. 4 of Law No. 2011/028, the SCC comprises the bench, the legal department, and the registry. The bench contains a president, one or more vice-presidents, one or more judges and one or more examining magistrates. The legal department comprises a *procureur-général*, one or more advocates-general, and one or more deputy *procureurs généraux*. The registry consists of a registrar-in-chief, one or more section heads, one or more registrars, and registrars working with the examining magistrate. Under sec. 5 of Law No. 2011/028, judicial officers, court registrars and judicial police officers assigned to the SCC are obliged to respect the rules and regulations of their respective professions.

These arrangements were supplemented by Presidential Decree No. 2012/223 of 15 May 2012 on the administrative organisation of the SCC. Essentially, as indicated by its name, this decree sets up the administrative organisation of the SCC, which reiterates the important places of the registry and the legal department, and consolidates their works and mode of operations with supplementing offices which are all geared towards administration and process.³²

While the court seems to be well constituted, the provisions of the 2011 law establishing this court are vague on the number of members of the court. By the same token, these provisions are quiet on the selection and appointment of judges and prosecutors. This is deeply problematic because, as much as art. 37 of the Cameroon *Constitution* provides for the independence of the judiciary,³³ it also gives full powers to the President for the appointment of judges. It states that the President of the Republic shall guarantee the independence of judicial power, but also that he shall, with the “assistance” of the Higher Judicial Council, “appoint members of the bench and the legal department [ie the prosecution department]”. It is important to note that the President is simultaneously the chairperson of the Higher Judicial Council, assisted by the Minister of Justice. This suggests that the President is also the only authority who is mandated to convene the Higher Judicial Council and who has the absolute power to appoint and dismiss or transfer judges and prosecutors without any possibility of being held accountable. This presidentialism, characterised by the might of the executive and lack of independence of the judiciary, weakens prospects of addressing the illicit flow of resources by the SCC, because judges who are mere civil servants may be easily manipulated by the executive to settle political scores.

The other critical question is whether the President himself is not prosecutable, because judges, who are subjects, cannot act against him. Therefore, any involvement of the President and his cronies in IFFs can be

32 Presidential Decree No. 2012/223 of 15 May 2012 on the Administrative Organisation of the SCC.

33 *Constitution of the Republic of Cameroon* 1996:art. 37(2) states, *inter alia*: “The judicial power shall be independent of the executive and legislative powers. Magistrates of the bench shall, in the discharge of their duties, be governed only by the law and their conscience”.

perceived as normal, and this cannot foster the right to development in the country. It is, therefore, imperative to secure the independence of the judiciary so as to enable the court to hear and determine corruption and IFF cases without fear or favour. Failure to do so dilutes the public confidence in the court, which is perceived as another tool in the hands of the President that may be used to frustrate his political opponents.

4.4 Proceedings at the SCC

The examination of the proceedings at the SCC entails unpacking the jurisdiction and deadlines, the role of specialised corps of Judicial Police Officers of the SCC, and the modalities for the restitution of the *corpus delicti*.³⁴

4.4.1 Jurisdiction and deadlines

As far as the jurisdiction of the SCC is concerned, it is the court of first instance and its decisions may be taken on appeal to the Supreme Court.³⁵ While this rule is necessary to avoid unnecessary delays at the Appeal Court and to get to the bottom of matters as quickly as possible, it is simply not common practice in any state where the rule of law is respected. The suspect must be given an opportunity to be heard by another court that may reach a different judgment in the matter at hand, and subsequently the matter can reach the Supreme Court if a party to the trial is not satisfied with the outcome of the case at the first instance and on appeal. Such an approach, which advances respect for the rule of law, is important in order to secure the impartiality of judges at the court of first instance, since they know that the matter before them could be considered by another judge on appeal.

Under the rules establishing the SCC, while appeals made by the legal department of the SCC shall be based both on the facts and on points of law,³⁶ those of other parties shall be based exclusively on points of law.³⁷ Although this seems to be a mechanism to avoid unnecessary delays, it is also a violation of the principle of equality between the parties to a trial. This provision places the suspect in a disadvantaged position as s/he can only rely on law, while the other parties can rely on both the law and the facts of the matter at hand.

An appeal must be lodged within 48 hours after the SCC has handed down its judgment.³⁸ The appeal must be examined within six months.³⁹ Although the deadline of 48 hours to launch an appeal at the Supreme Court seems to be ambitious, it could be useful to avoid case backlogs and wastage of time before the final decision.⁴⁰ The failure to meet the deadlines indicated above could lead to the sanction of judicial police officers, a registrar or a magistrate

34 For more on this, see sec. 4.5 below.

35 Law No. 2012/011 of 16 July 2012:sec. 11(1); Law No. 2011/028:art. 11(1).

36 Law No. 2012/011 of 16 July 2012:sec. 11(2).

37 Law No. 2012/011 of 16 July 2012:sec. 11(3).

38 Law No. 2012/011 of 16 July 2012:sec. 12.

39 Law No. 2012/011 of 16 July 2012:sec. 13(3).

40 Yawaga 2012:58.

tasked to handle the case.⁴¹ This is problematic in a context where only the President of the Republic is competent to impose sanctions on members of the judiciary as he can use his discretion to do so or not. While the deadlines are important in terms of speeding up the proceedings, vesting the President with the power to punish members of the judiciary is disquieting, because it violates judicial independence which is “crucial for any effective and credible strategy to combat endemic corruption”.⁴²

Even though the central place of the President of the Republic in the process seems to be an indication of commitment to fighting corruption at the highest level of the state, it epitomises the violation of the separation of powers, which is essential to giving effect to the rule of law on which the fight against corruption and IFFs should be grounded. This discredits the SCC and should be remedied by ensuring a strong separation of powers in which the judiciary can take disciplinary measures against its members without the interference of the executive. Ultimately, to increase the prospect of dealing with IFFs through the SCC, it is imperative to ensure that the rule of law becomes a reality. This entails enabling due process to take place through possible appeals before reaching the Supreme Court, advancing equality between the parties to a trial, and guaranteeing the independence of the judiciary.

4.4.2 Specialised Corps of Judicial Police Officers of the SCC

To foster the judicial character of the SCC, the President passed Decree No. 2013/131 of 3 May 2013, establishing the Specialised Corps of Judicial Police Officers. The importance of this body cannot be overemphasised, as its role is to conduct investigations to enable the SCC to discharge its mandate. While judicial police officers receive orders from the *procureur général*,⁴³ and conduct investigations in harmony with the provisions of the *Criminal Procedure Code*,⁴⁴ it is important to note that the Specialised Corps of Judicial Officers is comprised of two units, namely one in charge of investigations and the other in charge of administrative duties. Both units are established under the authority of the Head of State.⁴⁵ In this respect, the head of the investigative unit and deputy are appointed by Presidential decree.⁴⁶ In the same perspective, the *chargé d'étude* is appointed by ordinance of the Prime Minister,⁴⁷ and the head of administrative services is appointed by ordinance of the Prime Minister after consultation with the President of the Republic.⁴⁸

The problem is the strong authority and involvement of the executive in the SCC. This casts serious doubt on its independence, because key players are appointed by the executive from whom they can receive instruction to

41 Law No. 2011/28 of 11 December:art. 17, relating to the creation and organisation of the Special Criminal Court.

42 Fombad 2007:247.

43 Presidential Decree No. 2013/131 of 3 May 2013:sec. 4(1).

44 Presidential Decree No. 2013/131 of 3 May 2013:sec. 4(1).

45 Presidential Decree No. 2013/131 of 3 May 2013:art. 6.

46 Presidential Decree No. 2013/131 of 3 May 2013:art. 9(1).

47 Presidential Decree No. 2013/131 of 3 May 2013:art. 9(2).

48 Presidential Decree No. 2013/131 of 3 May 2013:art. 9(3).

prosecute or not. This perception of dependence on the executive is likely to tarnish the credibility of the SCC which should be welcomed in principle. The perceived lack of independence of the SCC leads to its qualification as a platform used by the President to settle fights against those who have ambitions to become president.⁴⁹ In making their case, proponents of this view argue that many people who have embezzled huge amounts of money are not questioned if they do not display political ambition or rather the intention to unseat the President of the Republic.⁵⁰ Therefore, to remove this perception, it is necessary to ensure the full independence of the SCC from the executive so as to enable it to freely investigate all its members, including the Head of State, if necessary. If the SCC is truly a judicial body, its full independence from other branches of government should be guaranteed.

4.5 Modalities for the restitution of the *corpus delicti*

Even though the modalities for the restitution of the *corpus delicti* were originally contemplated by Presidential Decree No. 2013/131 of 3 May 2013,⁵¹ they are fixed by Decree No. 2013/288 of 4 September 2013. Art. 5 of Decree No. 2013/131 reads as follows: "Any offer to reconstitute the *corpus delicti* in cash or in kind in the course of the preliminary investigation shall be recorded in the report forwarded to the *Procureur-Général* of the SCC".

Under this provision, during the preliminary investigation, a suspect can offer to return the proceeds of the crime in nature or the amount of cash stolen from the public purse,⁵² or in kind. The latter means the suspect restitutes the stolen property whose value is equal to the sum of at least 50 million CFA Francs.⁵³ When the offer to reconstitute takes place before the seizure of the court by the committal order of the examining magistrate or by the judgment of the Inquiry Control Chamber of the Supreme Court, the *procureur général* may, upon a written authorisation by the Minister of Justice, enter a *nolle prosequi*.⁵⁴

Nevertheless, if the offer to reconstitute happens after the court is already seized of the matter, the *procureur général* of the SCC may, upon a written authorisation by the Minister of Justice, enter a *nolle prosequi* against the proceedings prior to any judgment on the merits, and the court seized of the matter shall inflict the forfeitures under sec. 30 of the *Penal Code* and cause mention to be made in the criminal record.⁵⁵

49 Ezieh 'Biya is devouring his own chickens: Another Minister grilled for 5hrs today by Special Criminal Court' 21 November 2014 <https://cameroonvoice.com/news/2014/11/21/biya-is-devouring-his-own-chickensanother-minister-grilled-for-5hrs-today-by-special-criminal-court/> (accessed on 17 January 2020).

50 Walla 'The Special Criminal Court issues a two-speed justice'. <http://www.cameroonweb.com/CameroonHomePage/NewsArchive/The-Special-Criminal-Court-issues-a-two-speed-justice-Kah-Walla-315523> (accessed on 17 January 2020).

51 Presidential Decree No. 2013/131 of 3 May 2013:art. 5.

52 Presidential Decree No. 2013/288 of 4 September 2013:sec. 4(1).

53 Presidential Decree No. 2013/288 of 4 September 2013:sec. 4(3).

54 Presidential Decree No. 2013/288 of 4 September 2013:sec. 3(1).

55 Presidential Decree No. 2013/288 of 4 September 2013:sec. 3(2).

The problem with this part of the proceedings is that it clearly shows the interference of the executive in the judicial sphere. In fact, the *procureur général* has no powers to drop charges, however the Minister of Justice – appointed by the head of the *magistrature suprême* who is the President of the Republic – may do so. This suggests that the Minister of Justice is likely to be a judge and party if s/he is to be investigated for misappropriation of public funds. This provision derives from art. 64(1) of the *Criminal Procedure Code*, which empowers the Minister of Justice to call on the *procureur général* at the Appeal Court to drop charges, especially if these charges are likely to be detrimental to social interest or peace. This is another demonstration of the entrenched dependency of the judiciary to the executive or the consecration of the violation of the separation of powers. Nonetheless, as correctly argued by Agbor:

The restitution of the *corpus delicti* does not automatically translate into the termination of criminal investigation or the entering of a *nolle prosequi*. It is merely a factor that may be adjudged by the competent authorities as to whether it suffices to discontinue criminal investigations. Depending on the stage at which an offer for restitution is made, it may result in a *nolle prosequi*, the imposition of the forfeitures provided in Section 30 of the Penal Code and the entering of a criminal record.⁵⁶

It is equally important to note that Presidential Decree No. 2013/288 of 4 September 2013 extends the restitution of the *corpus delicti* to other courts.⁵⁷ This means that, for misappropriation of public funds of less than 50 million CFA Francs in other courts, the accused person can also offer restitution of the proceeds of the crime in nature or in kind as is the case at the SCC. The enactment of this decree resulted in several restitutions of the *corpus delicti* with some prosecutions being dropped.⁵⁸

While restitutions of the *corpus delicti* could be a positive measure to recover the proceeds of corruption, the problem is that its arrangement under the 2013 Decree is likely to compromise the independence of the judiciary, especially when the restitution of the *corpus delicti* occurs before the seizure of the court as, in such a case, the *procureur général* needs written permission of

56 Agbor 2017:23.

57 Presidential Decree No. 2013/288 of 4 September 2013:sec. 12.

58 See the case of *Ministère Public et Etat du Cameroun (Ministère de l'Education de Base – Partie Civile) C/ Haman Adama née Halimatou Kangue Maonde, Baoro née Azo'o Nkoulou Christine, Malongaltoa née Nnougou Annick Joëlle, Willayi Richard, Zega Stanislas, Mvondo Nyina Barthelemy, Mbeng Boniface Blaise, Besong John Besong, Ntsama Zoa Pierre, Ngo Um Deborah Angèle, Fouda François, Matat Joseph, Mekougou Ondoa Joseph et Lebongo Blaise*, Tribunal Criminel Spécial, Yaoundé, Arrêt No. 026/CRIM/TCS du 19 Septembre 2013. Twelve of the accused paid to the public treasury the sum of 369.048.876 FCFA, being the *corpus delicti* of the offence of misappropriation of public funds. Per Ministerial Correspondence 214/CR/CAB/MINETAT/MJ/GDS of 18 September 2013, criminal charges against twelve of the accused persons were dropped. Of the remaining two accused persons, the sum of 19.812.500 FCFA was to be paid by Mr Mekougou Ondoa Joseph. The remaining sum of 75.004.245 FCFA was to be paid by Mr Lebongo Blaise, who perished during the course of the trial. See also Agbor 2017:24.

the Minister of Justice to enter a *nolle prosequi* and drop the charges.⁵⁹ This is a clear indication that, in this case, the decision is not that of the judiciary but of the executive, whose decision would likely be political and not necessarily legal. This approach casts a sombre doubt on the main objective of the SCC: whether it is a tool to destroy political enemies under the banner of fighting corruption or whether it is truly an independent tribunal. In fact, the dominance of the executive at the SCC has led to headlines such as: “Biya is devouring his own chickens” when a Minister was tried by the SCC⁶⁰ or “The Special Criminal Court issues a two-speed justice”⁶¹ when some civil servants suspected of corruption were not prosecuted, whereas their counterparts were.

Besides the independence-of-the-judiciary-concern, the SCC Decree violates the principles of equality of the suspects. In this respect, those who embezzle more than 50 million have their own regime, as they can be set free by the *procureur général* upon receiving the authorisation of the Minister of Justice, while those who have misappropriated less than 50 million CFA Francs and are tried away from the SCC cannot see charges dropped against them. This leads to the argument that there is a specific form of justice for those who misappropriate public funds of at least 50 million CFA Francs, and a separate form of justice for those who misappropriate less than this amount.⁶² This impedes true justice.

In sum, although the creation of the SCC was a good initiative, it suffers “from serious design faults that have limited [its] independence” and have rendered it vulnerable to manipulation. The latter can easily be engineered through the institution’s senior officials generally appointed by the executive power, to whom they are accountable as opposed to the people or the public through the National Assembly.⁶³ The SCC *modus operandi* is indeed worrisome and does not enhance its capacity to deal with IFFs. To remedy this, it is imperative to set the judiciary free and ensure that a discontinuance of proceedings is left to the *procureur général* and the SCC.

59 Presidential Decree No. 2013/288 of 4 September 2013:sec. 3(1).

60 Ezieh ‘Biya is devouring his own chickens: Another Minister Grilled for 5hrs. Today by Special Criminal Court’ 21 November 2014. <https://cameroonvoice.com/news/2014/11/21/biya-is-devouring-his-own-chickensanother-minister-grilled-for-5hrs-today-by-special-criminal-court/> (accessed on 17 January 2020).

61 Wallah ‘The Special Criminal Court issues a two-speed justice’ <http://www.cameroonweb.com/CameroonHomePage/NewsArchive/The-Special-Criminal-Court-issues-a-two-speed-justice-Kah-Walla-315523> (accessed on 17 January 2020).

62 Nga ‘La protection de la fortune publique au Cameroun: Regard critique sur la loi du 14 décembre 2011 portant création d’un tribunal criminel spécial’, 29 March 2012. <http://lumiairedudroit.centerblog.net/10-libres-propos-sur-le-nouveau-tribunal-criminel-special> (accessed on 17 January 2020).

63 Fombad & Choe-Amusimo 2015:23.

5. SIGNIFICANCE OF THE SCC AND THE FIGHT AGAINST IFFS: A FINAL EVALUATION

This section focuses on the evaluation of the practical impact or achievement of the SCC on the fight against corruption to unveil its prospects of addressing the IFFs of wealth from Cameroon, so as to foster the enjoyment of the right to development.

Since its inception, the SCC has been recognised as an illustration of the serious commitment of the government to combat corruption. Only three years into its existence, the SCC had received 119 cases from high courts, among which 39 were immediately enrolled, 19 defendants benefited from a dismissal of charges, and 107 were referred back to the SCC.⁶⁴ As of 3 April 2014, the SCC has ruled over 52 cases: 36 on the merits and 16 on the preliminaries.⁶⁵ A total of 26 defendants have been freed, and 51 sentenced. Some of them have appealed.⁶⁶ So far, the trend has not changed, and the SCC has been extremely busy with the trials of numerous high-level representatives of the Cameroon People's Democratic Party (CPDM), the ruling party, members of government and dignitaries (including the former Prime Minister and Assistant Secretary General at the Presidency), and many directors of state-owned companies.⁶⁷

For some, the SCC is a bridge used by the Head of State for political witch-hunting with a dependent judiciary.⁶⁸ Nevertheless, it could be argued that the number of cases in which the charges against the suspects were dismissed and the valuable data available on the processes followed illustrate that the SCC does its work without fear or favour and relies on evidence to reach its decisions. Agbor observes:

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- 64 Bakary 'Government Pledges Renewed War against Corruption'. http://ct2015.cameroon-tribune.cm/index.php?option=com_content&view=article&id=82690:government-pledges-renewed-war-against-corruption&catid=1:politique&Itemid=3 (accessed on 17 January 2020).
- 65 Bakary 'Government Pledges Renewed War against Corruption'. http://ct2015.cameroon-tribune.cm/index.php?option=com_content&view=article&id=82690:government-pledges-renewed-war-against-corruption&catid=1:politique&Itemid=3 (accessed on 17 January 2020).
- 66 Bakary 'Government Pledges Renewed War against Corruption' http://ct2015.cameroon-tribune.cm/index.php?option=com_content&view=article&id=82690:government-pledges-renewed-war-against-corruption&catid=1:politique&Itemid=3 (accessed on 17 January 2020).
- 67 See, for example, the following cases: *Ministère Public et Etat du Cameroun C/ Atangana Mebara Jean-Marie, Inoni Ephraim, Otele essomba Hubert Patrick Marie, Kevin Joseph Walls* Tribunal Criminel Spécial, Yaoundé, Arrêt No. 28/CRIM/TCS du 2 Octobre 2013; *Ministère Public et Etat du Cameroun (Ministère des Finances – Partie Civile) C/ Yen Eyoum Lydienne épouse Loyse, Abah Abah Polycarpe, Engoulou Henri, Baleng Maah Célestin, Ngwem Honoré* Tribunal Criminel Spécial, Yaoundé, Arrêt No. 021/CRIM/TCS/14 du 26 Septembre 2014; Agbor 2017: 25.
- 68 Ezieh 'Biya is devouring his own chickens: Another Minister Grilled for 5hrs. Today by Special Criminal Court' 21 November 2014. <https://cameroonvoice.com/news/2014/11/21/biya-is-devouring-his-own-chickensanother-minister-grilled-for-5hrs-today-by-special-criminal-court/> (accessed on 17 January 2020).

Speculation may grow wildly, but as [in] any criminal proceedings, a court is limited to the law and the evidence. The expression of different perspectives may be entertained, but legal analysts look at the crime in question and find an answer to whether there is evidence to sustain the charges brought against the accused.⁶⁹

In other words, notwithstanding the judicial independence challenges noted in various aspects of this article, it could be argued that these challenges do not affect the core objectives of the SCC which addresses embezzlement of public funds. The other important factor to consider is that, under the paying back of the *corpus delicti*, the SCC has recovered huge amounts of money in the form of cash restitution, fines, costs of procedure, and compensation.⁷⁰ In this respect, only 3 years into the existence of the SCC, it was reported that the state had recovered approximately 2,4 billion CFA Francs in the form of cash restitutions, 602 million CFA Francs from fines and procedure costs, and in excess of 12,1 billion CFA Francs worth of damages.⁷¹ These figures show the determination of the state in addressing the problem of misappropriation of public funds, IFFs and corruption in general. This determination undoubtedly enhances the prospect of addressing IFFs successfully and advancing the right to development.

It is, however, important to note that the centralisation of the operation of the SCC around the Head of State is suspicious and does not build citizens' confidence in the SCC. It is important to foster the independence of the SCC to avoid turning it into a political tool in the hands of the Head of State. Such a development would foster public trust and remove the perception that the SCC is simply another instrument used by the Head of State to settle political scores. This perception is amplified by the fact that so many people who could have appeared before the SCC are yet to do so. Of course, while it could be claimed that these potential suspects cannot be brought to book without evidence, some reports also indicate a high level of interference and influence of the executive in bringing some accused persons to book. In an interview with *Jeune Afrique*, an SCC judge who requested anonymity reported that judges regularly receive instructions from the hierarchy on how to handle cases, or are often instructed to reach specific outcomes on some cases.⁷² According to this judge, the Minister of Justice often asks them how far they are with specific cases and sometimes the requisition of the prosecutor is

69 Agbor 2017:26 (at fn. 138).

70 Bakary 'Government Pledges Renewed War against Corruption'. http://ct2015.cameroon-tribune.cm/index.php?option=com_content&view=article&id=82690:government-pledges-renewed-war-against-corruption&catid=1:politique&Itemid=3 (accessed on 17 January 2020).

71 Bakary 'Government Pledges Renewed War against Corruption' http://ct2015.cameroon-tribune.cm/index.php?option=com_content&view=article&id=82690:government-pledges-renewed-war-against-corruption&catid=1:politique&Itemid=3 (accessed on 17 January 2020).

72 *Jeune Afrique* No. 2890, as quoted by Njayou 'Le Tribunal Criminel Spécial (TCS): Une guillotine aux ordres de Laurent Ezzo' 8 June 2016. <http://asmarafa.over-blog.com/2016/06/le-tribunal-criminel-special-tcs-une-guillotine-aux-ordres-de-laurent-esso.html> (accessed on 17 January 2020).

nothing but the expression of instructions from the Department of Justice to judges who, as ordinary careerists, will simply implement them.⁷³ Some commentators have argued that the SCC is a platform used by the Head of State to eliminate potential rivals.⁷⁴

President Biya [needed] to avail himself of a legal tool under his direct control to consolidate absolute power, blackmail potential rebels and competitors within the system and to stifle any form of institutional opposition. He perceived the court as a tool with which to whitewash his more than thirty years of corrupt governance and the rape of the economy.

Besides claiming that the SCC is a guillotine against political opponents, it has also been argued that the President of the Republic has a personal interest, as the SCC is used as a public relations tool to clean the image of Cameroon abroad before donors and investors. According to Akana and Agbaw-Ebai, the Head of State had a personal interest in establishing the SCC. They explain as follows:⁷⁵

Establishing this court was President Biya's way of saving himself the embarrassment of being humiliated during his perennial trips abroad as the President of the most corrupt countries in the world. [*sic*] This ranking of the country as the most corrupt or one of the most corrupt countries had a potential to hamper President Biya's personal pecuniary interests far from the borders of Cameroon. There was therefore a personal interest need to establish the court.

Some of these strong views, although debatable, are directly linked to the centralisation of the activities of the SCC around the executive. Therefore, it is imperative that the SCC be afforded the space needed to do its work without interference from the executive. In other words, judges should not be "drawn into politics through rulings",⁷⁶ but should enjoy a deserved legitimacy by developing a "parallel channel of accountability".⁷⁷

In addition, concerns are also raised that the SCC – not being entrenched in the *Constitution* – is the result of a decree that can be repealed at any time by the Head of State. Indeed, a constitutional mandate would have strengthened the judicial independence of the SCC and secured public confidence in the institution. Fombad and Choe-Amusimo emphasised the imperative of constitutionally entrenched mechanisms to address corruption:

73 Jeune Afrique No 2890, as quoted by Njayou 'Le Tribunal Criminel Special (TCS): Une guillotine aux ordres de Laurent Ezzo' 8 June 2016. <http://asmarafa.over-blog.com/2016/06/le-tribunal-criminel-special-tcs-une-guillotine-aux-ordres-de-laurent-esso.html> (accessed on 17 January 2020).

74 Akana & Agbaw-Ebai 'Special Criminal Court: 3 facing trial on corruption charges' 28 May 2017. <http://www.cameroonconcordnews.com/special-criminal-court-3-facing-trial-on-corruption-charges/> (accessed on 17 January 2020).

75 Akana & Agbaw-Ebai 'Special Criminal Court: 3 facing trial on corruption charges' 28 May 2017. <http://www.cameroonconcordnews.com/special-criminal-court-3-facing-trial-on-corruption-charges/> (accessed on 17 January 2020).

76 Smith 2007:222.

77 James 1996:627.

only constitutionally entrenched measures and institutions, protected by certain entrenched fundamental principles, can provide a solid bedrock on which to launch any effective anti-corruption strategy that could bring Africa's troubling endemic corruption under control.⁷⁸

This statement underlines the need to ensure that measures to fight corruption are expressly provided in the *Constitution* of the country, since such an approach "provides a [greater] sense of durability, certainty and predictability than is the case with ordinary legislation".⁷⁹ Nevertheless, considering that the SCC was adopted to remedy the weaknesses and shortcomings of other anti-corruption bodies, and was considered a "drastic and harsh measure designed" to discourage people from "indulging in corrupt practices",⁸⁰ its creation was arguably a good initiative, but checks and balances should be put in place to foster its independence from other branches of government. This is important not only in advancing the fight against corruption and IFFs, but also in promoting the rule of law. In this regard, it is imperative to give effect to art. 66 of the *Constitution* that covers a long list of public officials, including the President of the Republic, who are required to "declare their assets and property at the beginning and at the end of their tenure of office".⁸¹ Implementing this provision may go a long way towards demonstrating the seriousness of the government in addressing corruption and IFFs, and will also equip the SCC with another important toolbox for discharging its duties.

In sum, although the importance of the SCC cannot be discarded, there is a need to foster its independence and enable it to apply the law consistently without fear, favour or prejudice. Moreover, considering the high level of corruption still prevalent in Cameroon, the SCC is yet to achieve its objective. Nonetheless, it is also important to note that the SCC is only six years old and still growing, hence the submission that fostering its independence would achieve much in terms of increasing its efficiency and credibility.

6. CONCLUSION

This article aimed to examine the SCC's prospects of, and challenges in addressing the illicit flows of wealth from Cameroon, with the ultimate end of realising the right to development. After acknowledging that the SCC is the latest governance response to corruption besides CONAC, ANIF, CONSUPE

78 Fombad & Choe-Amusimo 2015:4.

79 Fombad & Choe-Amusimo 2015:29.

80 Fombad & Choe-Amusimo 2015:4.

81 *Constitution of the Republic of Cameroon* 1996:art. 66 states: "The President of the Republic, the Prime Minister, Members of Government and persons ranking as such, the President and Members of the Bureau of the National Assembly, the President and Members of the Bureau of the Senate, Members of Parliament, Senators, all holders of an elective office, Secretaries-General of Ministries and persons ranking as such, Directors of the Central Administration, General Managers of public and semi-public enterprises, Judicial and Legal Officers, administrative personnel in charge of the tax base, collection and handling of public funds, all managers of public votes and property, shall declare their assets and property at the beginning and at the end of their tenure of office."

and the Sparrow Hawk, the article commenced with an assessment of the magnitude of IFFs from Cameroon. It found that IFFs from Cameroon is a huge problem, as significant amounts of money leave the country annually. It also found that IFFs empty the state coffers and deprive it of resources needed to give effect to the right to development provided for in the *Constitution*. This underlined the need to have a SCC to address the problem. The article proceeded to examine the possibilities to remedy IFFs from Cameroon through the SCC. To this end, it examined the historic place of the SCC in the Cameroonian legal landscape, the mandate, composition, *modus operandi* of the institution, and its practical impact on the ground.

It found that the SCC is not new in Cameroon and that this is a positive, as it provides institutional memory. It also found that the core mandate of the SCC is to focus on misappropriation of funds in excess of 50 million CFA Francs. Based on its achievement on the ground, it was found that the SCC is vital for fighting corruption; however its place in the judicial arm of government was criticised for being the only degree of jurisdiction before reaching the Supreme Court. In addition, the SCC does not always enjoy a good image in the press, and is observed with suspicion by many. This distrust is due to the over-involvement and influence of the executive branch of government in its processes, which essentially violates judicial independence. To enhance the potential and effectiveness of the SCC, it was argued that it is imperative to set up appropriate checks and balances to empower the institution to combat corruption and IFFs from the country without fear, favour or prejudice.

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