



**Gender and Transitional Justice in the Central African Republic**

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This thesis is only the beginning of a work that I intend to complete soon in a book and which, certainly, will continue to occupy me in the years to come, even once the first version of my book is published, I hope.

I therefore recommend to those who read this thesis not to use it to cite it, because the pages of citations may be approximate or the concepts and ideas still poorly defined or analysed, but rather as possible avenues of research.

This thesis, being essentially theoretical, does not aim to enlighten the reader on the history or geopolitical situation of the CAR. Having never been there, I certainly do not claim the title of expert on this region. This thesis rather uses this case study to develop the concept of transformative justice, in a theoretical way, and what this type of justice could be in a country like the CAR: postcolonial, multicultural and having on its territory all the mechanisms of transitional justice known to date.

Furthermore, my thesis having been submitted at the beginning of May 2023, it is therefore no longer up to date. A new constitution was adopted in CAR in 2023. In my section on retributive justice, the SCC has since issued its reparation order in Case 1, another situation is currently pending before this court and the ICC has also issued a new reparations order in the *Ongwen* case. However, I have not updated this thesis... These new developments do not call into question the essence of my thesis and I am currently working on its publication which will include these additional analyses and updates.

Finally, my section on retributive justice and ICL is not intended to be exhaustive. These parts simply help me present the most important parts of my thesis which are the last two. So I suspect that the lawyers, jurists or legal scholars and law students working on these cases will certainly do a more detailed and precise analysis of the facts and the law.

I am also aware of any research gaps that exist in my thesis. In the 10 months of waiting for the result of my thesis, I had time to read other doctoral theses which deal with reparations, intersectionality in ICL, violence against women, responsibility of transnational companies in TJ processes, or the responsibility of non-state actors. All this work has humbled me on the still vast research work that remains to be accomplished to complete this thesis. As I do not cite them in my thesis (I will do so if I publish it), I therefore recommend that you also read their doctoral thesis which you can find online.

Above all, I also know that by using the concepts of social sciences and philosophy, I took risks. I therefore do not claim to be an expert on these subjects. However, I took great pleasure in processing them and I now know that this is the direction I wish to take my work in the years to come. I nevertheless have the humility to know that I am not yet a specialist in questions of political, legal and moral philosophy and that I still have many authors to read and explore (I have in fact started to read them during my 10 months of waiting and I also plan to use their work in the final version of my thesis which I will send for publication – I have indeed understood how valuable their work is for thinking about responsibility, identity, values, law and justice, among others). However, not having read them when writing this thesis allowed me, perhaps, to explore these questions without a predetermined outcome, which can also be an advantage. This is particularly why I loved teaching this subject, while also dreading it, because the intuition of my students, a word which seems to be accepted in moral philosophy if I understood correctly, on justice can also open up new avenues of

research on the question, avenues which can be illuminated by their standpoint and the spirit of the times.

As for the concept of normative justice, while it was validated by one of my examiners, it was rejected by another. I am keeping it in this version of the thesis but, before publication, I also plan to work on it further with researchers specializing in the philosophy of law.

It is therefore important for the moment to take this thesis for what it is, that is to say, a beginning.

## Summary

The Central African Republic has been the scene for many years, even decades, of many conflicts and almost permanent political, social, and economic instability. During the most recent conflicts, in 2002/2003, and in 2012/2013 until today, women have been the first victims of Gender-Based Violence (GBV), understood in its broadest sense as also including violations of socio-economic and cultural rights of which they were the first targets or from which they suffered the most disproportionate consequences. This thesis proposes to assess whether the transitional justice mechanisms created in the Central African Republic can combat GBV by challenging the unequal gender norms and structures pre-existing the conflicts and, therefore, bring about a significant change in the life of women in the country. To do this, this thesis proposes to look at the concept of transformative justice to analyse what this concept means in theory and practice. In doing so, three different modes of justice will be successively studied: interactional justice, distributive justice, and normative justice from the perspective of a feminist analysis of transitional justice.

## Acknowledgments

I foremost thank my supervisor, Professor Mia Swart, who trusted me in conducting my research from start to finish and whose advice, presence, and direction were invaluable throughout these four years, as well as my family and friends. I also wanted to thank everyone who was there from the beginning to the end of the process, directly or indirectly. A process that started long before my thesis began. Thanks to Prof. O. de F. for having, one day, suggested that I do my research on the theme of transitional justice and for having, without knowing it, determined the ten years that were to follow. Thank you to all the experts and activists who have answered my questions throughout these years worldwide and given me the keys to understanding their profession. Thanks to Judge C. C. and Judge R. D., who have been excellent mentors in Cambodia within the Extraordinary Chambers in the Courts of Cambodia. Thank you for sharing with me the joys, the successes, the limits, the constraints, the diversions of the long and winding adventure and construction of international criminal law. Thanks to L. M. L. C., in Colombia, for allowing me to see firsthand what transitional justice, particularly access to education, can mean on the ground. Thanks to Prof. N. R. for one day advising me to do my research about South Africa and believing in me. Thank you to McGill and the Center for Human Rights and Legal Pluralism for opening me to new legal perspectives and showing me that legal pluralism is a reality. Thanks to the Southern Africa Litigation Centre for allowing me to see firsthand what gender justice, in a broad sense, means. Thanks especially to T. E. for the fights he allowed me to lead by his side. I also thank Prof. M. B., whose advice, in 2018, significantly guided my work and gave it the direction and conclusion it has today. Thank you, especially to all the women I met on the way, from Paris to Phnom Penh, via Tensobentenga, Jakarta, Johannesburg, Tunis, Santa Marta, Nancy and Berlin (among others) and who in a way formal or informal allowed me to shake my beliefs, sometimes even my convictions, and to redefine what feminism meant to me. I tried to synthesise in this thesis all that you brought me.

Finally, the adventure of the thesis began at the beginning of 2019 in Johannesburg and led me on still unexplored paths. I, therefore, wanted to thank my students from the Wanderers Club middle/high school in Johannesburg, who were extremely patient with me and my beginnings as a teacher (of French at the time), who were the first, those with whom I honed my skills and taught me to develop valuable teaching skills (including patience). I will not forget you. I would also like to thank my colleagues who gave me valuable advice on how to improve, supported me, reassured me, listened to me (often for hours), and accompanied me. A big thank you, mainly, to M. La G., the school director, who trusted me and always supported me even when I faced moments of doubt. I thank the many waiters and waitresses in all the cafes where I worked for hours and who made me become part of the decor and feel 'at home'. Thank you to the Hertie School team for welcoming me to Berlin. Special thanks to Prof. S. G., who allowed me to give my first lecture to university students as a guest lecturer. Thank you to the members of the Center for Fundamental Rights for suggesting that I read Tamale (and rediscover the philosophy of Ubuntu with her) and Gebeye (and thus finally put a concept on an idea that was dear to me – 'legal syncretism') and for introducing me to the concept of intersectionality. Above all, a huge thank you to E. G., who, after this long journey, trusted me absolutely to teach my thesis subject to her students at Sciences Po on the Nancy campus. It was a great privilege. I therefore thank my 19 students from Sciences Po who were there in the last months of writing my thesis (sometimes to their detriment because they had to do with my fatigue, stress, my research gaps, and my beginnings as a university lecturer). Thanks for reminding me again how to see the world without compromise. Thank you for reminding me of the importance of

international human rights law, particularly women's rights. You were at the end of one cycle and, hopefully, the start of another. This thesis would indeed not have been the same without you.

Last but not least, thank you to all the people who are currently working in the Central African Republic and who are contributing to these great adventures of transitional justice and gender justice; thank you to all those who answered my questions from afar, who gave me the keys to try to understand a little better what is happening there, and who dedicate their time, even their lives, to making the country better. Finally, thank you to all the Central African women I have unfortunately never met. I apologize for my clumsiness, my uncertainties, and even my mistakes. I, therefore, wish to end these thanks with the hope that the transitional justice that is taking place in the Central African Republic will, finally, be a truly transformative one – and if so, that it will be according to your criteria.

**Abbreviations:**

ADR: customary justice, conciliation, mediation

APPR-RCA: Political Agreement for Peace and Reconciliation in the CAR

AP I: The Additional Protocol to the Geneva Conventions of 1949 relating to the Protection of Victims of International Armed Conflicts

AP II: The Protocol Additional to the Geneva Conventions of 1949 relating to the Protection of Victims of Non-International Armed Conflicts

AU: African Union

AUTJP: The African Union Transitional Justice Policy

AU Solemn Declaration: The Solemn Declaration on Gender Equality in Africa

Banjul Charter: The African Charter on Human and Peoples' Rights

CAVR: The Commission for Reception, Truth and Reconciliation (Timor Leste)

CAR: Central African Republic

CC: Constitutional Court

CDT: The Tunisian Truth and Dignity Commission

CEDAD: Extraordinary Committee for the Defence of Democratic Achievements

CEDAW: Convention on the Elimination of All Forms of Discrimination against Women

CEDAW Committee: Committee of the UN Convention on the Elimination of Discrimination against Women

CIRGL: International Conference on the Great lakes Region

CPJP : Convention des Patriotes pour la Justice et la Paix

CRC : Convention on the Rights of the Child

CRSV : Conflict-related Sexual/sexualized Violence

CVJRR : Commission Vérité, Justice, Réparation and Réconciliation

CVR : Commission de la Verdad y Reconciliacion (Peru)

DAW : Discrimination Against Women

DDR: disarmament, demobilization and reconstruction programme

DP: Displaced Persons

ESC rights: Economic, Social and Cultural rights

EU: European Union

FACA: The Central African Armed Forces

FIDH: International Federation for Human Rights

FDPC: Democratic Front of the Central African People

GBC: Gender-Based Crimes

GC: Geneva Conventions

GCF: The Global Fund for Survivors of Sexual Violence in Conflict

GBV : Gender-Based Violence

GBVIMS: Gender-Based Violence Information Management System

GC IV: The Fourth Geneva Convention of 1949 relative to the Protection of Civilian Persons in Time of War

GNR: Guarantees of non-repetition

HLP: Housing, Land and Property

IDP: Internally Displaced People

ICC: International Criminal Court

ICCPR: International Covenant on Civil and Political Rights

ICERD: The International Convention on the Elimination of All Forms of Racial Discrimination

ICESCR: International Covenant on Economic, Social and Cultural Rights

ICTJ: The International Center for Transitional Justice

ICL: International Criminal Law

ICTR: the International Criminal Tribunal for Rwanda

ICTY: the International Criminal Tribunal for the former Yugoslavia

IHL: International Humanitarian Law



IHRL: International Human Rights Law

IO: International Organisations

IMT: International Military Tribunal (in Nuremberg)

INGO: International Non-Governmental Organization(s)

JCE: Joint Criminal Enterprise

LRA: Lord's Resistance Army

Maputo Protocol: The African Protocol on Women's Rights

MINUSCA: The United Nations Multidimensional Integrated Stabilization Mission in the Central African Republic

MLC: Movement for the Liberation of Congo

MMIWG: The National Inquiry into Missing and Murdered Indigenous Women and Girls in Canada

Nairobi Declaration: The Nairobi Declaration on the Right of Women and Girls to a Remedy and Reparation of 2007

NGO: Non-Governmental Organisation(s)

OECD: The Organisation for Economic Co-operation and Development

OCDH : Observatoire Congolais des Droits de l'Homme

OCRB: Central Office for the Repression of Banditry

OTP: Office of the Prosecutor

POW Convention: Third Geneva Convention of 1949 relative to the Protection of Prisoners of War

RJ: Revolution and Justice

RPE: Rules of Procedure and Evidence

RSS: reform of the security sector

SATRC: South African Truth and Reconciliation Commission

SCC: Special Criminal Court

SCSL: The Special Court for Sierra Leone

SDGs: Sustainable Development Goals

SGBC: Sexual and Gender-Based Crimes

SGBC Policy: Policy Paper on Sexual and Gender-Based Crimes of the International Criminal Court

SGBV: Sexual and Gender-Based Violence

TRC: Truth and Reconciliation Commissions

TJ : Transitional Justice

TJRC : Truth, Justice and Reconciliation Commission (Kenya)

TVF : The Trust Fund for Victims of the International Criminal Court

UDHR: Universal Declaration of Human Rights

UFDR : Union des Forces Démocratiques pour le Rassemblement

UMIRR: The Mixed Unit for Rapid Intervention and Repression of Sexual Violence against Women and Children

UN : United Nations

UN Basic Principles: The Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law

UNDRIP: UN Declaration on the Rights of Indigenous Peoples

UNDP: The United Nations Development Programme

UNICEF: The United Nations International Children's Emergency Fund

UN SC : UN Security Council

UN Secretary-General: The Secretary General of the United Nations

UPC : Union pour la Paix en Centrafrique

VAW : Violence Against Women

WPS : Women, Peace and Security agenda

WTO: World Trade Organisation

WWII : Second World War

3R : Retour, Réclamation et Réhabilitation

## **GENDER AND TRANSITIONAL JUSTICE IN THE CENTRAL AFRICAN REPUBLIC 14**

### **INTRODUCTION 14**

- (A) LITERATURE REVIEW 36**
- (B) METHODOLOGY 49**

### **I. GENDER JUSTICE AND LEGAL PLURALISM 53**

- (A) GENDER JUSTICE IN INTERNATIONAL LAW 56**
- (B) FROM THE CONSIDERATION OF GENDER JUSTICE UNDER THE PRISM OF LEGAL CENTRALISM (...) 62**
- (C) (...) TO THE CONSIDERATION OF GENDER JUSTICE UNDER THE PRISM OF LEGAL PLURALISM 67**
  - (i) SHIFTING THE PARADIGM 67
  - (ii) LEGAL PLURALISM IN THE CAR 74
  - (iii) LEGAL PLURALISM AND GENDER JUSTICE 78
- CONCLUSION 82**

### **II. CONFLICT-RELATED GENDER-BASED VIOLENCE IN THE CENTRAL AFRICAN REPUBLIC 84**

- (A) SEXUAL AND GENDER-BASED VIOLENCE AS INTERNATIONAL CRIMES 84**
  - (i) THE INTERNATIONAL CRIMINAL COURT AND THE SITUATIONS IN THE CAR 91
  - (ii) THE SPECIAL CRIMINAL COURT (SCC) 100
  - (iii) TOWARDS GOING BEYOND SEXUAL AND GENDER-BASED CRIMES 105
- (B) SEXUAL AND GENDER-BASED VIOLENCE, BEYOND INTERNATIONAL CRIMES: THE COMMISSION VÉRITÉ, JUSTICE, RÉPARATION ET RÉCONCILIATION (CVJRR) 106**
  - (i) INCLUDING BROADER GENDER EQUALITY POLICIES AND NORMS 109
  - (ii) ADDRESSING NEGLECTED GBV AND THE CONSEQUENCES OF GBV 112
  - (iii) ADDRESSING SOCIO-ECONOMIC AND CULTURAL RIGHTS ABUSES 113
  - (iv) ADDRESSING THE ROOT CAUSES OF GBV 117
  - (v) MOVING FORWARD 118
- CONCLUSION 119**

### **III. INTERACTIONAL JUSTICE 120**

- (A) RETRIBUTIVE JUSTICE 124**
  - (i) A LIMITED JUSTICE FOR VICTIMS 125
  - (ii) A NARROW MODE OF LIABILITY 140
  - (iii) REPARATION REGIMES 149
- CONCLUSION 157**
- (C) RESTORATIVE JUSTICE 158**
  - (i) VICTIMS AND PERPETRATORS 159
  - (ii) INTERACTIONAL RECONCILIATION 166
  - (iii) HUMAN RIGHTS REPARATIONS 172
- CONCLUSION 181**

### **IV. DISTRIBUTIVE JUSTICE: THE FIRST STEP TOWARDS STRUCTURAL JUSTICE 184**

- (A) A BRIEF OVERVIEW OF DISTRIBUTIVE JUSTICE 185**

<b>(B) FROM VICTIMS TO CITIZENS</b>	<b>188</b>
<b>(C) MORAL, POLITICAL, SOCIAL AND ECONOMIC RESPONSIBILITIES</b>	<b>194</b>
(i) THE ROLE OF THE CVJRR	195
(ii) THE RESPONSIBILITY OF THE STATE	197
(iii) DUTY TO ASSIST	201
(iv) THE RESPONSIBILITY OF BENEFICIARIES/ ENABLERS	203
<b>(D) TRANSFORMATIVE REPARATIONS</b>	<b>219</b>
(i) DEFINITION	221
(ii) TRANSFORMATIVE REPARATIONS AND DEVELOPMENT: WHAT ARE THE DIFFERENCES?	225
(iii) WHAT TRANSFORMATIVE REPARATIONS COULD BE LIKE IN THE CAR: RECOMMENDATIONS	228
<b>CONCLUSION</b>	<b>233</b>
<b><u>V. NORMATIVE JUSTICE: STRUCTURAL JUSTICE AS FUNDAMENTAL CHANGE</u></b>	<b><u>235</u></b>
<b>(A) TRANSITIONAL JUSTICE AND NORMATIVE JUSTICE</b>	<b>237</b>
<b>(B) THE 'SOCIAL CONNECTION MODEL'</b>	<b>239</b>
(i) REDEFINING POLITICAL RESPONSIBILITY BEYOND REPARATIONS	240
(ii) JUSTICE AS RECOGNITION	243
(iii) THE STANDPOINT THEORY	248
<b>(C) TOWARDS AN 'AFFIRMABLE AND AFFIRMED POLITICAL AND SOCIAL ORDER' FOR WOMEN IN THE CAR</b>	<b>256</b>
(i) TOWARDS A 'MULTIVALENT' UNDERSTANDING OF GENDER JUSTICE: 'LEGAL SYNCRETISM'	258
(ii) WHAT LEGAL SYNCRETISM COULD BE LIKE IN THE CAR: RECOMMENDATIONS	262
<b>CONCLUSION</b>	<b>272</b>
<b><u>CONCLUSION</u></b>	<b><u>273</u></b>
<b><u>BIBLIOGRAPHY</u></b>	<b><u>277</u></b>

# Gender and Transitional Justice in the Central African Republic

## INTRODUCTION

The Central African Republic (CAR) is located in the heart of the African continent and shares its borders with six other countries: Chad, Sudan, South Sudan, the Democratic Republic of Congo, the Republic of Congo, and Cameroon.<sup>1</sup> The population of the CAR today is just over 5 million<sup>2</sup> and is concentrated mainly in the capital, Bangui, and in the South West region of the country.<sup>3</sup> Bangui also brings together most of the CAR's infrastructure.<sup>4</sup> Since its independence in 1960, the country has seen almost constant upheaval. The CAR is indeed infamous for the various cycles of violence that have erupted on its territory over the past decades. The country's economic, political and social instability has often been punctuated by coups against ruling leaders,<sup>5</sup> worsening or highlighting an already precarious situation. Most recently, in 2003, François Bozizé, a former member of the government, overthrew the incumbent president, Ange-Félix Patassé,<sup>6</sup> who was then supported by foreign armed groups such as the *Movement for the Liberation of Congo* (MLC).<sup>7</sup> Ten years later, in March 2013, the *Seleka*, an alliance of armed factions active in the north of the country, including, among others, the *Convention des Patriotes pour la Justice et la Paix* (CPJP) and the *Union des Forces Démocratiques pour le Rassemblement* (UFDR) captured Bangui.<sup>8</sup> The capture of Bangui led to the overthrow of François Bozizé and the seizure of power by Michel Djotodia.<sup>9</sup> In response to the numerous atrocities and human rights violations committed by the *Seleka*, a constellation of village militias banded

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<sup>1</sup> Bernard Lugan *Histoire de l'Afrique du Nord: Des origines à nos jours* (2016) 1054.

<sup>2</sup> See the World Bank's Website, Population, total – Central African Republic (consulted on the 27<sup>th</sup> of March 2023), online at: <https://data.worldbank.org/indicator/SP.POP.TOTL?locations=CF>.

<sup>3</sup> Louisa Lombard *State of rebellion: Violence and intervention in the Central African Republic* (2016) 5.

<sup>4</sup> Ibid at 5.

<sup>5</sup> Bertelsmann Transformation Index *Central African Republic Country Report* (2020) / Interview recorded on the 29/12/2022.

<sup>6</sup> Ibid.

<sup>7</sup> Amnesty International *Five months of war against women* (2004) at 3, online at <https://www.amnesty.org/download/Documents/88000/afr190012004en.pdf>.

<sup>8</sup> Roland Marchal 'Premières leçons d'une «drôle» de transition en République centrafricaine' (2015) *Politique africaine* 3: 123-146 at 125-126.

<sup>9</sup> Ibid at 126.

together as the *Anti-Balaka*,<sup>10</sup> sparking further violence.<sup>11</sup> This conflict has had a direct impact on civil society and has affected people's well-being and security.<sup>12</sup>

This almost uninterrupted cycle of violence has led to numerous attempts at transition in the form of peace agreements<sup>13</sup> and new governments. In 2014, Catherine Samba-Panza became the new president of the Central African transitional government as the country's first female president,<sup>14</sup> soon followed by the presidential election of Professor Faustin Archange Touadera in 2016<sup>15</sup> and 2021.<sup>16</sup> However, instability has persisted and violence has taken new shapes. New armed groups have sprung up, such as *Retour, Réclamation, et Réhabilitation (3R)*.<sup>17</sup> The 3R group is a Central African rebel group created at the end of 2015 to protect the Fulani community, a minority in the country, against attacks by *anti-balaka* militias. However, this armed group also very quickly committed numerous cases of abuse in the northwest of the country, such as in 2016, when they committed various attacks against several villages in the Kouï sub-prefecture.<sup>18</sup> The *Revolution and Justice (RJ)* group is also active in the region. It was founded in December 2013 by Armel Sayon, officially in response to the *Seleka* and Fulani armed activities in northwestern CAR. The group operates in an area close to the Chadian-Cameroon border, north of Bocaranga and near Paoua, and fights for the control of Markounda and Ngaoundaye.<sup>19</sup> Meanwhile, the *Seleka* disbanded in 2014 and split into different factions under different names, including the *Union for Peace in*

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<sup>10</sup> Ibid at 126.

<sup>11</sup> See MINUSCA, UNDP, United Nations Human Rights Office of the High Commissioner, Bureau de la Représentante spéciale du Secrétaire général chargée de la question des Violences Sexuelles en Conflit *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 2013 and December 2015* (2017) at 120/ United States Department of State, *2016 Country Reports on Human Rights Practices - Central African Republic*, 3 March 2017, available at: <https://www.refworld.org/docid/58ec8a5ba.html> [accessed 3 April 2020]/ Human Rights Watch '*They said we are their slaves*': Sexual Violence by Armed Groups in the Central African Republic (2017), online at: <https://www.hrw.org/report/2017/10/05/they-said-we-are-their-slaves/sexual-violence-armed-groups-central-african>.

<sup>12</sup> Human Rights Council, *Report of the Independent Expert on the situation of human rights in the Central African Republic* (2018) A/HRC/39/70, online: <https://undocs.org/en/A/HRC/39/70>.

<sup>13</sup> For example : '*A cessation of hostilities agreement was signed on 23 July 2014, in Brazzaville, between the main ex-Séléka and anti-Balaka armed factions*' see MINUSCA op cit note 119 at 279.

<sup>14</sup> Marchal op cit note 116 at 137.

<sup>15</sup> Cour constitutionnelle de Transition, Décision n°005/15/CCT du 1<sup>er</sup> mars 2016 portant proclamation des résultats définitifs du second tour de l'élection présidentielle du 14 février 2016.

<sup>16</sup> Cour constitutionnelle République Centrafricaine, Décision N° 003/CC/21 du 18 janvier 2021 Portant proclamation des résultats définitifs du premier tour de l'élection présidentielle du 27 décembre 2020.

<sup>17</sup> Human Rights Watch *Central African Republic: Justice Vital to Peace, new killings during talks; Rebels seek amnesty* (2019), online at: <https://www.hrw.org/news/2019/02/22/central-african-republic-justice-vital-peace>.

<sup>18</sup> Cour Pénale Spéciale, Chambre d'Assises, Première Section d'Assises, Jugement N° 003-2022, *Le Parquet v. Issa Sallet Adoum alias Bozizé ; Yaouba Ousmane ; Mahamat Tahir* Dossier n° CPS/C.ASS/1SA/22-001 (31 October 2022), paras 8 & 9.

<sup>19</sup> Ibid para. 187.

<sup>19</sup> Human Rights Watch op cit note 125.

the Central African Republic (UPC).<sup>20</sup> Former President François Bozizé returned to the CAR at the end of 2020 and regrouped armed groups within the *Coalition of Patriots for Change* to thwart Touadera's presidential election.<sup>21</sup> Finally, the *Lord's Resistance Army* (LRA), another armed group, has operated in the Central African region for 30 years,<sup>22</sup> and Russian-linked forces now support the current CAR government's fight against armed groups and have reportedly committed abuses against the civilian population.<sup>23</sup>

Women have been documented as the primary victims of conflict-related Gender-Based Violence (GBV).<sup>24</sup> To understand what is meant by GBV, one must first define the term gender. Today, the only definition of gender in international treaty law is found in Article 7§3 of the Rome Statute of the International Criminal Court (ICC):<sup>25</sup> 'For the purposes of this Statute, it is understood that the term "gender" refers to the two sexes, male and female, within the context of society. The term "gender" does not indicate any meaning different from the above.' This definition has been criticised for being undecided between two different interpretations of the term gender, a view of gender as socially constructed or an understanding of gender as referring to biological sex.<sup>26</sup> Debates persist today over

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<sup>20</sup> Human Rights Watch op cit note 125.

<sup>21</sup> Human Rights Watch *Central African Republic: Events of 2020* (2020), online at: <https://www.hrw.org/world-report/2021/country-chapters/central-african-republic/>. Also see The Institute for Justice and reconciliation, Peter Knoope *Central African Republic: Post-Electoral Crisis and the Prospects for Reconciliation* (2021), at 3, available online at: <https://www.ijr.org.za/home/wp-content/uploads/2021/02/IJR-Policy-Brief-No-31-Post-electoral-WEB.pdf>.

<sup>22</sup> See enough project's website, (Consulted on the 15<sup>th</sup> of March 2021), online at <https://enoughproject.org/conflicts/lra>.)

<sup>23</sup> Human Rights Watch *Central African Republic: Abuses by Russia-Linked Forces* (2022), online at: <https://www.hrw.org/news/2022/05/03/central-african-republic-abuses-russia-linked-forces>.

<sup>24</sup> Committee on the Elimination of Discrimination against Women [CEDAW] (2014), *Concluding observations on the combined initial and second to fifth periodic reports of the Central African Republic*, CEDAW/C/CAF/CO/1-5, United Nations §15a / GBVIMS *Statistiques des Incidents de VBG/VS au cours du 1<sup>er</sup> trimestre 2020* (2020), available online at: [https://www.humanitarianresponse.info/sites/www.humanitarianresponse.info/files/documents/files/3\\_rapport\\_t1\\_gbvim\\_2020.pdf](https://www.humanitarianresponse.info/sites/www.humanitarianresponse.info/files/documents/files/3_rapport_t1_gbvim_2020.pdf). In the first trimester of 2020, 93% of recorded cases of gender-based violence concerned women/ FIDH *All I Want is Reparation: Views of Victims of Sexual Violence about Reparation in the Bemba Case before the International Criminal Court* (2017), at 13, online at: <https://www.fidh.org/IMG/pdf/rca705ang.pdf> / Also see Report of the Secretary-General, *Conflict-Related Sexual Violence*, 2022, UN Doc S/2022/272.

<sup>25</sup> Valerie Oosterveld 'The ICC policy paper on sexual and gender-based crimes: a crucial step for international criminal law' (2017) *Wm. & Mary J. Women & L.* 24: 443 at 451, referring to UN General Assembly, *Rome Statute of the International Criminal Court (last amended 2010)*, 17 July 1998, ISBN No. 92-9227-227-6, available at: <https://www.refworld.org/docid/3ae6b3a84.html> [accessed 20 July 2021].

<sup>26</sup> Ibid at 451 / also see Valerie Oosterveld 'Gender-based crimes against humanity' in L. N. Sadat (ed.), *Forging a Convention for Crimes against Humanity* (2011) at 79-80, noting that some definitions employed by the United Nations conflate 'gender' with 'sex': 'The outcome document of the World Human Rights Conference, in Vienna, used the term *gender* five times in reference to girls or women (arts. 18, 38, 42).' See UN General Assembly, *Vienna Declaration and Programme of Action*, 12 July 1993, A/CONF.157/23, available at: <https://www.refworld.org/docid/3ae6b39ec.html> [accessed 22 July 2020] / 'The document produced at the International Conference on Population and Development, in Cairo, devoted a section to "Gender Equality, Equity, and Empowerment of Women" (Chapter IV)—again, clearly in relation to women'; see UN Population Fund (UNFPA), *Report of the International Conference on Population and*



whether a definition of gender should be included in the Convention on the Prevention and Punishment of Crimes Against Humanity and, if so, how gender should be defined.<sup>27</sup>

However, the ICC's Policy on the Crime of Gender Persecution adopted in 2022 seems to lean towards an understanding of gender as a social construct according to which:

Under article 7(3) of the Rome Statute ("Statute"), "gender" is understood as the two sexes, male and female, within the context of society. Gender refers to sex characteristics and social constructs and criteria used to define maleness and femaleness, including roles, behaviours, activities and attributes. As a social construct, gender varies within societies and from society to society and can change over time. This understanding of gender is in accordance with article 21 of the Statute.<sup>28</sup>

This definition is similar to that generally accepted in the literature on gender studies<sup>29</sup> as well as with the definitions of gender recently given by the United Nations (UN).<sup>30</sup> This understanding of the term 'gender' challenges 'the naturalistic explanations of sex and sexuality that assume that the meaning of women's social existence can be derived from some fact of their physiology.'<sup>31</sup> According to Butler, gender attributes, on the contrary, are essentially performative repetitions of acts associated with masculine or feminine.<sup>32</sup> Actions perceived as appropriate are an internalised notion of gender norms

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*Development, Cairo, 5-13 September 1994, 1995, A/CONF.171/13/Rev.1, available at: <https://www.refworld.org/docid/4a54bc080.html> [accessed 22 July 2020].*

<sup>27</sup> See Indira Rosenthal & Valerie Oosterveld 'Gender and the ILC's 2019 Draft Articles on the Prevention and Punishment of Crimes against Humanity' (2020) *AJICJ*: 214.

<sup>28</sup> International Criminal Court *Policy on the Crime of Gender Persecution* (2022) at 3, online at: <https://www.icc-cpi.int/sites/default/files/2022-12/2022-12-07-Policy-on-the-Crime-of-Gender-Persecution.pdf>.

<sup>29</sup> Natalie Florea Hudson *Gender, human security and the United Nations: security language as a political framework for women* (2009) at 50/ the neat binary of female and male has also been challenged in neurosciences, see Gina Rippon *The Gendered Brain: The new neuroscience that shatters the myth of the female brain* (2019).

<sup>30</sup> See World Health Organization's website, *Gender and health* (consulted on the 23th of March 2022), online at: [https://www.who.int/health-topics/gender#tab=tab\\_1](https://www.who.int/health-topics/gender#tab=tab_1) : the UN's agency for public health, defines 'gender' as 'the socially constructed characteristics of women and men – such as norms, roles and relationships of and between groups of women and men'/ Also see: UN Women, *Concepts and Definitions* (consulted on the 23th of March 2022), online at: <https://www.un.org/womenwatch/osagi/conceptsanddefinitions.htm> : 'Gender refers to the social attributes and opportunities associated with being male and female and the relationships between women and men and girls and boys, as well as the relations between women and those between men. These attributes, opportunities and relationships are socially constructed and are learned through socialization processes. They are context/time-specific and changeable. Gender determines what is expected, allowed and valued in a woman or a man in a given context. In most societies there are differences and inequalities between women and men in responsibilities assigned, activities undertaken, access to and control over resources, as well as decision-making opportunities.'/ Also see UN Committee on the Elimination of Discrimination Against Women (CEDAW), *General Recommendation No. 28 on the Core Obligations of States Parties under Article 2 of the Convention on the Elimination of All Forms of Discrimination against Women*, 16 December 2010, CEDAW/C/GC/28, para. 5, available at: <https://www.refworld.org/docid/4d467ea72.html> [accessed 17 August 2021].

<sup>31</sup> Judith Butler 'Performative Acts and Gender Constitution: An Essay in Phenomenology and Feminist Theory' (1988) *Theatre Journal*, 40(4), 519 at 520.

<sup>32</sup> *Ibid* at 528.

enforced by historical social practice.<sup>33</sup> The concept of gender as a social construct is useful in the context of this thesis as it is ‘a powerful conceptual tool’<sup>34</sup> that allows one to grasp the complexity of unequal social dynamics between men and women,<sup>35</sup> thus avoiding their essentialisation,<sup>36</sup> and allowing a transformation of structural inequalities.<sup>37</sup> The construction of gender based on a binary feminine and masculine cleavage is indeed often at the origin of gendered hierarchies and power dynamics.<sup>38</sup> This division can create a situation in which certain roles<sup>39</sup> are assigned to women and men, frequently to the detriment of women.<sup>40</sup> This division has an impact on ‘the ways that social, economic, political, and institutional relations operate,’<sup>41</sup> and may have consequences on women's unequal access to the law, as well as resources, power in society, and health.<sup>42</sup> Gender inequalities, in turn, generate a series of prejudices often making women the first victims of personal violence.<sup>43</sup> Violence Against Women (VAW) and Gender are therefore often two concepts that are interrelated.

The category of GBV applied to women can be defined as covering ‘every form of violence for which women might be targeted based on their physical vulnerabilities or distinct biology; their economic, sexual, and symbolic values in their own eyes and the eyes

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<sup>33</sup> Ibid at 528.

<sup>34</sup> Marie Coussi *Le Droit International de l'environnement à l'épreuve du genre une analyse critique* (2017) at 60 : ‘un outil conceptuel puissant.’

<sup>35</sup> Ibid at 60.

<sup>36</sup> Ibid at 10 : ‘En ce sens, les différences perçues entre les hommes et les femmes - notamment les différentes normes et valeurs communément attachées à la féminité et à la masculinité - ne sont pas le résultat d'un quelconque déterminisme biologique ou de qualités posées comme « naturelles » mais sont au contraire socialement construites’ translated as ‘In this sense, the perceived differences between men and women - in particular the different norms and values commonly attached to femininity and masculinity - are not the result of any biological determinism or of qualities posed as "natural" but are on the contrary socially constructed’, citing Simone de Beauvoir, *Le deuxième sexe* (1968) at 511 & 512.

<sup>37</sup> Ibid at 60.

<sup>38</sup> Aisling Swaine *Conflict-Related Violence against Women: Transforming Transition* (2018) at 13.

<sup>39</sup> John Money, Joan G. Hampson & John L. Hampson ‘An examination of some basic sexual concepts: the evidence of human hermaphroditism’ (1955) *Bulletin of the Johns Hopkins Hospital* 97, no. 4: 301 at 319: Money defines gender role as “all those things that a person says or does to disclose himself or herself as having the status of boy or man, girl or woman, respectively. It includes, but is not restricted to sexuality in the sense of eroticism. Gender role is appraised in relation to the following: general mannerisms, deportment and demeanor; play preferences and recreational interests; spontaneous topics of talk in unprompted conversation and casual comment; content of dreams, daydreams and fantasies; replies to oblique inquiries and projective tests; evidence of erotic practices, and, finally, the person's own replies to direct inquiry.’

<sup>40</sup> Wendy Wood & Alice H Eagly ‘A Cross-Cultural Analysis of the Behavior of Women and Men: Implications for the Origins of Sex Differences’ (2002) *Psychological Bulletin* 699 at 701, According to them, gender roles ‘arise from the distribution of men and women into social roles within a society. In current industrial and postindustrial economies, women are more likely than men to assume domestic roles of homemaker and primary caretaker of children, whereas men are more likely than women to assume roles in the paid economy and to be primary family providers.’

<sup>41</sup> Swaine op cit note 79 at 13.

<sup>42</sup> Lisa A. Cubbins ‘Women, men, and the division of power: A study of gender stratification in Kenya’ (1991) *Social Forces* 69, no. 4: 1063-1083 at 1064.

<sup>43</sup> Swaine op cit note 79 at 13.

of men and their communities; or their central roles in producing and sustaining children, social structure, and social capital.<sup>44</sup> According to Walker, social capital is defined as ‘the rules, norms, obligations, reciprocity and trust embedded in social relations, social structures and a society’s institutional arrangements that enable its members to achieve their individual and community objectives.’<sup>45</sup> This thesis is cognisant that some people may fluctuate between gender understood as the binary division of male and female or even express multiple genders at the same time.<sup>46</sup> However, although GBV can refer to violence committed against people who identify with a gender other than woman or girl, in this thesis, GBV refers to Violence against Women (VAW) (in this thesis, the term also being an umbrella for girls)<sup>47</sup> for the reason that women have been the primary victims of conflict-related GBV in the CAR. From a legal perspective, GBV has been defined by the CEDAW Committee as:

Violence that is directed against a woman because she is a woman or that affects women disproportionately. It includes acts that inflict physical, mental or sexual harm or suffering, threats of such acts, coercion and other deprivations of liberty. (In the Committee’s understanding, gender-based violence) impairs or nullifies the enjoyment by women of human rights and fundamental freedoms under general international law or under human rights conventions (and constitutes) discrimination within the meaning of Article 1 (CEDAW).<sup>48</sup>

Conflict-related sexualized violence (CRSV), which often falls under the umbrella of GBV, has specifically been addressed by the ‘Women, Peace and Security’ (WPS) agenda of the UN Security Council (UN SC).<sup>49</sup> The term regroups the following acts: ‘rape, forced impregnation, forced sterilization, forced abortion, forced prostitution, sexual exploitation, trafficking, sexual enslavement, forced circumcision, castration, forced nudity or any other

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<sup>44</sup> Margaret Urban Walker ‘Gender and violence in focus: A background for gender justice in reparations’ in Ruth Rubio-Marín, ed. *The gender of reparations: unsettling sexual hierarchies while redressing human rights violations* (2009) at 48.

<sup>45</sup> Margaret Urban Walker ‘Gender and violence in focus: A background for gender justice in reparations’ in Ruth Rubio-Marín, ed. *The gender of reparations: unsettling sexual hierarchies while redressing human rights violations* (2009) at 48 citing Caroline O. N. Moser ‘The Gendered Continuum of Violence and Conflict: An Operational Framework’ in *Victims, Perpetrators or Actors?* Moser & Clark at 43.

<sup>46</sup> Stevi Jackson ‘Interchanges: Gender, sexuality and heterosexuality: The complexity (and limits) of heteronormativity’ (2006) *Feminist Theory*, 7(1), 105–121 at 108.

<sup>47</sup> I am aware that GBV has a differentiated impact on girl children, but a full exploration of the differences is beyond the scope of this work.

<sup>48</sup> Elisabeth Veronika Henn *International Human Rights Law and Structural Discrimination* (2019) 15 citing CEDAW, General Recommendation 19, 1992, paras 6, 7.

<sup>49</sup> *Ibid* at 17 referring to the UNSC resolutions 1325 (2000), 1820 (2008), 1888 (2009), 1960 (2010), 2106 (2013) and 2122 (2013), to which we can add resolutions 2242 (2015), 2467 (2019), 2493 (2019).

form of sexualized violence of comparable gravity.’<sup>50</sup> Because this framework is based on international criminal law (ICL), these acts would have to be a constituent element of a crime against humanity, genocide, or war crime to be prosecuted.<sup>51</sup> CRSV has also been defined by the UN Secretary-General as ‘sexual violence occurring in a conflict or post-conflict setting that has a direct or indirect causal link with the conflict itself.’<sup>52</sup> It therefore ‘includes manifestations of violence that may reach the tactic of war threshold as well as sexual violence against civilians within the wider context of the conflict.’<sup>53</sup> VAW is a broader category than CRSV, as it goes beyond sexual violence. It is argued in this thesis that this type of violence almost always falls under the category of GBV, the two terms will therefore be used interchangeably.

Walker proposes to divide conflict-related VAW into four categories. First, ‘Gender-Normative Violence and Harm,’ where VAW occurs because of pre-existing gender norms.<sup>54</sup> This type of violence can arguably apply to all categories of VAW in most circumstances since studies show that, generally, the social construction of gender has an impact on the treatment of women in times of conflict.<sup>55</sup> The Nairobi Declaration on the Right of Women and Girls to a Remedy and Reparation (Nairobi Declaration) of 2007 adopts the same analysis.<sup>56</sup> In that respect, the UN Secretary-General has observed that conflict-related VAW, in the CAR, draws on pre-existing structural inequalities and patriarchal norms.<sup>57</sup> He notes that women have been the primary targets of CRSV in part because of pre-existing gender norms according to which women are ‘the symbolic repositories of family and national “honour”’ and ‘transmitters of cultural and ethnic identity.’<sup>58</sup> As for the conflict of 2003, the

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<sup>50</sup> Ibid at 17-18 citing Stop rape now – UN Action against Sexual Violence in Conflict, *Analytical and Conceptual Framing of Conflict-related Sexual Violence*, June 2011.

<sup>51</sup> Ibid at 18.

<sup>52</sup> Fionnuala Ní Aoláin, Catherine O’Rourke & Aisling Swaine ‘Transforming reparations for conflict-related sexual violence: Principles and practice’ (2015) *Harv. Hum. Rts. J.* 28: 97 at 98 referring to *Resolution 1888 (2009) on Women, Peace and Security*, supra note 291, para. 5.

<sup>53</sup> Ibid at 98.

<sup>54</sup> Walker op cit note 133 at 49/ For a brief definition of gender norms, see the European Institute for Gender Equality’s website, online at: <https://eige.europa.eu/thesaurus/terms/1194> (Consulted on the 30<sup>th</sup> of January 2023): Gender norms are defined as ‘Standards and expectations to which women and men generally conform, within a range that defines a particular society, culture and community at that point in time.’

<sup>55</sup> Oosterveld op cit note 66 at 452.

<sup>56</sup> Nairobi Declaration on Women’s and Girls’ Right to a Remedy and Reparation (2007), Preamble para.4, online at: [https://www.fidh.org/IMG/pdf/NAIROBI\\_DECLARATIONeng.pdf](https://www.fidh.org/IMG/pdf/NAIROBI_DECLARATIONeng.pdf).

<sup>57</sup> *Report of the Secretary-General on conflict-related sexual violence*, SC, 2018, UN Doc S/2018/250, para. 13, online at: <https://documents-dds-ny.un.org/doc/UNDOC/GEN/N18/083/25/PDF/N1808325.pdf?OpenElement> / Also see United Nations Office for the Coordination of Humanitarian Affairs (OCHA) *Central African Republic - Gender-based violence: a scourge with devastating consequences* (oct. 2022), online at: <https://reports.unocha.org/en/country/car/card/3wnXz0h5EQ/>.

<sup>58</sup> S/2018/250 supra note 145, para 13.

FIDH reports that: ‘The perpetrators of rape and other types of sexual violence target victims because of their real or imagined social, ethnic or religious ties to the groups they are battling. These crimes are also perpetrated to terrorize and humiliate populations, rupture the family and social circle of the victims and destroy communities that are perceived as enemies.’<sup>59</sup> The CEDAW Committee finally outlines that pre-existing socio-economic inequalities compound VAW committed by all parties to the conflicts that started in 2012.<sup>60</sup> Moreover, gender frequently inform the forms that ‘violence takes, the impact it has on the survivor, and the reactions of families and communities,’<sup>61</sup> as will be seen below.

Secondly, 'Sex-, Reproductive-, and Care-Specific Violence' is a type of violence that affects ‘women's sexuality, reproductive capacity, and role as caregivers.’<sup>62</sup> In the CAR, CRSV, including rape, sexual violence,<sup>63</sup> and sexual slavery<sup>64</sup> among others, has been widespread and has affected all genders, although mostly women. In the period from October 26, 2002, to March 15, 2003, the members of the MLC committed widespread acts of sexual violence<sup>65</sup> that fall under the meaning of article 28(a) of the Rome Statute, for war crimes and crimes against humanity.<sup>66</sup> During this period, it was also reported that physical violence had

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<sup>59</sup> FIDH op cit note 132 at 12.

<sup>60</sup> Supra note 132, CEDAW/C/CAF/CO/1-5 at §11.

<sup>61</sup> UN *International, Impartial and Independent Mechanism IIIM Gender Strategy and Implementation Plan*, abridged version (2022), at 9, online at: <https://iiim.un.org/wp-content/uploads/2022/10/Gender-Strategy-Implementation-AbridgedEnglish.pdf>.

<sup>62</sup> Walker op cit note 133 at 50.

<sup>63</sup> Supra note 132, CEDAW/C/CAF/CO/1-5 at §15a/ Also see, United States Department of State op cit note 119/ FIDH op cit note 132 at 12.

<sup>64</sup> General Assembly, Seventieth session, Agenda item 68, Promotion and protection of the rights of children *Children and armed conflict, Report of the Secretary-General* (2016) A/70/836–S/2016/360 §35/ Sexual slavery has been defined by the United Nations as: ‘the sexual exploitation of individuals through the use or threat of force, often occurring in times of armed conflict or belligerent occupation. There may be no financial gain in sexual slavery, unlike in the case of exploitation of prostitution (another contemporary form of slavery).’ Forced or early marriage are considered as ‘slavery-like practices which exist within the context of marriage’ – See United Nations Voluntary Trust Fund on Contemporary Forms of Slavery *The Human Faces of Modern Slavery* at 7, online at:

<https://www.ohchr.org/sites/default/files/Documents/Issues/Slavery/UNVTCFS/UNSlaveryFund.pdf/>

Furthermore, ‘The finalized common elements of crime for sexual slavery listed under the crime against humanity and war crimes sections read: 1. The perpetrator exercised any or all of the powers attaching to the right of ownership over one or more persons, such as by purchasing, selling, lending or bartering such a person or persons, or by imposing on them a similar deprivation of liberty. 2. The perpetrator caused such person or persons to engage in one or more acts of a sexual nature.’ See Valerie Oosterveld ‘Sexual slavery and the International Criminal Court: advancing international law’ (2003) *Mich. J. Int'l L.* 25: 605 at 641 referring to *Report of the Preparatory Commission for the International Criminal Court, Finalized Draft Text of the Elements of Crimes*, Preparatory Comm'n for the International Criminal Court, addendum part II, U.N. Doc. PCNICC/2000/1/Add.2 (2000) at 13 n. 18, 34 n.53, 44 n.65.

<sup>65</sup> See FIDH, *The political transition closes against a backdrop of impunity: How will the ICC respond?* (2005) at 27 / Also see ICC, *Situation in the Central African Republic in the Case of the Prosecutor v. Jean-Pierre Bemba* (2016), case information sheet, ICC-01/05-01/08, online at: <https://www.icc-cpi.int/sites/default/files/CaseInformationSheets/BembaEng.pdf>.

<sup>66</sup> ICC Ibid.

been perpetrated by the militia under the command of Miskine,<sup>67</sup> former rebel leader and founder and head of the *Democratic Front of the Central African People* (FDPC),<sup>68</sup> as well as Bozizé's rebels.<sup>69</sup> All parties to the conflict that erupted in August 2012 allegedly committed CRSV.<sup>70</sup> Large-scale sexual violence has reportedly been committed by the *anti-balaka* and the *ex-seleka*.<sup>71</sup> Ngaïssona, alleged former senior leader and the 'National General Coordinator' of the *Anti-Balaka* movement, has been charged by the Prosecutor of the ICC of the war crime of rape and of the crime against humanity of rape that fall under the meaning of article 25(3)(c) and article 25(3)(d) of the Rome Statute.<sup>72</sup> The charges have been confirmed by the Pre-Trial Chamber II of the ICC and his trial is currently ongoing.<sup>73</sup> Smaller armed groups such as the *RJ movement*,<sup>74</sup> 3R<sup>75</sup> and UPC fighters<sup>76</sup> also presumably perpetrated sexual violence. Meanwhile, the LRA has reportedly committed numerous attacks on civilians, including rape.<sup>77</sup> During the presidential elections of 2020, the *Coalition of Patriots for Change* launched an offensive on Bangui, resulting in grave violations against the civilian population, including sexual violence.<sup>78</sup> Finally, allegations of sexual crimes have been made against international contingents,<sup>79</sup> sometimes under mandate of the UN.<sup>80</sup>

Even though going beyond the scope of 'Sex-, Reproductive-, and Care-Specific Violence', it can also be noticed that the Non-Governmental Organisation (NGO) *Girls not Brides* points out that since the outbreak of the conflict in August 2012, cases of child

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<sup>67</sup> MINUSCA op cit note 119 at 42.

<sup>68</sup> Al Jazeera *UN imposes sanctions on Central African Republic rebel leader* (2020), online at: <https://www.aljazeera.com/news/2020/4/21/un-imposes-sanctions-on-central-african-republic-rebel-leader>.

<sup>69</sup> MINUSCA op cit note 119 at 46.

<sup>70</sup> The International Commission of Inquiry on the Central African Republic (S/2014/928), 22 December 2014, paras. 30-38.

<sup>71</sup> MINUSCA op cit note 119 at 120/ United States Department of State op cit note 119.

<sup>72</sup> ICC, *Situation in the Central African Republic II, The Prosecutor v. Alfred Yekatom and Patrice-Edouard Ngaïssona*, case information sheet, ICC-01/14-01/18, online at: <https://www.icc-cpi.int/sites/default/files/2022-04/yekatom-ngaïssonaEn.pdf>.

<sup>73</sup> ICC's website, Yekatom and Ngaïssona case, online at: <https://www.icc-cpi.int/carII/yekatom-ngaïssona> (Last consulted on the 30<sup>th</sup> of January 2023).

<sup>74</sup> United States Department of State op cit note 119.

<sup>75</sup> UN Security Council *Conflict-Related Sexual Violence* (30 March 2021), UN Doc S/2021/312, para. 16: 'Notably, the leader of Retour, réclamation et réhabilitation, Sidiki Abbas, was added to the United Nations sanctions list in August 2020 for his involvement in planning, directing or committing acts of sexual violence including rape, as well as abduction and forced displacement, in the Central African Republic.'

<sup>76</sup> Human Rights Watch op cit note 119.

<sup>77</sup> MINUSCA op cit note 119 at 79.

<sup>78</sup> S/2021/312 supra note 163, para. 20.

<sup>79</sup> The Guardian, Sandra Laville *UN aid worker suspended for leaking report on child abuse by French troops* (2015)/ Le journal Le Parisien, *Abus sexuels en Centrafrique : le parquet de Paris ouvre une nouvelle enquête* (2016)/ United States Department of State op cit note 119.

<sup>80</sup> Amnesty International *République Centrafricaine. Il faut que les Casques bleus soupçonnés du viol d'une fillette et de deux homicides aveugles fassent l'objet d'une enquête* (2015) / Human Rights Watch *République Centrafricaine: Des viols commis par des Casques bleus* (2016)/ United States Department of State op cit note 119/ Report of the Secretary-General *Central African Republic*, 2019, UN Doc S/2019/498 §78.



marriage have increased because families see marriage as a way to protect their daughters from sexual violence in times of insecurity or as a way to access resources for the rest of the family.<sup>81</sup> Child marriage is defined by the United Nations (UN) as ‘any formal marriage or informal union between a child under the age of 18 and an adult or another child.’<sup>82</sup> This practice is widespread in the CAR.<sup>83</sup> For example, in the locality of Bamingui-Bangoran, early marriage is common and often leads to students dropping out of school.<sup>84</sup> Child marriage is equated by the UN with forced marriage defined as ‘a marriage in which one and/or both parties have not personally expressed their full and free consent to the union. A child marriage is considered to be a form of forced marriage, given that one and/or both parties have not expressed full, free and informed consent.’<sup>85</sup> Forced marriage has also been widely practiced by armed groups,<sup>86</sup> with Fulani girls ‘being forcibly married to members of armed groups with whom Fulani elements are aligned,’<sup>87</sup> for example.

Third, 'Gender-Skewed Violence and Harm' relates to gender-neutral violence that predominantly and disproportionately affects women.<sup>88</sup> The main example is population displacement, which often leads people to live in formal or informal refugee areas.<sup>89</sup> In the CAR, the displacement of populations has been the main side effect of the conflicts. By way of illustration, since the overthrow of François Bozizé in March 2013 until the beginning of 2014, the number of Internally Displaced Persons (IDP) was estimated at 900,000.<sup>90</sup> In 2016 alone, more than 385,000 people were displaced across the country.<sup>91</sup> The tumultuous presidential elections of December 2020 led to a further increase in refugees and IDPs.<sup>92</sup>

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<sup>81</sup> Report of the United Nations Secretary-General, *Conflict-related sexual violence*, 2019, UN Doc S/2019/280, at 13, online at: <https://www.un.org/sexualviolenceinconflict/wp-content/uploads/2019/04/report/s-2019-280/Annual-report-2018.pdf>.

<sup>82</sup> UNICEF’s website, *Child marriage*, online at: <https://www.unicef.org/protection/child-marriage>.

<sup>83</sup> UNICEF *Child Marriage in West and Central Africa at a Glance* (2018) at 4, online at: <https://www.unicef.org/wca/media/2596/file>.

<sup>84</sup> Norwegian Refugee Council *A girl’s education: An investment in the Future* (April 2018), online at: <https://www.nrc.no/news/2018/april/a-girls-education-an-investment-in-the-future/>.

<sup>85</sup> OHCHR’s website, *Child and forced marriage, including in humanitarian settings*, (last consulted on the 30<sup>th</sup> of January 2023), online at: <https://www.ohchr.org/en/women/child-and-forced-marriage-including-humanitarian-settings>.

<sup>86</sup> Report of the Secretary-General, *on children and armed conflict in Central African Republic*, 2016, UN Doc S/2016/133.

<sup>87</sup> S/2021/312 supra note 163, para. 20.

<sup>88</sup> Walker op cit note 133 at 51.

<sup>89</sup> Ibid at 51.

<sup>90</sup> Supra note 132, CEDAW/C/CAF/CO/1-5 at §17.

<sup>91</sup> United States Department of State op cit note 119.

<sup>92</sup> Al Jazeera UN: *Nearly 60000 have fled Central African republic Violence* (15 Janv 2021), online at: <https://www.aljazeera.com/news/2021/1/15/nearly-60000-have-fled-central-african-republic-violence-un/> Also see International Committee of the Red Cross *It’s time to end the violence in the Central African Republic* (12 February 2021), online at: <https://www.icrc.org/en/document/it-time-to-end-violence-in-central-african-republic>.

Refugees are ‘people who have fled war, violence, conflict or persecution and have crossed an international border to find safety in another country,’<sup>93</sup> while IDP ‘have not crossed a border to find safety.’<sup>94</sup> Not only is sexual violence one of the leading causes of displacement for women,<sup>95</sup> but it is also a type of violence exacerbated once they live in IDP or refugee camps.<sup>96</sup> In addition, looting and the destruction of property have disproportionately affected women.<sup>97</sup> The United Nations Development Programme (UNDP) notes that: ‘In countries where women are not able to hold property rights, this is a particular challenge for women who become heads of household as a result of a human rights violation.’<sup>98</sup> In the CAR, with the looting of their property, women are often unable to provide for themselves or those in their care,<sup>99</sup> which is partly explained by the fact that, in customary law, inheritance, and property rights are passed from male to male, leaving widowed women without access to matrimonial assets.<sup>100</sup> According to customary law, widows or single women can enjoy the usufruct of the land but cannot own it.<sup>101</sup>

Fourth, 'Gender-Multiplied Violence and Harm' happen when 'some forms of violent harm or loss precipitate further losses that enlarge the impact of, and may, in the end, be worse or less manageable than, the original violation or loss itself.'<sup>102</sup> This violence can be ‘accentuated by social or biological factors that make women suffer more than their male counterparts from certain types of violence. Multipliers are also factors that predictably play a role in additional losses or exposure to violence, even if unintentional.’<sup>103</sup> Sexual violence, for example, generally has disastrous consequences on the physical<sup>104</sup> and mental<sup>105</sup> health of

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<sup>93</sup> UNHCR’s website, *What is a refugee?*, (last consulted on the 30th of January 2023), online at: <https://www.unhcr.org/what-is-a-refugee.html>.

<sup>94</sup> UNHCR’s website, *Internally Displaced People*, (last consulted on the 30th of January 2023), online at: <https://www.unhcr.org/internally-displaced-people.html>.

<sup>95</sup> S/2018/250 supra note 145, para 1.

<sup>96</sup> Supra note 132, CEDAW/C/CAF/CO/1-5 at §17.

<sup>97</sup> Ibid at §15.

<sup>98</sup> UNDP *From Justice for the Past to Peace and Inclusion for the Future: A Development Approach to Transitional Justice* (2020) at 27.

<sup>99</sup> FIDH op cit note 132 at 13.

<sup>100</sup> Margaret Owen & Laura Castellan *Issues of Discrimination in Widowhood in Central African Republic that Require Addressing in the Context of the CEDAW*, online [https://www.ecoi.net/en/file/local/1075398/1930\\_1405599122\\_int-cedaw-ngo-caf-17345-e.pdf](https://www.ecoi.net/en/file/local/1075398/1930_1405599122_int-cedaw-ngo-caf-17345-e.pdf).

<sup>101</sup> Norwegian Refugee Council *Consequences of Evicting Widows: Displacement and women’s housing, land and property rights in the Central African Republic* (2015), online at:

<https://reliefweb.int/sites/reliefweb.int/files/resources/Consequences%20Of%20Evicting%20Widows.pdf>.

<sup>102</sup> Walker op cit note 133 at 53.

<sup>103</sup> Ibid at 53.

<sup>104</sup> Naomi Cahn ‘Beyond Retribution and Impunity: Responding to War Crimes of Sexual Violence’ (2004) *GWU Law School Public Law Research Paper* No 104 at 18: ‘The consequences for women’s health range from unwanted pregnancies, miscarriages caused by the abuse, illness or death from illegal abortion, damaged vaginas resulting from rape or knives or gunshots, and sexually transmitted diseases, including HIV-AIDS.’

<sup>105</sup> Ibid at 26.



victims, as well as on their economic well-being. It can also lead to the repudiation of the victim by her husband.<sup>106</sup> Traumatic symptoms can prevent victims from working or performing daily tasks.<sup>107</sup> In addition, victims often suffer from stigmatisation and marginalisation,<sup>108</sup> preventing them from seeking medical care and filing complaints against the perpetrators.<sup>109</sup> The already fragile socio-economic conditions of women have also deteriorated drastically due to their ‘exclusion, the physical consequences of rape (injuries, unwanted pregnancy, AIDS), or the mere fact that they are no longer able (physically or psychologically) to engage in their usual subsistence activities.’<sup>110</sup> Additionally, the disintegration of the country's social fabric has led to a higher rate of accusations of witchcraft,<sup>111</sup> of which women have been the primary target.<sup>112</sup> These witchhunts make them particularly vulnerable to torture and mob justice.<sup>113</sup> More generally, ‘ordinary’ VAW intensifies in post-conflict periods. Thus, the conflict appears as ‘a multiplier’ of ordinary violence.<sup>114</sup> Hence the need to also consider violence committed in the private sphere.<sup>115</sup>

As seen above, these four categories of violence are linked. The forms of violence that are enshrined in 'ordinary' gender norms are those that are most likely to be intensified during a conflict or post-conflict period.<sup>116</sup> The prevalence of child marriages and women's difficulties in claiming property rights are just a few examples. The focus on a ‘continuum’ of violence therefore helps predict the forms of violence that women are likely to experience in times of conflict and post-conflict.<sup>117</sup> It also allows one to avoid false divisions in how to apprehend this violence.<sup>118</sup> The work of Cockburn, for example, shows how a continuum of violence rests on ‘the line of continuity (...) between phases of peace and conflict (pre-war,

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<sup>106</sup> Cour Pénale Spéciale supra note 126 para. 363.

<sup>107</sup> Human Rights Watch op cit note 119.

<sup>108</sup> FIDH op cit note 132 at 26.

<sup>109</sup> Supra note 132, CEDAW/C/CAF/CO/1-5 at §15.

<sup>110</sup> Justiceinfo.net, Jean-Pierre Massias & Magalie Besse *Sexual Violence persists in CAR without justice, but what form of justice is needed?* (November 2019), online at: <https://www.justiceinfo.net/en/43074-sexual-violence-persists-in-car-without-justice-but-what-form-of-justice-is-needed.html>.

<sup>111</sup> Al Jazeera, Marco Simoncelli & David Lemmi *In Pictures: The Witch Hunts of Bangui: Elderly people in the war-torn Central African Republic are being accused of witchcraft, with fatal consequences* (Mars 2020), online at: <https://www.aljazeera.com/gallery/2020/3/24/in-pictures-the-witch-hunts-of-bangui/> / Also see, United States Department of State op cit note 119.

<sup>112</sup> General Assembly, *Report of the Independent Expert on the Situation of Human Rights in the Central African Republic*, (2016), UN Doc A/HRC/33/63.

<sup>113</sup> Ibid/ Also see Reuters, Lucy Jones *Central Africa witchcraft cops fight sorcery boom* (August 2002).

<sup>114</sup> Walker op cit note 133 at 55.

<sup>115</sup> Pamela Scully ‘Vulnerable women: A critical reflection on human rights discourse and sexual violence’ (2009) *Emory Int'l L. Rev.* 23: 113 at 117.

<sup>116</sup> Walker op cit note 133 at 31.

<sup>117</sup> Ibid at 23.

<sup>118</sup> Aoláin, O'Rourke & Swaine op cit note 140 at 105.

war-fighting, peace-making, and post-war).<sup>119</sup> Thus, while new forms of violence may emerge from the specific temporal moments of a conflict, others are tied to ideological roots that pre-exist the conflict.<sup>120</sup> According to Boesten: ‘Thinking in terms of a continuum allows us to see how much violence is hidden, institutionalized and/or normalized in everyday life, both in peacetime and wartime, in homes, in intimate relationships and in public spaces. The term allows us to see parallels between the extreme and the everyday, the public and the private, thereby not undermining the seriousness of the extreme but undercutting the normality of the everyday.’<sup>121</sup> This approach is essential for understanding the social, institutional and legal reforms needed once the conflict ends,<sup>122</sup> or a period of calm is achieved.

VAW is indeed widespread in the CAR.<sup>123</sup> It takes place mainly in the home<sup>124</sup> and often extends to socio-economic rights. In 2013, 33% of women who participated in a study on VAW said they were excluded from decisions about finances in their homes.<sup>125</sup> VAW is

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<sup>119</sup> Denisa Kostovicova, Vesna Bojicic-Dzelilovic & Marsha Henry ‘Drawing on the continuum: A war and post-war political economy of gender-based violence in Bosnia and Herzegovina’ (2020) *International Feminist Journal of Politics* 22, no. 2: 250-272 at 253 referring to Cynthia Cockburn ‘A Continuum of Violence: A Gender Perspective on War and Peace’ in Wenona Giles & Jennifer Hyndman (eds) *Sites of Violence: Gender and Conflict Zones* (2004).

<sup>120</sup> Ibid at 253.

<sup>121</sup> Boesten op cit note 112 at 514.

<sup>122</sup> Walker op cit note 133 at 23.

<sup>123</sup> See UNAIDS’s website, *Central African Republic adopts plan to address gender inequality in the AIDS response* (2021), online at:

[https://www.unaids.org/en/resources/presscentre/featurestories/2021/september/20210908\\_central-african-republic-gender](https://www.unaids.org/en/resources/presscentre/featurestories/2021/september/20210908_central-african-republic-gender) : ‘According to data from the MICS-6 survey published in 2021 by the government, with the support of the United Nations, 23.6% of women and girls between the ages of 15 and 49 years were married or entered into a marital union before the age of 15 years. More than 21% of central African women had undergone female genital mutilation. In January 2021 alone, 340 cases of gender-based violence, including 72 rapes, were collected by the gender-based violence information management system in the Central African Republic.’ / UN Women *Global Database on Violence against Women*, online at: <https://evaw-global-database.unwomen.org/fr/countries/africa/central-african-republic?typeofmeasure=2adb4f35f599429e8138b117fd26ae56>: 30% of women experience physical and/or sexual intimate partner violence in their lifetime / United States Department of State op cit note 119: ‘A legal aid centre in Bimbo for sexual and gender-based crimes reported receiving around 10 cases a week.’ / Médecins Sans Frontières “*The Tip of the Iceberg*”: *Stream of Patients offer Glimpse into Scale of Sexual Violence* (2018), available online at: <https://www.msf.org/-tip-iceberg-stream-patients-offer-glimpse-scale-sexual-violence>: Doctors Without Borders also reported treating 1914 victims of sexual violence in the first six months of 2018 alone.

<sup>124</sup> Cordaid *Tackling sexual violence in the Central African Republic: Insights from the women, peace and security barometer* (2020) 19, online at: <https://www.cordaid.org/en/wp-content/uploads/sites/11/2020/09/Tackling-sexual-violence-in-Central-African-Republic.pdf> / Also see Observatoire Pharos *Les Droits des Femmes en RCA: Des Actrices Majeures dans le Processus de Paix* (2018), online at: <https://www.observatoirepharos.com/pays/republique-centrafricaine/droits-femmes-rca-actrices-majeures-processus-de-paix-fr/>: ‘A recent study on domestic violence in West Africa notes that the primary threat to women in the region “is not a man with a gun or a stranger. It is their husbands.”’

<sup>125</sup> Aurelie-Clemence Moga-Kpely & Yang Zewei ‘Gender-Based Violence in Central African Republic’ (2013) *International Journal of Social Science and Humanity*, Vol. 3, No. 1, [www.ijssh.org/papers/183-G00017.pdf](http://www.ijssh.org/papers/183-G00017.pdf) / Also see UN Women supra note 100 at 32.

closely linked to the persistence of gender stereotypes and harmful patriarchal beliefs.<sup>126</sup> The CEDAW Committee reports that women and their communities sometimes see violent behaviour by husbands as expected and even an expression of love.<sup>127</sup> According to the Organisation for Economic Co-operation and Development (OECD) Center, in 2019, 80% of the female population justified domestic violence,<sup>128</sup> even though the Harvard Humanitarian Initiative notes that, in 2020, only 35% of the respondents of all genders found it acceptable.<sup>129</sup> This situation is often aggravated in times of conflict. In 2020, the Gender-Based Violence Information Management System (GBVIMS) recorded 9,216 GBV cases nationwide in the CAR, with more than a third committed by members of armed groups.<sup>130</sup> This number increased in 2022, with 11,732 cases recorded between January and June 2022, more than the total cases recorded in 2021.<sup>131</sup> Therefore, while VAW is closely linked to harmful patriarchal beliefs in ‘peacetime’, or instead periods of calm in the context of the CAR, this violence will likely be accentuated in periods of conflict and post-conflict.<sup>132</sup> This is why some authors argue for an analysis that goes beyond the vision of sexual violence as a weapon of war, that focuses on the perpetrator or a military strategy, to also take into account the structural factors that led to these crimes.<sup>133</sup> Ultimately, the conceptual tool of a continuum of violence makes it possible to move away from a minimalist conception of violence, that highlights VAW as a single event and understands it only as direct violence, to adopt a more global vision of violence shaped by structural and cultural factors.

In that respect, Kelly’s work shows that sexual violence, for example, is part of ‘structural rather than purely individual or emotional explanations.’<sup>134</sup> VAW is therefore

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<sup>126</sup> Committee on the Elimination of Discrimination against Women, *Consideration of reports submitted by States parties under Article 18 of the Convention on the Elimination of All Forms of Discrimination against Women* (2013) CEDAW/C/CAF/1-5, § 207.

<sup>127</sup> *Ibid* § 208.

<sup>128</sup> OECD *Gender, Institutions and Development Database* (2019), online at: <https://oe.cd/ds/GIDDB2019>.

<sup>129</sup> Harvard Humanitarian Initiative *Sondage, Paix, Justice et Sécurité, République Centrafricaine, Rapport 5 – Novembre 2020* (2020), at 24, online at :

[http://www.peacebuildingdata.org/sites/m/pdf/CAR\\_Poll5\\_FR\\_final.pdf](http://www.peacebuildingdata.org/sites/m/pdf/CAR_Poll5_FR_final.pdf).

<sup>130</sup> UNFPA *In the Central African Republic, the devastating price women and girls pay for war* (12 July 2021), online at: <https://www.unfpa.org/news/central-african-republic-devastating-price-women-and-girls-pay-war>.

<sup>131</sup> OCHA *Supra* note 145.

<sup>132</sup> Samantha Bradley ‘Domestic and family violence in post-conflict communities: International human rights law and the state’s obligation to protect women and children’ (2018) *Health and human rights* 20, no. 2 at 123.

<sup>133</sup> Alexandra Lily Kather *What do intersectionality, feminist leadership and feminist foreign policy have to do with justice?* (October 2022), online at: <https://www.boell.de/en/2022/10/21/justice-sexual-and-gender-based-crimes-conflict-what-does-intersectionality-feminist>

<sup>134</sup> Kostovicova, Bojicic-Dzelilovic & Henry *op cit* note 207 at 252 referring to Liz Kelly ‘The Continuum of Sexual Violence’ in Mary Maynard Jalna Hanmer (eds) *Women, Violence and Social Control* (1987).

often triggered by the exacerbation of gender inequalities.<sup>135</sup> Thus, the continuum makes it possible to understand how unequal political, economic, and social structures make women more vulnerable to violence. Here, Galtung's theory is key to understanding how different forms of violence are 'interdependent and mutually reinforcing.'<sup>136</sup> According to his theory, violence, and in this thesis VAW, is both personal and structural. By personal, he means that there is a direct causal link between the person or agent who commits the act of violence (the subject) and the person who is the victim of this violence (the object).<sup>137</sup> By structural, he means that there is no direct link between the victim of violence and an identifiable perpetrator. It is instead a diffuse causality entangled in political and social structures that goes beyond the individual.<sup>138</sup> According to him, these two types of violence almost never exist completely isolated from each other. Personal violence often presupposes the overt or latent presence of structural violence and vice versa.<sup>139</sup> Thereby, although these two forms of violence can occasionally occur in isolation, they are nevertheless more frequently linked and overlapping. Personal VAW has a negative effect on the human, social and economic development of a country in particular because it has intergenerational consequences.<sup>140</sup> It is also considered a public health problem and an obstacle to sustainable development by the World Health Organization (WHO).<sup>141</sup> The Declaration on the Elimination of Violence against Women, in its preamble, draws a parallel between VAW and gender inequality by noting that: 'violence against women is an obstacle to the achievement of equality, development and peace.'<sup>142</sup> Structural violence, on the other hand, often creates the conditions for all other forms of violence, by creating power imbalances between women and

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<sup>135</sup> Meghan Campbell and Geoffrey Swenson 'Legal pluralism and women's rights after conflict: The role of CEDAW' (2016) *Colum. Hum. Rts. L. Rev.* 48: 112 at 119/ UN Committee on the Elimination of Discrimination Against Women (CEDAW), *General Recommendation No. 30 on women in conflict prevention, conflict, and post-conflict situations*, 18 October 2013, CEDAW/C/GC/30, para. 34.

<sup>136</sup> Kostovicova, Bojicic-Dzelilovic & Henry op cit note 207 at 253.

<sup>137</sup> Johan Galtung 'Violence, peace, and peace research' (1969) *Journal of peace research* 6, no. 3 167-191 at 178.

<sup>138</sup> Ibid at 178.

<sup>139</sup> Ibid at 177.

<sup>140</sup> GBV IMS *Rapport annuel* (2019), online at :

[https://reliefweb.int/sites/reliefweb.int/files/resources/rapport\\_annuel\\_des\\_statistiques\\_vbg\\_de\\_2019\\_rca\\_final.pdf](https://reliefweb.int/sites/reliefweb.int/files/resources/rapport_annuel_des_statistiques_vbg_de_2019_rca_final.pdf).

<sup>141</sup> WHO *Respect Women : Preventing Violence Against Women* (2019) at 4.

<sup>142</sup> UN General Assembly, *Declaration on the Elimination of Violence against Women*, 20 December 1993, A/RES/48/104, Preamble § 4, available at: <https://www.refworld.org/docid/3b00f25d2c.html>.

men.<sup>143</sup> The WTO indeed notes that VAW is rooted in gender inequality.<sup>144</sup> Structural violence most often impede on women's ESC rights which are themselves critical factor in ensuring the realisation of other categories of rights,<sup>145</sup> such as access to justice,<sup>146</sup> the right to peace, or a clean environment.<sup>147</sup> In conflict and post-conflict periods, structural violence is reinforced and impacts the ability of women and girls to survive and recover from conflict,<sup>148</sup> and the humanitarian crisis<sup>149</sup> that often ensues.

In the CAR, in 2013, the year when the conflict between the *Seleka* and the *anti-Balaka* was at its height, a UN report pointed out that work was divided according to strict gender criteria: women, in particular those living in rural areas, were generally assigned to domestic work and reproduction, while men were salaried.<sup>150</sup> Even in the labour force, women earned meagre incomes,<sup>151</sup> rarely held leadership positions,<sup>152</sup> and seldom worked in the formal sector.<sup>153</sup> This strict division of labour impacts how women recover, among other things, financially from conflict, particularly if their husband, who was the breadwinner, has died or is missing.<sup>154</sup> Women living in rural areas also barely have access to health care

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<sup>143</sup> Galtung op cit note 225 at 177/ See also James Gilligan *Violence: Reflections on a national epidemic* (1997) at 196: 'Structural violence is (...) the main cause of behavioral violence on a socially and epidemiologically significant scale (from homicide and suicide to war and genocide). The question as to which of the two forms of violence – structural or behavioral – is more important, dangerous, or lethal is moot, for they are inextricably related to each other, as cause to effect.'

<sup>144</sup> WTO supra note 229 at 4.

<sup>145</sup> Joseph Oloka-Onyango & Sylvia Tamale 'The personal is political, or why women's rights are indeed human rights: An African perspective on international feminism' (1995) *Hum. Rts. Q.* 17: 691 at 712.

<sup>146</sup> David Lawson, Adam Dubin & Lea Mwambene *Ensuring African Women's Access to Justice: Engendering Rights for Poverty Reduction in Sub-Saharan Africa* (2019) 4/ See also Natalia Szablewska & Olga Jurasz 'Sexual and gender-based violence: the case for transformative justice in Cambodia' (2018) *Global Change, Peace & Security*, 1–20 at 20/ Frances Raday 'Gender and Democratic Citizenship: The Impact of CEDAW' (2012) *International Journal of Constitutional Law* 10, no. 2: 512–30, at 515.

<sup>147</sup> Oloka-Onyango & Tamale op cit note 233 at 712.

<sup>148</sup> World Peace Foundation, Dyan Mazurana & Keith Proctor *Gender, Conflict and Peace* (2013), at 5, online at: <https://sites.tufts.edu/wpf/files/2017/04/Gender-Conflict-and-Peace.pdf>.

<sup>149</sup> OHCHR's website, *Humanitarian crisis and emergencies*, online at:

<https://www.ohchr.org/en/taxonomy/term/878>

'A humanitarian crisis is defined as a singular event or a series of events that are threatening in terms of health, safety or well-being of a community or large group of people. It may be an internal or external conflict and usually occurs throughout a large land area.' – Thanks go to M.B. (this definition comes from her own research and contribution to my class).

<sup>150</sup> CEDAW/C/CAF/1-5 supra note 214 § 186 and § 190.

<sup>151</sup> Ibid §236.

<sup>152</sup> For the farming industry see CEDAW/C/CAF/1-5 supra note 214 § 189/ And for the media: CEDAW/C/CAF/1-5 supra note 214 § 194.

<sup>153</sup> CEDAW/C/CAF/1-5 supra note 214 §323/ Also see UN Women supra note 100 at 30: 'The informal sector in the CAR absorbs about 99% of the active population. More than 80% of women work in the informal sector, particularly the rural economy and petty trade. Although Central African women have the same legal right to employment as men, their low level of education and qualification does not allow them to have the same access as men to the labor market and to certain jobs.'

<sup>154</sup> Groupe de la Banque Africaine de Développement *Profil Genre de la République centrafricaine* (2011) at 2.5.3 & 2.5.4.

services. This access has been further compromised due to the on-going conflict. Most displaced persons are women,<sup>155</sup> and service provisions rarely reach remote areas, especially when they are under the control of armed groups.<sup>156</sup> Human Rights Watch pointed out that in 2017, half of the women and girls interviewed did not have access to medical care after a rape due, among other things, to the destruction of health structures.<sup>157</sup> In May 2022, 30% of the Central African population were either refugees or IDP.<sup>158</sup> While some basic health care is provided at some IDP sites, pregnant women generally need special care, especially those experiencing pregnancy complications.<sup>159</sup> This lack of access to health services makes the maternal mortality rate one of the highest in the world and therefore affects women disproportionately.<sup>160</sup>

Additionally, in 2018, the CAR was globally ranked as the state in which girls had the least access to education,<sup>161</sup> with an adult literacy rate of 37.4%. While the male literacy rate was 49.51%, the female literacy rate was 25.76%, showing a large gender gap.<sup>162</sup> The proportion of women in tertiary education has remained low with school attendance dropping to 70% by the time a girl turns 13<sup>163</sup> due to domestic chores, early marriage and pregnancy, among other reasons.<sup>164</sup> This situation has been aggravated by the current humanitarian crisis

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<sup>155</sup> UNFPA supra note 218.

<sup>156</sup> S/2021/312 supra note 163, para. 14.

<sup>157</sup> Human Rights Watch op cit note 119.

<sup>158</sup> Médecins Sans Frontières *Violence and displacement in Ippy mirror people's daily reality in CAR* (May 2022), online at: <https://reliefweb.int/report/central-african-republic/violence-and-displacement-ippy-mirror-peoples-daily-reality-car>.

<sup>159</sup> Ibid.

<sup>160</sup> United States Department of State op cit note 119/ UN Women, *Central African Republic* (consulted on the 19<sup>th</sup> of July 2022), online at: <https://data.unwomen.org/country/central-african-republic/> / Also see OCHA *Central African Republic: Overcoming challenges to give their best* (Last updated on the 18<sup>th</sup> of March 2022), online at: <https://reports.unocha.org/en/country/car/card/5JBAIwceyX/> / UN Women supra note 100 at viii.

<sup>161</sup> Observatoire Pharos supra note 212.

<sup>162</sup> See UNESCO's website, *Central African Republic* (consulted on the 10<sup>th</sup> of September 2020), online at: <http://uis.unesco.org/country/CF> / Also see World Bank, *Central African Republic: Gender Landscape*, online at:

<https://documents1.worldbank.org/curated/en/099831206302230894/pdf/IDU0f8e805b10d047040400b25e01ae8150f0dd8.pdf> / UN Women supra note 100 at 47: According to the MICS6-RCA 2018-2019 survey, the illiteracy rate is 75.1% among women and 52.6% among men.

<sup>163</sup> Borgen Project *Improving Girls' Education in the Central African Republic*, online at: <https://borgenproject.org/improving-girls-education-in-the-central-african-republic/>.

<sup>164</sup> CEDAW/C/CAF/1-5 supra note 214 § 298 / Also see UN Women supra note 100 at 47: '(...) the central role of women in household maintenance and the recovery of the country does not guarantee them equitable access to educational opportunities: While 68% of boys go from primary to secondary school, this does not concern 46% of girls, i.e. an index of 0.68 (...) Several factors are responsible (...), in particular, traditional roles and norms that encourage early marriages and pregnancies (among the highest in Africa), ignorance of laws promoting compulsory access for all to school, violence at school or on the way to school.'



with an estimated 1.4 million children in need of humanitarian assistance,<sup>165</sup> and some refugee girls being married off early and therefore often dropping out of school.<sup>166</sup> Women also remain vastly underrepresented in politics, which may affect their inclusion in the peace process as well as their access to TJ mechanisms. On March 7, 2019, only three women were elected to the executive office, which was not in line with the law on parity imposing a minimum representation of 35% of women in public and private institutions for a transitional period of 10 years.<sup>167</sup> As of December 2020, only one woman, Catherine Samba-Panza, was running in the presidential elections out of 17 candidates, and insecurity in the country prevented many women from voting.<sup>168</sup>

In the end, the legislative elections of February 2021 resulted in only 8.6% of seats in parliament being held by women.<sup>169</sup> In 2021, the government had only 5 women ministers out of 39. In the regions, 12.5% of prefectures were headed by women, and 11.3% of sub-prefectures.<sup>170</sup> In rural areas, women are often marginalised in decision-making bodies such as the village council and the town council.<sup>171</sup> At the community level, there are some female leaders. Nonetheless, ‘(a)ccess to these positions is by lineage, and the woman is only eligible if there is no credible male successor to be elected.’<sup>172</sup> Overall, this lack of political representation can be partly explained by ‘onerous household duties, pregnancy and childbirth, social and cultural constraints, poverty, illiteracy, a lack of political instruction and leadership, a lack of self- confidence, fear of facing up to men, of failing and of appearing ridiculous, and disorganization.’<sup>173</sup>

Therefore, ultimately, talking about a continuum of violence makes it possible to consider the cultural violence that legitimate VAW in its personal or structural form.<sup>174</sup> This observation goes with an analysis of the concept of gender. Indeed, gender, understood as a social construct, is often defined as being more than a role or an identity passed through

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<sup>165</sup> UNICEF *Central African Republic Humanitarian Situation Report: September-October 2022* (December 2022), online at: <https://reliefweb.int/report/central-african-republic/unicef-central-african-republic-humanitarian-situation-report-september-october-2022>.

<sup>166</sup> News Trust, Kieran Guilbert *Child marriage threatens future of young Central African Republic refugees in Cameroon* (2016), online at: <https://news.trust.org/item/20161108060345-ih2oh/>. / Also see UN Women supra note 100 at viii.

<sup>167</sup> Supra note 168 S/2019/498, §14.

<sup>168</sup> Africanews *Central African Republic votes in shadow of rebel offensive* (2021), online at: <https://www.africanews.com/2021/03/14/central-african-republic-car-votes-in-shadow-of-rebel-offensive/>.

<sup>169</sup> UN Women, *Central African Republic* (consulted on the 19<sup>th</sup> of July 2022), online at: <https://data.unwomen.org/country/central-african-republic>.

<sup>170</sup> UN Women supra note 100 at 24.

<sup>171</sup> CEDAW/C/CAF/1-5 supra note 214 §408.

<sup>172</sup> Groupe de la Banque Africaine de Développement supra note 242 at 5.1.4.

<sup>173</sup> CEDAW/C/CAF/1-5 supra note 214 §249.

<sup>174</sup> Johan Galtung ‘Cultural violence’ (1990) *Journal of peace research* 27, no. 3: 291-305 at 291.

generations as it is also an ‘institutionalized system of social practices.’<sup>175</sup> ‘Cultural beliefs’<sup>176</sup> as well as social ‘relational contexts’<sup>177</sup> play a decisive role in the ‘gender system.’<sup>178</sup> This system can be called patriarchal when ‘artificially constructed “masculine” values’<sup>179</sup> are endorsed and perpetuated. By ‘cultural violence,’ Galtung means ‘those aspects of culture, the symbolic sphere of our existence - exemplified by religion and ideology, language and art, empirical science and formal science (logic, mathematics) - that can be used to justify or legitimize direct or structural violence,’<sup>180</sup> since it makes them ‘look, even feel, right - or at least not wrong.’<sup>181</sup> Cultural violence may feel right through the psychological mechanism of ‘internalization.’<sup>182</sup> For example, when women internalise that domestic violence can be acceptable. One of the ways cultural violence also works ‘is by changing the moral color of an act from red/wrong to green/right or at least to yellow/acceptable (...).’<sup>183</sup> Galtung divides the three types of violence along temporality lines: ‘Direct violence is an *event*; structural violence is a *process* with ups and downs; cultural violence is an *invariant*, a “permanence”, remaining essentially the same for long periods, given the slow transformations of basic culture.’<sup>184</sup> In this thesis, culture is best exemplified by ideology. It can be, for example, the ideology according to which ‘men are stronger/ more logical than women.’<sup>185</sup> In the CAR, more precisely, the value placed on a girl's virginity and the place of women in the home, for example, can lead some families to marry off their daughters early, in particular to protect them from premarital sex and sexual

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<sup>175</sup> Cecilia L. Ridgeway ‘Gender, status, and leadership’ (2001) *Journal of Social issues* 57, no. 4: 637-655 at 637 ‘More than a trait of individuals, gender is an institutionalized *system* of social practices for constituting males and females as different in socially significant ways and organizing inequality in terms of those differences.’/ Also see Cecilia L. Ridgeway & Shelley J. Correll ‘Unpacking the Gender System: A Theoretical Perspective on Gender Beliefs and Social Relations’ (2004) *Gender*. 18 (4): 510–531 at 510.

<sup>176</sup> Ridgeway & Correll Ibid at 511, defined as ‘widely shared gender stereotypes.’ In this thesis, this term will be broadly understood as widely shared gender norms.

<sup>177</sup> Ibid: ‘Social relational contexts comprise any situation in which individuals define themselves in relation to others in order to act, and are the arenas where (cultural) beliefs or rules are in play’/ Also see Margaret S. Clark, Edward P. Lemay & Harry T. Reis ‘Other people as situations: Relational context shapes psychological phenomena’ (2017) for an account on how relational contexts are crucial to understanding most psychological phenomena.

<sup>178</sup> Ridgeway & Correll Ibid at 511.

<sup>179</sup> Madeleine Rees & Christine Chinkin ‘Exposing the gendered myth of post conflict transition: The transformative power of economic and social rights’ (2015) *NYUJ Int'l L. & Pol.* 48: 1211 at 1216.

<sup>180</sup> Ibid at 291.

<sup>181</sup> Ibid at 291.

<sup>182</sup> Ibid at 291-292.

<sup>183</sup> Ibid at 292.

<sup>184</sup> Ibid at 294.

<sup>185</sup> Ibid at 298.



violence.<sup>186</sup> Patrilineal societies can also prevent women from inheriting or accessing housing, land and property (HLP) rights, as discussed above.

This analysis means that focusing only on CRSV fails to take into account the full scope of violence against women and the broader and structurally discriminatory context that underlies it. As a result, conflict-related VAW can hardly be addressed if it is only conceptualised as an individual crime committed in conflict situations against an individual person.<sup>187</sup> According to Lu: ‘In such circumstances, individuals’ or states’ wrongful actions typically conform to, rather than deviate from, a morally defective baseline.’<sup>188</sup> Therefore, when it comes to VAW, ‘the underlying concepts of equality and discrimination significantly impact the way it is combated, prevented and, eventually, remedied.’<sup>189</sup> In feminist literature on TJ this call has already been made. For example, Nesiah comments:

Bodily injury provides too narrow a lens into women’s experiences of authoritarian regimes; other aspects of human rights-abusive contexts, such as the extreme vulnerabilities and structural inequalities created by systems of war or repressive rule, affect women in disproportionate numbers and in ways that have far-reaching human rights implications.<sup>190</sup>

Bell and O'Rourke point out that, in general the term justice is understood narrowly to the detriment of taking into account the socioeconomic violence ‘suffered predominantly by women as internally displaced persons, heads of households and refugees.’<sup>191</sup> Rees and Chinkin, therefore, expose the importance of providing access to socio-economic rights for women in a post-conflict period by grounding their argument in international law.<sup>192</sup> The UN Security Council takes the same position. Resolution 1325 adopted in 2000,<sup>193</sup> followed by

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<sup>186</sup> UN Women supra note 100 at 11.

<sup>187</sup> Henn op cit note 136 at 34.

<sup>188</sup> Catherine Lu *Justice and reconciliation in world politics* (2017) 123.

<sup>189</sup> Henn op cit note 136 at 35-36/ Also see Nairobi Declaration op cit note 144, Preamble para. 4.

<sup>190</sup> Aguirre & Pietropaoli op cit 54 at 364 referring to Vasuki Nesiah *Truth Commissions and Gender: Policies and Procedures* (New York: International Center for Transitional Justice, 2006) at 8–9.

<sup>191</sup> Christine Bell & Catherine O'Rourke ‘Does Feminism Need a Theory of Transitional Justice? An Introductory Essay’ (2007) *International Journal of Transitional Justice* 1(1): 23–44 at 29.

<sup>192</sup> See the extensive work of Rees & Chinkin op cit note 89.

<sup>193</sup> *Resolution 1325 (2000) on Women, Peace and Security*, SC Res 1325, UNSCOR, 4213<sup>th</sup> meeting, UN Doc S/RES/1325 (2000), online: <<https://documents-dds-ny.un.org/doc/UNDOC/GEN/N00/720/18/PDF/N0072018.pdf?OpenElement>>.

resolutions 1820,<sup>194</sup> 1888,<sup>195</sup> 1889,<sup>196</sup> 1960,<sup>197</sup> 2106,<sup>198</sup> 2122,<sup>199</sup> 2242,<sup>200</sup> 2467,<sup>201</sup> and 2493<sup>202</sup> on WPS ensure that a gender perspective is guaranteed in conflict and post-conflict situations, which goes through ‘the analysis of the political, economic and cultural context - the definition of policy and strategic frameworks focused on gender equality - the definition, planning, and implementation of gender equality programs - the management and evaluation of gender equality programs.’<sup>203</sup> For example, resolution 1889 encourages ‘the Peacebuilding Commission and Peacebuilding Support Office to continue to ensure systematic attention to and mobilisation of resources for advancing gender equality and women’s empowerment as an integral part of post-conflict peacebuilding,’<sup>204</sup> while Resolution 1960 adopts the language of ‘prevention of and response to sexual violence.’<sup>205</sup> Resolution 2467 (2019) recognises structural root causes of sexual violence in conflict, including gender inequality.<sup>206</sup> Ultimately, Resolution 2493 calls on ‘Member States to promote all the rights of women, including civil, political and economic rights.’<sup>207</sup> Several international conferences have also argued in the same sense, such as the Beijing Conference in 1995.<sup>208</sup> Boesten, finally, posits that: ‘Gender analysis should be the starting point of all quests for explanations,

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<sup>194</sup> *Resolution 1820 (2008) on Women, Peace and Security*, SC Res 1820, UNSCOR, 5916<sup>th</sup> meeting, UN Doc S/RES/1820 (2008), online: <<http://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/CAC%20S%20RES%201820.pdf>>.

<sup>195</sup> *Resolution 1888 (2009) on Women, Peace and Security*, SC Res 1888, UNSCOR, 6195<sup>th</sup> meeting, UN Doc S/RES/1888 (2009), online: <[http://www.un.org/ga/search/view\\_doc.asp?symbol=S/RES/1888\(2009\)&Lang=E](http://www.un.org/ga/search/view_doc.asp?symbol=S/RES/1888(2009)&Lang=E)>.

<sup>196</sup> *Resolution 1889 (2009) on Women, Peace and Security*, SC Res 1889, UNSCOR, 6196<sup>th</sup> meeting, UN Doc S/RES/1889 (2009) online: <[http://www.un.org/en/ga/search/view\\_doc.asp?symbol=S/RES/1889\(2009\)](http://www.un.org/en/ga/search/view_doc.asp?symbol=S/RES/1889(2009))>.

<sup>197</sup> *Resolution 1960 (2010) on Women, Peace and Security*, SC Res 1960, UNSCOR, 6453<sup>rd</sup> meeting, UN Doc S/RES/1960 (2010) online: <[http://www.un.org/en/ga/search/view\\_doc.asp?symbol=S/RES/1960\(2010\)](http://www.un.org/en/ga/search/view_doc.asp?symbol=S/RES/1960(2010))>.

<sup>198</sup> *Resolution 2106 (2013) on Women, Peace and Security*, SC Res 2106, UNSCOR, 6984<sup>th</sup> meeting, UN Doc S/RES/2106 (2013) online: <[http://www.un.org/en/ga/search/view\\_doc.asp?symbol=S/RES/2106\(2013\)](http://www.un.org/en/ga/search/view_doc.asp?symbol=S/RES/2106(2013))>.

<sup>199</sup> *Resolution 2122 (2013) on Women, Peace and Security*, SC Res 2122, UNSCOR, 7044<sup>th</sup> meeting, UN Doc S/RES/2122 (2013) online: <[http://www.un.org/en/ga/search/view\\_doc.asp?symbol=S/RES/2122\(2013\)](http://www.un.org/en/ga/search/view_doc.asp?symbol=S/RES/2122(2013))>.

<sup>200</sup> *Resolution 2242 (2015) on Women, Peace and Security*, SC Res 2242, UNSCOR, 7533<sup>th</sup> meeting, UN Doc S/RES/2242 (2015) online: <[https://www.un.org/en/ga/search/view\\_doc.asp?symbol=S/RES/2242\(2015\)](https://www.un.org/en/ga/search/view_doc.asp?symbol=S/RES/2242(2015))>.

<sup>201</sup> *Resolution 2467 (2019) on Women, Peace and Security*, SC Res 2467, UNSCOR, 8514<sup>th</sup> meeting, UN Doc S/RES/2467 (2019) online: <[https://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/s\\_res\\_2467.pdf](https://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/s_res_2467.pdf)>.

<sup>202</sup> *Resolution 2493 (2019) on Women, Peace and Security*, SC Res 2467, UNSCOR, 8649<sup>th</sup> meeting, UN Doc S/RES/2493 (2019) online: <<https://documents-dds-ny.un.org/doc/UNDOC/GEN/N19/339/37/PDF/N1933937.pdf?OpenElement>>.

<sup>203</sup> Françoise Nduwimana *La résolution 1325 du Conseil de sécurité de l'ONU sur les femmes, la paix et la sécurité* (2005) (New York: the Office of the Special Adviser to the Secretary-General on Gender Issues and Advancement of Women (OSAGI), at 10, para 17.

<sup>204</sup> *Resolution 1889 (2009)* supra note 292, para. 14.

<sup>205</sup> *Resolution 1960 (2010)* supra note 293, Preamble § 14.

<sup>206</sup> *Resolution 2467 (2019)* supra note 297 at 2.

<sup>207</sup> *Resolution 2493 (2019) on Women, Peace and Security*, supra note 298, para. 5.

<sup>208</sup> Declaration et Plate-Forme d’Action de Beijing, chap IV, para 202, see online: <<http://www.un.org/womenwatch/daw/beijing/pdf/BDPfA%20F.pdf>>.

understandings and ultimately solutions for the enormous problem that sexual violence in conflict poses.<sup>209</sup> VAW has thus been acknowledged as being interconnected with Discrimination Against Women (DAW),<sup>210</sup> and harmful ideologies based on gender stereotypes,<sup>211</sup> themselves often ingrained in gender norms.

In this respect, the continuum of violence theory usefully draws attention to the cultural and structural injustices that underlie direct VAW. If direct VAW ‘is not only widespread during war but also omnipresent during peacetime (...) this means that gendered social structures—independent of warfare—partly dictate which violence will be effective during war. It also suggests that it might not be wise to separate war and peace as political contexts if the aim is to eradicate sexual violence.’<sup>212</sup> Boesten adds: ‘What the concept of a continuum of violence intends to highlight is how all forms of sexual violence are part of gendered social structures and patterns that have to be identified and transformed.’<sup>213</sup> That is why, the language of ‘transformation’ has become fundamental in feminist literature.<sup>214</sup> This approach shows how women may have a greater interest in TJ being transformative rather than reconstructive to avoid returning to their starting position.<sup>215</sup> If conflict-related VAW is compounded by pre-existing inequalities and harmful gender ideologies, and vice-versa,<sup>216</sup> failure to address cultural and structural violence will undermine the goal of a positive peace for women by maintaining them in an original unequal position.<sup>217</sup> This would run the risk of subjecting them to the same ordinary violence exerted on them in the past,<sup>218</sup> as well as

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<sup>209</sup> Jelke Boesten ‘Of exceptions and continuities: Theory and methodology in research on conflict-related sexual violence’ (2017) *International Feminist Journal of Politics* 19, no. 4: 506-519 at 517.

<sup>210</sup> Henn op cit note 136 at 22 referring to The United Nations Special Rapporteur on Violence against Women, *15 Years of the United Nations Special Rapporteur on Violence against Women, its causes and consequences*, 2009, 34.

<sup>211</sup> Ibid at 22 citing IACtHR, *Gonzalez v. Mexico (Cotton Field Case)*, Judgment (Preliminary Objection, Merits, Reparations and Costs), 16 November 2009, para 401.

<sup>212</sup> Boesten op cit note 112 at 511.

<sup>213</sup> Ibid at 514.

<sup>214</sup> UN Women *Progress of the world's women 2011–2012: In pursuit of justice*. United Nations entity for gender equality and the empowerment of women. (2011) New York: UN Women at 97-98.

<sup>215</sup> Fionnuala Ní Aoláin ‘Advancing feminist positioning in the field of transitional justice’ (2012) *The International Journal of Transitional Justice*, 6(2), 205–228 at 210 / Niamh Reilly ‘Seeking gender justice in post-conflict transitions: Towards a transformative women’s human rights approach’ (2007) *International Journal of Law in Context*, 3(2), 155–172 at 165 referring to Bell, Christine and O’Rourke Catherine ‘Does Feminism Need a Theory of Transitional Justice? An Introductory Essay’ (2007) *International Journal of Transitional Justice* 1:23–44.

<sup>216</sup> Jelke Boesten & Polly Wilding ‘Transformative gender justice: Setting an agenda’ (2015) *Women’s Studies International Forum*, 51, 75–80 at 75.

<sup>217</sup> Pankhurst op cit note 91 at 161.

<sup>218</sup> See Galtung op cit note 225; also see Polly Wilding *Negotiating boundaries: Gender, violence and transformation in Brazil* (2012) at 10.

exacerbated violence in the post-conflict period.<sup>219</sup> Therefore, even if in practice, concerns can be raised regarding the excessively broadening of the objectives of TJ, where accountability mechanisms attempt to solve all of society's problems beyond the specificities of an armed conflict or authoritarian regime and thus dilutes the more immediate challenges of a political transition, this thesis will not address the question of *whether* TJ should be transformative or not, taking as a starting point that it should be,<sup>220</sup> but rather *how* it can be transformative for women in the CAR.

(a) Literature review

The CAR government has signed about 13 major peace agreements since 1997. The terms of most of these agreements have never been respected by the armed groups.<sup>221</sup> The latest, the *Accord politique pour la paix et la réconciliation en République centrafricaine* (Political Agreement for Peace and Reconciliation in CAR - APPR-RCA), was ratified by 14 armed groups and the Government on 6 February 2019.<sup>222</sup> This agreement is based on 'the commitment of the various parties to a number of pillars, including (...) the establishment of a truth, justice, reparation and reconciliation commission. The fight against impunity is also, in theory, at the core of the commitments of the signatories.'<sup>223</sup> To this end, two TJ mechanisms have been created: the *Commission vérité justice réconciliation et réparation* (the Truth, Justice, Reparation and Reconciliation Commission - CVJRR) and the SCC which will work alongside national courts and the ICC in the fight against impunity. This thesis proposes to study these mechanisms since TJ in the CAR combines trials with the creation of a truth commission and includes all existing TJ methods, from traditional justice to reparations. Very few other situations have tiered courts (national, hybrid, international), in addition to a truth and reconciliation commission (TRC), with an expansive mandate. The CAR situation is therefore interesting to explore how TJ can work for positive peace for women.

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<sup>219</sup> Philippe Bourgois 'The power of violence in war and peace: Post-cold war lessons from El Salvador' (2001) *Ethnography*, 2(1), 5–34 at 16.

<sup>220</sup> This transformative agenda is also supported by the African Union *Transitional Justice Policy* (2019) § 10.

<sup>221</sup> Interview recorded on the 29<sup>th</sup> of December 2022.

<sup>222</sup> FIDH, OCDH & Ligue Centrafricaine des Droits de l'Homme *What Prospects for Justice in the Central African Republic? Complementarity between national and international mechanisms: Status and Challenges* (October 2022) at 11.

<sup>223</sup> *Ibid* at 11/ See *Accord politique pour la paix et la réconciliation en République centrafricaine* (Political Agreement for Peace and Reconciliation in CAR - APPR-RCA) of 2019, art. 4 (s) & art. 7.

The concept of positive peace comes from the broader concept of peacebuilding coined by Galtung which seeks to identify the 'structure of peace,' meaning the 'structures (...) that remove causes of war and offer alternatives to war in situations where wars might occur.'<sup>224</sup> Galtung describes peacebuilding activities as 'building structural and cultural peace.'<sup>225</sup> One must therefore go beyond 'negative peace,' which represents an absence of direct violence, such as the cessation of hostilities, to also take into consideration 'positive peace,' which represents the removal of structural and cultural violence.<sup>226</sup> How TJ can fit into this agenda has however still to be determined. The legal framework of TJ, its practice, and the concept of TJ itself have changed dramatically over the years.<sup>227</sup> It is often said that the origins of modern TJ date back to the end of the Second World War (WWII) with the creation, in particular, of the International Military Tribunal (IMT) in Nuremberg,<sup>228</sup> whose mandate was to prosecute individuals allegedly guilty of committing crimes against humanity, war crimes, and crimes against peace.<sup>229</sup> The objective of TJ was, then, to fight against impunity<sup>230</sup> through retributive justice. TJ, as a paradigm, however truly emerged around the 1980s to respond to the violation of human rights caused by authoritarian regimes in Latin America.<sup>231</sup> This period marks the end of the Cold War and is associated with the end of the Soviet Empire, followed by a wave of liberalisation in South America, Central America, and Eastern Europe.<sup>232</sup> To the fight against impunity was therefore added a second objective of TJ closely correlated to the establishment of liberal democratic regimes.<sup>233</sup>

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<sup>224</sup> Rama Mani *Beyond retribution: Seeking justice in the shadows of war* (2002) 12/ Galtung op cit note 225 at 183.

<sup>225</sup> Mani ibid 12/ See Galtung op cit note 225 at 183.

<sup>226</sup> Mani ibid 12/ See Galtung op cit note 225 at 183.

<sup>227</sup> Paige Arthur 'How transitions reshaped human rights: a conceptual history of transitional justice' (2009) *Hum. Rts. Q.* 31: 321 at 359.

<sup>228</sup> Ruti G. Teitel 'Transitional justice genealogy' in *The Criminology of War* (2017) at 490.

<sup>229</sup> Brianne McGonigle Leyh 'Nuremberg's legacy within transitional justice: prosecutions are here to stay' (2016) *Wash. U. Global Stud. L. Rev.* 15: 559 at 560-561.

<sup>230</sup> M. Cherif Bassiouni 'Searching for peace and achieving justice: the need for accountability' (1996) *Law Contemp Probl* 59:9-28 at 18/ Also see Diane Orentlicher "'Settling Accounts" Revisited: Reconciling Global Norms with Local Agency' (2007) 1(1) *International Journal of Transitional Justice* 10 at 13/ Miriam Aukerman 'Extraordinary Evil, Ordinary Crime: A Framework for Understanding Transitional Justice' (2002) 15 *H.HUM.RTS J.* 39 at 41-42/ Claire Nielsen 'From Nuremberg to The Hague: the civilizing mission of international criminal law' (2008) *Auckland UL Rev.* 14: 81 at 103-104/ L. Vinjamuri & J. Snyder 'Advocacy and Scholarship in the Study of International War Crime Tribunals and Transitional Justice' (2004) *Annual Review of Political Science* 345-362.

<sup>231</sup> Rosario Figari Layús 'Transitional Justice in Latin America: Toward What Kind of Justice?' in *Dealing with the Past* (2021) at 17.

<sup>232</sup> Teitel op cit note 8 at 495.

<sup>233</sup> Augustine SJ Park 'Settler colonialism, decolonization and radicalizing transitional justice' (2020) *International Journal of Transitional Justice* 14, no. 2: 260-279 at 266/ See Francis Fukuyama, *The End of History and the Last Man* (1992)/ Teitel, Ruti G. "Transitional justice in a new era." *Fordham Int'l LJ* 26 (2002): 893 at 896.

Finally, in the 1990s, the objective of TJ again shifted from this objective to the objective of preserving peace.<sup>234</sup> This period was marked by the creation of ad hoc international criminal tribunals, the International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR), in the 1990s, and the creation of the International Criminal Court (ICC), in 2002, thus confirming the Nuremberg model.<sup>235</sup>

This development has been marked by the growing involvement of non-state actors implicated in internal armed conflicts, sometimes without affiliation with the government in place.<sup>236</sup> As a result, less legalistic ways of dealing with the past have been considered.<sup>237</sup> Restorative justice processes, often through TRCs, have offered the opportunity to initiate reconciliation either ‘horizontally’ between civil society actors or ‘vertically’ between civil society actors and state institutions.<sup>238</sup> The Secretary General of the United Nations (UN Secretary-General) defines *truth commissions* as:

(...) official, temporary, non-judicial fact-finding bodies that investigate a pattern of abuses of human rights or humanitarian law committed over a number of years. These bodies take a victim-centred approach and conclude their work with a final report of findings of fact and recommendations.<sup>239</sup>

The mandate of truth commissions varies from truth commission to truth commission. Initially intended to investigate disappearances and murders, as in Argentina,<sup>240</sup> they were later associated with amnesty processes, as in South Africa.<sup>241</sup> Most often, however, they are associated with restorative justice and are, for that reason, usually called truth and reconciliation commissions. Instead of insisting on punishment, restorative justice is a type of justice that focuses on notions such as healing, reconciliation,<sup>242</sup> reparation, or even harmony

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<sup>234</sup> Teitel op cit note 8 at 500/ Also see C. Campbell & F. Ní Aoláin ‘The Paradox of Transition in Conflicted Democracies’ (2005) 27(1) *Human Rights Quarterly* 173.

<sup>235</sup> Teitel op cit note 8 at 511.

<sup>236</sup> Thomas E. O’Toole & Tamara Lynn Giles-Vernick *Central African Republic, 21<sup>st</sup> century*, online at: <https://www.britannica.com/place/Central-African-Republic/The-21st-century#ref1174710> / Alison Brysk & Michael Stohl (eds.) *Contesting Human Rights: Norms, Institutions and Practice* (2019) at 3.

<sup>237</sup> Kelli Mudell *Gender and Transitional Justice: Challenges from the Field* (2018), online at: <https://web.law.duke.edu/video/kelli-muddell-gender-and-transitional-justice-challenges-field/>.

<sup>238</sup> Charles Mulinda Kabwete ‘Towards justice and reconciliation in post-conflict countries: Meaningful concepts and possible realities’ (2018) *African Journal on Conflict Resolution* 18, no. 1: 65-91 at 84.

<sup>239</sup> UN Security Council *The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies*, SC, 2004, UN Doc S/2004/616, para. 50, online at: <https://documents-dds-ny.un.org/doc/UNDOC/GEN/N04/395/29/PDF/N0439529.pdf?OpenElement>.

<sup>240</sup> Naomi Roht-Arriaza ‘Truth commissions and amnesties in Latin America: The second generation’ in *Proceedings of the ASIL Annual Meeting* (1998) at 313.

<sup>241</sup> Jeremy Julian Sarkin ‘Amnesties and Truth Commissions’ in Barbora Hola (ed.) *The Oxford Handbook of Atrocity Crimes* (2022).

<sup>242</sup> Reconciliation can be understood as ‘building or repairing (...) relationships after massive human rights violations’, as defined by the International Center for Transitional Justice, in the article ‘After the Rupture:

between members of the same community.<sup>243</sup> The concept of restorative justice is therefore ‘usually understood as a form of justice that contributes to repairing the harm done, not only to direct victims but also to other social groups affected by violence.’<sup>244</sup> In addition to trials and TRCs, reparations programs for victims of human rights violations have also come within the framework of TJ,<sup>245</sup> often following the recommendations of a truth commission to a government, as in South Africa, for example.<sup>246</sup>

These developments led, in 2004, the UN Secretary-General to define *transitional justice* as: ‘the full range of processes and mechanisms associated with a society’s attempt to come to terms with a legacy of large-scale past abuses, to ensure accountability, serve justice and achieve reconciliation.’<sup>247</sup> TJ understood as such responds to four rights theorised by Joinet,<sup>248</sup> and, later on, by Orentlicher:<sup>249</sup> 1) The right to justice, understood as retributive justice. Retributive justice, according to Andrieu, can be defined as ‘criminal prosecutions and all legal investigations against the individuals responsible for the violations of human rights (by an international or national criminal court, by the international criminal court, traditional justice or hybrid justice mechanisms, or by universal jurisdiction),’<sup>250</sup> 2) The right to the truth which includes the establishment of truth commissions but also access to archives among other measures;<sup>251</sup> 3) The right to repairs: restitution, compensation, rehabilitation, are forms of reparation for victims of ‘gross violations of international human rights law’ or ‘serious violations of international humanitarian law.’<sup>252</sup> 4) The guarantee of non-repetition

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Understanding Transitional Justice and Reconciliation’ (2017), online at: <https://www.ictj.org/news/rupture-relationships-transitional-justice-reconciliation>.

<sup>243</sup> Kora Andrieu *La Justice Transitionnelle : de l’Afrique du Sud au Rwanda* (2012) 323 ‘en redéfinissant le crime non plus comme simple violation d’une loi, mais comme la rupture d’une harmonie de la communauté.’ / Also see McGill Daire ‘“Post-Conflict” Reconstruction, the Crimes of the Powerful and Transitional Justice’ (2017) *State Crime Journal*, Vol. 6, No. 1, at 88.

<sup>244</sup> Layús op cit note 12 at 22.

<sup>245</sup> Impunity Watch, Vasuki Nesiah *Transitional Justice Practice : Looking back, moving forward* (2016) at 7.

<sup>246</sup> Christopher J. Colvin ‘Overview of the reparations program in South Africa’ in Pablo De Greiff (eds) *The handbook of reparations* (2006).

<sup>247</sup> S/2004/616 supra note 20 para. 8.

<sup>248</sup> Louis Joinet *Question de l’Impunité des Auteurs des Violations des Droits de l’Homme Civils et Politiques, Rapport final en Application de la Décision 1996/119 de la Sous-Commission, Nations Unies*, E/CN.4/Sub.2/1997/20 and E/CN.4/Sub.2/1997/20/Rev.1.

<sup>249</sup> UN Commission on Human Rights, *Report of the independent expert to update the Set of principles to combat impunity*, Diane Orentlicher, *Updated Set of principles for the protection of human rights through action to combat impunity*, 8 February 2005, E/CN.4/2005/102/Add.1, available at: <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G05/109/00/PDF/G0510900.pdf?OpenElement>.

<sup>250</sup> Andrieu op cit note 24 at 322 : ‘les poursuites pénales et toutes enquêtes juridiques contre les individus responsables des violations des droits de l’homme (par un Tribunal pénal international ou national, par la Cour pénale internationale, des mécanismes de justice traditionnelle ou de justice hybride, ou encore par la compétence universelle).’

<sup>251</sup> Andrieu op cit note 24 at 322.

<sup>252</sup> See UN General Assembly, *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International*

which involves ‘demobilization, disarmament and reintegration of ex-combatants, lustration programs (*vetting*) or reforms of the security system,<sup>253</sup> as well as legal and institutional reforms,<sup>254</sup> among others.

These four rights are included across various instruments of international law. Four branches of public international law drive the mechanisms of TJ: international human rights law, international humanitarian law, refugee law, and international criminal law. In international law, these rights are mentioned as such:

(a) the state obligation to investigate and prosecute alleged perpetrators of gross violations of human rights and serious violations of international humanitarian law, including sexual violence, and to punish those found guilty;<sup>255</sup>

(b) the right to know the truth about past abuses and the fate of disappeared persons;<sup>256</sup>

(c) the right to reparations for victims of gross violations of human rights and serious violations of international humanitarian law,<sup>257</sup> and;

(d) the state’s obligation to prevent, through different measures, the reoccurrence of such atrocities in the future.<sup>258</sup>

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*Humanitarian Law: resolution / adopted by the General Assembly*, 21 March 2006, A/RES/60/147, available at: <https://www.refworld.org/docid/4721cb942.html> [accessed 8 July 2020].

<sup>253</sup> Andrieu op cit note 24 at 323-324 : ‘la démobilisation, le désarmement et la réintégration des anciens combattants, les programmes de lustration (*vetting*) ou les réformes du système de sécurité.’

<sup>254</sup> Paul Gready & Simon Robins ‘Transitional justice and theories of change : Towards evaluation as understanding’ (2020) *International Journal of Transitional Justice* 14, no. 2 : 280-299 at 281/ See Louis Joinet (ed) *Lutter contre l'impunité, Dix questions pour comprendre et agir* (2002) 29.

<sup>255</sup> Supra note 33 UN General Assembly, *Basic Principles*/ UN General Assembly, *Convention on the Prevention and Punishment of the Crime of Genocide*, 9 December 1948, United Nations, Treaty Series, vol. 78, p. 277, available at: <https://www.refworld.org/docid/3ae6b3ac0.html> [accessed 8 July 2020] art 4, 5 & 6 / *Velasquez Rodriguez Case*, Judgment of July 29, 1988, Inter-Am.Ct.H.R. (Ser. C) No. (1988).

<sup>256</sup> See International Committee of the Red Cross (ICRC), *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I)*, 8 June 1977, 1125 UNTS 3, art. 32, entered into force December 7, 1978/ UN General Assembly, *International Convention for the Protection of All Persons from Enforced Disappearance*, 20 December 2006, art. 24 (2), available at: <https://www.refworld.org/docid/47fdfaeb0.html> [accessed 26 April 2023]/ See also supra note 30 E/CN.4/2005/102/Add.1, Principle 2/ UN Commission on Human Rights, *Human Rights Resolution 2005/66: Right to the Truth*, 20 April 2005, E/CN.4/RES/2005/66, available at: <https://www.refworld.org/docid/45377c7d0.html> [accessed 26 April 2023].

<sup>257</sup> See as an example: Human Rights Committee, General Comment No. 31 on the Nature of the General Legal Obligation Imposed on States Parties to the Covenant, UN Doc CCPR/C/21/Rev.1/Add.13 (2004), para 16.

<sup>258</sup> See *Velasquez Rodríguez v Honduras (Compensatory damages)*, I/ACtHR, Judgment of 21 July 1989, Series C No. 7, paras 166, 172, 174, 187, 188.



A fifth pillar was subsequently added to TJ: memorialization.<sup>259</sup> According to Salvioli, Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence: ‘Memorialization processes complement truth, justice, reparations and non-repetition mechanisms and can play a key role in duly addressing the gender dimension of violations of human rights and international humanitarian law. (...) Memorialization programmes at a formal educational level and other mechanisms, such as memorials, documentation centres and archives, cannot be omitted from these processes.’<sup>260</sup> It is generally accepted that all components of TJ need to be combined to achieve holistic TJ.<sup>261</sup> The term holistic implies the cooperation<sup>262</sup> and comprehensive implementation of the components of TJ.<sup>263</sup> The various measures should therefore be ‘externally coherent’, ‘meaning that they should be conceived of and implemented not as discrete and independent initiatives but rather as parts of an integrated policy.’<sup>264</sup> Nesiah notes, however, that establishing all TJ mechanisms is only relevant in some instances. Implementing the different mechanisms should be assessed against what is applicable in a particular political context. Thus, the term ‘holistic’ seems more appropriate to express the ‘interrelationship between many domains of justice struggles.’<sup>265</sup> Therefore, a holistic approach could rather be understood as pursuing all mutually reinforcing dimensions of justice, focusing on acts of extraordinary violence, systemic abuses, and their ecosystem.<sup>266</sup>

This approach is part of a broader conceptual shift in TJ. In 2010, the UN Secretary-General issued a Guidance Note, called ‘United Nations Approach to Transitional Justice,’ according to which the United Nations should ‘adopt an approach that strives to take account of the root causes of conflict or repressive rule, and address the related violations of all

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<sup>259</sup> *Report of the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence, Memorialization processes in the context of serious violations of human rights and international humanitarian law: the fifth pillar of transitional justice*, GA, 2020, UN Doc A/HRC/45/45.

<sup>260</sup> *Report of the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence, The gender perspective in transitional justice processes*, GA, 2020, UN Doc A/75/174, § 71.

<sup>261</sup> Clara Sandoval ‘Transitional justice and social change’ (2014) 20 *SUR-Int'l J. on Hum Rts.* 181, online: <https://sur.conectas.org/en/transitional-justice-and-social-change/>.

<sup>262</sup> Rebekka Friedman & Andrew Jillions ‘The pitfalls and politics of holistic justice’ (2015) *Global Policy* 6, no. 2: 141-150 at 142.

<sup>263</sup> *Report of the Special Rapporteur on the Promotion of Truth, Justice, Reparation and Guarantees of Non-Recurrence, Pablo de Greiff, The foundation of the mandate and the importance of a comprehensive approach that combines the elements of truth-seeking, justice initiatives, reparations and guarantees of non-recurrence in a complementary and mutually reinforcing manner*, GA, 2012, UN Doc. A/HRC/21/46, § 22-27.

<sup>264</sup> *Ibid* § 27 referring to Pablo de Greiff ‘Justice and Reparations’ in Pablo de Greiff (eds) *The Handbook of Reparations* (2006) / S/2004/616 supra note 20 para. 9.

<sup>265</sup> Nesiah op cit note 26 at 27.

<sup>266</sup> *Ibid* at 28.

rights,<sup>267</sup> including ‘civil, political, economic, social and cultural rights.’<sup>268</sup> This Note sends the message that TJ mechanisms and processes can today deal with discrimination, and violations of economic, social, and cultural (ESC) rights along with civil and political rights, which is deemed to be central for significant social transformations to occur.<sup>269</sup> This Guidance Note also reflects a general trend towards “integrated” strategies that bring together peace, justice, development, and security considerations.<sup>270</sup> The UN Secretary General indeed underlined that ‘(b)y striving to address the spectrum of violations in an integrated and interdependent manner, TJ can contribute to achieving the broader objectives of prevention of further conflict, peacebuilding and reconciliation.’<sup>271</sup> Prior to the publication of this policy brief, Arbour had already noted that sidelining ESC rights in TJ processes would run the risk of creating an impunity gap and would be the source of a new cycle of violence.<sup>272</sup> She also observed that a narrow approach to TJ would not address pre-conflict inequalities and underdevelopment, two aspects that are nonetheless critical, especially for women, explaining, ‘(Transitional justice) must reach to, but also beyond the crimes and abuses committed during the conflict which led to the transition, into the human rights violations that pre-existed the conflict and caused, or contributed to it.’<sup>273</sup> She thus pleaded for the integration of ESC rights into the framework of TJ, making ‘the gigantic leap that would allow justice, in its full sense, to make the contribution that it should to societies in transition.’<sup>274</sup>

The inclusion of ESC rights in post-conflict processes is often linked to the concept of prevention which also ‘embodies the principle of “nonrepetition” – the foundation of

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<sup>267</sup> United Nations, *Guidance Note of the Secretary-General: United Nations Approach to Transitional Justice* (2010), at 2 and Principle 9, online at: [https://www.un.org/ruleoflaw/files/TJ\\_Guidance\\_Note\\_March\\_2010FINAL.pdf](https://www.un.org/ruleoflaw/files/TJ_Guidance_Note_March_2010FINAL.pdf).

<sup>268</sup> *Ibid* at 3.

<sup>269</sup> Lars Waldorf ‘Anticipating the past: Transitional justice and socio-economic wrongs’ (2012) *Social & Legal Studies* 21, no. 2: 171-186 at 174.

<sup>270</sup> *Ibid* at 174.

<sup>271</sup> *Supra* note 40 United Nations, Guidance Note at 3.

<sup>272</sup> Louise Arbour ‘Economic and social justice for societies in transition’ (2007) *NYUJ Int'l L. & Pol.* 40: 1 at 8/ Also see ICTJ *On Solid Ground: Building Sustainable Peace and Development After Massive Human Rights Violations*, Report of the Working Group on Transitional Justice and SDG16+, (May 2019) at 2.

<sup>273</sup> Daniel Aguirre & Irene Pietropaoli ‘Gender equality, development and transitional justice: The case of Nepal’ (2008) *The International Journal of Transitional Justice* 2, no. 3: 356-377 at 358 referring to Louise Arbour, ‘Economic and Social Justice for Societies in Transition’ (Second Annual Transitional Justice Lecture, New York University School of Law Center for Human Rights and Global Justice and the International Center for Transitional Justice, New York, 25 October 2006), at 2.

<sup>274</sup> Louise Arbour ‘Economic and social justice for societies in transition’ (2006) Second Annual Transitional Justice Lecture hosted by the Center for Human Rights and Global Justice at New York University School of Law and the International Centre for Transitional Justice. New York University Law School, New York, 25 October at 3 / Also see Office of the UN High Commissioner for Human Rights, *Transitional Justice and Economic, Social, and Cultural Rights* (2014).

international human rights law.<sup>275</sup> Laplante argues that ‘the overarching aim of prevention rests on the basic premise that postconflict recovery entails a holistic approach that should include economic, political and social structural reform.’<sup>276</sup> The 2020 United Nations Secretary-General's Call to Action for Human Rights affirms that considering human rights is an essential component of broader prevention efforts, encompassing the prevention of CRSV.<sup>277</sup> Studies point in the same direction and have demonstrated a direct relationship between gender equality and conflict prevention.<sup>278</sup> The UN Secretary-General therefore recently declared that prevention was the main priority.<sup>279</sup> In that regard, in his annual report on the responsibility to protect, he ‘underlined the distinction between structural prevention, seeking to reduce the vulnerability of societies to atrocities over an extended timeline, and operational prevention, aiming to avert specific threats of atrocities or to stop, or at least de-escalate, ongoing atrocities.’<sup>280</sup> By referring to structural prevention, he, therefore, recognised that ‘atrocities crimes are not single events that unfold overnight, but interconnected processes that develop over many years.’<sup>281</sup> Prevention is also at the heart of 'Our Common Agenda,' published by the UN Secretary-General on August 5, 2021, incorporating the 2030 Agenda for Sustainable Development among its commitments.<sup>282</sup> Prevention, therefore, aims today to

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<sup>275</sup> Lisa J. Laplante ‘Transitional justice and peace building: Diagnosing and addressing the socioeconomic roots of violence through a human rights framework’ (2008) *The International Journal of Transitional Justice* 2, no. 3: 331-355 at 332.

<sup>276</sup> *Ibid* at 332.

<sup>277</sup> Stop Rape Now, Un Action against sexual violence in conflict *Framework for the prevention of conflict-related sexual violence* (2022) at 11 referring to UN *The Highest Aspiration: A Call to Action for Human Rights* (2020), at 5 & 8, online at: [https://www.un.org/sg/sites/www.un.org.sg/files/atoms/files/The\\_Highest\\_Aspiration\\_A\\_Call\\_To\\_Action\\_For\\_Human\\_Right\\_English.pdf](https://www.un.org/sg/sites/www.un.org.sg/files/atoms/files/The_Highest_Aspiration_A_Call_To_Action_For_Human_Right_English.pdf).

<sup>278</sup> UN Security Council, *Report of the Secretary-General on Women and Peace and Security*, 2018, UN Doc S/2018/900, para. 7.

<sup>279</sup> The United Nations Secretary-General’s Remarks to the Security Council Open Debate on Maintenance of International Peace and Security: *Conflict Prevention and Sustaining Peace* (January 2017)/ General Assembly and Security Council, *Report of the High-level Independent Panel on Peace Operations on uniting our strengths for peace: politics, partnership and people*, (2015), UN Doc A/70/95–S/2015/446\*/ UN General Assembly, Review of the United Nations peacebuilding architecture, 17 June 2015, A/RES/70/262, available at: [https://www.un.org/en/development/desa/population/migration/generalassembly/docs/globalcompact/A\\_RES\\_70\\_262.pdf](https://www.un.org/en/development/desa/population/migration/generalassembly/docs/globalcompact/A_RES_70_262.pdf) / Resolution 2282 (2016) Adopted by the Security Council at its 7680th meeting, on 27 April 2016, SC Res 2282, UNSCOR, 7680<sup>th</sup> meeting, UN Doc S/RES/2282 (2016) online: < <https://documents-dds-ny.un.org/doc/UNDOC/GEN/N16/118/51/PDF/N1611851.pdf?OpenElement> > / United Nations, World Bank, *Pathways for Peace: Inclusive Approaches to Preventing Violent Conflict* (2018), online at: <https://openknowledge.worldbank.org/handle/10986/28337>.

<sup>280</sup> UN Human Rights Council, *Joint Study of the Special Rapporteur on the Promotion of Truth, Justice, Reparation and Guarantees of Non-recurrence and the Special Advisor to the Secretary-General on the Prevention of Genocide* (A/HRC/37/65, March 1, 2018) § 22, referring to A/65/877-S/2011/393, para. 21.

<sup>281</sup> *Ibid* § 23.

<sup>282</sup> UN General Assembly, *Review of the United Nations peacebuilding architecture*, 17 June 2015, UN Doc A/RES/70/262, at 2§3, available at: [https://www.un.org/en/development/desa/population/migration/generalassembly/docs/globalcompact/A\\_RES\\_70\\_262.pdf](https://www.un.org/en/development/desa/population/migration/generalassembly/docs/globalcompact/A_RES_70_262.pdf)

support the 2030 Agenda to guarantee a sustaining peace understood ‘as a goal and a process to build a common vision of a society, (and) ensuring that the needs of all segments of the population are taken into account (...).’<sup>283</sup> The United Nations Sustainable Development Goals for 2015-2030 call for achieving gender equality by 2030.<sup>284</sup> The prevention of CRSV therefore contributes to the achievement of the 2030 Agenda for Sustainable Development by ‘addressing specific targets related to gender equality, reduced inequalities and peace, justice and strong institutions.’<sup>285</sup> Gender equality has been mainstreamed into the process of peacebuilding and strengthening the rule of law in the CAR as an opportunity to support and advance women's rights, particularly given the fluidity of post-war spaces and the opportunities they present for renegotiating and restructuring power and gender relations.<sup>286</sup>

TJ occupies today an important place in the framework of sustaining peace.<sup>287</sup> In 2011, the UN Secretary General stated that the UN ‘must promote dialogue on the realization of economic and social rights, and provide concrete results through transitional justice mechanisms,’<sup>288</sup> which, in terms of GBV, was reflected in the Secretary General's 2014 ‘Guidance Note of the Secretary-General on Reparations for Conflict-Related Sexual Violence’ through the transformative potential of reparations in dismantling the structural inequality and discrimination at the heart of sexual violence.<sup>289</sup> UN Women and UNDP therefore recall that: ‘Transitional justice should further seek to take account of the root causes of conflicts and the related violations of all rights, including civil, political, economic, social and cultural rights. By striving to address the spectrum of violations in an integrated and interdependent manner, TJ can contribute to achieving the broader objectives of prevention of further conflict, peacebuilding and reconciliation.’<sup>290</sup> UNDP notes: ‘this requires that transitional justice measures are a part of broader efforts to foster political, social, and economic transformation and advance gender equality. Thus, TJ focuses on both

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<sup>283</sup> Ibid at 2§3.

<sup>284</sup> UN Website, *Achieve gender equality and empower all women and girls*, online: <<https://sustainabledevelopment.un.org/sdg5>>.

<sup>285</sup> Stop Rape Now supra note 307 at 10.

<sup>286</sup> UN Women supra note 100 at 22 referring to CORAID *Manuel sur le Genre, la Consolidation de la Paix et le Renforcement de l'Etat* (2016).

<sup>287</sup> A/RES/70/262 supra note 312 at §12; Resolution 2282 (2016) Adopted by the Security Council at its 7680th meeting, on 27 April 2016, SC Res 2282, UNSCOR, 7680<sup>th</sup> meeting, UN Doc S/RES/2282 (2016), §12, online: <<https://documents-dds-ny.un.org/doc/UNDOC/GEN/N16/118/51/PDF/N1611851.pdf?OpenElement>>

<sup>288</sup> UN Security Council, *The Rule of Law and Transitional Justice in Conflict and Post-conflict Societies: Report of the Secretary-General*, 2011, UN Doc S/2011/634.

<sup>289</sup> UN, *Guidance Note of the Secretary-General on Reparations for Conflict-Related Sexual Violence* (2014) at 8.

<sup>290</sup> UN Women, UNDP *Women's Meaningful Participation in Transitional Justice: Advancing Gender Equality and Building Sustainable Peace* (March 2022) at 11.

the individual and society as a whole, with two distinct objectives: (1) achieving justice for victims and (2) creating just, inclusive, and peaceful societies.’<sup>291</sup>

Consequently, TJ, which was initially based on a liberal vision of politics<sup>292</sup> with the explicit aim of bringing about a political transition from dictatorships or states that massively violate human rights towards liberal democracies, is today perceived by some as able to rebuild the damaged social fabric, which brings its objectives closer to the concept of development.<sup>293</sup> Teitel notes that this shift redefines ‘the understanding of the purposes of transition,’<sup>294</sup> and expands ‘the category of TJ, with implications for its future normalization,’<sup>295</sup> making it deeply linked to the peacebuilding agenda.<sup>296</sup> Therefore, what some have described as the ‘fourth generation’ of TJ is characterised, among other things, by a desire to broaden the definition of TJ as:

(t)o the extent that “peace” invokes more holistic sets of objectives than the narrower goals associated with facilitating liberal political transitions, the turn to peacebuilding might be seen to represent a broadening and a loosening of earlier paradigms and moorings, making this a significant moment in the normative evolution of the field.<sup>297</sup>

As a result, some scholars are now adopting the language of transformation to emphasise that TJ is meant to address the past but also establish conditions and structures that will ensure justice in the present and the future, creating longer-term engagement.<sup>298</sup> The concept of transformative justice, its goals, and how to achieve them however still need to be clarified since there is no commonly agreed definition. Sharp observes that this new approach to TJ as contributing to peacebuilding (or sustaining peace) relies to a large extent on one’s understanding of the concepts of transition, justice and peacebuilding.<sup>299</sup>

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<sup>291</sup> UNDP supra note 186 at 12.

<sup>292</sup> Ruti G Teitel, *Transitional Justice* (2000) 225/ see Andrieu op cit note 24 at 589- 590.

<sup>293</sup> Helena Sancho, ‘Using Transitional Justice to Promote Development’ (2014), online at: [https://www.sida.se/contentassets/3e28b323f8374010a577bdad7cb47593/using-transitional-justice-to-promote-development\\_3753.pdf/](https://www.sida.se/contentassets/3e28b323f8374010a577bdad7cb47593/using-transitional-justice-to-promote-development_3753.pdf/).

<sup>294</sup> Supra Teitel, note 8 at 500.

<sup>295</sup> Ibid at 501.

<sup>296</sup> Valentina Gentile & Megan Foster ‘Towards a minimal conception of Transitional Justice’ (2022) *International Theory* 14, no. 3: 503-525 at 509/ Also see Bill & Ní Aoláin op cit note 1719 at 332.

<sup>297</sup> Dustin N. Sharp ‘Emancipating transitional justice from the bonds of the paradigmatic transition’ (2015) *International Journal of Transitional Justice* 9, no. 1: 150-169 at 151.

<sup>298</sup> Wendy Lambourne ‘Transitional Justice and Peacebuilding after Mass Violence’ (2008) *International Journal of Transitional Justice*, 3(1), 28–48 at 45/ See also the definition of transitional justice given by African Union *Transitional Justice Policy* (2019), § 19: ‘For purposes of this policy, transitional justice refers to the various (formal and traditional or non-formal) policy measures and institutional mechanisms that societies, through an inclusive consultative process, adopt in order to overcome past violations, divisions and inequalities and to create conditions for both security and democratic and socio-economic transformation.’

<sup>299</sup> Sharp op cit note 64 at 168.

Peacebuilding, as defined by Galtung, includes both the dual purpose of preserving negative peace and building positive peace. These definitions move away from a liberal vision of peacebuilding,<sup>300</sup> limited to negative peace, to see the role of peacebuilding in sustainable development instead.<sup>301</sup> This definition, therefore, echoes the concept of prevention mentioned above. This shift towards positive peace has led to a paradigm shift from a paradigm of transition to a paradigm of transformation, suggesting a more permanent justice.<sup>302</sup> In this regard, Sharp calls for rethinking the notion of transition as a transition to positive peace and, therefore, for emancipating the field of TJ from the transitional paradigm to imagine a more sustainable justice.<sup>303</sup> This development also calls for a redefinition of the concept of justice. Various suggestions have been put forward. Some authors refer today ‘to a process of coming to terms with the past that is strictly linked to that of creating the basis for some degree of peace and stability,’<sup>304</sup> and is linked, from a normative perspective, ‘to that of the creation of a new social order – one that ought to be able to combine some, at least, minimal conditions for domestic justice, and a durable/stable international peace.’<sup>305</sup> Lambourne confirms that justice in the context of peacebuilding must be seen as more than transitory to put structures, institutions, and lasting relationships in place.<sup>306</sup> This suggests introducing socio-economic and political justice into TJ, alongside legal justice, to ensure permanent respect for human rights and the rule of law.<sup>307</sup> It is thus a question of developing a concept of transformative justice that connects ‘the past and the future through locally relevant mechanisms and processes that provide accountability, acknowledgment, socioeconomic justice, and political justice.’<sup>308</sup> According to her, TJ, understood as transformative must pay attention to psychosocial processes, socio-economic conditions, and the political context.<sup>309</sup>

According to Cahill-Ripley, this redefinition of TJ as transformative justice implies broadening the mandate of existing mechanisms by including serious violations of economic

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<sup>300</sup> Ibid at 168.

<sup>301</sup> Paul Gready & Simon Robins ‘From transitional to transformative justice: A new agenda for practice’ (2014) *International Journal of Transitional Justice* 8, no. 3: 339-361 at 350-351.

<sup>302</sup> Sharp op cit note 64 at 158.

<sup>303</sup> Ibid at 168.

<sup>304</sup> Ibid Gentile & Foster at 503.

<sup>305</sup> Ibid at 504.

<sup>306</sup> Lambourne op cit note 65 at 34 referring to UN Security Council, *Statement by the President of the Security Council*, UN Doc. S/PRST/2001/5 (20 February 2001).

<sup>307</sup> Lambourne op cit note 65 at 34/ Also see K. McEvoy & L. McGregor (eds) *Transitional Justice From Below: Grassroots Activism and the Struggle for Change* (2008).

<sup>308</sup> Lambourne Ibid at 47.

<sup>309</sup> Ibid at 47.

and social rights.<sup>310</sup> TJ could therefore encompass more forward-looking measures, such as recommendations for legal and institutional reforms and a rights-based approach to development.<sup>311</sup> Sharp, while referring to Robert and his concept of ‘people's peace’, notes that this new approach calls for a shift in perspective. TJ should prioritise the needs of communities and individuals above those of the state. This implies focusing more on the day-to-day problems faced by individuals and communities affected by the conflict, which could involve the provision of social services, guaranteeing the respect of economic and social rights, meeting basic needs such as housing and sanitation, and finally maintaining security.<sup>312</sup> Mani advocates for a justice she calls ‘restorative’ meaning: restoring the rule of law through judicial reform; responding to human rights violations through the traditional TJ mechanisms; and distributive justice.<sup>313</sup> Duthie argues that TJ measures can, to some extent, contribute to development.<sup>314</sup> Balint, furthermore, believes that TJ should see the past and the future as intertwined rather than successive in order to take into account enduring structural injustices and their effects on present and future generations.<sup>315</sup>

Aguirre, focusing on women's rights, suggests broadening the notion of TJ and moving beyond retributive and restorative approaches to also incorporate distributive justice based on the third-generation right to development,<sup>316</sup> while McGill offers a ‘Structural Violence Reduction Matrix’ based on two dimensions. The diagnostic dimension requires a comprehensive analysis of the violence's historical roots and its manifestations in the current political economy of the countries concerned. This means considering structural violence as well.<sup>317</sup> The second dimension, outcome, requires TJ to target social changes, such as reducing wealth disparities and creating more equitable societal structures.<sup>318</sup> Gready and Robins, drawing on Lambourne's analysis, understand transformative justice as involving

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<sup>310</sup> Amanda Cahill-Ripley ‘Foregrounding socioeconomic rights in transitional justice: Realising justice for violations of economic and social rights’ (2014) *Netherlands Quarterly of Human Rights* 32, no. 2: 183-213 at 193.

<sup>311</sup> Ibid at 193.

<sup>312</sup> Sharp op cit note 64 at 164 referring to David Roberts ‘Post-Conflict Peacebuilding, Liberal Irrelevance and the Locus of Legitimacy’ (2011) *International Peacekeeping* 18(4): 410–424.

<sup>313</sup> Rosemary Nagy ‘Transitional justice as global project: Critical reflections’ (2008) *Third World Quarterly* 29, no. 2: 275-289 at 277-278, referring to Mani op cit note 279.

<sup>314</sup> Geoff Dancy & Eric Wiebelhaus-Brahm ‘Bridge to human development or vehicle of inequality? Transitional justice and economic structures’ (2015) *International Journal of Transitional Justice* 9, no. 1: 51-69 at 52 citing Duthie op cit note 1329 at 320.

<sup>315</sup> Jennifer Balint, Julie Evans & Nesam McMillan ‘Rethinking transitional justice, redressing indigenous harm: A new conceptual approach’ (2014) *International Journal of Transitional Justice* 8, no. 2: 194-216 at 201.

<sup>316</sup> Aguirre & Pietropaoli op cit 54 at 356.

<sup>317</sup> Dáire McGill ‘Different violence, different justice? Taking structural violence seriously in post-conflict and transitional justice processes’ (2017) *State Crime Journal* 6, no. 1: 79-101 at 91.

<sup>318</sup> Ibid at 94-95.

'transformative change that emphasizes local agency and resources, the prioritization of process rather than preconceived outcomes and the challenging of unequal and intersecting power relationships and structures of exclusion at both the local and the global level.'<sup>319</sup> Therefore, TJ, understood as transformative justice, is meant to go beyond civil and political human rights violations and large-scale abuses<sup>320</sup> to engage in a 'wide-reaching change throughout society'<sup>321</sup> by 'rebalancing power relations.'<sup>322</sup> This conception of justice is anchored 'in the broader and more holistic conceptions of peace and peacebuilding associated with positive peace,<sup>323</sup> with a conception of TJ as a form of peacebuilding,<sup>324</sup> which involves 'a wide spectrum of efforts involving components of retributive, restorative and distributive justice,'<sup>325</sup> and which requires the participation of all of sectors of society without a pre-determined outcome.

Therefore, this redefinition of TJ as transformative justice places Galtung's concept of positive peace at the center, closely linked to considerations of social and distributive justice long absent from peacebuilding and TJ practices.<sup>326</sup> It however remains unclear to what extent TJ mechanisms and processes can be entirely situated within the broader peacekeeping architecture and what this entails regarding justice, reparations, truth, memorialisation, and guarantees of non-repetition. Moreover, while this definition of transformative justice is a positive step, it seems to fall short of the logic of Galtung, who also includes cultural violence in his analysis. Identifying the ideologies that give roots to VAW and the social and cultural norms that underpin these ideologies is, however, paramount in a gender analysis of violence and in thinking about what transformative justice can mean for women in the CAR.

If addressing the root causes of GBV could better prevent its re-occurrence in the future,<sup>327</sup> it may indeed be necessary to adopt a holistic perspective that includes the full scope of VAW. The interconnections between 'violence against women, gender-based discrimination in the social, economic, cultural, political and civil fields of life, as well as gender stereotypes and hierarchies as basic social institutions'<sup>328</sup> has been illustrated by Henn

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<sup>319</sup> Gready & Robins op cit note 324 at 340.

<sup>320</sup> UN Office of the High Commissioner for Human Rights supra note 55.

<sup>321</sup> Bhavani Fonseka & Ellen Schulz 'Gender and Transformative Justice in Sri Lanka' (2018): 1-12 at 1-2.

<sup>322</sup> Ibid at 3.

<sup>323</sup> Sharp op cit note 64 at 158.

<sup>324</sup> Ibid at 158.

<sup>325</sup> Ibid at 159.

<sup>326</sup> Ibid at 159.

<sup>327</sup> Henn op cit note 136 at 19.

<sup>328</sup> Ibid at 23.



by an ‘iceberg-model of gender justice.’<sup>329</sup> This model consists of a three-layered pyramid, where gender stereotypes and hierarchisation are at the ground level, DAW in all fields of life is at the second level and direct VAW is the tip of the pyramid.<sup>330</sup> This thesis therefore posits that, only by addressing the three layers of this pyramid, can TJ be transformative for women in the CAR. Even though Lu's book *Justice and Reconciliation in World Politics* deals with historical injustices, the concept of structural injustice as she defines it can be useful in understanding the different types of injustices women face in the CAR. In that respect, the distinction she draws between interactional injustice, defined as wrongful conduct or unjust interactions between clearly identified agents,<sup>331</sup> and structural injustice as resulting ‘from social structural processes in which many individuals and corporate agents may participate,’<sup>332</sup> can be a starting point for understanding the different types of violence that women face in conflict and post-conflict situations in the CAR, as well as their causes and consequences.

For this, five objectives will be pursued. First, it will be about understanding what fundamental change means for women in the CAR. Therefore, the first chapter of this thesis will succinctly attempt to analyse what gender justice can mean in the specific context of the CAR. The second chapter will focus on defining conflict-related GBV in the CAR. The last three chapters, once gender justice (forward-looking) and conflict-related GBV (backward-looking) defined, will attempt to answer what transformative justice can be for women in the CAR by analysing, first, interactional justice. This category includes both retributive and restorative justice (Chapter 3). Finally, this thesis's fourth and fifth chapters will focus on structural justice. Chapter 4 will deal with distributive justice, while Chapter 5 will deal with what will be referred to in this thesis as ‘normative justice’ since understanding gender norms can help to understand what is considered to be discrimination and subjugation in a specific context and thus open avenues to challenge the norms that support gender inequalities.

## (b) Methodology

Knowledge was drawn from other fields of study to illuminate what could be done. Because different disciplines have studied gender, adopting an interdisciplinary methodology has led

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<sup>329</sup> Ibid at 23.

<sup>330</sup> Ibid at 23.

<sup>331</sup> Lu op cit note 283 at 33.

<sup>332</sup> Ibid at 100.

to a better understanding of how gender roles and sex differences may or may not impact gender justice. Among which, feminism, as a methodology, has been central since feminism:

places gender at the centre of its analyses. It considers the different, gendered lives of women and men and the role of society and its institutions in constructing, perpetuating, and masking gender differences and privileges. This perspective allows us to open up new possibilities for the transformative powers of reasserting justice after a period of conflict or insecurity. A gendered perspective on TJ may be open to including views not generally associated with TJ as it is typically presented or understood. A gendered perspective need not be entirely encapsulated within a feminist rhetoric, but the focus remains on assessing gender advantages and disadvantages and how to equalize them.<sup>333</sup>

As Charlesworth said: ‘Use of a range of techniques, however, can lead to charges of methodological and theoretical impurity. I think that this impurity is inevitable in the analysis of complex situations.’<sup>334</sup> Overall, my thesis uses the method of intersectionality to address the concept of gender – this method is present throughout the content of my work and my findings.

Including positive peace in the equation also opened up the field of TJ to ‘new areas of competence, such as the humanities, history of ideas, philosophy, theology’<sup>335</sup> in order to grasp the implications of cultural violence, and social sciences in order to grasp the implications of structural violence.<sup>336</sup> This thesis therefore adopts a methodology that crosses disciplinary boundaries to develop a comprehensive understanding of transformative justice and incorporates, following a transdisciplinary methodology, insights and lessons learned from many disciplinary perspectives and experiences to create new ways of thinking about TJ theory and practice. In order to address cultural violence, I used feminist and postcolonial literature because I thought both were important to holistically understand the complexity of this subject in the CAR. I have not delved too deeply into the more rigorous concepts of moral, legal, and political philosophy, but I hope to do so in a more robust version of this thesis. To address structural justice, I used concepts from political and social sciences while using a bit of historical analysis to address historical injustices. Ultimately, traditional doctrinal legal methods have proven useful to analyse Gender-Based Crimes and for my Chapter on retributive justice.

In the course of writing this thesis, 9 individuals were consulted, including representatives of local and international civil society, journalists, academics, lawyers, judges

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<sup>333</sup> Martha Albertson Fineman & Estelle Zinsstag ‘Feminist perspectives on transitional justice’ (2013) *Series on transitional justice* 13 at 2.

<sup>334</sup> Hilary Charlesworth ‘Feminist methods in international law’ (1999) *American Journal of International Law* 93, no. 2: 379-394 at 381.

<sup>335</sup> Galtung op cit note 263 at 303.

<sup>336</sup> Ibid at 303.

and other staff of relevant institutions. As a result of practical difficulties linked to the health and security context, and despite an initial intention to go to the CAR, the majority of interviews were conducted remotely, by telephone or video conference, and in a very limited number of cases in writing, due to logistical difficulties. The information obtained is reflected throughout this thesis. For security reasons and in order to facilitate exchanges, the identities of the interviewees are not disclosed and each audio recording was deleted within 24 hours of the interview. Ethical clearance was sought and granted from the Human Research Ethics Committee (Non-Medical) of the University of the Witwatersrand.

In light of the broad scope of the research, the sensitivity of specific issues, the political and security fluidity, and the limited available data, this thesis should be considered as the starting point for a discussion on gender justice and TJ in the CAR. It highlights several issues encountered during this research that merit further study to inform appropriate responses better. It is also essential to specify that this thesis intends to provide avenues of purely theoretical research, which could be helpful, if they wish, to women currently living in the CAR by giving them legal and philosophical tools to advance their interests. This thesis does not intend to influence practice at any cost. It is presented instead as a road map and it will be up to women living in the CAR and practitioners to determine what in this thesis seems relevant to them in their work and daily lives. I chose the CAR because it is a country that has all the characteristics of recent TJ theoretical developments: decolonizing methodologies and literature, gender and sexuality, Third World approaches to international law, climate justice, and a regional focus on the global south. I also chose this country because it allowed me to analyze complex normative questions that I thought necessary to address and that have fascinated me for many years. Therefore, this contribution is academic and has the humility to leave people working on the ground to choose whether to refer to this thesis or not. However, if this theoretical work can contribute, even if only a little, to the improvement of women's rights in the CAR, this author will already be happy.

Because this thesis is purely theoretical, it is therefore not bothered by material and practical questions, such as the financing of transitional justice, divergent political interests, economic and human resources, and the like. This thesis offers to identify criteria that could help stakeholders decide when to include violations of economic, social, and cultural rights in transitional justice processes and how best to do so. However, it does not address related problems in the institutional capacity of the different transitional justice mechanisms and the different limitations they face that can range from a need for more human or financial resources to the nature of their mandates. Such limitations must be taken into account in other

research works. Having never been in the field, I also leave it to practitioners to consider these complex questions in a more relevant way. They will then see what, in theory, seems possible to them to apply in practice.

However, because this thesis is theoretical, it can apply to identical cases or countries facing problems similar to those of the CAR. That is why, it seemed to me necessary to divide justice into four parts to have a clear idea of what transitional justice, to be transformative, requires. Some authors, however, include distributive justice in an expanded definition of restorative justice and normative justice in an expanded definition of distributive justice. I chose to disassemble these 'Matryoshka dolls' in order to give them, in their own right, their distinct part in transformative justice. The solutions given to restorative and distributive justice can, I think, be applied to most contexts where transitional justice occurs. However, more than any other, normative justice must be adapted on a case-by-case basis, depending on the country concerned. While I call for legal pluralism in the CAR, I know that cultural and social norms will have to be transformed using other means in other contexts. However, I think it is crucial, in any context, to take these norms into account and to confront cultural violence in the same way as structural or direct violence.

## I. GENDER JUSTICE AND LEGAL PLURALISM

If TJ is understood as transformative, it must guarantee that GBV will not recur in the CAR in the future. It will therefore be essential to change the norms and structures that maintain gender inequalities. The question then is to know around which notion of gender justice the mechanisms and processes of TJ can be deployed in the CAR, given that the concepts of equality and discrimination have been debated for centuries.<sup>337</sup> What constitutes inequality for some often results from representations of a specific social order accepted and shared by the populations concerned. Gender roles and resulting power dynamics are closely linked to cultural beliefs and the social-relational contexts in which they operate. Therefore, this chapter will analyse how gender justice relates to multiple sources of legitimacy, involving many actors, normative systems, authorities, and territories in the CAR. This diversity of sources can reveal ‘a multiplicity of conceptions of, and praxes connected with, what a given group accepts as just or feels to be unjust.’<sup>338</sup> Mohanty notes that there is indeed no universal patriarchal framework and that each power structure must be understood in its context.<sup>339</sup> This requires a thorough ‘analysis of culture, ideology, and socio-economic conditions.’<sup>340</sup>

In the social sciences, for example, post-modernist and critical realist theories converge on one point: ‘Knowledge is culturally and historically situated.’<sup>341</sup> Post-modernists, including Foucault, argued that “‘justice,” as an evaluative notion, is therefore tied to various other features of our social world, those features that make our world what it in fact is.<sup>342</sup> Therefore, taking a critical realist stance on human rights, the following sections posit that the objectivity of the human rights framework should be sought without denying the particularities of perspectives surrounding definitions and understandings of gender justice.<sup>343</sup> The authors of human rights themselves:

disowned the thought that human rights are the expression of any single conception of human nature or human good or of any but the most general understanding of the purposes of human social organization. They took it as an ineliminable fact that people would differ about these matters. They therefore aspired to a doctrine that could be endorsed from many contemporary

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<sup>337</sup> Henn op cit note 136 at 35.

<sup>338</sup> Séverine Bellina ‘A Plural Approach to the Definition of Social Justice’ (2011) in *Global Civil Society 2011* at 138.

<sup>339</sup> Chandra Talpade Mohanty ‘Under Western Eyes: Feminist Scholarship and Colonial Discourses’ in *Colonial discourse and post-colonial theory* (2015) at 63.

<sup>340</sup> Ibid at 63.

<sup>341</sup> José López & Garry Potter (eds) *After postmodernism: An introduction to critical realism* (2005) 9.

<sup>342</sup> Satya P. Mohanty ‘Can our values be objective? On ethics, aesthetics, and progressive politics’ (2001) *New Literary History* 32, no. 4: 803-833

<sup>343</sup> López & Potter op cit note 368 at 12.

moral, religious, and cultural points of view and that was suited to be implemented by means distinctive to characteristically modern forms of social organization.<sup>344</sup>

Feminist theories also inspire this analysis. Western feminists have already called for additional research to ‘question the assumptions of neutrality and universal applicability of norms of international law and to expose the invisibility of women and their experiences in discussions about the law.’<sup>345</sup> In addition, black, Third World, and lesbian feminists have pointed out ‘that women's experiences are influenced by race, ethnicity, class, colonisation, religion and/or sexual orientation as well as gender.’<sup>346</sup> The concept of intersectionality will therefore allow a more precise understanding of the term gender. A field study in Iraq, for example, showed that ‘assuming a universality of priorities, concerns and interests among women of different backgrounds, merely as a result of their gender’ would be a mistake and that ‘instead, women’s concerns are likely to be highly particular to their own society’s pre-conflict gender norms and to the disruption of those norms during the conflict.’<sup>347</sup> Understanding gender in its intersectionality with other variables will make it possible to understand the various incarnations of women according to the status to which reference is made, whether it be ethnicity, nationality, or other. While the use of categories may risk reifying these categories and obscuring the fluidity and complexity of identity, in this work, these categories remain a valuable tool for illuminating women's experiences.<sup>348</sup>

This thesis, therefore, proposes to adopt a realistic theory of identity insofar as it makes it possible to recognise how the social categories of race, class, gender, and sexuality, among others, or the cultural category of ethnicity ‘function in individual lives without *reducing* individuals to those social determinants.’<sup>349</sup> These incarnations, in turn, can indicate what justice will be considered most legitimate by women, although this perception can fluctuate throughout life.<sup>350</sup> These determinants can also help to understand why people make choices and how to structure the incentives that can accelerate the change process.<sup>351</sup> This

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<sup>344</sup> Charles R. Beitz *The idea of human rights* (2009) 8.

<sup>345</sup> Hilary Charlesworth, Christine Chinkin & Shelley Wright ‘Feminist approaches to international law’ (1991) *American Journal of International Law* 85, no. 4: 613-645 at 644.

<sup>346</sup> Rosemary Hunter ‘Deconstructing the subjects of feminism: The essentialism debate in feminist theory and practice’ (1996) *Australian Feminist Law Journal* 6, no. 1: 135-162 at 135.

<sup>347</sup> Angeline Lewis ‘WPS, Gender and Foreign Military Interveners: Experience from Iraq and Afghanistan’ in *Rethinking Transitional Gender Justice* (2019) 122.

<sup>348</sup> Lorraine S. Gilpin ‘Postpositivist realist theory: Identity and representation revisited’ (2006) *Multicultural Perspectives* 8, no. 4: 10-16 at 12.

<sup>349</sup> *Ibid* at 13.

<sup>350</sup> Bellina *op cit* 365 at 140.

<sup>351</sup> Mojubaolu Olufunke Okome ‘Listening to Africa, Misunderstanding and misinterpreting Africa: Reformist Western feminist evangelism on African women’ In *42nd Annual Meeting of African Studies Association, Philadelphia, Pennsylvania* (1999) at 5.

thesis will therefore take as its starting point the study of international women's rights in the analysis of gender justice. However, this study will also move towards a more nuanced understanding of women's interests within their society and the importance of other aspects of their identity, including religion, ethnicity, and politics, in shaping those interests.

This approach will allow one to think a multidimensional and culturally effective TJ project since, 'because of its transformative goal, the pillars of TJ are seen today as processes rather than mere mechanisms, which requires adopting holistic and context-specific approaches with common and overlapping objectives among the different TJ processes.'<sup>352</sup> This common and overlapping objective is, in this thesis, gender justice understood in its plurality. The concepts of *ubuntu* and intersectionality will therefore be used together or alternatively throughout this thesis in order to better illustrate the complexity of gender norms in the CAR. In interactional justice, they can offer the tools to the TJ actors for understanding women's voice and needs when defining what harms, discrimination and inequality mean to them.

This approach will also be particularly useful when dealing with structural justice. It will allow one to better grasp the meaning of gender disparities in the socio-economic field of the CAR in order to avoid the pitfalls of seeing cultural sexual differentiation as the central cause of inequality in economic production.<sup>353</sup> Mohanty notes in that regard that: 'often the mere existence of a sexual division of labour is taken to be the proof of the oppression in various societies. This results from a confusion between and collapsing together of the descriptive and explanatory potential of the concept of the sexual division of labour. Superficially similar situations may have radically different, historically specific explanations, and cannot be treated as identical.'<sup>354</sup> Considering another epistemic paradigm, albeit still imperfect, will then avoid some erroneous interpretations according to which 'polygamy is equated with patriarchy; patrilinearity evidences patriarchy; and women's refusal to seek inclusion in male associations and structures reflects subordination.'<sup>355</sup>

This approach will ultimately allow to reimagine what guarantees of non-recurrence and the rule of law may mean in the context of the CAR by redefining what the law subject is. If application of universal rules conceives of law's subject as 'abstractions from real people emphasising one side of the human life- the ability to reason and calculate -at the expense of

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<sup>352</sup> UNDP supra note 186 at 14.

<sup>353</sup> Nzegwu op cit note 487 at 88.

<sup>354</sup> Chandra Talpade Mohanty "'Under western eyes" revisited: Feminist solidarity through anticapitalist struggles' (2003) *Signs: Journal of Women in culture and Society* 28, no. 2: 499-535 at 76.

<sup>355</sup> Nzegwu op cit note 487 at 91.

every social circumstance that brings individuals to reason and calculate in particular ways,<sup>356</sup> and an abstract entity,<sup>357</sup> by contrast, African legal philosophy as defined by Ramose understands the legal subject as a living experience.<sup>358</sup> This approach can help explore new avenues for women to assess, shape and transform norms.

(a) Gender Justice in international law

International human rights law is ‘the expression of a set of important overlapping moral expectations to which different cultures hold themselves and other accountable,’<sup>359</sup> and a public expression of what is acceptable between nations.<sup>360</sup> In international law, gender justice is understood as gender equality and non-discrimination against women.<sup>361</sup> The Charter of the United Nations provides for the ‘equal rights of men and women.’<sup>362</sup> Human rights and fundamental freedoms should be enjoyed ‘without distinction as to race, sex, language, or religion.’<sup>363</sup> This equal access to human rights has been reaffirmed by the Universal Declaration of Human Rights (UDHR)<sup>364</sup> adopted in 1948. The International Covenant on Civil and Political Rights (ICCPR),<sup>365</sup> ratified by the CAR in 1981, and the International Covenant on Economic, Social and Cultural Rights (ICESCR),<sup>366</sup> ratified by the CAR in 1981, prohibit discrimination based on sex (art. 2) and ensure the equal right of men

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<sup>356</sup> Ni Aolain & Hamilton op cit note 462 at 387.

<sup>357</sup> Mogobe B. Ramose *African philosophy through Ubuntu* (1999) 81.

<sup>358</sup> Ibid 81.

<sup>359</sup> Beitz op cit note 371 at 73 citing Sumner B. Twiss *A constructive framework for discussing Confucianism and human rights* (1995) 31.

<sup>360</sup> Bardo Fassbender & Knut Traisbach (eds) *The Limits of Human Rights* (2019) 240/ See Martha C Nussbaum ‘Women’s Progress and Women’s Human Rights’ (2016) 38 *Human Rights Quarterly* 589–622.

<sup>361</sup> ‘Gender justice entails ending the inequalities between women and men that are produced and reproduced in the family, the community, the market and the state. It also requires that mainstream institutions — from justice to economic policymaking — are accountable for tackling the injustice and discrimination that keep too many women poor and excluded,’ in UNIFEM ‘Gender justice: Key to achieving the millenium development goals’ (accessed on 24 May 2020), online at: <https://www.unwomen.org/-/media/headquarters/media/publications/en/unifemmdgbrief2010.pdf?la=en&vs=947>, Referring to Anne Marie Goetz ‘Gender justice, citizenship and entitlements: Core concepts, central debates and new directions for research’ in Maitrayee Mukhopadhyay & Navsharan Singh (ed) *Gender Justice, Citizenship and Development* (2007).

<sup>362</sup> United Nations, *Charter of the United Nations*, 24 October 1945, 1 UNTS XVI, Preamble §2, available at: <https://www.refworld.org/docid/3ae6b3930.html> [accessed 3 June 2021].

<sup>363</sup> Ibid art. 1.

<sup>364</sup> UN General Assembly, *Universal Declaration of Human Rights*, 10 December 1948, 217 A (III), available at: <https://www.refworld.org/docid/3ae6b3712c.html> [accessed 3 June 2021].

<sup>365</sup> UN General Assembly, *International Covenant on Civil and Political Rights*, 16 December 1966, United Nations, Treaty Series, vol. 999, p. 171, available at: <https://www.refworld.org/docid/3ae6b3aa0.html> [accessed 3 June 2021].

<sup>366</sup> UN General Assembly, *International Covenant on Economic, Social and Cultural Rights*, 16 December 1966, United Nations, Treaty Series, vol. 993, p. 3, available at: <https://www.refworld.org/docid/3ae6b36c0.html> [accessed 3 June 2021].



and women to the enjoyment of all rights contained in the two covenants (art. 3). The principle of non-discrimination, including discrimination based on sex, has been enshrined in all human rights instruments, which makes it the most fundamental principle of human rights law.<sup>367</sup> For example, the Convention on the Rights of the Child (CRC), ratified by the CAR in 1992, also prohibits discrimination based on sex.<sup>368</sup>

The leading international instrument for promoting and protecting women's rights is the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW),<sup>369</sup> ratified by the CAR in 1991. CEDAW extends to ESC rights and personal and family matters.<sup>370</sup> The treaty defines *discrimination* against women as ‘... any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field’ (art. 1). As an evolutionary instrument, CEDAW ‘anticipates the emergence of new forms of discrimination that had not been identified at the time of drafting,’<sup>371</sup> and is intended to respond to the evolving nature of discrimination against women.<sup>372</sup> The obligation to eliminate discrimination based on sex rests with the state (art. 2).

With regard to the concept of *equality*, the CEDAW Committee emphasises that it is inherent in ‘the idea that all human beings, regardless of sex, are free to develop their personal abilities, pursue their professional careers and make choices without the limitations set by stereotypes, rigid gender roles and prejudices.’<sup>373</sup> The concept of gender equality includes both formal and substantive equality. Formal equality is the guarantee for women of the same treatment as men through the elimination of discriminatory laws.<sup>374</sup> However, while some laws may directly discriminate against women because they explicitly refer to sex as

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<sup>367</sup> Thomas Buergenthal ‘The Normative and Institutional Evolution of International Human Rights’ (1997) 19 *HuM. RTs. Q.* 703 ‘The only unambiguous provision ...is the prohibition of discrimination.’

<sup>368</sup> UN Commission on Human Rights, *Convention on the Rights of the Child.*, 7 March 1990, E/CN.4/RES/1990/74, Art. 2§1, available at <https://www.refworld.org/docid/3b00f03d30.html>, accessed 3 June 2021.

<sup>369</sup> UN General Assembly, *Convention on the Elimination of All Forms of Discrimination Against Women*, 18 December 1979, United Nations, Treaty Series, vol. 1249, p. 13, available at: <https://www.refworld.org/docid/3ae6b3970.html> [accessed 3 June 2021].

<sup>370</sup> Berihun Adugna Gebeye *A Theory of African Constitutionalism* (2021)180.

<sup>371</sup> *General Recommendation No. 28* supra note 71.

<sup>372</sup> UN Committee on the Elimination of Discrimination Against Women (CEDAW), *General recommendation No. 25, on article 4, paragraph 1, of the Convention on the Elimination of All Forms of Discrimination against Women, on temporary special measures*, 2004, para. 7, available at: <https://www.refworld.org/docid/453882a7e0.html> [accessed 12 August 2021].

<sup>373</sup> *General Recommendation No. 28* supra note 71 para. 22.

<sup>374</sup> CEDAW GR 25 supra note 392, para. 7.

the basis for differential treatment,<sup>375</sup> for example, laws prohibiting women from driving,<sup>376</sup> others may be neutral and indirectly discriminate against women<sup>377</sup> because they have a disproportionately disadvantageous impact on them.<sup>378</sup> Hence the need for substantive equality.<sup>379</sup> Substantive equality recognises the limits of formal equality since gender-neutral laws can have discriminatory effects on women and thus requires that ‘biological as well as socially and culturally constructed differences between women and men’<sup>380</sup> be taken into account.

To this end, the state should ‘take special measures to redress historical wrongs and entrenched inequalities in order to give women access to opportunities usually beyond their reach and, in doing so, achieve equality of results.’<sup>381</sup> The state should also take appropriate measures ‘(t)o modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women’ (CEDAW, art. 5 (a)). CEDAW therefore is a radical instrument in terms of transformation<sup>382</sup> which, through its article 5, allows the state to intervene in the social and cultural spheres.<sup>383</sup> This radicality therefore requires a deep understanding of the social and cultural patterns of behaviour in the context studied, as will be seen below.

A series of international conferences have also strengthened states' political commitment to women's human rights.<sup>384</sup> The Beijing Platform for Action, for example, in its

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<sup>375</sup> Henn op cit note 136 at 36.

<sup>376</sup> UN Committee on Economic, Social and Cultural Rights (CESCR), *General comment No. 20: Non-discrimination in economic, social and cultural rights (art. 2, para. 2, of the International Covenant on Economic, Social and Cultural Rights)*, 2 July 2009, E/C.12/GC/20, para. 10(a), available at: <https://www.refworld.org/docid/4a60961f2.html> [accessed 12 August 2021].

<sup>377</sup> Ibid para. 10(b).

<sup>378</sup> Henn op cit note 136 at 36.

<sup>379</sup> UN Human Rights Committee (HRC), *CCPR General Comment No. 18: Non-discrimination*, 10 November 1989, available at: <https://www.refworld.org/docid/453883fa8.html> [accessed 12 August 2021]; UN Committee on Economic, Social and Cultural Rights (CESCR), *General Comment No. 16: The Equal Right of Men and Women to the Enjoyment of All Economic, Social and Cultural Rights (Art. 3 of the Covenant)*, 11 August 2005, E/C.12/2005/4, para. 7, available at: <https://www.refworld.org/docid/43f3067ae.html> [accessed 12 August 2021]; and UN Committee on Economic, Social and Cultural Rights (CESCR), *General comment No. 20: Non-discrimination in economic, social and cultural rights (art. 2, para. 2, of the International Covenant on Economic, Social and Cultural Rights)*, 2 July 2009, E/C.12/GC/20, para. 8(b), available at: <https://www.refworld.org/docid/4a60961f2.html> [accessed 12 August 2021].

<sup>380</sup> CEDAW GR 25 supra note 392 para. 8.

<sup>381</sup> Ibid para. 9.

<sup>382</sup> Makau Mutua ‘Savages, victims, and saviors: The metaphor of human rights’ (2001) *Harv. Int'l LJ* 42: 201 at 221.

<sup>383</sup> Bai Guimei ‘Women’s Rights are Human Rights’ (2019) *The Limits of Human Rights*: 223 at 229.

<sup>384</sup> See, among others, UN General Assembly, *Vienna Declaration and Programme of Action*, 12 July 1993, A/CONF.157/23 (accessed 5 August 2021), available at <https://www.refworld.org/docid/3ae6b39ec.html/>

chapter 1, advocates for ‘a full and equal share in economic, social, cultural and political decision-making,’<sup>385</sup> which means ‘that the principle of shared power and responsibility should be established between women and men at home, in the workplace and in the wider national and international communities,’<sup>386</sup> and entails ‘that women and men can work together for themselves, for their children and for society to meet the challenges of the twenty-first century.’<sup>387</sup> At a more decentralised level, regional instruments play a role in promoting gender equality and non-discrimination. In Africa, the African (Banjul) Charter on Human and Peoples’ Rights,<sup>388</sup> has been ratified by the CAR.<sup>389</sup> The Charter prohibits discrimination on any ground, including sex, in the enjoyment of the Charter rights (art. 2). Article 18 specifically mentions the obligation of African states to ‘ensure the elimination of every discrimination against women and also ensure the protection of the rights of the woman and the child as stipulated in international declarations and conventions.’ The African Commission on Human and Peoples’ Rights, a quasi-judicial body tasked with promoting human rights across the African continent and interpreting the Banjul Charter, has also passed a series of resolutions concerning the rights of women.<sup>390</sup>

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UN Population Fund (UNFPA), *Report of the International Conference on Population and Development, Cairo, 5-13 September 1994*, 1995, A/CONF.171/13/Rev.1 (accessed 5 August 2021), available at <https://www.refworld.org/docid/4a54bc080.html> / United Nations, *Beijing Declaration and Platform of Action, adopted at the Fourth World Conference on Women*, 27 October 1995, available at <https://www.refworld.org/docid/3dde04324.html> / General Assembly, Reports of Preparatory Meetings and Activities at the International, Regional and National Levels, Report of the Regional Conference for Africa (Dakar, 22-24 January 2001) A/CONF.189/PC.2/8.

<sup>385</sup> UN Women, Beijing +5 Political declaration and Outcome at 16.

<sup>386</sup> Ibid at 16.

<sup>387</sup> Ibid at 16.

<sup>388</sup> See Organization of African Unity (OAU), *African Charter on Human and Peoples’ Rights (“Banjul Charter”)*, 27 June 1981, CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), available at: <https://www.refworld.org/docid/3ae6b3630.html> [accessed 5 August 2021].

<sup>389</sup> See IJRC *African Commission on Human and Peoples’ Rights*, (consulted on the 15<sup>th</sup> of March 2023), online at: <https://ijrccenter.org/wp-content/uploads/2020/05/ACHPR-one-pager-2020.pdf>.

<sup>390</sup> See, for example, ACHPR /Res.66 (XXXV) 04: Resolution On The Situation Of Women And Children In Africa: Appeals to Member States to implement programmes to fight against HIV/AIDS and to devise a system to help women benefit from social security (paras 6 and 7 respectively)/ Resolution on the Status of Women in Africa and the Entry into Force of the Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa (2005): Encourages Member States to increase the participation of women in peacekeeping initiatives in the continent and to implement strategies, including affirmative action, to ensure that women can attain the highest levels of education and leadership in governance (paras 5 and 6 respectively)/ ACHPR/Res.103 (XXXX) 06: Resolution on the Situation of Women in the Democratic Republic of Congo /Resolution on Health and Reproductive Rights of Women in Africa (2007): relates to ‘the problems relating to reproductive health care and the quality of services available to women in Africa, including the inability of existing healthcare institutions to provide adequate pre- and post-natal care for mothers and babies especially in cases of complications, the high rate of maternal mortality in a number of African countries, and the prohibition of abortion where necessary to save the woman’s life’/ ACHPR/Res.111 (XXXXII) 07: Resolution on the Right to a Remedy and Reparation for Women and Girls Victims of Sexual Violence: Urges States Parties to the African Charter on Human and Peoples’ Rights to Identify the causes and consequences of sexual violence and to take all necessary measures to prevent and eradicate it (art 2 para 3), put in place efficient and accessible reparation programmes that ensure information, rehabilitation and compensation for victims of sexual violence

The African Protocol on Women's Rights (Maputo Protocol)<sup>391</sup> supplements the African Charter on Human and People's Rights. It was adopted in 2003 by the African Union Assembly of Heads of state and Government,<sup>392</sup> and signed by the CAR in 2008.<sup>393</sup> The Protocol considers the issue of culture and 'promotes the right of women to live in a positive cultural context and ensuring women's participation at all levels of authority associated with the cultural sector.'<sup>394</sup> It also calls on states to commit themselves 'to modify the social and cultural patterns of conduct of women and men through public education, information, education and communication strategies, with a view to achieving the elimination of harmful cultural and traditional practices and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes, or on stereotyped roles for women and men' (Art. II (2)). Ultimately, the African Union (AU) Assembly adopted the Solemn Declaration on Gender Equality in Africa (AU Solemn Declaration) in 2004,<sup>395</sup> a non-binding commitment by states, which contains provisions on GBV and conflict prevention.<sup>396</sup> According to this Declaration the state is responsible for ensuring 'the active promotion and

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(art 2 para 5), Ensure participation of women in the elaboration, adoption and implementation of reparation programmes (art 2 para 7)/ ACHPR/Res.121 (XXXXII) 07: Resolution on the United Nations Declaration on the Rights of Indigenous Peoples/ ACHPR/Res.135 (XXXVIII) 08: Resolution on Maternal Mortality in Africa/ ACHPR/Res.153 (XLVI) 09: Resolution on Climate Change and Human Rights and the need to Study its Impact in Africa: Urges the Assembly of Heads of State and Government to ensure that special measure of protection for vulnerable groups such as children, women, the elderly, indigenous communities and victims of natural disasters and conflicts are included in any international agreement or instruments on climate change (art. 2)/ ACHPR/Res.176 (XLVIII) 2010: Resolution on the Deteriorating Situation of Indigenous People in some parts of Africa/ ACHPR/Res.183 (XLIX) 2011: Resolution on the Protection of the Rights of Indigenous Women in Africa: 'Noting the indivisibility of the rights of indigenous women and those of the populations to which they belong and the fact that the respect for the rights of indigenous women passes necessarily through the respect for the collective rights of indigenous populations'.

<sup>391</sup> African Union, *Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa*, 11 July 2003, available at: <https://www.refworld.org/docid/3f4b139d4.html> [accessed 20 December 2022].

<sup>392</sup> Frans Viljoen 'An introduction to the protocol to the African charter on human and peoples' rights on the rights of women in Africa' (2009) *Wash. & Lee J. Civil Rts. & Soc. Just.* 16: 11 at 12.

<sup>393</sup> Moga-Kpely & Zewei op cit note 213 at 14.

<sup>394</sup> Ibid at 14 – See Art. XVII of the Maputo Protocol.

<sup>395</sup> Solemn Declaration on Gender Equality in Africa (AU Solemn Declaration), Assembly/AU/Decl.12 III Rev. 1, online at: [https://au.int/sites/default/files/documents/38956-doc-assembly\\_au\\_decl\\_12\\_iii\\_e.pdf](https://au.int/sites/default/files/documents/38956-doc-assembly_au_decl_12_iii_e.pdf). / Also see Le Pacte de Sécurité, de Stabilité et de Développement de la Conférence Internationale sur la Région des Grands Lacs (2008), online at : <https://faolex.fao.org/docs/pdf/mul121601.pdf>. CAR is a member of this conference (Art. 1 (d)); 'The Pact on Peace, Security, Stability and Development in the Greater Region serves as the legal framework and agenda for the ICGLR, with the central objective of creating favorable conditions for security, stability and development in the within Member States' (Art. 2); 'States undertake to outlaw all propaganda and organizations that attempt to justify or encourage any form of hatred or discrimination based on gender' (Art. 8 (d)); 'Member States undertake to prevent and respond to sexual violence against women and children in times of peace and in times of war' (Art. 11).

<sup>396</sup> Viljoen op cit note 413 at 14.

protection of all human rights for women and girls including the right to development by raising awareness or by legislation if necessary.<sup>397</sup>

Although imperfect, international and regional human rights law has, over the years, offered more and more guarantees to women around the world. It has, however, also been the subject of much criticism. Western feminists have denounced the male perspective of international law, which dismisses women's real concerns and experiences because it focuses primarily on the public sphere.<sup>398</sup> According to them, the public-private dichotomy created by some of these rights is often detrimental to women because it excludes certain acts from the parameters of international law, such as women's reproductive rights.<sup>399</sup> More recently, international human rights law has been criticised by African feminists, among others, for its failure to consider women in their diversity and ignore factors such as 'ethnicity, race, religion, culture, class, and other similar attributes.'<sup>400</sup> They recommended an intersectional approach to gender discrimination and inequality to draw attention to women's multiple experiences of oppression<sup>401</sup> instead of treating them as an 'undifferentiated homogeneous group.'<sup>402</sup> Afro-feminist theories indeed emphasise that international norms and equality understood as formal and substantive, while important, do not capture the meaning attached to the terms gender and equality in the context of Africa.<sup>403</sup> Analyses of gender disparities 'only make sense if they are linked to "context-specific histories of the interplay between class, ethnicity and race."' <sup>404</sup> These findings represent transformative alternatives to traditional human rights discourses<sup>405</sup> and open new avenues for regulating gender justice in the CAR.

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<sup>397</sup> Ibid at 14 citing article 6 of the AU Solemn Declaration.

<sup>398</sup> Gebeye op cit note 390 at 179.

<sup>399</sup> Hilary Charlesworth & Christine Chinkin 'Between the Margins and the Mainstream' in Bardo Fassbender & Traisbach, Knut (ed) *The Limits of Human Rights* (2019) 210.

<sup>400</sup> Gebeye op cit note 390 at 180.

<sup>401</sup> Hunter op cit note 373 at 142/ Also see CEDAW GR 25 supra note 392, para 10: 'Certain groups of women, in addition to suffering from discrimination directed against them as women, may also suffer from multiple forms of discrimination based on additional grounds such as race, ethnic or religious identity, disability, age, class, caste or other factors. Such discrimination may affect these groups of women primarily, or to a different degree or in different ways than men. States parties may need to take specific temporary special measures to eliminate such multiple forms of discrimination against women and its compounded negative impact on them.'

<sup>402</sup> Sylvia Tamale *Decolonization and Afro-Feminism* (2020) 39.

<sup>403</sup> Ibid 6.

<sup>404</sup> Ibid 38.

<sup>405</sup> Ibid 119-120/ See Nicholas F. Stump 'Critical Explorations of Human Rights: Recent and Selected Works' (2019) *Legal Reference Services Quarterly* 38, no. 3: 115-122; Ratna Kapur *Gender, alterity and human rights: Freedom in a fishbowl* (2018).

(b) From the consideration of gender justice under the prism of legal centralism (...)

Law, in the CAR, is conceptualised as *legal centralism*. Legal centralism describes ‘the projection of state law as a supreme and singular legal order of the state, as well as the consideration of law by legal philosophers as the sole business and sphere of the state.’<sup>406</sup> Therefore, ‘(l)aw is and should be the law of the state, uniform for all persons, exclusive of all other law, and administered by a single set of state institutions.’<sup>407</sup> This section will analyse the limits of such a conceptualisation in the CAR. The CAR’s obligation under international law is to ensure that there is no direct or indirect discrimination against women in its domestic law. In this regard, after having ratified the international legal instruments cited above, the CAR incorporated them into its domestic law.<sup>408</sup> The first wave of transition in the CAR, with the National Forum in Bangui, resulted in the drafting of a new Constitution, which entered into force on March 30, 2016, and includes more guarantees for women,<sup>409</sup> while reflecting international standards. The new CAR’s Constitution reaffirms the fundamental principle of equality for all before the law,<sup>410</sup> and guarantees equal rights for men and women in all areas,<sup>411</sup> including access to education,<sup>412</sup> work<sup>413</sup> and health care,<sup>414</sup> and guarantees the rights for women to hold public and political office including within the legislature, the executive and the judiciary,<sup>415</sup> reinforced by the law of 2016 on parity between men and women.<sup>416</sup>

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<sup>406</sup> Gebeye op cit note 390 at 18.

<sup>407</sup> Ibid at 18 citing John Griffiths ‘What Is Legal Pluralism?’ (1986) 24 *Journal of Legal Pluralism and Unofficial Law* 1 at 3.

<sup>408</sup> The Constitution of the Central African Republic of 2016 reaffirms, in its preamble, the acceptance by the people of the Central African Republic of the international legal texts listed below: The Charter of the United Nations; The Universal Declaration of Human Rights supra note 384; The international covenants of 16 December 1966, on economic, social and cultural rights and on civil and political rights; The African Charter on Human and Peoples’ Rights; The Convention on the Elimination of All Forms of Discrimination against Women; The Convention on the Rights of the Child, as well as all conventions and international treaties duly ratified by the Central African Republic.

<sup>409</sup> Rapport général du Forum National de Bangui at 23/ Niagale Bagayoko *Comparative Study of Transitional Justice in Africa: Central African Republic* (2018) 47.

<sup>410</sup> See Constitution of 2016, art 6§1: The Constitution enshrines the principle of equality and non-discrimination, online [https://constituteproject.org/constitution/Central\\_African\\_Republic\\_2016.pdf?lang=en](https://constituteproject.org/constitution/Central_African_Republic_2016.pdf?lang=en).

<sup>411</sup> Ibid, art 6 §3.

<sup>412</sup> Ibid, art 9.

<sup>413</sup> Ibid, art 11.

<sup>414</sup> Ibid, art 8.

<sup>415</sup> Ibid, arts 80 & 99.

<sup>416</sup> Law n°16. 004 of 24 November 2016 on parity between men and women/ Also see Ordinance No. 05.007 of 2 June 2005 on political parties and the status of the opposition in the Central African Republic: lays down the principle of non- discrimination when political parties are formed.

One could say that this type of constitutional change expresses a more inclusive social contract and is therefore part of a maximalist vision of the rule of law. The ‘rule of law’ has gradually become one of the critical goals of TJ, and while the minimalist view implies a government that is subject to and operates only within the law,<sup>417</sup> the maximalist view posits that the rule of law is a broader concept that also encompasses substantive standards, such as human rights.<sup>418</sup> Therefore, the CAR Constitution, like most Constitutions today, sets out the basic principles of governance while formulating Bills of Rights that incorporate fundamental principles of international human rights. In this regard, the 2016 Constitution can be seen as potentially the most important legal instrument in the CAR in terms of gender justice, as it can help articulate a vision of values to which a society can aspire,<sup>419</sup> contribute to the objective of prevention by creating a society based on non-discrimination,<sup>420</sup> and subjecting all laws to its provisions.<sup>421</sup> However, religious and customary norms are not mentioned.

In terms of gender justice, analysing the place of women within the family institution is extremely important because the family is ‘the cornerstone of the production and reproduction of social norms.’<sup>422</sup> Family law is therefore indicative of the status of women in the political economy of their country.<sup>423</sup> The Family Code of the CAR was adopted in 1997<sup>424</sup> and entered into force in 1998. This code complies with the legal requirements established under international law. The consent of both spouses is required for a marriage to be legal (art. 200) and a divorce can be pronounced at the request of one of the spouses (art. 266, art. 267 & art. 269). The Family Code also guarantees a woman's ability to inherit as a widow (art. 745) and as a daughter in the same way as sons (art. 745). With respect to land, property and other non-land assets, the law grants married and single women the same rights as married and single men to own, use, make decisions and use as collateral (art. 383 and Constitution, art. 18).

If the Family Code in the CAR offers precious guarantees to women, it is nevertheless built on a conception of the family conceived as an ahistorical institution. This approach may seem paradoxical given that the family institution is deeply rooted in the history and tradition

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<sup>417</sup> Mani op cit note 279 at 26.

<sup>418</sup> Mani op cit note 279 at 27.

<sup>419</sup> A/HRC/37/65 supra note 310 § 32.

<sup>420</sup> Ibid § 33, referring to A/67/929-S/2013/399.

<sup>421</sup> Tamale op cit note 423 at 86 referring to Yash Ghai ‘Constitutionalism: African Perspectives’ (2017) *The Gallant Academic*:149; and Okoth Ogenido & G. W. Hastings ‘Constitutions Without Constitutionalism: An African Paradox’ (1988).

<sup>422</sup> Ibid at 181.

<sup>423</sup> Ibid at 179.

<sup>424</sup> Act No. 97/013 of 11 November 1997 on the Family Code.

of peoples.<sup>425</sup> The prism through which the law legitimises the family and enshrines the rights of its members does not necessarily correspond to certain family forms to which many Central Africans refer. The population, especially those living in rural areas, still rely heavily on customary norms<sup>426</sup> in terms of marriages,<sup>427</sup> inheritance,<sup>428</sup> parental authority,<sup>429</sup> and divorce.<sup>430</sup> In 2014, for example, only 10% of couples in the CAR referred to the Family Code.<sup>431</sup> However, the law remains silent on other forms of unions (it includes polygamy but this text is controversial), informal marriages or unions and does not provide for official registration.<sup>432</sup> This, in turn, excludes some women from the title of wife or widow in the eyes of the law and does not take into account the varied forms of families in different regions of the CAR. This may impact how displaced women can claim their housing, land and property (HLP) rights once they return to their places of origin, as will be detailed below.

Overall, the many legal reforms in the CAR have led the country's national legal apparatus to be progressive in terms of women's rights. Other laws provide for equal access of women and men to the political, economic and social authorities, health care,<sup>433</sup> education<sup>434</sup> and employment.<sup>435</sup> No discrimination based on sex is enshrined in the law with regard to the right to vote<sup>436</sup> and eligibility.<sup>437</sup> Two ordinances were also adopted in 1966, one prohibiting the practice of excision<sup>438</sup> and another one promoting the schooling of

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<sup>425</sup> Tamale op cit note 423 at 181.

<sup>426</sup> The World Bank Group *Understanding Access to Justice and Conflict Resolution at the Local Level in the Central African Republic (CAR)* (2012), at 52, online: <http://documents1.worldbank.org/curated/en/970091468192841525/pdf/782640WP0CAR0A0Box0377336B00PUBLIC0.pdf>.

<sup>427</sup> Jaminal El Abdellaoui, Norwegian refugee Council & UNHCR, *Displacement and Housing, Land and Property Rights in the Central African Republic* (2014) (accessed 8 April 2020), online at: [www.nrc.no/globalassets/pdf/reports/displacement-and-housing-land-and-property-rights-in-the-central-african-republic.pdf](http://www.nrc.no/globalassets/pdf/reports/displacement-and-housing-land-and-property-rights-in-the-central-african-republic.pdf).

<sup>428</sup> Margaret Owen & Laura Castellan, op cit note 188.

<sup>429</sup> CEDAW/C/CAF/1-5 supra note 214 § 184

<sup>430</sup> See Jacqueline Cassandra Woodfork *Culture and Customs of the Central African Republic* (2006).

<sup>431</sup> El Abdellaoui supra note 448.

<sup>432</sup> See art. 226 of the Family Code.

<sup>433</sup> Act No. 06.005 of 20 June 2006 on reproductive health/ Act No. 06.030 of 12 September 2006 establishing the rights of people living with HIV infection/AIDS.

<sup>434</sup> Act No. 97.014 of 10 December 1997 on national education policy.

<sup>435</sup> See CEDAW/C/CAF/1-5 supra note 214/ The Labour Code of 2009, art. 253 & 254.

<sup>436</sup> Act No. 09.016 of 14 October 2009 on the Electoral Code: One important feature is that the law obliges all parties to present slates that have 35 per cent women. However, the main problem is high illiteracy among women (the new code specifies that all candidates must be able to read and write) see art. 281.

<sup>437</sup> Supra note 168 S/2019/498, §15: see art. 281 of the electoral code of 2019.

<sup>438</sup> Ordinance No. 66/16 of 22 February 1966 prohibiting the practice of female genital mutilation (excision) / art. 114 of the Penal Code of 2010: Excision is punished of 2 to 5 years imprisonment and a fine/ Anyone who has knowledge about excision being practiced can also be punished of 6 months to 1-year imprisonment and a fine (Art. 116 of the Penal Code of 2010).



girls.<sup>439</sup> If the legal texts have a role in the perception of women in a given society which can make it possible to redefine gender roles in certain sectors, and to build a specific ideology often transplanted into the social field,<sup>440</sup> it seems however to be insufficient in the CAR. While the first wave of the CAR transition provided the country with the strongest legal protections for women, it is not clear that this new rule of law will fundamentally change outcomes for women.<sup>441</sup> Enforcement and dissemination of the laws has, for example, been virtually non-existent outside of Bangui,<sup>442</sup> hampering their potentially transformative effect. Many women are still unable to understand the law either because of language barriers or because they are illiterate.<sup>443</sup>

Intersectionality is a valuable tool for examining issues of underenforcement especially when it comes to women's equality legislation and policy programs.<sup>444</sup> In the CAR, for example, the locality variable helps to understand how underenforcement mainly affects women living in rural areas. The education variable informs on the ability of women to understand official texts. Indeed, although not the mother tongue of most Central Africans, French is the language of reference for administration and education which raises issues of inequity for women who did not learn this language at school.<sup>445</sup> However, systematic incongruity between stated rules and their application may also mean that legal rules do not generally govern conduct.<sup>446</sup> Murphy notes that: 'Officials may maintain scrupulous adherence to the requirements of the rule of law, but unless citizens are willing to obey the law declared, rules will not govern conduct.'<sup>447</sup> Some women may have the capability to

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<sup>439</sup> Ordinance No. 66/26 of 31 March 1966 on the advancement of girls and their continuation in the education system until the age of 21 years.

<sup>440</sup> Julie Ada Tchoukou 'Religion as an ideological weapon and the feminisation of culture in Nigeria: a critical analysis of the textuality of violence through the legal regulation of child marriages' (2020) *The International Journal of Human Rights* 24, no. 10: 1515-1536 at 1525.

<sup>441</sup> Also noticed, more generally, by Fionnuala Ni Aolain & Michael Hamilton 'Gender and the rule of law in transitional societies' (2009) *Minn. J. Int'l L.* 18 (2009): 380 at 388.

<sup>442</sup> CEDAW/C/CAF/1-5 supra note 214 § 137 / Also see UN Women supra note 100 at 19 noting that: 'Although there is a General Inspectorate of Judicial Services (IGSJ) which is responsible for verifying throughout the Central African Republic the observance of laws, ordinances, regulations and instructions, the functioning of courts, judicial services and prisons, the country does not have separate judicial bodies to oversee the implementation of human rights and gender equality provisions. However, there is an association of women judges and magistrates which has just been created (...) in the long term, it also intends to take an interest in issues related to the decision-making of women judges and magistrates and to monitor the application of decisions related to provisions relating to gender equality and human rights.'

<sup>443</sup> Ministère des affaires sociales, de la solidarité nationale et de la famille *Stratégie sectorielle de genre et réduction de la pauvreté* at 12, online at : <https://www.ilo.org/dyn/natlex/docs/ELECTRONIC/98146/116671/F767470346/CAF-98146.pdf>.

<sup>444</sup> Fionnuala Ni Aolain & Eilish Rooney 'Underenforcement and intersectionality: Gendered aspects of transition for women' (2007) *The International Journal of Transitional Justice* 1, no. 3 (2007): 338-354 at 340.

<sup>445</sup> UN Women supra note 100 at 12.

<sup>446</sup> Colleen Murphy *The conceptual foundations of transitional justice* (2017) at 123.

<sup>447</sup> *Ibid* 126.

access those rights and yet still decide not to. Or they can weight these rights against other claims on their possible actions,<sup>448</sup> based on customary norms for example.<sup>449</sup> It would therefore be important to also understand those claims.

More generally, Western feminists have already questioned whether the acquisition of legal rights is synonymous with real progress for women's equality: 'Quite apart from problems such as the form in which rights are drafted, their interpretation by tribunals, and women's access to their enforcement, the rhetoric of rights, according to some feminist legal scholars, is exhausted.'<sup>450</sup> Some authors emphasise that measures promoting substantive equality have little impact when they do not consider the complexity of gender roles and the hierarchy between the sexes.<sup>451</sup> It is also widely recognised that positive and lasting changes for women are more likely to take shape if they are rooted in a change in the values and practices of the populations concerned rather than in legislative reform alone.<sup>452</sup> Therefore, any attempt to achieve gender justice cannot inspire popular support without a clear understanding of local peoples' ideas of what constitutes legitimacy, equality, and fairness in their lives.<sup>453</sup> In that regard, Fobear notes that: 'Using laws and policies to reach for an equality based on one dominant, abstract and universal version of identity and experience is necessarily going to be a partial version of the actual lived experience of equality because it excludes differences, excludes understandings of how those differences result from, and are brought into effect by intersectionality.'<sup>454</sup> Therefore, the concept of intersectionality can here provide information on the type of justice that women will prefer and what legitimacy, equality, and fairness mean for them according to their ethnicity, age, level of education, their geography, among other factors.

This observation raises the question: Could culture fare any better for gender justice in the CAR? Culture can be defined 'as the set of shared spiritual, material, intellectual and

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<sup>448</sup> Amartya Sen 'Elements of a theory of human rights' (2004) *Philosophy & public affairs* 32, no. 4: 339 at 340: 'A great many parametric considerations of these and other kinds will inescapably figure in the reasoned evaluation of what a person should do, even after the need to undertake such an evaluation has been fully accepted.'

<sup>449</sup> Ministère des affaires sociales supra note 464 at 12.

<sup>450</sup> Charlesworth, Chinkin & Wright op cit note 372 at 635.

<sup>451</sup> Tamale op cit note 423 at 138.

<sup>452</sup> Sindiso Mnisi & Aninka Claassens 'Rural women redefining land rights in the context of living customary law' (2009) *South African Journal on Human Rights* 25, no. 3: 491-516 at 513 referring to B Oomen *Chiefs in South Africa: Law, Power & Culture in the Post-Apartheid Era* (2005) at 251/ Also see Beitz op cit note 371 at 194.

<sup>453</sup> Kevin Bales & Sarich 'Anti-Slavery and the Redefining of Justice' in *Global Civil Society 2011* (2011) 75/ Also see Philipp Kastner & Elisabeth Roy-Trudel 'Addressing masculinities in peace negotiations: An opportunity for gender justice' in *Rethinking transitional gender justice* (2019) at 149-150.

<sup>454</sup> Katherine Fobear 'Queering truth commissions' (2014) *Journal of Human Rights Practice* 6, no. 1: 51-68 at 62.

emotional features of human experience that is created and constructed within social praxis. As such, culture is intimately connected with the diverse ways in which social groups produce their daily existence economically, socially and politically. It therefore embraces both the commonly held meanings that allow for the continuation of everyday practices as well as the competing meanings that galvanize change over time.<sup>455</sup> Former Special Rapporteur on Violence Against Women, its causes and consequences, Yakin Ertürk, adds: ‘Across all regions, culture constitutes a primary source of diverse and sometimes contradictory normative systems that provides the rationale for varied patterns of gender roles and identities, which signify relations of power.’<sup>456</sup> The concept of legal pluralism is therefore introduced in this thesis in order to take into account this multitude of normative systems. Ige indeed notes: ‘Law claims to permeate every strata of life, but legal pluralism challenges this claim, because in essence legal pluralism is a confluence of history, politics, sociology and the culture of the people whose colonial law supplants.’<sup>457</sup>

(c) (...) To the consideration of gender justice under the prism of legal pluralism

Culture establishes ideas and practices that enforce power dynamics and gender relations. Cultural traditions, practices and values, as well as religious norms and customs, have therefore significant impacts on shaping the perception of women and men in society, their social status and overall experience. It is therefore important to understand these norms.

(i) Shifting the paradigm

To understand gender inequality in the CAR, it is first essential to avoid essentialising a category as broad as ‘women’ in order to capture the different gender relations in the country and understand the relational contexts in which these relationships take place. It is also important to understand the different and not mutually exclusive ways that women understand and define themselves.<sup>458</sup> Some women may share ‘the same political, economic,

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<sup>455</sup> *Report of the Special Rapporteur on Violence Against Women, its causes and consequences, Implementation of General Assembly Resolution 60/251 of 15 March 2006 entitled “Human Rights Council”, Intersections between culture and violence against women*, UHC, 2007, UN Doc A/HRC/4/34, § 17 online at: <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G07/103/04/PDF/G0710304.pdf?OpenElement>.

<sup>456</sup> *Ibid* § 18.

<sup>457</sup> Rhoda Asikia Ige ‘Legal Pluralism in Africa: Challenges, Conflicts and Adaption in a Global Village’ (2015) *JL Pol'y & Globalization* 34: 59 at 60.

<sup>458</sup> Interview recorded on the 05/12/2022.

social, intellectual, professional and indeed personal desires for change<sup>459</sup> than Western Feminists. For others, however, their role and status in a certain social relational context, even if they are sometimes objectionable by outsiders, are considered part of a social capital.<sup>460</sup> In the Democratic Republic of Congo, for example, a country neighbouring the CAR, a study showed that seeing the oppression of women as rooted in patriarchal norms alone would limit full knowledge of the situation, with men being reduced to perpetrators and women to victims.<sup>461</sup> This perspective views oppression through the prism of Western norms, and fails to account for the position of these women ‘within their communities, their roles as caregivers and providers, and their search for justice.’<sup>462</sup> In the same country it has been reported that ‘the racialised representation of Congolese men as savages erases the family unit and the role of community, and can lead to significant blind spots in policy.’<sup>463</sup> The roles of wives and mothers, as an example, are considered part of some communities' social ethos and are just as important as the roles attributed to men.<sup>464</sup> Therefore, this finding calls for further exploration of certain gendered practices in the cultures concerned to discern why people do what they do<sup>465</sup> and to reassess what the division of public and private spheres means in various social contexts.<sup>466</sup>

Since ‘cultural beliefs’ and ‘social relational contexts’ play a decisive role in the ‘gender system’, it is therefore important to understand what these ‘cultural beliefs’ and ‘social relational contexts’ are in the CAR. Indeed, gender understood as a social construct is always culturally specific,<sup>467</sup> since the social meaning attached to masculine and feminine is closely linked to what is considered ‘normal behaviour, attitudes, and attributes’ in a specific context.<sup>468</sup> Gender systems, in the CAR, are shaped by variables such as ‘ethnicity, age,

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<sup>459</sup> Elaine Salo ‘Talking about feminism in Africa’ (2001) *Agenda* 16, no. 50: 58-63 at 60.

<sup>460</sup> Sylvia Walby *Gender transformations* (2003) at 7.

<sup>461</sup> Bilge Sahin & Sidonia Lucia Kula ‘What women want before justice: examining justice initiatives to challenge violence against women in the DRC’ (2018) *International Journal of Transitional Justice* 12, no. 2: 296-313 at 309.

<sup>462</sup> *Ibid* at 312.

<sup>463</sup> Chrisanthi Giotis ‘More than a victim: Thinking through foreign correspondents’ representations of women in conflict’ in *Rethinking transitional gender justice* (2019) 109.

<sup>464</sup> Nkiru Nzegwu ‘Gender equality in a dual-sex system: The case of Onitsha’ (1994) *Canadian Journal of Law & Jurisprudence* 7, no. 1: 73-95 at 80.

<sup>465</sup> Okome *op cit* note 378 at 3.

<sup>466</sup> Nzegwu *op cit* note 487 at 79.

<sup>467</sup> Spike Peterson ‘New Wars and Gendered Economies’ (2008) 88 *Feminist Rev* 7, cited by Miranda Alison, *Women and Political Violence: Female Combatants in Ethno-National Conflict* (2009) 9/ Also see Rees & Chinkin *op cit* note 89 at 1214.

<sup>468</sup> Donna Pankhurst ‘The “sex war” and other wars: Towards a feminist approach to peace building’ (2003) *Development in Practice* 13(2-3), 154–177 at 166.

education, wealth, skill set and employment, locality, power and social status.<sup>469</sup> The concept of intersectionality is often used to denote the various ways in which someone's multiple identities shape the various dimensions of their experiences.<sup>470</sup> An intersectional approach to gender has been encouraged by the the Committee of the UN Convention on the Elimination of Discrimination against Women (CEDAW Committee), noting that: 'The discrimination of women based on sex and gender is inextricably linked with other factors that affect women, such as race, ethnicity, religion or belief, health, status, age, class, caste and sexual orientation and gender identity. Discrimination on the basis of sex or gender may affect women belonging to such groups to a different degree or in different ways to men.'<sup>471</sup>

An intersectional perspective can therefore help to address the cross-cutting forms of discrimination against women in various spheres of life, the way in which they can claim their rights, the way in which they are exposed to injustices, and the way in which they experience violence. In the CAR, the locality variable shows a gap in access to infrastructure and public services between women living in cities, especially the capital, Bangui, and women living in rural areas who barely have access to them.<sup>472</sup> Age can play a role in access to land, which is difficult for young people.<sup>473</sup> The level of education creates a difference between literate women and those who are illiterate, the former being able to understand the law and official documents, and having a better chance of entering the labour market.<sup>474</sup> Women's political status and level of wealth can impact the control they have over assets.<sup>475</sup> The ethnicity of women can also determine their status within society, the Baka, Bagyeli and Efe are, for example, considered at the bottom of the social ladder.<sup>476</sup>

Even though lacking sufficient data, this concept can also allow for a more detailed analysis of the cultural beliefs and social relational contexts in which gender power dynamics operate. Ethnic and geographic variables can be important variables for understanding social relational contexts in which cultural beliefs are at play. The CAR is indeed divided between two geographies: one close to the northern border countries, notably Chad, while the other is

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<sup>469</sup> D. Russell & M. B. Vabi 'Gender Analysis for the Central Africa Regional Program for the Environment (CARPE) Phase III' (2013) at 6.

<sup>470</sup> Kimberle Crenshaw 'Mapping the margins: Intersectionality, identity politics, and violence against women of color' (1990) *Stan. L. Rev.* 43: 1241 at 1244.

<sup>471</sup> *General Recommendation No. 28* supra note 71 § 18.

<sup>472</sup> Russell & Vabi op cit note 92 at 6.

<sup>473</sup> Ibid at 6.

<sup>474</sup> Ibid at 6.

<sup>475</sup> Ibid at 6.

<sup>476</sup> Russell & Vabi op cit note 92 at 6.

closer to the southern border countries, such as the Democratic Republic of Congo.<sup>477</sup> This geographical division has an impact on the beliefs, values and languages spoken by the populations living in these areas, and contributes to the socio-cultural diversity of the country and its different regions.<sup>478</sup> For example, the northern part of the country, close to Chad, is predominantly Muslim, while the region close to the southern border countries is predominantly Christian and animist. In addition, a large part of the population in the northeast of the country speaks Arabic instead of Sango.<sup>479</sup> As an illustration, the Sara is a Central Sudanic people.<sup>480</sup> This multitude of languages spoken in the country can have a decisive influence on peoples' thinking and perception<sup>481</sup> and therefore also influence the way in which gender norms are thought and defined.

Three indigenous groups are currently recognised in the CAR: the Fulani M'bororo, the Aka, and the Litho.<sup>482</sup> The Fulani M'bororo, mainly nomadic herders, live in the prefectures of Ouaka in the center-east, M'bomou in the south, and Lobaye in the southwest.<sup>483</sup> The Aka Pygmies live mainly in the CAR forests, where they continue to practice their traditional activities.<sup>484</sup> The Litho people are located in the north of the country. They are semi-nomadic and practice agriculture, hunting, gathering, and fishing.<sup>485</sup> Due to their own cultural traditions, these groups may certainly share different cultural beliefs from the rest of the Central African population regarding gender roles. The CAR voted in favour of the UN Declaration on the Rights of Indigenous Peoples (UNDRIP)<sup>486</sup> in September 2007 and ratified the ILO Convention 169<sup>487</sup> in August 2010. Concerning indigenous women, the CEDAW Committee notes that: 'State action to prevent and address discrimination against

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<sup>477</sup> Tatiana Carayannis 'CAR's Southern Identity: Congo, CAR, and International Justice' in *Making Sense of the Central African Republic* (2015) 245/ Also see Marchal, Roland. "CAR and the Regional (Dis) order." *Making Sense of the Central African Republic* (2015): 166-93 at 167.

<sup>478</sup> UN Women *Profil Genre de la RCA* (2021) at 5.

<sup>479</sup> Interview recorded on the 16/09/2022.

<sup>480</sup> Dennis D. Cordell 'The savanna belt of north-Central Africa' in *History of Central Africa* 1 (1983) at 42.

<sup>481</sup> See the "Linguistic Relativity Hypothesis", otherwise known as the Sapir-Whorf Hypothesis, Basal Al-Sheikh Hussein 'The sapir-whorf hypothesis today' (2012) *Theory and Practice in Language Studies* 2, no. 3: 642-646 at 642.

<sup>482</sup> International Work Group for Indigenous Affairs' website, *Indigenous World 2019: Central African Republic*, online at: <https://iwgia.org/en/central-african-republic/3495-iw2019-car.html>.

<sup>483</sup> Ibid.

<sup>484</sup> Ibid.

<sup>485</sup> Ibid.

<sup>486</sup> Ibid/ See UN General Assembly, *United Nations Declaration on the Rights of Indigenous Peoples : resolution / adopted by the General Assembly, 2 October 2007, A/RES/61/295*, available at: <https://www.refworld.org/docid/471355a82.html> [accessed 21 December 2022].

<sup>487</sup> International Work Group for Indigenous Affairs Ibid / See International Labour Organization (ILO), *Indigenous and Tribal Peoples Convention, C169*, 27 June 1989, C169, available at: <https://www.refworld.org/docid/3ddb6d514.html> [accessed 21 December 2022].

Indigenous Women and Girls must integrate a gender, intersectional, intercultural, and multi-disciplinary perspective throughout their lifespan.<sup>488</sup>

The concept of equality understood as equivalence therefore can miss the fact that what is defined as equality also depends on the character of the social structures in which equality takes place and on the value attributed to the two sexes.<sup>489</sup> Equality, according to the ‘Aristotelian approach, means identical treatment of like persons (formal equality), on the one hand, and differential treatment of unlike persons (substantive equality), on the other hand.’<sup>490</sup> However, this definition of equality does not indicate when a person's situation is considered different or equal to another and, if considered different, to what extent the treatment should be considered discriminatory.<sup>491</sup> The vacuum created by this normative and conceptual uncertainty often risks taking Western, white, heterosexual bourgeois men as the sole reference.<sup>492</sup> This can take the form, in terms of equality of inclusion, for example, of seeking to include women in all the institutions where men already find themselves without necessarily understanding the gender dimensions that are at stake or questioning the relevance of these institutions. Therefore, without assuming that gender equality is a Western prerogative,<sup>493</sup> Tamale proposes a paradigm shift and a reassessment of the liberal right to equality as understood in international standards in the light of other worldviews, that can be based on communitarianism, interdependence and solidarity, aiming to engender a type of gender justice that affirms social diversity.<sup>494</sup> According to her, *ubuntu*, as an academic concept, can help, if only partially, to broadly capture what other worldviews could be like. *Ubuntu* as a concept is said to relate to the unity of Bantu languages.<sup>495</sup>

In the CAR, the majority of the population is part of the ethnolinguistic group known as the ‘oubanguian peoples’.<sup>496</sup> The official language is French, the national language is Sango,<sup>497</sup> the native and most often spoken languages belong to the Adamawan, Oubanguian

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<sup>488</sup> UN Committee on the Elimination of Discrimination Against Women (CEDAW), *General Recommendation No. 39 on the rights of Indigenous women and girls*, 31 October 2022, CEDAW/C/GC/39 § 4.

<sup>489</sup> Ibid at 84.

<sup>490</sup> Henn op cit note 136 at 39.

<sup>491</sup> Ibid at 39.

<sup>492</sup> Ibid at 39-40 referring to Catharine A. MacKinnon *Women's lives, men's laws* (2007) 48.

<sup>493</sup> Kiran Grewal ‘Using War to Shift Peacetime Norms: The Example of Forced Marriage in Sierra Leone’ in *Rethinking Transitional Gender Justice* (2019) 85.

<sup>494</sup> Tamale op cit note 423 at 131.

<sup>495</sup> Elikia M'Bokolo ‘Comparisons and Contrasts in Equatorial Africa: Gabon, Congo and the Central African Republic’ in *History of Central Africa: The Contemporary Years since 1960* (1960) 70.

<sup>496</sup> Lombard op cit note 3 at 12.

<sup>497</sup> William J. Samarin ‘The colonial heritage of the Central African Republic: A linguistic perspective’ (1989) *The International journal of African historical studies* 22, no. 4: 697-711 at 704: Bantu words also left their imprint on Sango.

and Bantu language families. Many children also learn Hausa, Fulani, or parts of Arabic.<sup>498</sup> Linguistically, the CAR is a multilingual country with 72 languages used. Sango became an official language in 1991 but is the mother tongue of only around 10% of the population, although it is used as a vehicular language by a large number of Central Africans.<sup>499</sup> Nevertheless, the *ubuntu* philosophy is said to encompass other language groups than the Bantu language family on the African continent and is deeply embedded in the cultural fabric of many African societies.<sup>500</sup> Tamale refers to the now classic *African Philosophy Through Ubuntu*, where Ramose presents the concept of *ubuntu* as the source of African ontology and epistemology.<sup>501</sup> He argues that the concept informs the worldview of some Africans, based on interrelatedness, beyond the Bantu speakers.<sup>502</sup> The notion of *ubuntu* is a South African variant of the African philosophy of community and ‘individual wholesomeness’,<sup>503</sup> and derives from the philosophy that ‘I am because we are, and because we are therefore I am.’<sup>504</sup> A number of African philosophers indeed distinguish the importance of community for some Africans, as opposed to the autonomous individualism common to many dominant philosophies found in Western societies.<sup>505</sup> Most African societies ‘function within a communal structure whereby a person’s dignity and honour flow from his or her transcendental role as a cultural being.’<sup>506</sup> However, describing what she calls ‘Afro-communitarianism,’ Oelofsen demonstrates that *ubuntu* is not ‘trapped in the false dichotomy posed between individualism and communitarianism,’<sup>507</sup> it is only a matter of noting, as

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<sup>498</sup> Rebecca Hardin ‘Concessionary politics: property, patronage, and political rivalry in Central African forest management’ (2011) *Current Anthropology* 52, no. S3: S113-S125 at S114.

<sup>499</sup> UN Women supra note 100 at 12.

<sup>500</sup> Tamale op cit note 423 at 139/ Also see John S. Mbiti *African religions & philosophy* (1990).

<sup>501</sup> Tamale Ibid at 140 referring to Mogobe B. Ramose *African philosophy through Ubuntu* (1999).

<sup>502</sup> Ibid.

<sup>503</sup> Makau Mutua ‘What is the future of transitional justice?’ (2015) *International Journal of Transitional Justice* 9, no. 1 1-9 at 5 /Also see Ilize Keevy *African philosophical values and constitutionalism: a feminist perspective on Ubuntu as a constitutional value* (2008) Unpublished PhD thesis, Faculty of Law, University of the Free States, Bloemfontein at 334: ‘The concept of “personhood” indicates that the person is whole. Personhood is a state that can only be achieved after having gone through all *ubuntu* rites and living an “altruistic and ethical life”. “Wholeness is the starting point of the African concept of a person. Consequently, the human person in African thought is not definable in terms of a single physical or psychological characteristic to the exclusion of everything else” (Ramose, 2002 {b}: 64). To become an ancestor, the deceased had to be an elder. “Ancestors are therefore a distinct group of eternal saints, apart from other spiritual personalities who are also endowed with immortality, but are not ancestors” (Ephirim-Donkor, 1996: 129).’

<sup>504</sup> James A.M. Cobbah ‘African values and the human rights debate: An African perspective’ (1987) *Human Rights Quarterly*, 9 at 320.

<sup>505</sup> Tamale op cit note 423 at 139/ Also see Kwame Gyekye ‘Person and community in African thought’ (1992) *Person and community: Ghanaian philosophical studies* 1: 101-122.

<sup>506</sup> Ibid at 139 citing Cobbah op cit note 505 at 331.

<sup>507</sup> Ibid at 139 citing Rianna Oelofsen ‘Women and ubuntu: Does ubuntu condone the subordination of women?’ in *African philosophy and the epistemic marginalization of women* (2018) at 45.



Nahum asserts, that in the framework of African humanism, individuality is simply ‘not overemphasized at the expense of collective rights.’<sup>508</sup>

In order to refine the analysis, this paradigm shift would also benefit from being supplemented by an intersectional analysis to grasp the diversity of the social relational contexts in the CAR and the complexity of each person's identity. Some women may not identify with this philosophy.<sup>509</sup> It is moreover difficult, if not impossible to discuss gender as a continent-wide phenomenon. Some communities, like the Fulani/Peulh communities, for example, have different languages and customs than other segments of the Central African population, which has prompted some armed groups, such as the 3R, to fight *anti-balaka* militias and RJ fighters whom they claim threatened these communities and marginalised them.<sup>510</sup> The same may be true for indigenous peoples living in the CAR like mentioned in the introduction.<sup>511</sup> Taking this paradigm shift seriously and recognising this diversity can, however, make it possible to rely on different normative categories anchored in values that express a collective ethos and which are ‘key to the adoption of an idea or the practice of what is “just” for the actors.’<sup>512</sup> The concept of legal pluralism will therefore be used in this thesis to question the myth of a unified and centralised law in the CAR and thus put at the center of the analysis the different philosophical, social and political visions concerning the role of women in society.<sup>513</sup> It will also help to better understand the gender norms at play.

In the context of a TJ that aims to be transformative, it is particularly interesting to examine the composition and operation of these additional modes of ordering as well as their relationship with state law. This leads to reconsider:

(...) the very process of *making* laws and on the substance of the laws thus produced. A rule is recognized as a legal *norm* not only in virtue of attending to facts pertaining to the rules themselves (for example, the fact that the rule has formal properties such that it has the capacity to guide behavior), but in virtue of the fact that those subject to it, after taking a normative, evaluative attitude, endow the rule with the authority to “norm” (*normen*) their behavior. (...) the authority of law depends, ultimately, upon its legitimacy, something that a

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<sup>508</sup> Ibid at 139, referring to Issa G. Shivji *The concept of human rights in Africa* (1989) at 14.

<sup>509</sup> Keevy op cit note 504 at 209.

<sup>510</sup> Cour Pénale Spéciale supra note 126 para. 180.

<sup>511</sup> International Labour Organization (ILO), *Indigenous and Tribal Peoples Convention, C169*, 27 June 1989, C169, available at: <https://www.refworld.org/docid/3ddb6d514.html> [accessed 14 April 2023], (art. 1): This Convention applies to: ‘(a) tribal peoples in independent countries whose social, cultural and economic conditions distinguish them from other sections of the national community, and whose status is regulated wholly or partially by their own customs or traditions or by special laws or regulations; (b) peoples in independent countries who are regarded as indigenous on account of their descent from the populations which inhabited the country, or a geographical region to which the country belongs, at the time of conquest or colonisation or the establishment of present state boundaries and who, irrespective of their legal status, retain some or all of their own social, economic, cultural and political institutions.’

<sup>512</sup> Bellina op cit 365 at 140.

<sup>513</sup> Adam Jackson ‘The Influence of European Colonialism on Zande Customary Law’ (2003) *The University of Western Ontario Journal of Anthropology* 11, no. 1 at 53.

law gains precisely in virtue of the fact that we can consider it to be *our* rule (ownership), one that we give to ourselves —via recognized procedures —where the “ourselves” keeps growing (inclusion).<sup>514</sup>

Therefore, while legal change can contribute, to some extent, to ‘legal transformation,’<sup>515</sup> it must be recognised that changing gender norms will undoubtedly require consideration of socio-legal and socio-cultural contexts that, in the CAR, are based on legal pluralism. Reincorporating into the analysis the norms that prevail in social life is therefore essential.<sup>516</sup> However, the role that legal pluralism can have and the challenges it poses in achieving gender justice have been under-theorised.

(ii) Legal pluralism in the CAR

Claassens and Mnisi note that: ‘in the context of overlapping international instruments, state law, informal local law and customary regimes, people tend to “mix and match,” drawing on whichever authority, law or “right” best advances their specific interests in those instances. (...) Hence, nowhere can “rights” or custom be said to exist or operate in isolation from the other.’<sup>517</sup> Legal pluralism refers in this thesis ‘to the existence and application of multiple legal orders in the same social field—with or without the recognition of the state.’<sup>518</sup> Legal order is understood as ‘an aggregate or a plurality of general and individual norms that govern human behavior, that prescribe, in other words, how one ought to behave. That behavior is prescribed in a norm or, what amounts to the same thing, is the content of a norm means that one ought to behave in a certain way.’<sup>519</sup> In this section, the concept of law will be extended to the broader concept of norm, the concept of norm being understood in a larger sense as: ‘(a) normative statements that (b) are socially reproduced and (c) represent the individual’s perception of the expectations surrounding their own behaviour.’<sup>520</sup> The forms of normative ordering commonly discussed in studies of legal pluralism can be roughly

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<sup>514</sup> Pablo De Greiff ‘Articulating the links between transitional justice and development: Justice and social integration’ (2009) *Transitional justice and development: Making connections* 63 at 60.

<sup>515</sup> Swaine op cit note 79 at 274.

<sup>516</sup> Brian Z. Tamanaha ‘Understanding legal pluralism: past to present, local to global’ (2008) *Sydney Law Review* 30, no. 3: 375-411 at 385.

<sup>517</sup> Tamale op cit note 423 at 96 citing Mnisi & Claassens op cit note 475 at 497.

<sup>518</sup> Gebeye op cit note 390 at 22.

<sup>519</sup> Hans Kelsen & Stanley L. Paulson ‘The concept of the legal order’ (1982) *The American Journal of Jurisprudence* 27, no. 1: 64-84 at 64: They outline: ‘The concept of the norm and the concept of the “ought” coincide. To prescribe in a norm how one ought to behave is understood here not only as a command but also as a positive permission or an authorization.’

<sup>520</sup> Måns Svensson ‘Norms in law and society: towards a definition of the socio-legal concept of norms’ (2013) *Social and Legal Norms: Towards a Socio-legal Understanding of Normativity* at 47.

separated in the following six categories: ‘(i) official legal systems; (ii) customary/cultural normative systems; (iii) religious/cultural normative systems; (iv) economic/capitalist normative systems; (v) functional normative systems; (vi) community/cultural normative systems.’<sup>521</sup> This thesis focuses mainly on the first two and the last normative systems because they are the ones potentially, depending on their definition, capable of adapting relatively quickly to social changes while reflecting the social and cultural gender norms that currently exist in the CAR.

In the CAR, legal and customary<sup>522</sup> norms are coexisting as autonomous normative orders ‘in the same time–space context,’<sup>523</sup> and sometimes in semi-autonomous social fields.<sup>524</sup> The CAR also sometimes finds itself in a situation of ‘strong legal pluralism’, in other words ‘a situation where multiple legal orders coexist in parallel— independently of each other—within the same social field,’<sup>525</sup> since societies are not densely connected.<sup>526</sup> Ultimately, the CAR is in a situation in which ‘multiple legal orders are applicable in the same social field without the authorization of the state,’<sup>527</sup> since the Central African Constitution does not protect the status of customary norms.<sup>528</sup> Even though article 24 of the Constitution: ‘recognizes and protects the traditional values in accordance with the law and the Customary Authorities,’<sup>529</sup> customary justice has been deprived of an institutional

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<sup>521</sup> Tamanaha op cit note 517 at 397.

<sup>522</sup> See David Pimentel ‘Legal pluralism in post-colonial Africa: linking statutory and customary adjudication in Mozambique’ (2011) *Yale Hum. Rts. & Dev. LJ* 14: 59 at 61: Customary norms are defined ‘as unwritten law, retained by oral tradition and by acceptance and observance by the community or society to which it applies.’

<sup>523</sup> William Twining ‘Normative and legal pluralism: a global perspective’ (2009) *Duke J. Comp. & Int’l L.* 20: 473 at 489.

<sup>524</sup> Sally Falk Moore ‘Law and social change: the semi-autonomous social field as an appropriate subject of study’ (1972) *Law & Soc’y Rev.* 7: 719 at 720: In anthropology, the term semi-autonomous social field refers to the fact that a certain social field ‘can generate rules and customs and symbols internally, but that it is also vulnerable to rules and decisions and other forces emanating from the larger world by which it is surrounded.’/ Also see PNUD *La justice informelle en République Centrafricaine: Un champs qui nécessite un engagement prioritaire* at 11.

<sup>525</sup> Gebeye op cit note 390 at 20.

<sup>526</sup> Roland Marchal ‘Being Rich, Being Poor: Wealth and Fear in the Central African Republic’ in *Making Sense of the Central African Republic* (2015) 58/ Also see J-P. Danagoro, Dominique Malo, M. Serekoisse Samba, & A. Blague ‘La dualite vive entre les normes juridiques et les pratiques coutumieres en Republique centrafricaine’ (1999) *Land Reform, Land Settlement and Cooperatives (FAO) Reforme Agraire, Colonisation et Cooperatives Agricoles (FAO) Reforma Agraria, Colonizacion y Cooperativas (FAO)*, online at: <https://www.fao.org/3/x3720t/x3720t09.htm>.

<sup>527</sup> Gebeye op cit note 390 at 20.

<sup>528</sup> Central African republic’s Constitution of 2016, online [https://constituteproject.org/constitution/Central\\_African\\_Republic\\_2016.pdf?lang=en](https://constituteproject.org/constitution/Central_African_Republic_2016.pdf?lang=en): the Constitution remains silent on customary norms.

<sup>529</sup> Central African republic’s Constitution of 2016, online [https://constituteproject.org/constitution/Central\\_African\\_Republic\\_2016.pdf?lang=en](https://constituteproject.org/constitution/Central_African_Republic_2016.pdf?lang=en).

framework since 1965, when customary courts were abolished.<sup>530</sup> The decree of July 27, 1966, in application of the law of 1965, specifies that the modern courts will hear disputes which were previously brought before the customary law courts and will rule on this occasion according to the customary law.<sup>531</sup> In practice, this provision is rarely applied because the magistrates do not have sufficient knowledge of the many customs that exist in the country and therefore prefer to rule essentially according to national law.<sup>532</sup> The 1988 ordinance, however, gives the chiefs the power to intervene in matters of civil and commercial justice after having taken an oath before the judge and in the presence of the village council. No additional details about this task, such as procedures, appeal options, enforcement mechanisms and administrative costs, are provided.<sup>533</sup> This ordinance has been completed recently by a law relating to administrative districts which reiterates that in matters of civil, commercial and customary justice, the village or neighbourhood chief is vested with the power to reconcile the parties.<sup>534</sup> It is only specified that these activities are subject to the payment of hearing fees determined by deliberation at the municipal council (art 134 §2). The Chefs often ‘refer to local norms and/or religious texts (primarily the Bible or Koran).’<sup>535</sup> Many alternative dispute resolution mechanisms, however, remain outside the scope of state control.<sup>536</sup>

Alongside the official legal system, court auxiliaries such as gendarmes and police officers often take on the powers of a judge even though they are not authorised to do so.<sup>537</sup> Village chiefs or neighborhood chiefs (called makunji in Sango), on the other hand, derive their authority and responsibilities, as briefly seen above, from a 1988 decree and are accountable for their activities to local mayors, as well as the Ministry of Territorial Administration.<sup>538</sup> In some villages or neighbourhoods, they manage community affairs due to the limited and weak presence of state authorities outside Bangui.<sup>539</sup> Their primary and

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<sup>530</sup> United Nations Economic Commission for Africa *Le droit et la condition de la femme en République Centrafricaine* (1985) at ii, online at : <https://repository.uneca.org/bitstream/handle/10855/10313/Bib-51002.pdf?sequence=1&isAllowed=y>.

<sup>531</sup> Ibid at 2.

<sup>532</sup> Ibid at 2.

<sup>533</sup> El Abdellaoui supra note 448 at 24 referring to World Bank supra note 447 at 39.

<sup>534</sup> Act 21.001 of 21 January 2021 on administrative districts, art. 134, in French : ‘en matière de justice civile, commerciale et coutumière, le chef de village ou quartier est investi du pouvoir de concilier les parties.’

<sup>535</sup> El Abdellaoui supra note 448 at 24.

<sup>536</sup> Ministère de la Justice et des Droits de l’Homme *Politique sectorielle de la justice : 2020-2024* (2019) at ix.

<sup>537</sup> Jocelyn Ngoumbango Kohetto *L’accès au droit et à la justice des citoyens en République centrafricaine* (2013) Droit. Université de Bourgogne at 11-12.

<sup>538</sup> El Abdellaoui supra note 448 at 23.

<sup>539</sup> Ibid at 23.

official role is to apply the decisions of the administrative and local authorities;<sup>540</sup> however, in some remote villages where there are no state institutions, they often apply their own decisions.<sup>541</sup> Justice can also be organised by traditional chiefs, as in the western border area of the country.<sup>542</sup> Village and neighbourhood communities and people living in refugee camps also organise their own rules and justice systems.<sup>543</sup> In rural areas, the population is organised around the clan and the family, and the palaver tree is used as the main method of conflict resolution.<sup>544</sup> These modes of justice are considered the main supporters of peace in several provinces, both in the northeastern part of the Muslim-majority in the CAR and the rest of the country.<sup>545</sup>

The proliferation of conflict resolutions can show that the social capital of Central Africans has withered over the past two centuries, undermining in the process a sense of common identity and shared values.<sup>546</sup> The ancient traditional modes of justice, that were ‘decentralized, clan-based means of settling disputes and enforcing social norms,’<sup>547</sup> were destroyed by successive foreign powers, among which the trans-Saharan slave trade, and French colonisation.<sup>548</sup> Most of the traditional rules and laws were forgotten during these successive invasions.<sup>549</sup> Therefore, as is the case on most of the African continent: the legal orders that existed before colonialism were undermined and subordinated to that imported by the colonial power.<sup>550</sup> Western notions of household organisation and gender norms have sometimes supplanted local notions.<sup>551</sup> As a result, Central African citizens today are shaped not only by tradition but also by the Christian and Muslim religions,<sup>552</sup> with a population

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<sup>540</sup> Ibid at 24.

<sup>541</sup> Ibid at 24.

<sup>542</sup> Conciliation Ressources Peace and Security in the Central African Republic *Community perspectives from Bossangoa and the Western boarder zones* (2020), at 9, available online at: [https://www.hdcentre.org/wp-content/uploads/2020/06/Peace\\_and\\_security\\_in\\_the\\_Central\\_African\\_Republic.pdf](https://www.hdcentre.org/wp-content/uploads/2020/06/Peace_and_security_in_the_Central_African_Republic.pdf).

<sup>543</sup> Kohetto op cit note 538 at 11-12 / Enrica Picco & Roger Duthie *Rethinking Transitional Justice in the Central African Republic as Part of the 2030 Agenda* (2019), online at: <https://reliefweb.int/report/central-african-republic/rethinking-transitional-justice-central-african-republic-part-2030>.

<sup>544</sup> ICTJ Rim el Gantri & Arnaud Yaliki ‘*A Drop of Water on a Hot Stone*’ *Justice for Victims in the Central African Republic* (2021) at 26, online at: [https://www.ictj.org/sites/default/files/ICTJ\\_Report\\_CAR\\_EN.pdf](https://www.ictj.org/sites/default/files/ICTJ_Report_CAR_EN.pdf). / Kohetto op cit note 538 at 60.

<sup>545</sup> Interview recorded on the 31<sup>st</sup> of September 2022.

<sup>546</sup> World Bank supra note 447 at 42.

<sup>547</sup> Ibid at 17.

<sup>548</sup> Ibid at 13.

<sup>549</sup> Ibid at 13.

<sup>550</sup> Tamale op cit note 423 at 179.

<sup>551</sup> Ibid at 180.

<sup>552</sup> Lombard op cit note 3 at 11.

composed of ‘61 percent Protestant, 28 percent Catholic, and 9 percent Muslim,<sup>553</sup> and by globalised norms and values. The CAR, like most African countries, has now a ‘triple heritage’ taking its roots in ‘African indigeneity, the spread of Islam, and European colonialism,<sup>554</sup> coupled with the ‘hegemony and universalization of liberal constitutionalism.’<sup>555</sup> The result is a set of ill-defined and situational customary norms,<sup>556</sup> and traditional justice mechanisms often appropriated by armed groups, such as the *ex-Seleka*, in the areas they control.<sup>557</sup>

(iii) Legal pluralism and gender justice

These different norms and modes of conflict resolution and their persistence over time are nevertheless the manifestations of a system of norms and conflict resolution that remain more familiar to most of the Central African population.<sup>558</sup> Picco and Duthie note that: ‘Although the conflict has deeply affected the country’s social fabric, the authority of local chiefs remains a reference for Central Africans on family issues and land and property rights, both inside the country and in the refugee camps across the border.’<sup>559</sup> For example, in 2020, in the event of destruction of property 76% victims of all genders said they would first turn to the neighbourhood chief.<sup>560</sup> Thus, while state law officially prevails over customary norms, the latter still enjoy popular support<sup>561</sup> since the population often feels alienated from national legal texts.<sup>562</sup> This can be explained in part because of the low literacy rate in the country and the lack of translation of the various legal instruments into the national language, Sango,<sup>563</sup> or other dialects spoken at home:<sup>564</sup> Sango being little spoken in the extreme north-east of the CAR, for example.<sup>565</sup> Therefore, the many laws for gender equality ‘find themselves severely

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<sup>553</sup> US Department of State *2020 Report on International Religious Freedom: Central African Republic* (2021), online at: <https://www.state.gov/reports/2020-report-on-international-religious-freedom/central-african-republic/>.

<sup>554</sup> Gebeye op cit note 390 at 9.

<sup>555</sup> Ibid at 9.

<sup>556</sup> World Bank supra note 447 at 50.

<sup>557</sup> Godfrey M Musila ‘The Special Criminal Court and Other Options of Accountability in the Central African Republic: Legal and Policy Recommendations’ (2016) International Nuremberg Principles Academy at 30.

<sup>558</sup> Interview recorded on the 31/09/2022.

<sup>559</sup> Picco & Duthie op cit note 544.

<sup>560</sup> Harvard Humanitarian supra note 217, at 21.

<sup>561</sup> Kohetto op cit note 538 at 23.

<sup>562</sup> Ibid at 25.

<sup>563</sup> CEDAW/C/CAF/1-5 supra note 214 § 143.

<sup>564</sup> Lombard op cit note 3 at 11.

<sup>565</sup> Stephen W. Smith ‘CAR's History: The Past of a Tense Present’ in *Making Sense of the Central African Republic* (2015) 39.

limited in their scope, because of the "cohabitation" between customary rules and positive law which remains misunderstood and ignored by the vast majority of the population.<sup>566</sup>

This pluralism can also illustrate different types of legitimacy: A 'rational legal legitimacy' based on the normativity of national and international legal texts and a 'symbolic legitimacy' which relies instead on 'shared beliefs as the basis for what seems desirable, to be striven for.'<sup>567</sup> The recognition and effectiveness of a normative system will indeed also depend on it being seen as legitimate by the populations concerned.<sup>568</sup> These two types of legitimacy must therefore both be taken into account since a given population's sense of achieving social justice, and in this thesis gender justice, is in many cases rooted in 'coexistence, and dependent on the nature of the interaction, from all these sources.'<sup>569</sup> The confrontation of normative systems indeed highlights their different capacities of influence according to people, regions and situations. These different types of legitimacy also imply different ideas of justice,<sup>570</sup> different definitions of one's identity, and different approaches and perceptions of morality and power. This thesis therefore deals with customary norms since they may best illustrate symbolic legitimacy considering that norms 'are not produced in a void but rather with a view to regulating human relations, it follows that law is a necessary component of culture in the same manner as work, leisure, art, religion and others.'<sup>571</sup> As customary norms were forged by the peoples to whom they apply, it is often said that they better reflect local reality.<sup>572</sup> In *ubuntu* philosophy, for example, it is said that 'my society's Law is my Law.'<sup>573</sup> This is so if one accepts that words, concepts and ideas are closely linked to the language spoken, for example.<sup>574</sup>

According to legal hermeneutics, understanding of a word or text cannot be detached from its cultural context. Keevy, citing Van Blerk notes that 'a specific cultural context influences the perceptions and meanings of words as "[t]he languages unique to the societies which use them constitute unique worlds for those societies and should not be seen as

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<sup>566</sup> Groupe de la Banque Africaine de Développement supra note 242 at 3.4.3.

<sup>567</sup> Bellina op cit 365 at 140/ Also see Khanyisela Moyo 'Feminism, postcolonial legal theory and transitional justice: A critique of current trends' (2012) *International Human Rights Law Review* 1, no. 2: 237-275 at 238-239 referring to J. M. Mbaku, 'Constitutionalism and Governance in Africa' (2004) 6 *West Africa Review*.

<sup>568</sup> Bellina op cit 365 at 140.

<sup>569</sup> Ibid at 140.

<sup>570</sup> Ibid at 140.

<sup>571</sup> Ilias Bantekas 'The anthropological dimension of international crimes and international criminal justice' in *Criminological Approaches to International Criminal Law* (2014) at 242.

<sup>572</sup> Mutua op cit note 403 at 220.

<sup>573</sup> Keevy op cit note 504 at 333.

<sup>574</sup> Bantekas op cit note 572 at 249-250 / Gail M. Presbey "'Should women love" wisdom"? Evaluating the Ethiopian wisdom tradition' in Coetzee, P. H., & Roux, A. P. J. (Eds.) *The african philosophy reader* (2003) 432.

interchangeable words with different names for the same things.”<sup>575</sup> Therefore the diversity of languages and cultures of the CAR should be taken seriously as it certainly illustrates different visions of gender justice.<sup>576</sup> Consequently, a gender analysis includes but also goes beyond questions of ‘whether women have rights, what rights they have, and whether they have gained or lost rights to explore the centrality of gender ideas and assumptions in formulating the promotion and application of justice.’<sup>577</sup> As a result, taking legal pluralism seriously makes it possible to grasp the multiple sources of legitimacy in defining, promoting, and implementing gender justice in the CAR.<sup>578</sup>

As a matter of illustration, the looting, burning, and destruction of homes during armed conflicts have led thousands of Central Africans to be Displaced Persons (DP).<sup>579</sup> Addressing HLP rights will therefore be crucial for TJ in the country.<sup>580</sup> However, even though the law allows women to inherit and own their land, many Central Africans, especially those living outside the capital, do not have valid documents to prove ownership of their land or their dwellings, and most obtain land by inheritance or from the *Chef de Quartier or Village* of their locality even if they do not have a clear legal mandate.<sup>581</sup> The population generally accepts their role in land allocation and management as it is considered part of the customary land system that dominates in the CAR.<sup>582</sup> Some people living in the forests also feel that they do not need a permit since the land has belonged to them for generations.<sup>583</sup> Moreover, obtaining a land title can prove extremely difficult and requires a good knowledge of the administrative and judicial systems, which automatically excludes certain populations who do not know these procedures.<sup>584</sup> In 2014, 0.1% of the land was registered in the CAR.<sup>585</sup>

The eviction of wives and partners from the matrimonial home upon the death of one's spouse is one of the main issues related to women's rights concerning HLP. In terms of

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<sup>575</sup> Keevy op cit note 504 at 219.

<sup>576</sup> Edward Sapir *Culture, language and personality: Selected essays* (1985) 207.

<sup>577</sup> Conference ‘Anthropology and Human Rights: The Impact of Sally Engle Merry’ (Nov 8, 2019) – Gender, Dorothy Hodgson ‘*We are Not Birds*’: *Land Dispossession, Collective Protest, and Gender Justice in Tanzania*, at 35:54, online at: <https://chrgj.org/event/anthropology-and-human-rights-the-impact-of-sally-engle-merry/>

<sup>578</sup> Bellina op cit 365 at 140.

<sup>579</sup> El Abdellaoui supra note 448 at 6.

<sup>580</sup> Ibid at 8.

<sup>581</sup> Ibid at 6.

<sup>582</sup> Ibid at 20.

<sup>583</sup> Rainforest Foundation UK supra note 1917 at 2.

<sup>584</sup> Rainforest Foundation UK, Pierre Etienne Kenfack *Quels droits fonciers pour les populations des zones forestières en République Centrafricaine ? Etude critique de la législation foncière et propositions de réformes* (2018) at 2.

<sup>585</sup> El Abdellaoui supra note 448 at 20.



recourse options, the head of the locality is generally recognised as the authority for disputes of a civil nature.<sup>586</sup> In the case of a customary marriage or cohabitation, recourse options for a wife would, in most cases, be limited to filing a complaint with the local chief since these unions are not recognised by law.<sup>587</sup> On the other hand, a legally married woman facing threats of deportation or other violations of her right to HLP, according to the Family Code, can take the matter to court. The process of land restitution is also complicated when women have been displaced and need a title to prove their ownership of land or property. This situation is further aggravated since the state does not recognise customary land or family norms.

A study notes that:

Although the acquisition of land titles constitutes additional legal security for communities wishing to take the process, the Central African legislator should have as a constant concern the protection of pre-existing customary rights, even in the absence of any legal procedure. This concern is relevant for the revision of laws relating to land, but also for various sectoral laws and their implementing texts, relating in particular to the agricultural, forestry and mining sectors and to the protection of the environment and biodiversity. Therefore, the elaboration of a framework law that guarantees the fundamental rights of the populations is one of the important stages of the land reform process, and should serve as a reference for any other political or legal reform.<sup>588</sup>

South African land claims courts have pioneered an approach to establishing the facts of ownership and identity through the use of oral traditions, testimonies, and other unwritten sources; a similar approach might be acceptable in other similar circumstances.<sup>589</sup> Indeed, legal strategies that seek to avoid the customary arena can unwittingly reduce the capabilities of women for whom customary rights are the best or only basis for asserting or proving land rights.<sup>590</sup> Moreover, Certain legal terminologies such as personal law, private law and public law, individual law and collective law, among others, do not reflect the relationships which, in certain land and agrarian communities, bind human beings to the land, unite people of the same terroir and govern relations between individuals. Some customary norms, in fact,

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<sup>586</sup> El Abdellaoui supra note 448 at 34.

<sup>587</sup> El Abdellaoui supra note 448 at 34.

<sup>588</sup> Ibid at 4.

<sup>589</sup> Roht-Arriaza & Orlovsky op cit note 1251 at 188/ Also see International Labour Organization (ILO), *Indigenous and Tribal Peoples Convention, C169*, 27 June 1989, C169, art. 14 (3), available at: <https://www.refworld.org/docid/3ddb6d514.html> [accessed 14 April 2023].

<sup>590</sup> Mnisi & Claassens op cit note 475 at 492 / Also see Kossi op cit note 1829: Taking the example of the Aka community.

instead of emphasising the vertical state and individual relationship, rather privilege the spiritual and the beliefs linked to land rights.<sup>591</sup>

This highlights the shortcomings of legal reforms that only focus on statutory reforms. This suggests that legal strategies to support women's land rights, for example, cannot gloss over the arena of customary law and should instead engage in it directly.<sup>592</sup> Griffiths describes the land reform debate as stuck between whether 'individual property rights [should] take precedence over customary land tenure or vice versa.'<sup>593</sup> Nedelsky's ideas about how rights work, not primarily to create boundaries around individuals but to structure the interdependent relationships that advance or undermine autonomy, help escape this trap by recognising the socially rooted nature of women's land rights.<sup>594</sup> Whitehead and Tsikata cite studies from other parts of Africa that:

suggest not only that women's claims to land are much more diverse, but also that women's claims to land are much stronger than usually represented ... Ironically for those who link social embeddedness with women's *weaker* claims, the empirically demonstrated strength of women's claims seems to lie precisely in their social embeddedness.

Therefore, Mnisi and Claassens suggest that accommodations built on indigenous precedents are crucial for developing socio-economic rights. Local forums, for example, can be spaces to vernacularise land rights by incorporating 'underlying indigenous values.'<sup>595</sup> According to them, rural negotiations are, therefore, a place where a dialogue between customary and constitutional rights can occur as they have significant potential to modify power relations and transform women's land rights, thus achieving a change more tangible than many legislative reforms.<sup>596</sup> This women-centered approach to human rights is rooted in everyday perspectives and local contexts: Rights are shaped by real struggles informed by the understanding of those who claim them.<sup>597</sup>

## Conclusion

If it is accepted that gender is a social construction, in the sense that the division of roles between men and women varies from one society to another and from one era to another, then it seems essential when one talks about gender justice, to understand the plurality and

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<sup>591</sup> Danagoro et al. Op cit note 527.

<sup>592</sup> Mnisi & Claassens op cit note 475 at 493.

<sup>593</sup> Ibid at 513.

<sup>594</sup> Ibid at 513.

<sup>595</sup> Ibid at 513.

<sup>596</sup> Ibid at 514-515.

<sup>597</sup> Gready & Robins op cit note 324 at 354/ Also see Mark A. Drumbl 'Transitional justice moments' (2016) *International Journal of Transitional Justice* at 204-205.

diversity of social and cultural norms that impact the social dimension that being a woman can mean in a particular context. In the CAR, these norms are very often included in customary norms, that is to say, norms that have been perpetuated, more or less regularly, over time and have a strong legitimacy within the populations that refer to them. These norms may have, in the past, constituted the legal corpus, albeit informal, of the CAR, informing on what, in specific contexts and according to different cosmogony and cosmology, the form of the family, the gendered role of individuals within a couple but also, more broadly, a family or a community, was and what this repartition of roles could mean in terms, for example, of access and taking care of the land, for oneself but also for one's ancestors and for generations to come. This complexity regarding change for women in the CAR cannot be ignored. It will make it possible to render gender justice, not uniformly, but rather in a manner informed by the complexity and diversity of norms, languages, beliefs, epistemologies in the CAR, and how people make sense of the world around them. Cultural violence is located there and can only be dealt with by having a rigorous knowledge of the cultures at stake, their historical roots, and the diversity of these cultures within the CAR. In a time when GBV, as will be seen in the next chapter, is understood more and more widely as including violations of ESC rights, it seems essential that the term gender be understood in all its nuances and complexity. This will impact the very way in which transitional justice, in its quest for transformation, will be understood.

## II. Conflict-Related Gender-Based Violence in the Central African Republic

As seen in the Introduction of this thesis, if TJ was first understood as a response to the legacy of large-scale atrocities, understood as violations of civil and political rights, and to prevent their recurrence, today it is also seen as capable of contributing to the fight against impunity for violations of ESC rights.<sup>598</sup> This approach is strongly supported by the feminist academic literature,<sup>599</sup> and has a direct impact on the way GBV is defined and dealt with by TJ mechanisms. This chapter will therefore illustrate how GBV can be understood and defined. Within ICL, the ICC takes a broad approach to Gender-Based Crimes (GBC), going beyond mere sexual violence to also include other acts that may be gender-specific, persecution being perhaps the most prominent example. The two situations in the CAR before the ICC illustrate this evolution. *Bemba* was one of the first cases in which the ICC addressed sexual crimes. For their part, the *Ngaïssona/Yekatom* and *Saïd* cases illustrate how the ICC can take into account non-sexual gendered crimes and increasingly adopt an intersectional approach to SGBC. This methodology and case law may impact the work of the SCC, although this has not yet been apparent in the Court's first case. Moreover, with a broader definition of international crimes than that included in the Rome Statute, the SCC can potentially expand the scope of GBCs that fall within its jurisdiction. Nevertheless, the understanding of GBV as an international crime remains limited. The work of the CVJRR will therefore be essential to broaden the definition of GBV to violations not only of women's civil and political rights but also of their socio-economic and cultural rights, whether these have been directly violated by identifiable agents or by structural causes.

### (a) Sexual and Gender-Based Violence as International Crimes

The following sections illustrate how international and hybrid courts have defined Sexual and Gender-Based Violence (SGBV). These definitions are essential given that the judicial process in the CAR is expected to have an impact on society at large beyond the end results of the specific cases tried.<sup>600</sup> In recent years, international criminal law has made considerable progress on the issue of SGBCs. Before that, women have been considered

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<sup>598</sup> UN Office of the High Commissioner for Human Rights supra note 55 at 6.

<sup>599</sup> Fionnuala Ni Aoláin, Martha Albertson Fineman & Estelle Zinsstag 'Advancing a feminist analysis of transitional justice' (2013) *Feminist Perspectives on Transitional Justice: From International and Criminal to Alternative Forms of Justice* 4344 at 56.

<sup>600</sup> MINUSCA op cit note 119 at 27.

legitimate spoils of war and rape the inevitable by-product of war for centuries.<sup>601</sup> Despite a *de jure* prohibition of sexual violence in the first principles of international humanitarian law (IHL), *de facto* sexual violence was endemic and rarely prosecuted.<sup>602</sup> In modern IHL, rape was eventually prohibited by the Lieber Code of 1863.<sup>603</sup> Nevertheless, the rule explicitly prohibiting rape and punishing it was not mentioned in the Brussels Declaration of 1874, which only stated that ‘the honor of women and the rights of the family must be respected.’<sup>604</sup> This Declaration constituted an essential step in codifying the laws of war, culminating in the drafting of the Hague Conventions and the Regulations annexed thereto, adopted in 1899 and 1907. Accordingly, Article 46 of the Fourth 1907 Hague Convention Respecting the Laws and Customs of War on Land, the most important of the Hague Conventions for the protection of women,<sup>605</sup> refers only to family honour and rights instead of explicitly mentioning rape or sexual violence.<sup>606</sup> Similarly, the Geneva Convention on prisoners of war of 1929 retains in its art. 3 that ‘women shall be treated with all the consideration due to their sex.’<sup>607</sup> It was not until the end of World War II, in 1945, that rape was finally included in Control Council Law No. 10 (American Military Tribunal at Nuremberg) as one of the constituent acts of the crime against humanity.<sup>608</sup> It was moreover prosecuted as a war crime by the Far Eastern Military Tribunal<sup>609</sup> for ‘inhumane treatment,’ ‘ill-treatment,’ and ‘failure to respect family honour and rights.’<sup>610</sup> Despite these promising developments, impunity has

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<sup>601</sup> Kelly Askin ‘Treatment of sexual violence in armed conflicts: A historical perspective and the way forward’ in *Sexual violence as an international crime: Interdisciplinary approaches* (2013): 19-57 at 19.

<sup>602</sup> Patricia Viseur Sellers *The prosecution of sexual violence in conflict: The importance of human rights as means of interpretation* (2008) Women’s Human Rights and Gender Unit (WRGU) at 6.

<sup>603</sup> Jean-Marie Henckaerts & Louise Doswald-Beck, ICRC, Customary International Humanitarian Law, Volume 1: Rules, rule 93, online at: <https://www.icrc.org/en/doc/assets/files/other/customary-international-humanitarian-law-i-icrc-eng.pdf>.

<sup>604</sup> Henn op cit note 136 at 46 referring to para. 38 of the Declaration: see Project of an International Declaration concerning the Laws and Customs of War. Brussels, 27 August 1874, online at: <https://ihl-databases.icrc.org/ihl/INTRO/135>.

<sup>605</sup> Askin op cit note 595 at 28.

<sup>606</sup> Convention (IV) respecting the Laws and Customs of War on Land. The Hague, 18 October 1907, online at: <https://ihl-databases.icrc.org/ihl/INTRO/195>.

<sup>607</sup> International Committee of the Red Cross (ICRC), *Geneva Convention Relative to the Treatment of Prisoners of War (Third Geneva Convention)*, 12 August 1949, 75 UNTS 135, available at: <https://www.refworld.org/docid/3ae6b36c8.html> [accessed 27 April 2023], art. 3 online at: <https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Article.xsp?action=openDocument&documentId=13B15ED405C8DE78C12563CD00518D6A>.

<sup>608</sup> Jean-Marie Henckaerts & Louise Doswald-Beck, ICRC, Customary International Humanitarian Law, Volume 1: Rules, rule 93, online at: <https://www.icrc.org/en/doc/assets/files/other/customary-international-humanitarian-law-i-icrc-eng.pdf>.

<sup>609</sup> Theodor Meron ‘Rape as a crime under international humanitarian law’ (1993) *American Journal of International Law* 87, no. 3: 424-428 at 426.

<sup>610</sup> Askin op cit note 595 at 45.

reigned for conflict-related SGBCs for decades.<sup>611</sup> Only a few prosecutions condemning wartime rape have taken place at the national level.<sup>612</sup>

In 1949, IHL offered women new perspectives by prohibiting rape and sexual violence. In non-international armed conflicts, for example, what is most interesting in the case of the CAR, victims are covered by the Protocol Additional to the Geneva Conventions of 1949 relating to the Protection of Victims of Non-International Armed Conflicts (AP II) of 1977.<sup>613</sup> Common Article 3 GC applies to all non-international conflicts. According to Article 3 of the Joint GC, persons not taking an active part in hostilities must be treated humanely by all parties, including both state and non-state actors. A textual approach indicates that sexualised violence against the population is prohibited during conflicts of a non-international character.<sup>614</sup> Although there is no grave breaches regime, it is nonetheless recognized that serious violations of common Art. 3 also constitute war crimes and must be punished,<sup>615</sup> which is reflected in the Statute of the International Criminal Tribunal for Rwanda (ICTR).<sup>616</sup> Art. 4 (2) (e) and (f) AP II explicitly mentions that rape, enforced prostitution, and all forms of indecent assault and slavery are prohibited.<sup>617</sup>

However, despite the protection these provisions provide to women, the focus of these provisions is primarily on pregnant women and mothers.<sup>618</sup> An approach which has been criticized for reducing women to certain roles and ignoring the other violence to which they could be subject.<sup>619</sup> Furthermore, the relationship between sexual violence and honour has been singled out as mitigating the seriousness of the crime of sexual violence, in particular because it does not allow this crime to be taken into account as primarily an attack on the

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<sup>611</sup> Ibid at 20.

<sup>612</sup> Sellers op cit note 596 at 10/ Also see Asia Justice and Rights (AJAR) and the Transitional Justice Asia Network (TJAN) *Transitional Justice Handbook* (2023) at 19: The temporary military trials of 1946-1949 in the Dutch East Indies also saw the prosecution of the war crime of forced prostitution committed by the Japanese army in the Dutch East Indies.

<sup>613</sup> See International Committee of the Red Cross (ICRC), *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II)*, 8 June 1977, 1125 UNTS 609, available at: <https://www.refworld.org/docid/3ae6b37f40.html> [accessed 4 July 2022].

<sup>614</sup> Henn op cit note 136 at 55 referring to *Prosecutor v. Anto Furundzija (Trial Judgement)*, IT-95-17/1-T, International Criminal Tribunal for the former Yugoslavia (ICTY), 10 December 1998, para. 166, available at: <https://www.refworld.org/cases, ICTY,40276a8a4.html>.

<sup>615</sup> Ibid at 55.

<sup>616</sup> Judith Gardam 'Women, human rights and international humanitarian law' (1998) *International Review of the Red Cross* (1961-1997) 38, no. 324: 421-432 at 430.

<sup>617</sup> Henn op cit note 136 at 56.

<sup>618</sup> See the special protection given to pregnant women in Arts. 23, 89 and 98 of the Geneva Convention relative to the Protection of Civilian Persons in Time of War of 12 Aug. 1949 (the Fourth Geneva Convention).

<sup>619</sup> Gardam op cit note 619 at 424.

physical integrity of the victim.<sup>620</sup> According to some authors, this link between sexual violence and honour also reinforces a conception according to which women are the property of men, in particular due to the use of the word “protection” instead of “prohibition”.<sup>621</sup>

These gaps were gradually filled in the 1990s in the case law of hybrid and international jurisdictions. The crimes of rape and sexual violence have been incorporated into the jurisprudence of hybrid or international tribunals as separate crimes under the categories of crimes against humanity,<sup>622</sup> war crimes,<sup>623</sup> an instrument of genocide,<sup>624</sup> forms and means of torture,<sup>625</sup> rape and enslavement as constituting sexual slavery,<sup>626</sup> and forms and means of persecution.<sup>627</sup> These courts have finally recognised sexual crimes among the most serious crimes that can be committed<sup>628</sup> and constituting crimes against the physical and mental integrity of the victim rather than mere crimes against ‘honour’ and ‘dignity.’<sup>629</sup> The *Akayesu*<sup>630</sup> judgment rendered by the Trial Chamber of the Tribunal for Rwanda (ICTR) on September 2, 1998, found that rape and other forms of sexual violence had been used as instruments of genocide and constituted a crime against humanity.<sup>631</sup> That same year, the *Furundzija* judgment<sup>632</sup> was handed down by the Trial Chamber of the Tribunal for the former Yugoslavia (ICTY) on December 10, 1998. The crime of rape was recognised as a crime of torture and outrages upon personal dignity, which therefore could be part of the definition of a crime of war.

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<sup>620</sup> Judith Gardam ‘Women and the law of armed conflict: why the silence?’ (1997) *International & Comparative Law Quarterly* 46, no. 1: 55-80 at 57.

<sup>621</sup> Charlesworth op cit note 363 at 386.

<sup>622</sup> Askini op cit note 595 at 50 referring to *Prosecutor v. Akayesu*, ICTR-96-4-T, 2 September 1998 (*Akayesu Trial Chamber Judgement*); *Prosecutor v. Kunarac et al.*, IT-96-23-T & IT-96-23/1-T, 22 February 2001 (*Kunarac Trial Chamber Judgement*).

<sup>623</sup> Ibid at 50 referring to *Prosecutor v. Delalic et al.*, IT-96-21-T, 16 November, 1998 (*Celebici Trial Chamber Judgement*); *Prosecutor v. Furundzija*, IT-95-17/1-T, 10 December 1998 (*Furundzija Trial Chamber Judgement*).

<sup>624</sup> Ibid at 50 referring to *Akayesu Trial Chamber Judgement*; *Prosecutor v. Muhimana*, ICTR-95-1B-T, 28 April 2005 (*Muhimana Trial Chamber Judgement*).

<sup>625</sup> Ibid at 50 referring to *Akayesu Trial Chamber Judgement*; *Furundzija Trial Chamber Judgement*; *Kunarac Trial Chamber Judgement*.

<sup>626</sup> Ibid at 50 referring to *Kunarac Trial Chamber Judgement*.

<sup>627</sup> Ibid at 50 referring to *Prosecutor v. Kvočka*, IT-98-30-T, 2 November 2001 (*Kvočka Trial Chamber Judgement*).

<sup>628</sup> Ibid at 20.

<sup>629</sup> Amnesty International *CAR : International Criminal Court – Clarifying the scope of the crime of war* (2009), online at: <https://reliefweb.int/report/central-african-republic/car-international-criminal-court-clarifying-scope-crime-rape>.

<sup>630</sup> See *Prosecutor v Jean-Paul Akayesu*, Judgment, ICTR-96-4-T (2 September 1998) (International Criminal Tribunal for Rwanda, Chamber 1).

<sup>631</sup> Ibid para. 598.

<sup>632</sup> *Prosecutor v. Anto Furundzija (Trial Judgement)*, IT-95-17/1-T, International Criminal Tribunal for the former Yugoslavia (ICTY), 10 December 1998, available at: <https://www.refworld.org/cases, ICTY,40276a8a4.html>.

The Statute of the International Criminal Court (Rome Statute) is the first legal instrument that definitively breaks with the old vision of rape as a side effect of war.<sup>633</sup> The Rome Statute has expanded the range of SGBCs that can be elements of crimes against humanity or war crimes. SGBCs, as they are now understood, are crimes that fall within the subject matter jurisdiction of the ICC, as listed in articles 7(1)(g),<sup>634</sup> 8(2)(b)(xxii), and 8(2)(e)(vi)<sup>635</sup> of the Statute. These crimes include rape but also sexual slavery, enforced prostitution, forced pregnancy, enforced sterilisation or any other form of sexual violence of comparable gravity.<sup>636</sup> However, the term ‘gender-based crime’ (GBC) is not used *per se* by the ICC or defined.<sup>637</sup> A brief definition is given by the Office of the Prosecutor (OTP)’s 2014 *Policy Paper on Sexual and Gender-Based Crimes*<sup>638</sup>: ‘“Gender-based crimes” are those committed against persons, whether male or female, because of their sex and/or socially constructed gender roles. Gender-based crimes are not always manifested as a form of sexual violence. They may include non-sexual attacks on women and girls, and men and boys, because of their gender.’<sup>639</sup>

*Sex crimes*<sup>640</sup> are the first crimes that come to mind when discussing GBC. In the CAR, sexual violence, particularly rape, sexual assault, and sexual slavery, has been committed by multiple parties to the conflicts, including extreme forms of sexual violence, such as rape of children and gang rapes.<sup>641</sup> It is therefore essential to take these crimes into account. Sexual crimes are now an element of war crimes covered by the grave breach provisions.<sup>642</sup> Sexual crimes may also fall under the prohibitions of ‘torture,’ ‘inhuman treatment,’ ‘wilfully causing great suffering,’ and ‘serious injury to body or health.’<sup>643</sup> In the

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<sup>633</sup> Kelly D. Askin ‘Prosecuting Wartime Rape and Other Gender-Related Crimes under International Law: Extraordinary Advances, Enduring Obstacles’ (2003) 21 *Berkeley J. Int’l L.* 288 at 296-297.

<sup>634</sup> Crimes against humanity, see art. 7 of the Rome Statute (UN General Assembly, *Rome Statute of the International Criminal Court (last amended 2010)*, 17 July 1998, ISBN No. 92-9227-227-6, available at: <https://www.refworld.org/docid/3ae6b3a84.html> [accessed 31 October 2020]).

<sup>635</sup> War crimes, see art. 8 of the Rome Statute *Ibid.*

<sup>636</sup> See Rome Statute *Ibid.*

<sup>637</sup> Rosemary Grey ‘Gender-based Crimes’ in *Prosecuting Sexual and Gender-Based Crimes at the International Criminal Court* (2019) 37.

<sup>638</sup> See ICC *Policy Paper on Sexual and Gender-Based Crimes* (June 2014), online at: <https://www.icc-cpi.int/sites/default/files/iccdocs/otp/OTP-Policy-Paper-on-Sexual-and-Gender-Based-Crimes--June-2014.pdf>.

<sup>639</sup> Grey op cit note 648 at 45, citing *Policy Paper on Sexual and Gender-Based Crimes* *ibid* at 3.

<sup>640</sup> For examples of acts of sexual violence see: *The Hague Principles on Sexual Violence* (2019), at Part 4, online at: <https://4genderjustice.org/wp-content/uploads/2019/11/The-Hague-Principles-on-Sexual-Violence.pdf>.

<sup>641</sup> MINUSCA op cit note 119 at 27.

<sup>642</sup> Rhonda Copelon ‘Gender crimes as war crimes: Integrating crimes against women into international criminal law’ (2000) *McGill LJ* 46 (2000): 217 at para. 40-41/ Also see Louise Chappell ‘Women, gender and international institutions: exploring new opportunities at the International Criminal Court’ (2003) *Policy and Society* 22, no. 1: 3-25 at 7.

<sup>643</sup> Askin op cit note 643 at 309-310.



*Bosco Ntaganda* case the ICC confirmed that the minimum protection offered by Article 3, common to the four Geneva Conventions, applies to ‘crimes of sexual violence committed against child soldiers by members of their own military force.’<sup>644</sup> In the CAR, many children were recruited and used by armed groups, often resulting in them being ‘subjected to acts of sexual violence and ill-treatment, and used by armed groups as human shields during attacks.’<sup>645</sup> This judgment can therefore have great practical implications for them as it closes an accountability gap in International Criminal Law (ICL).<sup>646</sup> Regarding the crime of genocide,<sup>647</sup> Askin notes that ‘sexual violence can fall under each of the sub-elements of article 6 of the Rome Statute, although the most common means of using sex crimes as instruments of genocide are:

(b), causing serious bodily or mental harm to the group (such as by raping or otherwise violating women); (c), inflicting conditions of life on members of the group to bring about a slow death (such as having HIV/AIDS-infected persons repeatedly rape the victims); and (d) imposing measures intended to prevent births within the group (such as forced abortion or miscarriage, forced impregnation, sexual mutilation, or rape by a different ethnic group when custom dictates that the father determines the ethnicity of the child.)<sup>648</sup>

Sexual crimes may also be crimes against humanity when committed as part of a widespread or systematic<sup>649</sup> attack.<sup>650</sup> The chapeau to crimes against humanity also recognises that crimes of this dimension can be ‘perpetrated against any civilian population, in time of peace as well as war, and by private as well as state actors,’<sup>651</sup> which is particularly important for women in the CAR, often victims of non-institutional actors. However, the relationship between GBC and sex crimes is not always straightforward because these two terms are not agreed upon.<sup>652</sup> If it is quite clear that ‘the category of “gender-based crimes” is

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<sup>644</sup> Carsten Stahn *A critical introduction to international criminal law* (2019) 82 citing *Prosecutor v. Ntaganda*, ICC-01/04–02/06–309, Decision Pursuant to Art. 61 (7) (a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Bosco Ntaganda, 9 June 2014 (*Ntaganda* Confirmation Decision).

<sup>645</sup> MINUSCA op cit note 119 at 27.

<sup>646</sup> Tanja Altunjan ‘The International Criminal Court and sexual violence: Between aspirations and reality’ (2021) *German Law Journal* 22, no. 5: 878-893 at 889.

<sup>647</sup> Art. 6 of the Rome Statute.

<sup>648</sup> Askin op cit note 643 at 316: ‘Various forms of sexual violence may meet the elements of genocide, even when only a single member of the protected group is harmed.’

<sup>649</sup> Ibid at 315: ‘Perhaps the most contentious issue was whether “systematic” required the existence of a plan or policy. The ICTY Appeals Chamber has recently answered in the negative, stating that a plan or policy may be indicative of the systematic nature of the crime and thus be “evidentially relevant”, but it is not a legal element of the crime.’ See *Prosecutor v. Kunarac*, Judgement, IT-96-23-T & IT-96-23/1-T, 22 Feb. 2001, at para 98.

<sup>650</sup> Ibid at 314: ‘It is the attack that must be widespread or systematic, not each persecuting or criminal act forming part of the attack.’

<sup>651</sup> Copelon op cit note 653 at 235.

<sup>652</sup> Grey op cit note 648 at 64.

broader than the category of “sexual violence,”<sup>653</sup> nothing is said whether “sexual violence” is always a “gender-based crime” or not.<sup>654</sup> The qualification of sexual crimes as GBC will therefore depend on the OTP.<sup>655</sup> In addition, while victims of sexual violence are primarily identified as female,<sup>656</sup> male experiences of sexual violence may also be gendered.<sup>657</sup>

Almost all of the GBCs brought before the ICC are sex crimes.<sup>658</sup> The *Al Hassan* case however deals with ‘the deprivation of women’s civil and political rights, such as the right to freely assemble, by Islamist militants in Mali,’<sup>659</sup> and is the first instance of a gender persecution charge going to trial.<sup>660</sup> The *Ongwen* case also formally expands the scope of crimes, including non-sex crimes, which fall under the category of GBC, such as crimes of torture,<sup>661</sup> enslavement,<sup>662</sup> and outrages upon personal dignity.<sup>663</sup> According to Grey, there are ‘indications that the OTP will seek to prosecute various non-sexual acts directed against women and girls as “gender-based persecution” in future cases including the Afghanistan situation and the Nigeria situation.’<sup>664</sup> In addition to the *Al Hassan* case, in the situation in Mali,<sup>665</sup> Abd Al Rahman, in the situation in South Sudan, is also currently on trial for the alleged commission of, among other things, gender persecution.<sup>666</sup> A new policy initiative to

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<sup>653</sup> Ibid at 64 referring to the OTP’s 2014 *Gender Policy* / Also see Hannah El-Hitami *Syrian and Yazidi trials: Why victims’ lawyers want sexual violence considered* (2021), online at: <https://www.justiceinfo.net/en/73307-syrian-and-yazidi-trials-sexual-violence.html>.

<sup>654</sup> Ibid at 64

<sup>655</sup> Ibid at 44.

<sup>656</sup> Ibid at 254.

<sup>657</sup> Charlesworth & Chinkin op cit note 420 at 217/ Also see Guidance Note, supra note 319 at 3; African Commission on Human and Peoples’ Rights *Guidelines on Combatting Sexual Violence and its Consequences in Africa* (5 November 2017) at 16; Grey op cit note 648 at 255; *The Prosecutor v. Bosco Ntaganda*, icc-01/04-02/06, Trial Chamber VI, Reparations Order, 8 March 2021, para. 64: ‘All victims, regardless of their sex and gender expression or identity, may be affected by sexual and gender-based crimes’ / Kim Thuy Seelinger *Sexual and Gender-Based Crimes: Observations on the ICC Office of the Prosecutor* (2022) *Völkerrechtsblog*, online at: <https://voelkerrechtsblog.org/sexual-and-gender-based-crimes/>.

<sup>658</sup> Grey op cit note 648 at 258.

<sup>659</sup> Ibid at 258.

<sup>660</sup> PILPG, Debevoise & Plimpton *Comments on the International Criminal Court Office of the Prosecutor’s Policy initiative to Advance Accountability for Gender Persecution under the Rome Statute* (2022) at 8, online at <https://static1.squarespace.com/static/5900b58e1b631bffa367167e/t/6238ac96123c3e3d0691495b/1647881368466/Final+Commentary+to+ICC+OTP+Gender+Persecution+Policy.pdf>.

<sup>661</sup> Trial Chamber IX, *The Prosecutor v. Dominic Ongwen* ICC-02/04-01/15, §3034 online at: [https://www.icc-cpi.int/CourtRecords/CR2021\\_01026.PDF](https://www.icc-cpi.int/CourtRecords/CR2021_01026.PDF).

<sup>662</sup> Ibid § 3055.

<sup>663</sup> Ibid § 3068.

<sup>664</sup> Grey op cit note 648 at 259/ See ICC, Situation in the Islamic Republic of Afghanistan, ICC-02/17, Prosecutor’s Request for Authorisation of an Investigation, para. 115 - 121 (Nov. 20, 2017), [https://www.icc-cpi.int/CourtRecords/CR2017\\_06891.PDF](https://www.icc-cpi.int/CourtRecords/CR2017_06891.PDF) / The Office of the Prosecutor of the International Criminal Court, Report on Preliminary Examination Activities 2019, paras. 186–87 (2019), <https://www.icc-cpi.int/itemsDocuments/191205-rep-otp-PE.pdf>.

<sup>665</sup> Seelinger supra note 669.

<sup>666</sup> Adrienne Ringin *Gender Persecution Again a Focus for ICC in the Said Trial* (2022), online at: <https://opiniojuris.org/2022/09/29/gender-persecution-again-a-focus-for-icc-in-the-said-trial/>.

advance accountability for gender persecution under the Rome Statute has recently been adopted.<sup>667</sup> Oosterveld, referring to Beth Van Schaack notes that ‘in this respect, persecution can be particularly useful for charging acts of gender-based violence that are not captured in the other prohibited acts, like forced nudity.’<sup>668</sup> Thus, a new dynamic in the pursuit of SGBCs is being created that gives victims reason to hope for recognition, reparation and justice.<sup>669</sup>

(i) The International Criminal Court and the situations in the CAR

The ICC is a permanent court created to try ‘those who bear the greatest responsibility’ for genocide, crimes against humanity, war crimes, and the crime of aggression.<sup>670</sup> The ICC can ease the pressure on weak national criminal systems<sup>671</sup> that can refer cases to its jurisdiction.<sup>672</sup> The CAR ratified the Rome Statute on October 3, 2001, which gives the ICC the right to exercise jurisdiction over crimes listed in the Rome Statute committed on its territory or by its nationals from July 1, 2002. Under the Rome Statute establishing the ICC, a case is inadmissible before the Court if it has already been prosecuted (Article 17 (1) (b) of the Statute) or if it is prosecuted by a state having jurisdiction. However, a case may be admissible before the Court if the state in whose territory the crimes were committed is unwilling or unable to prosecute and try them (Article 17 (1) (a) of the Statute).

(i.1) *Situation in CAR I*

In the CAR, a referral to the ICC regarding the prosecution of Jean-Pierre Bemba, former president and commander-in-chief of the MLC, was transmitted to the Court on behalf of the Bozizé government on December 21, 2004.<sup>673</sup> The MLC provided military assistance to Ange-Félix Patassé from October 26, 2002 to March 15, 2003.<sup>674</sup> During this intervention, its members committed widespread acts of GBC and conflict-related sexual violence<sup>675</sup> that fall under the meaning of article 28(a) of the Rome Statute, for war crimes and crimes against

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<sup>667</sup> Policy on the Crime of Gender Persecution supra note 69.

<sup>668</sup> Valerie Oosterveld ‘Prosecuting Gender-Based Persecution as an International Crime’ in Brouwer, Anne-Marie de (ed.) *Sexual Violence as an International Crime: Interdisciplinary Approaches* (2013) at 65.

<sup>669</sup> See the Coalition for the ICC’s website, Gender inequality and sexual violence, online <http://www.coalitionfortheicc.org/global-challenges-ICC-gender-inequality-sexual-violence>.

<sup>670</sup> Art. 5 of the Rome Statute.

<sup>671</sup> Susan Harris Rimmer *Gender and transitional justice: The women of East Timor* (2010) 58.

<sup>672</sup> Art. 17 of the Rome Statute.

<sup>673</sup> See ICC’s website, Press release, *ICC - Prosecutor receives referral concerning Central African Republic* (2005), online at: <https://www.icc-cpi.int/Pages/item.aspx?name=otp%20prosecutor%20receives%20referral%20concerning%20central%20african%20republic>.

<sup>674</sup> Amnesty op cit note 49 at 3.

<sup>675</sup> FIDH op ci note 79.

humanity.<sup>676</sup> As a result, Jean-Pierre Bemba was indicted by the ICC in 2009 as a person effectively acting as a military commander and exercising effective control for the crimes against humanity of murder and rape and the war crimes of murder, rape, and looting by MLC troops.<sup>677</sup> He was found guilty by the ICC Trial Chamber on March 21, 2016,<sup>678</sup> but was acquitted on appeal on June 8, 2018.<sup>679</sup> In the *Bemba* case, the Prosecutor highlighted the link between rape and GBC, saying that: ““massive rapes” allegedly committed by Bemba’s troops in the CAR “were not just sexually motivated; as *gender crimes*, they were crimes of domination and humiliation directed against women, but also directed against men with authority.”<sup>680</sup> He continued: “[w]omen were raped systematically to assert dominance and to shatter resistance. Men were raped in public to destroy their authority, their capacity to lead.”<sup>681</sup>

In addition, rape was, for the first time, treated as an offence in its own right under war crimes and crimes against humanity,<sup>682</sup> contrary to the approach of the ICTY, which treated rape and sexual violence as dependent on the idea of torture,<sup>683</sup> and on the approach of the ICTR which dealt with rape and sexual violence closely linked to the determinations of the ethnic dimensions of the conflicts.<sup>684</sup> Treating rape as a crime on its own allows rape to be viewed not as violence to destroy a people but rather as 'violence intended to destroy individual women as women, not as ethnicities.'<sup>685</sup> The status of Bemba, held responsible for the crimes committed by his troops as a military commander, has also emphasised the systematic use of rape as a weapon of war.<sup>686</sup> However, the broader structural gender inequality was not addressed in the judgment,<sup>687</sup> even though the Chamber discussed the

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<sup>676</sup> See ICC’s website, *Situation in the Central African Republic in the Case of the Prosecutor v. Jean-Pierre Bemba*, ICC-01/05-01/08, online at: <https://www.icc-cpi.int/CaseInformationSheets/bembaEng.pdf>.

<sup>677</sup> Ibid.

<sup>678</sup> *The Prosecutor v. Jean-Pierre Bemba Gombo*, Judgment, Judgment pursuant to Article 74 of the Statute, ICC-01/05-01/08 (21 March 2016) (International Criminal Court, Trial Chamber III), at § 752, online at: [https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2016\\_02238.PDF](https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2016_02238.PDF).

<sup>679</sup> *The Prosecutor v. Jean-Pierre Bemba Gombo* (2018) Judgment on the appeal of Mr Jean-Pierre Bemba Gombo against Trial Chamber III’s “Judgment pursuant to Article 74 of the Statute” No. ICC-01/05-01/08 A, § 197 & 198, online [https://www.icc-cpi.int/CourtRecords/CR2018\\_02984.PDF/](https://www.icc-cpi.int/CourtRecords/CR2018_02984.PDF/) See ICC’s website, *Situation in the Central African Republic in the Case of the Prosecutor v. Jean-Pierre Bemba*, ICC-01/05-01/08, online at: <https://www.icc-cpi.int/CaseInformationSheets/bembaEng.pdf>.

<sup>680</sup> Grey op cit note 648 at 44 referring to ICC-01/05-01/08-T-32-ENG, 22 November 2010, at 10, lines 14–16.

<sup>681</sup> Ibid at 44 referring to ICC-01/05-01/08-T-32-ENG, 22 November 2010, page 10, lines 18-19.

<sup>682</sup> Marie-Alice D’Aoust ‘Sexual and gender-based violence in international criminal law: A feminist assessment of the Bemba case’ (2017) *International Criminal Law Review* 17, no. 1: 208-221 at 214.

<sup>683</sup> Ibid at 214.

<sup>684</sup> D’Aoust op cit note 717 at 213-214.

<sup>685</sup> Sarah Deibler ‘Rape by any other name: Mapping the feminist legal discourse regarding rape conflict onto transitional justice in Cambodia’ (2016) *Am. U. Int’l L. Rev.* 32: 501 at 528.

<sup>686</sup> D’Aoust op cit note 717 at 214.

<sup>687</sup> Ibid at 215.

physical, psychological, social and economic consequences of rape at length.<sup>688</sup> By not addressing the daily violence against women,<sup>689</sup> the Court has created a narrative of extraordinary violence in times of conflict that does not reflect VAW as part of a continuum in the CAR.<sup>690</sup>

Further, some authors point out that charging rape as an offence, regardless of its intersectionality with other factors, may risk essentialising women. It would, therefore, also ‘be a grave injustice to imply that all women must experience harm in a certain, gendered way.’<sup>691</sup> In the CAR, legal pluralism shows that gender power dynamics diverge from one cultural or social group to another. It is, therefore, essential to develop ‘a more nuanced understanding of why rape harms at all’<sup>692</sup> which may differ from woman to woman.<sup>693</sup> Arguably, a more advanced understanding of women, gender, and rape through the prism of intersectionality might have offered a more ‘comprehensive means of moving forwards, healing harms, and ensuring a lasting peace’<sup>694</sup> for women in the CAR. Some authors indeed point out that if ‘for the sake of criminal accountability, justice and reparation, thinking in terms of ruptures and exceptionality is simply necessary,’<sup>695</sup> however ‘without a gender analysis, one might only address the immediate, not the structural, causes of such violence.’<sup>696</sup>

### *(i.2) Situation in CAR II*

During her presidency, former President Catherine Samba-Panza sent a letter to the ICC prosecutor stating ‘the lack of capacity of the CAR institutions to investigate and prosecute perpetrators of international crimes,’<sup>697</sup> that was later confirmed by the Report of the Prosecutor on preliminary examination.<sup>698</sup> This referral led to the issuance of an arrest warrant by the ICC against Alfred Yekatom on November 11, 2018, ‘for his alleged criminal responsibility for war crimes and crimes against humanity committed in western CAR

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<sup>688</sup> Clark op cit note 700 at 681.

<sup>689</sup> D’Aoust op cit note 717 at 217.

<sup>690</sup> Ibid at 218.

<sup>691</sup> Deibler op cit note 720 at 535.

<sup>692</sup> Ibid at 537.

<sup>693</sup> Ibid at 537.

<sup>694</sup> Ibid at 537.

<sup>695</sup> Boesten op cit note 112 at 516.

<sup>696</sup> Boesten op cit note 112 at 517.

<sup>697</sup> Musila op cit note 558 at 14.

<sup>698</sup> Ibid 558 at 14.

between December 2013 and August 2014,<sup>699</sup> as well as the issuance of an arrest warrant against Patrice-Édouard Ngaïssona on December 7, 2018, for ‘his alleged criminal responsibility for war crimes and crimes against humanity committed in the western part of the Central African Republic ("CAR") between at least 5 December 2013 and at least December 2014.’<sup>700</sup> On 10 December 2018, the ICC issued a warrant of arrest against Maxime Jeoffroy Eli Mokom Gawaka for ‘war crimes and crimes against humanity allegedly committed in Central African Republic (CAR) between at least 5 December 2013 and at least December 2014,’<sup>701</sup> followed by a warrant of arrest against Mahamat Said Abdel Kani (Said), issued by the ICC on 7 January 2019 for ‘war crimes and crimes against humanity allegedly committed in Bangui (CAR) in 2013,’<sup>702</sup> and another warrant of arrest against Mahamat Nouradine Adam, the founder of the *Convention of Patriots for Justice and Peace – Fundamental* (CPJP-F), issued on the same day for ‘crimes against humanity (imprisonment or other severe deprivation of physical liberty, torture, persecution, enforced disappearance and other inhumane acts) and war crimes (torture and cruel treatment). (...) between at least 12 April 2013 and at least 27 November 2013.’<sup>703</sup>

These cases concern violence committed by *anti-balaka* and members of the *Seleka*. Yekatom, former *anti-balaka*, held the rank of corporal-chef in the Central African Armed Forces (FACA) and was a member of parliament in the CAR. He was placed on the UN sanctions list in August 2015 for contributing to ‘acts that undermine the peace, stability or security of the Central African Republic.’<sup>704</sup> Ngaïssona is a former *anti-balaka* commander.<sup>705</sup> He was the highest leader and ‘general national coordinator’ of the *anti-balaka* and is being prosecuted for war crimes and crimes against humanity of rape and attempted rape, among others.<sup>706</sup> Said was a senior member of the *Seleka* assigned to the

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<sup>699</sup> ICC’s website, Press release, Situation in Central African Republic II: Alfred Yekatom surrendered to the ICC for crimes against humanity and war crimes (2018), online at: <https://www.icc-cpi.int/Pages/item.aspx?name=pr1418>.

<sup>700</sup> Ibid.

<sup>701</sup> See ICC’s website, Maxime Jeoffroy Eli Mokom Gawaka makes first appearance before the ICC: confirmation of charges hearing scheduled for 31 January 2023 (22 March 2022), online at: <https://www.icc-cpi.int/news/maxime-jeoffroy-eli-mokom-gawaka-makes-first-appearance-icc-confirmation-charges-hearing>.

<sup>702</sup> ICC Pre-Trial Chamber II, Public Redacted Version of ‘Warrant of Arrest for Mahamat Said Abdel Kani’, 7 January 2019, ICC-01/14-01/21-2-US-Exp, online at: [https://www.icc-cpi.int/CourtRecords/CR2021\\_01345.PDF](https://www.icc-cpi.int/CourtRecords/CR2021_01345.PDF).

<sup>703</sup> See ICC’s Website, Situation in CAR II: ICC Pre-Trial Chamber II issues public redacted version of Arrest Warrant for Mahamat Nouradine Adam (28 July 2022), online at: [https://www.icc-cpi.int/news/situation-car-ii-icc-pre-trial-chamber-ii-issues-public-redacted-version-arrest-warrant?fbclid=IwAR0e5SPb2rcP-U17NF0S7Jbku2B80RMg1XZIJPQnBXn\\_hD2AZa0QPtN-W4c](https://www.icc-cpi.int/news/situation-car-ii-icc-pre-trial-chamber-ii-issues-public-redacted-version-arrest-warrant?fbclid=IwAR0e5SPb2rcP-U17NF0S7Jbku2B80RMg1XZIJPQnBXn_hD2AZa0QPtN-W4c)

<sup>704</sup> FIDH, OCDH & Ligue Centrafricaine des Droits de l’Homme supra note 589 at 27.

<sup>705</sup> Ibid at 27.

<sup>706</sup> ICC Case Information Sheet *Situation in the Central African republic II: The Prosecutor v. Alfred Yekatom and Patrice-Edouard Ngaïssona* ICC-01/14-01/18 (consulted 4 May 2021), available online at: [https://www.icc-cpi.int/CourtRecords/CR2021\\_01345.PDF](https://www.icc-cpi.int/CourtRecords/CR2021_01345.PDF)

Office central de répression du banditisme (Central Office for the Repression of Banditry - OCRB) and then to the Comité extraordinaire pour la défense des acquis démocratiques (Extraordinary Committee for the Defence of Democratic Achievements - CEDAD).<sup>707</sup> Mokom, the alleged former national coordinator of *anti-balaka* operations, became Minister of Disarmament, Demobilization, Reintegration, and Repatriation in February 2019.<sup>708</sup> Finally, Nouradine Adam served as Minister of Security, Emigration, Immigration, and Public Order between March 31 and August 22, 2013, and was the founder of the Convention of Patriots for Justice and Peace – Fundamental (CPJP-F).<sup>709</sup> He allegedly committed crimes in the OCRB and the CEDAD in Bangui between at least April 12, 2013, and at least November 27, 2013.<sup>710</sup>

Some of these cases may be interesting regarding the crime of gender persecution, which is a crime constituting a crime against humanity within the meaning of art. 7(1)(h) of the Rome Statute. Persecution is defined in the Rome Statute as ‘the intentional and severe deprivation of fundamental rights contrary to international law by reason of the identity of the group or collectivity’ (art. 7(2)(g)). Said, for example, was charged with the crime of persecution. As commander of the *Seleka*, Said would be responsible for targeting the civilian population ‘through multiple criminal acts of murder, torture, rape, persecution on political, ethnic and religious grounds.’<sup>711</sup> The charges of persecution on political, ethnic, religious and/or gender grounds have been confirmed by the Pre-Trial Chamber II of the ICC.<sup>712</sup> By focusing on men, the *Said* case shows how socially constructed norms and stereotypes can affect both men and women in the CAR. A warrant of arrest has also been issued against Mahamat Nouradine Adam for the crime of persecution, among others, on political, ethnic and religious grounds. No reference is made to gender even though the crimes were allegedly committed in the same facilities where Said’s alleged crimes occurred, the OCRB,<sup>713</sup> Said

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[cpi.int/CaseInformationSheets/yekatom-ngaïssonaEn.pdf](https://www.cpi.int/CaseInformationSheets/yekatom-ngaïssonaEn.pdf) / Also see Pre-Trial Chamber III, Situation in the Central African Republic II in the case of the Prosecutor v. Alfred Yekatom and Patrice-Edouard Ngaïssona, ICC-01/14-01/18 (11 December 2019).

<sup>707</sup> FIDH, OCDH & Ligue Centrafricaine des Droits de l’Homme supra note 589 at 27.

<sup>708</sup> Ibid at 28.

<sup>709</sup> See ICC’s Website supra note 736.

<sup>710</sup> Ibid.

<sup>711</sup> Gregor Maučec ‘On Implementation of Intersectionality in Prosecuting and Adjudicating Mass Atrocities by the International Criminal Court’ (2021) *International Criminal Law Review* 1, no. aop: 1-27 at 20 referring to ICC, *The Prosecutor v. Mahamat Said Abdel Kani*, ICC -01/14, Public Redacted Version of ‘Warrant of Arrest for Mahamat Said Abdel Kani’, 17 February 2021, para. 17 / Also see Ringin supra note 681.

<sup>712</sup> Pre-Trial Chamber II, Situation in the Central African Republic II in the Case of the Prosecutor v. Mahamat Said Abdel Kani, Decision on the confirmation of charges against Mahamat Said Abdel Kani, ICC-01/14-01/21, 9 December 2021, count 7.

<sup>713</sup> Pre-Trial Chamber II, Situation in the Central African Republic II, Public Redacted Version of ‘Warrant of Arrest for Mahamat Nouradine Adam’, 7 January 2019, ICC-01/14-41-US-Exp, § 20.

being his subordinate at the time.<sup>714</sup> The *Said* case nonetheless shows that gender-based persecution is slowly beginning to figure in prosecutorial strategy and to be seen as one of ‘the most serious crimes of concern to the international community as a whole’.<sup>715</sup> This is important because accountability for gender-based persecution requires recognition and understanding of the discrimination that underlies the crime and thus of its root causes which is essential in terms of transformative justice. This also requires a holistic understanding of why perpetrators committed such acts in order to eliminate discrimination and break cycles of violence.<sup>716</sup>

Besides, ‘(r)ecognition of gender persecution not only helps to unearth the discriminatory intent that can drive such crimes or entire conflicts, it can also shed light on victims who are vulnerable because of multiple and intersecting forms of discrimination.’<sup>717</sup> Prosecuting the crime of persecution is indeed also particularly interesting to the notion of intersectionality. This concept has become part of the ICC's work since it was included in the Prosecutor's *Policy Paper on Sexual and Gender-Based Crimes* (SGBC Policy) in 2014.<sup>718</sup> The SGBC Policy of the ICC recognises that ‘the intersection of factors such as gender, (...) religion or belief, political or other opinion, (...) sex, sexual orientation, and other status or identities (...) may give rise to multiple forms of discrimination and social inequalities.’<sup>719</sup> Crimes are therefore analysed in their interaction with other systems of oppression, such as race, religion, or economic factors. This intersectional approach has been reaffirmed by the prosecutor's policy on children adopted in 2016<sup>720</sup> and has been encouraged by recent literature on the subject.<sup>721</sup>

The *Yekatom and Ngaïssona* case, for example, deals with violence committed by the *Anti-Balaka* against civilians on the basis of their religious or ethnic affiliation, targeting the Muslim population.<sup>722</sup> Ngaïssona was accused of political, ethnic, and religious persecution

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<sup>714</sup> Ibid § 20.

<sup>715</sup> Ringin supra note 681.

<sup>716</sup> Policy on the Crime of Gender Persecution supra note 69 at 4.

<sup>717</sup> Ibid at 5.

<sup>718</sup> Maučec op cit note 744 at 2.

<sup>719</sup> *Policy Paper on Sexual and Gender-Based Crimes* supra note 649 para. 27 §3.

<sup>720</sup> Maučec op cit note 744 at 2-3 / See *OTP Policy on Children* (2016) paras 37§3 & 51, online at: [https://www.icc-cpi.int/sites/default/files/iccdocs/otp/20161115\\_OTP\\_ICC\\_Policy-on-Children\\_Eng.PDF](https://www.icc-cpi.int/sites/default/files/iccdocs/otp/20161115_OTP_ICC_Policy-on-Children_Eng.PDF).

<sup>721</sup> Alexandra Lily Kather & Alexander Schwarz *Intersecting religious and Gender-Based Persecution in Yazidi Genocide Case: A Request for an Extension of Charges* (2021), online at:

<https://www.justsecurity.org/74943/intersecting-religious-and-gender-based-persecution-in-yazidi-genocide-case-a-request-for-an-extension-of-charges/>.

<sup>722</sup> Maučec op cit note 744 at 19 referring to ICC, *The Prosecutor v. Alfred Yekatom*, icc-01/14-01/18, Pre-Trial Chamber ii, Public Redacted Version of “Warrant of Arrest for Alfred Yekatom”, 17 November 2018, para. 7; ICC, *The Prosecutor v. Patrice-Edouard Ngaïssona*, icc-01/14-02/18, Pre-Trial Chamber ii, Public Redacted Version of “Warrant of Arrest for Patrice-Edouard Ngaïssona”, 13 December 2018, para. 7.



against the Muslim population and the rape of women, which adds ‘to mass atrocities the fourth layer of intersectionality consisting of gendered violence and oppression.’<sup>723</sup> However, if the Pre-Trial Chamber confirmed charges of rape as a war crime and crime against humanity against Ngaïssona, it has denied the charge of gender-based persecution.<sup>724</sup> Moreover, the Court denied the OTP’s request to amend the confirmed charges to include SGBC in the *Yekatom* case on grounds of inefficiency and fairness to the accused.<sup>725</sup> Nevertheless, this case and the *Said* case are, according to Maučec, either through the crime of gender-persecution or SGBC an ideal opportunity for judges to significantly advance the Court’s intersectional jurisprudence by considering the diversity of discriminatory grounds and how they overlap and interact with each other in the context of the conflict between *seleka* and *anti-balaka*.<sup>726</sup> In the *Said* case, for example, men have been targeted not only because of their gender but also due to their actual or perceived political affiliation as well as their ethnic group, the Gbaya being perceived to traditionally support Bozizé, and religion, the Christians being also associated with Bozizé supporters.<sup>727</sup> In the *Ngaïssona* case, the women who were the victims of SGBC were mainly muslim women. Other women who did

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<sup>723</sup> Ibid at 19-20 referring to ICC, *The Prosecutor v. Alfred Yekatom and Patrice-Edouard Ngaïssona*, icc-01/14-01/18, Pre-Trial Chamber ii, Corrected version of ‘Decision on the confirmation of charges against Alfred Yekatom and Patrice-Edouard Ngaïssona’, 14 May 2020, para. 241/ Also see Gregor Maučec ‘Law Development by the International Criminal Court as a Way to Enhance the Protection of Minorities—the Case for Intersectional Consideration of Mass Atrocities’ (2021) *Journal of International Dispute Settlement* 12, no. 1: 42-83 at 70.

<sup>724</sup> Debevoise & Plimpton supra note 672 at 8 referring to *Prosecutor v. Alfred Yekatom & Patrice-Edouard Ngaïssona*, ICC-01/14-01/18-517, Decision on the Prosecution’s Request to Amend Charges pursuant to Article 61(9) and for Correction of the Decision on the Confirmation of Charges, and Notice of Intention to Add Additional Charges 19 (14 May 2020); *Prosecutor v. Alfred Yekatom & Patrice-Edouard Ngaïssona*, ICC-01/14-01/18-518-Red, Public Redacted Version of “Prosecution Motion to Amend the Charges against Alfred YÉKATOM,” ¶¶ 3–4 (22 May 2020); *Prosecutor v. Alfred Yekatom & Patrice-Edouard Ngaïssona*, ICC-01/14-01/18-560, Consolidated Decision on Filings ICC- 01/14-01/18-524-Corr and ICC-01/14-01/18-545 (Prosecutor’s requests for leave to appeal the decisions pursuant to article 61(9) of the Rome Statute dated 14 May 2020 and 1 June 2020), ¶ 19 (19 June 2020); *Yekatom & Ngaïssona*, Decision on Request to Amend Charges ¶ 14; *Yekatom & Ngaïssona*, Motion to Amend Charges Against Yekatom ¶¶ 23, 28. Rosemary Grey et al., *The ICC’s Troubled Track Record on Sexual and Gender-Based Crimes Continues: The Yekatom & Ngaïssona Case*, OPINIO JURIS (7 March 2020), available at <http://opiniojuris.org/2020/07/03/the-iccs-troubled-track-record-on-sexual-and-gender-based-crimes-continues-the-Yekatom-ngaïssona-case-part-1/>.

<sup>725</sup> See OpinioJuris, Rosemary Grey *The ICC’s Troubled Track Record on Sexual and Gender-Based Crime Continues: The Yekatom & Ngaïssona Case* (Part 2) (2020), online at: <http://opiniojuris.org/2020/07/03/the-iccs-troubled-track-record-on-sexual-and-gender-based-crimes-continues-the-yekatom-ngaïssona-case-part-2/> This decision is reminiscent of the *Lubanga* case, in which sexual violences were not included into the charges – See Luke Moffett ‘Reparations for victims at the International Criminal Court: a new way forward?’ (2017) *The International Journal of Human Rights* 21, no. 9: 1204-1222 at 1207.

<sup>726</sup> Maučec op cit note 744 at 20-21.

<sup>727</sup> Pre-Trial Chamber II, Situation in the Central African Republic II in the case of the Prosecutor v. Mahamat Said Abdel Kani, Public Redacted Version of “Pre-Confirmation Brief”, ICC-01/14-01/21-155-Conf, 30 August 2021, § 193.

not share all or some of these personal characteristics were not subject to violence and oppression of that extent and intensity.

An intersectional approach is therefore an ideal opportunity to potentially better assess gravity, contextualise crimes, interpret the applicable law (article 21 (3), Statut de Rome),<sup>728</sup> and provide adequate reparations for victims.<sup>729</sup> Intersectionality further can offer a structural understanding of the crimes prosecuted,<sup>730</sup> by considering different types of vulnerabilities that can manifest in temporal or permanent identities.<sup>731</sup> Understanding these types of vulnerabilities is meant to require historical analysis<sup>732</sup> and examination of discrimination before the crime occurred.<sup>733</sup> The concept of intersectionality also challenges universalism and shows how, depending on other factors, discrimination can be diverse.<sup>734</sup> As highlighted in Chapter 1 of this thesis, this approach is essential for understanding GBV in the CAR. An intersectional approach can indeed better enable the OTP to reach an accurate gender analysis of ‘the underlying differences and inequalities between women and men, and girls and boys, and the power relationships and other dynamics which determine and shape gender roles in a society, and give rise to assumptions and stereotypes.’<sup>735</sup> It can also lead to the ‘consideration of whether, and in what ways, crimes, including sexual and gender-based crimes, are related to gender norms and inequalities.’<sup>736</sup> In this regard, Deibler notes that: ‘The important fact of different realities and harms experienced by women is so often obscured by a failure to include the voices of feminists from outside the West, whose social, economic, and cultural particularities feminist academia so often glosses over in its effort to secure recognition of women as a uniform class in international law.’<sup>737</sup>

Even though it remains unclear how intersectionality is being applied in the *Ngaïssona* and *Said* cases, in theory intersectional approaches are meant to guide the work of

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<sup>728</sup> Maučec op cit note 749 at 66: ‘(...) in relation to international crimes and pursuant to Article 21(3) of the Rome Statute the Prosecutor’s policy looks at multiple factors and forms of discrimination and social inequalities as being interconnected among themselves.’

<sup>729</sup> Maučec op cit note 744 at 20-21.

<sup>730</sup> Ibid at 23.

<sup>731</sup> Patricia Viseur Sellers *What can intersectionality mean for international justice* (first video) at 32:57, online at: <https://www.emergentjusticecollective.org/events/>.

<sup>732</sup> Ibid at 41:25.

<sup>733</sup> Ibid at 41:32

<sup>734</sup> Yassin Brunger *What can intersectionality mean for international justice* (first video) at 1:08:38, online at: <https://www.emergentjusticecollective.org/events/>.

<sup>735</sup> 2014 Policy Paper at 4.

<sup>736</sup> Ibid at 4.

<sup>737</sup> Deibler op cit note 720 at 536 referring to Karen Engle ‘International Human Rights and Feminisms: When Discourses Keep Meeting’ in *International law: Modern feminist approaches* (2005) at 47, 48 (arguing against structural bias feminism, which obscures economic, social, and cultural differences between first and third world women).

the OTP at different stages of the procedure, either during preliminary examination,<sup>738</sup> investigation,<sup>739</sup> and prosecution.<sup>740</sup> This approach is necessary to accompany witnesses and victims in the most sensitive and precise way possible,<sup>741</sup> since a clear understanding of the culture and social relational contexts in which the crimes occurred can enhance experts' understanding of trauma and help them better understand its effects on the minds and bodies of the victims of SGBC.<sup>742</sup> This approach could make it possible to take into account the particular histories and ontological truths of certain indigenous women<sup>743</sup> as it can admit 'social science evidence, such as testimonies and opinions of cultural experts (for example, anthropologists or sociologists).'<sup>744</sup> Intersectionality or intersectional approaches to the investigation and prosecution of international crimes thus give way to what Kather calls 'pluriversality', a methodology that reveals the multiple realities in women's lives and 'that harm and the drivers of the crimes are multidimensional.'<sup>745</sup> Using intersectionality de-essentialises gender because it allows one to examine 'why specific inequalities are given more importance than others in specific moments in specific spaces.'<sup>746</sup> Finally, this approach offers a better understanding of the cultural meaning of GBV, which, in terms of reparation, is essential as it will be seen in a later Chapter.<sup>747</sup>

### *Conclusion*

According to Ni Aolian: 'One consequence of ICC ratification is the incentives that follow to prosecute the Statute-defined crimes domestically and support the mandate of the Court.'<sup>748</sup> The ICC, therefore, has a vital role to play in emphasising the international nature of SGBC 'in that it acknowledges that all people and states have a responsibility to ensure justice is served for such crimes, rather than just the state in which they were committed,'<sup>749</sup> which aligns with modern constructivist understandings of ICL as an attempt to create 'a normative

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<sup>738</sup> 2014 Policy Paper § 41.

<sup>739</sup> Ibid § 50 & 56-57.

<sup>740</sup> Ibid § 74, 84, 99.

<sup>741</sup> Kather supra note 221.

<sup>742</sup> Ibid.

<sup>743</sup> Laetitia Braconnier Moreno 'Vérités plurielles et justice transitionnelle en Colombie' (2020) *La Revue des droits de l'homme. Revue du Centre de recherches et d'études sur les droits fondamentaux* 18 at 9.

<sup>744</sup> Maučec op cit note 749 at 77.

<sup>745</sup> Kather supra note 221.

<sup>746</sup> Ibid.

<sup>747</sup> *The Prosecutor v. Bosco Ntaganda*, icc-01/04-02/06 (Reparations Order), supra note 669, para. 209.

<sup>748</sup> Fionnuala Ni Aoláin 'Gendered harms and their interface with international criminal law: Norms, challenges and domestication' (2014) *International Feminist Journal of Politics*, 16(4), 622-646 at 627/ Also see *The Prosecutor v. Bosco Ntaganda*, icc-01/04-02/06 (Reparations Order), supra note 669, para. 209.

<sup>749</sup> Rimmer op cit note 686 at 57.

community.<sup>750</sup> Therefore, how SGBCs are defined and prosecuted by the ICC can significantly impact the work of the SCC. At the trial stage, the *Bemba* case was seen as a potential vehicle for this game-changing dynamic<sup>751</sup> setting standards able to serve as an example for the jurisprudence of national courts and future legal reforms, particularly in the CAR. However, by not addressing the root causes of SGBCs, the ICC has only opened the door to superficial reforms.<sup>752</sup> Moreover, although NGOs have documented a high occurrence of SGBC against women during the 2012/2013 conflict,<sup>753</sup> almost no reference is made to SGBC against women in Situation II, except in the *Ngaïssona* case. Women are therefore largely excluded from the TJ process that takes place at the ICC level. Nevertheless, the prosecution of GBCs as acts of persecution and the adoption of an intersectional approach in the *Yekatom/Ngaïssona* and *Saïd* cases are positive steps to continue to broaden the scope of GBCs, to give a better contextualisation of these crimes, understand their causes, undertake deeper structural reforms, and not reduce women to a single category of victims. In this respect, the case law of the ICC can offer new frames of reference for the prosecution of SGBC by the SCC.

(ii) The Special Criminal Court (SCC)

Hybrid tribunals are often seen as ‘a pragmatic and flexible response to international crimes’<sup>754</sup> meant to capture ‘the duality of international criminal law as global and local crime.’<sup>755</sup> Mixed and hybrid tribunals ‘aim to redress the deficiencies of international tribunals on the one hand and domestic courts on the other while combining “the strengths of

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<sup>750</sup> Stahn op cit note 655 at 17.

<sup>751</sup> D’Aoust op cit note 717 at 213.

<sup>752</sup> Ibid at 218.

<sup>753</sup> Also see Pre-Trial Chamber II, Warrant of Arrest for Mahamat Nouradine Adam supra note 746 § 8: during *Seleka* ‘operations, looking for weapons and FACA members, in areas of Bangui considered to be supportive of François Bozizé, such as the 4<sup>th</sup> *arrondissement* – in particular the Boy Rabe neighbourhood – and the 7<sup>th</sup> *arrondissement* (...) Women and girls were raped and gang raped in front of their children or parents.’; § 17 ‘Moreover, the Single Judge finds reasonable grounds to believe that, from at least March 2013 until at least January 2014, (...) it appears that, pursuant to a State or organisational policy aimed to keep the Seleka in power, part of the civilian population was targeted through multiple acts of (...) rape, (...) and pillaging of houses belonging to non-Muslims and others perceived to be complicit with or supportive of the Bozizé government and, later, of the Anti-Balaka.’/ Also see Pre-Trial Chamber II, confirmation of charges against Mahamat Saïd Abdel Kani, supra note 745, the Pre-Trial Chamber acknowledges that from at least April 2013 until at least November 2013, ‘(t)he Seleka engaged in a course of conduct that involved the multiple commission of article 7(1) acts, including multiple acts of murder, rape, (...)’/ Also see Pre-Trial Chamber II, Situation in the Central African Republic II in the case of the *Prosecutor v. Maxime Jeoffroy Eli Mokom Gawaka*, Public Redacted Version of ‘Warrant of Arrest for Maxime Jeoffroy Eli Mokom Gawaka’ (ICC-01/14-01/22-2-US-Exp) (10 December 2018) § 9.

<sup>754</sup> Stahn op cit note 655 at 197.

<sup>755</sup> Pdraig McAuliffe ‘Hybrid Tribunals at Ten: How International Criminal Justice’s Golden Child Became an Orphan’ (2011) 7 *Journal of International Law and International Relations*, 1, at 22.

the ad hoc tribunals with the benefits of local prosecutions.” They incorporate ‘national laws, judges and prosecutors — contributing to the capacity-building of the judiciary and the legal system; while also including international norms and personnel — conferring legitimacy, resources and technical knowledge.’<sup>756</sup> Therefore, in addition to the ICC, the SCC was established in the CAR in 2015.<sup>757</sup> The SCC is an UN-sponsored hybrid court based in Bangui and was created to fill an accountability void as a complementary mechanism to the ICC and ordinary criminal courts.<sup>758</sup> The Court was created for five years from ‘its actual installation’ (art 70).<sup>759</sup> The decision to extend its mandate, which should end this year (2023),<sup>760</sup> was taken in consultation with the Central African Government and the United Nations (art. 70). The SCC should therefore complete its work in 2028.

At the time of writing this thesis, several persons have already been arrested, some believed to be responsible for SGBC. For example, Eugene Barret Ngaikosset was arrested in September 2021 and brought before the SCC for war crimes and crimes against humanity.<sup>761</sup> He is believed to be responsible for the murder of dozens of civilians and the burning of thousands of homes in the northwest and northeast of the country between 2005 and 2007 as commander of François Bozizé's Presidential Guard, as well as other crimes committed in 2015 as a leader of an *anti-balaka* armed group.<sup>762</sup> On December 17, 2015, he was listed, under paragraphs 11 and 12 (b) and (f) of resolution 2196 (2015), by the UN Security Council as being involved 'in planning, directing or the commission of acts which violate international human rights or international humanitarian law, as the case may be, or which constitute abuses or violations of human rights, in the CAR' including acts involving sexual violence.<sup>763</sup> Firmin Junior Danboy and Vianney Semndiro, former army officers, were also arrested and face charges of crimes against humanity allegedly committed in a military detention center in Bossembélé between 2009 and 2013, while a former *Seleka* general,

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<sup>756</sup> Alberto Costi ‘Hybrid Tribunals as a Viable Transitional Justice Mechanism to Combat Impunity in Post-Conflict Situations’ (2006) 22 *New Zealand Universities Law Review* 213-239 at 225.

<sup>757</sup> Act 15.003 of 2015 On the Creation, Organization and Operation of the Special Criminal Court.

<sup>758</sup> Amnesty International ‘One step forward, two steps backwards: Justice in the Central African Republic’ (2021) at 2.

<sup>759</sup> Act 15.003 supra note 790.

<sup>760</sup> FIDH, OCDH & Ligue Centrafricaine des Droits de l’Homme supra note 589 at 17 Act 15.003 supra note 790 – Art. 70.

<sup>761</sup> Amnesty International supra note 791 at 5.

<sup>762</sup> Amnesty International supra note 791 at 8.

<sup>763</sup> United Nations Security Council’s website, Eugène Barret Ngaikosset (accessed on the 21<sup>st</sup> of October 2021), online at: <https://www.un.org/securitycouncil/sanctions/2127/materials/summaries/individual/eugène-barret-ngaikosset>.

Abdel Kader Khalil, faces charges of war crimes and crimes against humanity.<sup>764</sup> Moreover, the investigation, prosecution and investigation strategy of the SCC gives priority to conflict-related sexual violence cases.<sup>765</sup> The creation of this Court therefore may offer a pluralist effort to repress SGBC by allowing the adoption of definitions that may differ from those given by the ICC without harming the project of international justice.

(ii.1) *The SCC's mandate*

The SCC is a special national court that is established within the CAR judicial system but benefits from the participation of international actors (art. 73).<sup>766</sup> Strongly inspired by the inquisitorial model, the jurisdiction comprises an investigating chamber, a special indictment chamber, which decides on appeals against orders issued by the investigating offices, a *Chambre d'Assise*, and an appeals chamber. It has a registry and a special prosecutor's office and is assisted by a particular judicial police unit.<sup>767</sup> The composition of the SCC is mixed with national and international staff.<sup>768</sup> The jurisdiction *rationae personae* of the Court is exercised over everyone who has presumably committed serious crimes as defined by the Central African Penal Code, including the crimes of genocide, crimes against humanity and war crimes. The jurisdiction *rationae loci* of the SCC 'extends throughout the national territory and acts of coalition and complicity committed in the territory of foreign states with which the Central African state is bound by mutual legal assistance agreements' (art. 4.1). As to the jurisdiction *rationae temporis* of the SCC, the Court is mandated to investigate and prosecute crimes under international law and other serious human rights violations committed in the CAR since January 2003 (art. 3§1). As the jurisdiction *rationae temporis* of the SCC overlaps with that of the ICC, the organic law instituting the SCC provides for a reversed complementarity, according to which the competence of the ICC takes precedence over that of the SCC, even though the latter is a national court (art. 37). The jurisdiction *rationae materiae* of the SCC is exercised over serious crimes as defined by the Central African Penal Code, including the crimes of genocide, crimes against humanity and war crimes (art.3.1),

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<sup>764</sup> Human Rights Watch *Central African Republic: First War Crimes Verdict Due: Special Criminal Court to Deliver Judgement on October 31* (October 2022), online at: [https://www.hrw.org/news/2022/10/28/central-african-republic-first-war-crimes-verdict-due?fbclid=IwAR0rNZutCbYf7hRFxCubwl\\_32H0EbxwRHbivrnysn62SIPIEHfFKCgjnVM](https://www.hrw.org/news/2022/10/28/central-african-republic-first-war-crimes-verdict-due?fbclid=IwAR0rNZutCbYf7hRFxCubwl_32H0EbxwRHbivrnysn62SIPIEHfFKCgjnVM).

<sup>765</sup> SCC *investigation, prosecution and investigation strategy* (2020) art. 57 § 4, § 7

<sup>766</sup> Act 15.003 supra note 790.

<sup>767</sup> Iryna Grebenyuk 'La Cour pénale spéciale centrafricaine: une illustration de «complémentarité élargie»? (2018) *Revue de science criminelle et de droit pénal comparé* 1: 1-20 at 4.

<sup>768</sup> FIDH, OCDH & Ligue Centrafricaine des Droits de l'Homme supra note 589 at 16.

and also extend to the distinct crime of torture.<sup>769</sup> The law provides that if a conflict of jurisdiction arises with the national courts of the CAR, which are competent to judge the same crimes, the primacy of jurisdiction belongs to the SCC (art.3.3). This means that the SCC has primacy of jurisdiction over ordinary courts to conduct investigations and prosecutions,<sup>770</sup> without however replacing them.<sup>771</sup>

*(ii.2) SGBC in the first SCC judgment & Further possible developments*

Issa Sallet Adoum alias Bozizé (parler aussi des autres) was prosecuted by the SCC's *Chambre d'Assise* for having committed on May 21, 2019, in Koundjili, in his capacity as a military leader within the meaning of article 57 of the law n ° 15.003, rapes constitutive of war crimes within the meaning of the provisions of Article 55 a) and b) of Law No. 15.003,<sup>772</sup> and rapes constituting crimes against humanity within the meaning of the provisions of Article 55 a) and b) ) of Law No. 15.003.<sup>773</sup> The Court recognised that these rapes were part of a widespread and systematic attack carried out by the 3R group<sup>774</sup> in the context of a non-international armed conflict opposing them to the Central African Government and other armed groups, particularly the *Antibalaka* and the RJ.<sup>775</sup> The Court therefore concluded beyond any reasonable doubt that the rapes committed against six women in Koundjili on May 21, 2019 were rapes constituting crimes against humanity and war crimes respectively, in accordance with the Articles 87 and 153 of the Central African Penal Code.<sup>776</sup>

Article 153 of the Penal Code, dealing with crimes against humanity faithfully reproduces Article 7(1) of the Rome Statute. As in Article 7(1)(g) of the Rome Statute, 'Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity' are acts constitutive of crimes against humanity. It is interesting to note in this regard that the Protocol on the Prevention and Suppression of Sexual Violence Against Women and Children of the International Conference on the Great lakes Region (CIRGL), of which the CAR is a member state, extends in its article 2, the scope of SGBC as crimes against humanity, to also include: 'i.

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<sup>769</sup> Musila op cit note 558 at 13.

<sup>770</sup> Special Criminal Court *Stratégie d'enquêtes, de poursuites et d'instruction* (2020) at paras 10, 22 & 23, online at : <https://www.cps-rca.cf/documentation.php?idcategorie=32>.

<sup>771</sup> Ibid paras 10.

<sup>772</sup> Cour Pénale Spéciale supra note 126 para. 110.

<sup>773</sup> Ibid para. 116.

<sup>774</sup> Ibid para. 370.

<sup>775</sup> Ibid para. 371.

<sup>776</sup> Ibid para. 373.

Forced disappearance of women and children; j. The crime of apartheid committed against women and children; k. Other inhumane acts of a similar character intentionally causing great suffering or serious injury to the body or to the physical or mental health of women and children,<sup>777</sup> which could potentially give the SCC the ability to prosecute more GBC as falling within the definition of crimes against humanity.

Moreover, the charge of gender-based persecution as included in article 153 §10 of the CAR's Criminal Code could allow to address gender-based acts that fall outside the scope of most statutory crimes, highlighting harms that are often obscured.<sup>778</sup> The violation of women's rights to housing, health, education, and culture during conflicts could constitute persecution as a crime falling under the ambit of a crime against humanity,<sup>779</sup> either because the perpetrators waged an attack against an identifiable group, for example Muslim women, or because the perpetrators subjected men and women to different crimes.<sup>780</sup> By prosecuting these crimes under an intersectional perspective, the SCC could develop a jurisprudence that considers the violations of women's ESC rights.<sup>781</sup> It therefore remains to be seen whether, in the future, the prosecution of SGBC as crimes of persecution will be a priority for the Office of the Prosecutor.

However, the threshold is high for a crime to fall within the scope of crimes against humanity, genocide, or war crimes. According to the ICC's case law, and still taking the crime of persecution as an example, it should be noted that not all human rights violations are covered: only cases of 'serious [...] denial' of 'fundamental rights [of a person] in violation of international law', as the right to private property and the right to education.<sup>782</sup> The conduct constituting persecution must also have been adopted in connection with another crime within the jurisdiction of the Court, which makes it possible to set aside discriminatory measures that fall outside this scope.<sup>783</sup> In addition, the perpetrator must have acted with discriminatory intent, meaning the specific intent to discriminate against persons covered by

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<sup>777</sup> CIRGL *Protocole sur la Prévention et la Répression de la Violence Sexuelle contre les Femmes et les Enfants* (2006), in French : 2: i. Disparition forcée de femmes et d'enfants ;

j. Le crime d'apartheid commis à l'encontre de femmes et d'enfants ;

k. Autres actes inhumains de caractère analogue causant intentionnellement de grandes souffrances ou portant atteinte grave à l'intégrité physique ou à la santé physique ou mentale des femmes et des enfants. (Art 7 (1) : This Protocol is an integral part of the Pact and shall not be subject to separate signature and ratification by Member States.)

<sup>778</sup> Ibid at 5 & § 57.

<sup>779</sup> Ibid § 23.

<sup>780</sup> Grey supra note 751.

<sup>781</sup> Policy on the Crime of Gender Persecution supra note 69 § 24.

<sup>782</sup> *Al Hassan* supra note 715 para. 664.

<sup>783</sup> *Al Hassan* supra note 715 para. 669.



one of the grounds set out in article 153 of the Penal Code. Special intent can be inferred from the general attitude of the crime's perpetrators and the circumstances surrounding the commission of that crime.<sup>784</sup> The 2014 Policy Paper also notes various 'indicia' of gender persecution, including 'discriminatory policies, violent acts selectively targeting a particular gender, gender-related propaganda, relevant utterances issued by the direct perpetrators, elements of an individual suspect's background, and prior conduct that are indicative of relevant intent and adverse gender biases[.]'<sup>785</sup> Ultimately, for the facts to be considered as constituting crimes against humanity, the perpetrator must still have known or intended that their behaviour was part of a widespread or systematic attack directed against a civilian population.<sup>786</sup>

(iii) Towards going beyond Sexual and Gender-Based Crimes

A broader conceptualisation of SGBC, including the prosecution of SGBC as crimes of persecution, which allows for the inclusion of violations other than rape, such as violations of ESC rights; as well as an intersectional approach could include more victims in ICL processes and address the root causes of SGBC in the CAR. This is all the more important since the concepts developed by the SCC can leave marks on Central African society's social order. In Sierra Leone, for example, the concepts developed by the SCSL 'were actively appropriated and—intentionally or otherwise— subverted by women to challenge patriarchal structures,'<sup>787</sup> whether they engaged directly with the court or not.<sup>788</sup>

However, in the CAR, if TJ were limited to international trials, the attention paid to women victims would be very limited, even almost non-existent, even if the work of the SCC is likely to bring new opportunities. Even so, these opportunities will also be finite. ICL indeed only tackles the 'tip of the iceberg' and does not address the lesser forms of GBV. Henn, referring more particularly to IHL, notes that this law is limited only to the prohibition of a specific type of sexual violence: that which reaches a certain level of gravity and which is linked to the conflict.<sup>789</sup> Likewise, due to its high threshold, ICL ignores a multitude of

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<sup>784</sup> *Al Hassan* supra note 715 para. 671.

<sup>785</sup> *Policy Paper on Sexual and Gender-Based Crimes* supra note 649 § 67.

<sup>786</sup> Cour Pénale Spéciale supra note 126 para. 337 : 'Par ailleurs, pour que les faits soient considérés comme constitutifs de crimes contre l'humanité, il est nécessaire que l'auteur savait que son comportement faisait partie d'une attaque généralisée ou systématique dirigée contre une population civile ou entendait qu'il en fasse partie.'

<sup>787</sup> Grewal op cit note 494 at 87.

<sup>788</sup> *Ibid* at 88.

<sup>789</sup> Henn op cit note 136 at 45.

harms, including those that do not qualify as crimes but occur as a result of the conflict.<sup>790</sup> Besides, crimes such as deportation or forcible transfert pursuant to art. 7(1)(d) of the Rome Statute,<sup>791</sup> or destroying or seizing the property of an adversary pursuant to art. 8(2)(e)(xii) of the Rome Statute,<sup>792</sup> pillaging pursuant to art. 8(2)(e)(v),<sup>793</sup> and limited access to basic health care after fleeing an attack<sup>794</sup> constituting other inhumane acts pursuant to article 7(1)(k) of the Rome Statute are not conceptualised by the ICC as gendered even though they can have a disproportionate impact on women. The structure of the law thus renders a large category of victims invisible.<sup>795</sup>

While adopting an intersectional approach may allow for a deeper study of the context and structures that made the crime possible, and produce a more accurate and holistic historical record of the abuses that occurred, courts will certainly always be limited in their efforts to deliver a broader view of the causes of conflict, the social, economic and political structures of inequality that have made this violence possible, and the economic and social consequences that these violations have for the victims.<sup>796</sup> Courts are thereby limited in addressing the continuum of violence in the victim's life.<sup>797</sup> Therefore, while the recent development of ICL has strengthened accountability for a range of SGBCs, ICL ‘does not (...) deal with the complexity of the range of violence in the lives of women and girls caught up in conflict whose experiences (...) might traverse its strict categorizations.’<sup>798</sup> Therefore, ICL, even in its most extended version, remains limited as an agent of social change. That is why the work of the CVJRR will be decisive in the CAR.

(b) Sexual and Gender-Based Violence, beyond international Crimes: The *Commission Vérité, Justice, Réparation et Réconciliation* (CVJRR)

The CAR also established the CVJRR. The Commission was set up in April 2020.<sup>799</sup> The creation of the CVJRR and its ambitious mandate resulted from public consultations

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<sup>790</sup> Swaine op cit note 79 at 4/ Also see Aoláin, O'Rourke & Swaine op cit note 140 at 106.

<sup>791</sup> For example, Pre-Trial Chamber II, Warrant of Arrest for Maxime Jeoffroy Eli Mokom, supra note 786 at 12.

<sup>792</sup> Ibid at 13.

<sup>793</sup> Ibid at 16.

<sup>794</sup> Ibid at 27.

<sup>795</sup> Ni Aoláin, Fineman & Zinsstag op cit note 592 at 53/ Also see Aoláin, O'Rourke & Swaine op cit note 140 at 106.

<sup>796</sup> Mani op cit note 279 at 100.

<sup>797</sup> Katie McQuaid ‘There is violence across, in all arenas: listening to stories of violence amongst sexual minority refugees in Uganda.’ (2020) *The international journal of human rights* 24, no. 4: 313-334 at 319.

<sup>798</sup> Swaine op cit note 79 at 4.

<sup>799</sup> Charles Bouessel *La Commission Vérité Centrafricaine patine* (mai 2019), online at: <https://www.justiceinfo.net/fr/commissions-verite/41343-la-commission-verite-centrafricaine-patine.html>: ‘The

organised by the Government in 2015, particularly during the Bangui Forum.<sup>800</sup> The Commission is established for four years from the date of the swearing-in of the commissioners (the commissioners were sworn in on July 2, 2021),<sup>801</sup> renewable once for a maximum period of 24 months.<sup>802</sup> The CVJRR is made up of three central bodies: the plenary Commission, which is ‘the design, orientation, and decision-making body,’ made up of all the commissioners; the Bureau, which is the body ‘responsible for coordinating the activities of the CVJRR,’ composed of the president and the two vice-presidents; the sub-commissions, which are the ‘working groups responsible for examining issues relating to each of its four pillars,’ namely truth, justice, reparation and reconciliation.<sup>803</sup> The CVJRR can also benefit from administrative and technical support services and recruiting national and international experts.<sup>804</sup>

The CVJRR has no judicial power,<sup>805</sup> and is therefore not in direct competition with other jurisdictions, even if it completes the work of the ICC and SCC by ‘investigating serious offences.’<sup>806</sup> The law establishing the CVJRR provides that the Commission may ‘issue recommendations on the transfer of cases to the Special Criminal Court and other courts with jurisdiction.’<sup>807</sup> It adds that ‘in the fulfilment of its mandate, the CVJRR shall benefit from the collaboration of all national and international institutions, as necessary (§1). In its pursuit of truth and justice, the CVJRR shall collaborate with the SCC and national courts (§2). A formal framework for collaboration shall be established to ensure the

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implementation of a Truth Commission was mentioned in the recommendations of the Bangui Forum, in May 2015, and in the Khartoum peace agreement, on February 6, 2019. However, this project faced ministerial blockages and delays in its implementation.’ / Act 20.009 of 7 April 2020 on the establishment, organisation and operation of the Truth, Justice, Reparation and Reconciliation Commission, (‘Law establishing the CVJRR’).

<sup>800</sup> FIDH, OCDH & Ligue Centrafricaine des Droits de l’Homme supra note 589 at 30 referring to *Pacte républicain pour la paix, la réconciliation et la reconstruction en République centrafricaine (Republican Pact for Peace, Reconciliation and Reconstruction in the Central African Republic)*, May 2015 (“Bangui Forum Pact 2015”), <https://hdcentre.org/wp-content/uploads/2016/06/The-Republican-Pact-May-2015.pdf>; Central African Republic, Ministry for Humanitarian Action and National Reconciliation ‘Commission Vérité, Justice, Réparations et Réconciliation’ (Truth, Justice, Reparation and Reconciliation Commission), <https://www.reconciliation.gouv.cf/projet/15/cvjrr>. and manifested in the APPR-RCA of 6 February 2019 art 4.s & 9.

<sup>801</sup> Ibid at 30 referring to MINUSCA, *Rapport Mensuel: Analyse de la situation des droits de l’Homme (Monthly Report: Analysis of the human rights situation)*, July 2021, [https://minusca.unmissions.org/sites/default/files/rapport\\_mensuel\\_ddh\\_juillet\\_21\\_final.pdf](https://minusca.unmissions.org/sites/default/files/rapport_mensuel_ddh_juillet_21_final.pdf).

<sup>802</sup> Law establishing the CVJRR supra note 885, art. 4.

<sup>803</sup> FIDH, OCDH & Ligue Centrafricaine des Droits de l’Homme supra note 589 at 31/ Also see Law establishing the CVJRR supra note 885, Title IV.

<sup>804</sup> Law establishing the CVJRR supra note 885, art. 33.

<sup>805</sup> Ibid, art. 2§2.

<sup>806</sup> S/2021/312 supra note 163, para 22.

<sup>807</sup> Law establishing the CVJRR supra note 885, art. 65.

effectiveness of their respective actions (§3).<sup>808</sup> When writing this thesis, it appeared that no collaborative framework had yet been developed.<sup>809</sup>

The Commission can expand TJ opportunities in the CAR. The mandate of the Commission concerns the serious events committed on the territory of the CAR between March 29, 1959, and December 31, 2019.<sup>810</sup> Its mission is to ‘elucidate serious human rights violations, to determine their nature, causes and extent, integrating the circumstances, factors, context and reasons which led to them.’<sup>811</sup> No further details are given as to the definition of these violations.<sup>812</sup> Its mission encompasses the hearing of victims and witnesses and the alleged perpetrators of serious human rights violations,<sup>813</sup> the search for the truth, and the establishment of individual or collective extrajudicial responsibilities.<sup>814</sup> In addition to hearings on specific crimes, the CVJRR can organise ‘thematic hearings on the main violations committed, in order to identify the root causes and the role played by state or private institutions, such as the Army, the Police, the justice system, education, the financial sector, the media, political parties and their affiliated movements, religious denominations, associations, armed groups and other organisations.’<sup>815</sup> To do this, it has ‘administrative, financial, legal and technical autonomy, and independence of action in relation to the other Institutions of the Republic.’<sup>816</sup> It must also ‘create a special victim reparation fund, propose a national reparations program and work to build a memorial for the victims.’<sup>817</sup>

As will be seen below, the existence of such a body can, in theory, overcome the limits of ICL by ‘establishing the truth about the wider context of crimes perpetrated on Central African territory and by recognising the suffering of victims, survivors and affected communities. It can also play a central role in reparation and recommend institutional reforms to contribute to guarantees of non-repetition of past human rights violations.’<sup>818</sup> More generally, truth commissions are often seen as allowing for consideration of four

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<sup>808</sup> Ibid, art. 38.

<sup>809</sup> FIDH, OCDH & Ligue Centrafricaine des Droits de l’Homme supra note 589 at 41/ Interview recorded on the 29<sup>th</sup> of December 2022.

<sup>810</sup> Law establishing the CVJRR supra note 885, art. 1.

<sup>811</sup> Justiceinfo.net, Ephrem Rugiririza, Centrafrique : La Commission Vérité aux Pieds d’Argiles (20 August 2021), online at : <https://www.justiceinfo.net/fr/81280-centrafrique-commission-verite-pieds-argile.html>.

<sup>812</sup> Law establishing the CVJRR supra note 885, art. 6§3.

<sup>813</sup> Ibid art. 6§1 & art. 6§2.

<sup>814</sup> Ibid art. 6§3 & art. 6§4.

<sup>815</sup> Ibid art. 57.

<sup>816</sup> FIDH, OCDH & Ligue Centrafricaine des Droits de l’Homme supra note 589 at 30 / Law establishing the CVJRR supra note 885, art. 2.

<sup>817</sup> Rugiririza supra note 897.

<sup>818</sup> FIDH, OCDH & Ligue Centrafricaine des Droits de l’Homme supra note 589 at 5.

dimensions of truth:<sup>819</sup> forensic or factual truth; personal or narrative truth; social or dialogue truth; and healing or restorative truth.<sup>820</sup> For example, forensic or factual truth can lead to the search for ‘the historical and structural causes of the conflict, and highlight the urgency of measures to address issues of inequality, poverty, and marginalisation.’<sup>821</sup> On the other hand, personal or narrative truth allows victims to define themselves, the crimes, and the structural inequalities they suffer.<sup>822</sup> These four dimensions of truth are essential in understanding the plurality of victims' needs and the causes of the violence they endured.<sup>823</sup> This chapter will therefore successively examine how the CVJRR is able to include broader policies and standards of equality between women and men, and thus to take into account types of GBV generally neglected by international or hybrid criminal tribunals. This broader set of norms and policies can also allow the CVJRR to broaden the definition of what is generally understood as GBV to include the violation of socio-economic and cultural rights. Finally, this section will analyse how the CVJRR can address the causes of GBV and allow the CAR population to move forward and rebuild a more just social contract.

- (i) Including broader gender equality policies and norms

While international law has traditionally distinguished between the law that applies in times of armed conflict, IHL, and that which applies in times of peace, international human rights law,<sup>824</sup> it is now widely accepted that international human rights law applies in times of conflict, providing a more comprehensive range of guarantees for women. Time-limited applicability of human rights is indeed now rejected.<sup>825</sup> More importantly, CEDAW, which guarantees gender equality, cannot be suspended during a conflict.<sup>826</sup> As ICL does not bind the CVJRR, it can therefore include broader global standards on gender equality, such as

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<sup>819</sup> Massias & Besse op cit note 123/ Lambourne op cit note 46 at 39.

<sup>820</sup> ‘The factual-forensic truth drew on legal, medical, and scientific evidence. The personal and narrative truth refers to people's perceptions, stories, myths, and experiences. The social or dialogic truth emerged from the interactions among participants at the hearings. Finally, healing truth is the acknowledgment or placing of information on the public record and affirming that a person's suffering is real and worthy of attention’ – See R. N. Kraft ‘Uncovering the truth: Confronting perpetrators and victims in violent accounts: Understanding the psychology through South Africa’s truth and reconciliation commission’ (2014).

<sup>821</sup> *CSVR Policy Brief: Transitional Justice and Colonialism* (2018) at 7, online at <https://www.csvr.org.za/pdf/Transitional%20Justice%20and%20Colonialism%20-%20Policy%20Brief.pdf>.

<sup>822</sup> Swaine op cit note 79 at 281.

<sup>823</sup> Lambourne op cit note 65 at 39 / Macdonald op cit note 869 at 91.

<sup>824</sup> Charlesworth op cit note 363 at 386.

<sup>825</sup> Henn op cit note 136 at 65.

<sup>826</sup> *General Recommendation No. 28* supra note 71/ *General Recommendation N°30* supra note 223 affirms the applicability of CEDAW in conflict and post-conflict settings, see §9 & §1.

international human rights law, by referring to the Platform for Action of Beijing or CEDAW, for example,<sup>827</sup> which can considerably extend the range of violations considered by the CVJRR. Other international conventions, such as the CRC, can also allow greater intersectionality in treating VAW.<sup>828</sup> For example, the regulation establishing the Commission for Reception, Truth, and Reconciliation in Timor-Leste contained a broad definition of human rights violations. The Commission looked into violations of ESC rights set out in the UDHR, the ICESCR, the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD), CEDAW, and the CRC.<sup>829</sup> Several soft law instruments also call on states to adopt laws, policies, and special measures to eliminate VAW.<sup>830</sup> The CVJRR can therefore also ensure that the CAR has fulfilled its obligations. General Assembly resolution 61/143 of 2006, for example, stresses that states must eliminate GBV, ‘whether occurring in public or private life,’ in order to ensure the protection of the human rights of ‘women and girls in situations of armed conflict, post armed conflict settings and refugee and internally displaced settings, where women are at greater risk of being targeted for violence (...).’<sup>831</sup> In Resolution 1325 (2000) on WPS, the UN Security Council calls all parties to a conflict to take special measures to protect women against GBV.<sup>832</sup> A call also made in the 1993 Vienna Declaration and Programme of Action, adopted by the United Nations World Conference on Human Rights.<sup>833</sup>

The CVJRR can also refer to regional legal instruments such as the Maputo Protocol, which in its Art. (2)(c) also requires states to ‘identify the causes and consequences of violence against women and take appropriate measures to prevent and eliminate such violence.’ This Protocol offers comprehensive guidelines that states can follow to prevent and address GBV.<sup>834</sup> The 2008 *Goma Declaration on Eradicating Sexual Violence and Ending Impunity in the Great Lakes Region* adopted by the states of the Great Lakes Region,

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<sup>827</sup> Swaine op cit note 79 at 280-281.

<sup>828</sup> Kris Brown & Fionnuala Ní Aoláin ‘Through the looking glass: Transitional justice futures through the lens of nationalism, feminism and transformative change’ (2015) *International Journal of Transitional Justice* 9, no. 1: 127-149 at 145.

<sup>829</sup> United Nations Human Rights Office of the High Commissioner *Transitional Justice and Economic, Social and Cultural Rights* (2014) at 17-20/ Nagy op cit 335 at 285.

<sup>830</sup> Henn op cit note 136 at 76 citing ICJ, *Ahmadou Sadio Diallo (Republic of Genuia v. Democratic Republic of Congo)*, Judgement (merits), 30 November 2010, para. 66. ‘Although the Court referred to the HRC, this mutatis mutandis holds true for other human rights treaty bodies.’

<sup>831</sup> Sellers op cit note 596 at 30.

<sup>832</sup> *Security Council resolution 1325 (2000)* supra note 289, art. 10.

<sup>833</sup> Gardam op cit note 619 at 426 referring to Article 38 of the *Vienna Declaration and Programme of Action*, UN Doc.A/CONF. 157/24 (Part 1), 13 October 1993 / Also see Declaration on the Elimination of Violence against Women, supra note 230, Preamble §7 & art. 2.

<sup>834</sup> Fareda Banda ‘The Limits of Law’ in *The Limits of Human Rights* (2019) 275.

including the CAR, provides a detailed list of measures to be taken at the national and regional level to prevent sexual violence and protect the human rights of women and children.<sup>835</sup> The ICGLR, of which the CAR is a member state, also adopted a Protocol on the Prevention and Suppression of Sexual Violence against Women and Children in 2006, signaling an understanding by states that tackling SGBV is an essential element of building peace and security in the region,<sup>836</sup> and that its impact on the ‘lives, health, physical, psychological, social and economic wellbeing of women and children’ constitutes an obstacle to the right to development.<sup>837</sup>

Most importantly, women should be able to identify and name the violations and harms they have suffered, and the law should, in turn, be adapted to adjudicate those violations.<sup>838</sup> Enabling women affected by violence to name the harms they have suffered could challenge common understandings of human rights by engaging local norms that are more familiar to some of them.<sup>839</sup> The CVJRR can therefore play the role of a ‘norm adaptor’ or a ‘norm facilitator’ and ‘develop conceptions of TJ that meet international law standards and are also inclusive of local justice,’<sup>840</sup> by synthesising and balancing competing norms. A dialogue between these norms can potentially allow human rights to be seen as ‘a set of ideas that foregrounds individual choice,’ and enable some women ‘to complicate, layer or break out of ethnic identification’.<sup>841</sup> Feminist scholars have also advocated for ‘a disruptive approach to narrative, a willingness to hear silence as well as voice and an ear to the intimate and the everyday, thereby offering fresh understanding of the experiences of historical, communal and individual harms.’<sup>842</sup> It is therefore important to ‘avoid constructing a static, imported frame and adopt a broad-based TJ approach, encompassing legal, quasilegal, symbolic, critical and educational methodologies.’<sup>843</sup>

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<sup>835</sup> International Conference on the Great Lakes Region *The Goma Declaration on Eradicating Sexual Violence and Ending Impunity in the Great Lakes Region* (2008). The Declaration also recognizes that discrimination can be a cause of GBV (at 2 § 3) and that GBV extends beyond the conflict (at 3 §5).

<sup>836</sup> Lucy Hovil ‘Gender, Transitional Justice, and Displacement’ (2012) at 7.

<sup>837</sup> *Ibid* at 8/ See CIRGL *Protocole sur la Prévention et la Répression de la Violence Sexuelle contre les Femmes et les Enfants* (2006), Preamble § 5 & 7.

<sup>838</sup> Swaine *op cit* note 79 at 282.

<sup>839</sup> A.M. Panepinto *relocating transitional justice from international law to Muslim-majority legal systems: Concepts, approaches and ways forward* (thesis- Durham University) (2015) at 38.

<sup>840</sup> *Ibid* at 44.

<sup>841</sup> Brown & Ní Aoláin *op cit* note 914 at 147-148.

<sup>842</sup> *Ibid* at 146 referring to Fionnuala Ní Aoláin & Catherine Turner ‘Gender, Truth and Transition’(2007) *UCLA Women’s Law Journal* 16: 229.

<sup>843</sup> Brown & Ní Aoláin *op cit* note 914 at 147.

(ii) Addressing neglected GBV and the consequences of GBV

Thanks to its ambitious mandate, the CVJRR can respond to the incomplete categorisation of acts that affect women as international crimes and, therefore, also address neglected abuses.<sup>844</sup> Crimes that the ICC or the SCC will not deal with still have a chance of being dealt with by the CVJRR. The CVJRR can also address less obvious GBV, such as reproductive violence. Reproductive violence, for example, was addressed by the Colombian Truth Commission in its final report.<sup>845</sup> In this regard, the Special Rapporteur on the promotion of truth, justice, reparation, and guarantees of non-recurrence notes that:

The concurrent application of the non-derogable core of human rights, the peremptory norms of general international law, human rights law, humanitarian law and international criminal law and respective case-law makes it possible to include in the list of serious violations of human rights such violations as torture and cruel, inhuman or degrading treatment, sexual violence and violence against children. It also enables the adoption of broad definitions of these violations that cover such gender behaviours as forced nudity, inappropriate touching, genital mutilation and beating, forced prostitution, sexual slavery, rape, forced abortion, forced pregnancy intentionally or unintentionally resulting from rape, forced fertilization, forced sterilization, forced incest, malicious or unintentional transmission of a sexual disease resulting from rape, loss of reproductive capacity intentionally or unintentionally resulting from torture or sexual violence, labour in captivity, baby theft, among other violations.<sup>846</sup>

The CVJRR can also better capture the continuum of violence by considering both sexual violence perpetrated in an armed conflict by a combatant and sexual violence perpetrated in the violent and militarised context of an armed conflict, but by a non-combatant,<sup>847</sup> as well as violence committed in the private space.

The CVJRR can additionally take into account, as was the case in Peru, Sierra Leone, or Timor-Leste, the impact that certain severe violations of human rights have on women, taking into account the demographic, ethnic, cultural, and socio-economic aspects of these

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<sup>844</sup> Elias O. Opongo 'Gendering transitional justice processes in Africa: a feminist advocacy approach to truth commissions' (2021) *Journal of the British Academy* 9, no. s2: 35-52 at 42.

<sup>845</sup> See Centro de Derechos Reproductivos *Una radiografía sobre la violencia reproductiva contra mujeres y niñas durante el conflicto armado colombiano* (2020), online at: <https://reproductiverights.org/sites/default/files/documents/Violencia%20Reproductiva%20en%20el%20conflicto%20armado%20colombiano.pdf>; Centro de Derechos Reproductivos *Salud reproductiva y glifosato en el contexto de conflicto armado*, online at: <https://reproductiverights.org/sites/default/files/documents/Salud%20Reproductiva%20y%20Glifosato%20en%20el%20Contexto%20de%20Conflicto%20Armado.pdf> / Also see Comisión de la Verdad, *Hay futuro si hay verdad: Informe Final de la Comisión para el Esclarecimiento de la Verdad, la Convivencia y la No Repetición*. -- Primera edición. -- Bogotá: Comisión de la Verdad, 2022, section 10.5, at 598; Section Para contribuir a la paz territorial, Recomendación 11 at 707.

<sup>846</sup> *Supra* note 41 UN Doc A/75/174 § 16.

<sup>847</sup> Aoláin, O'Rourke & Swaine *op cit* note 140 at 127.



experiences.<sup>848</sup> General Recommendation No. 19 of the CEDAW Committee, for example, recommends special measures that states must adopt in times of armed conflict to protect women from increased prostitution, trafficking, and sexual assault.<sup>849</sup> Resolution 1889 (2009) on WPS also encourages post-conflict states to improve the socio-economic situation of the victims ‘through education, income generating activities, access to basic services, in particular health services,’<sup>850</sup> indicating a first step towards a transformative approach.<sup>851</sup> This approach can allow commissioners to deal with various forms of stigmatisation, marginalisation, or ostracism in marriage, family, and community that women may face for having been raped or losing one's partner, for example. This may also concern the ensuing legal, social, and economic insecurity that victims of GBV endure.<sup>852</sup> For example, victims of GBV in the CAR are often afraid or ashamed to return to work in the fields or take up other activities that economically support them and their families, which can plunge them into poverty.<sup>853</sup> <sup>854</sup> It would also be interesting for the CVJRR to deal with the social and economic impact on women of the detention of their husbands within the CEDAD and the OCRB,<sup>855</sup> Or the disproportionate impact the looting of properties has had on them.<sup>856</sup> Ultimately, by including broader gender equality policies and standards, the CVJRR can address socio-economic and cultural (ESC) rights violations.<sup>857</sup>

(iii) Addressing Socio-economic and cultural rights abuses

The CVJRR can consider socio-economic violations,<sup>858</sup> and establish ‘the non-judicial individual and collective responsibilities of legal persons and private groups, such as moral, political, social, and economic responsibilities, in the perpetration of offences under the provisions of the law by clarifying their causes and reasons so that they are not repeated.’<sup>859</sup> Since serious violations are not clearly defined, the CVJRR can go beyond the violation of civil and political rights to also deal with the violation of ESC rights. An approach

<sup>848</sup> Supra note 41 UN Doc A/75/174 § 17.

<sup>849</sup> *General recommendation No. 19* *ibid* § 16.

<sup>850</sup> *Resolution 1889 (2009)* supra note 292, para. 10.

<sup>851</sup> Henn op cit note 136 at 78.

<sup>852</sup> Supra note 41 UN Doc A/75/174 § 17.

<sup>853</sup> OCHA supra note 145.

<sup>854</sup> UN Women ‘Towards an era of transformative justice’ at 111, online at: <https://wps.unwomen.org/justice/>.

<sup>855</sup> Pre-Trial Chamber II, Warrant of Arrest for Mahamat Nouradine Adam supra note 746 at 16.

<sup>856</sup> Pre-Trial Chamber II, Warrant of Arrest for Maxime Jeoffroy Eli Mokom, supra note 786 § 13.

<sup>857</sup> CSVR *Transitioning toward gender justice: A trend analysis of 13 African cases* (2018) at 9, online at: <https://www.csvr.org.za/project-reports/The-need-for-transitional-justice-to-embrace-gender-justice-cover.pdf>.

<sup>858</sup> Interview recorded on the 29/12/2022.

<sup>859</sup> Law establishing the CVJRR supra note 885, art.6

encouraged by the African Union (AU)'s Policy for TJ, which expands the mandate of transitional bodies to include ESC rights.<sup>860</sup> The violation of ESC rights indeed affects women disproportionately in the CAR. Most resulting violations of ESC rights, even though seemingly neutral, affect them disproportionately due to unequal social structures and norms. Therefore some authors have called for TRCs to include 'subsistence harms' in their work, for example. Subsistence harms are defined 'as deprivations of the physical, mental and social needs of human subsistence, perpetrated against individuals or populations in situations of armed conflict or as an act of political repression, where the perpetrator acts with intent or with knowledge of the inevitable consequences of such deprivations.'<sup>861</sup> The definition adheres to the ICL severity threshold.<sup>862</sup> Gender inequalities pre-existing an armed conflict shed light on the gendered nature of such harm.<sup>863</sup> Sankey takes the example, also relevant in the case of the CAR, of certain customary norms that do not allow women access to property and prevent them from returning to their homes after displacement in the absence of husbands and fathers.<sup>864</sup> *Seleka* attacks, for example, resulted in thousand of people fleeing their homes,<sup>865</sup> and *anti-balaka* groups allegedly led campaigns involving forcible transfer and deportation,<sup>866</sup> which have had a disproportionate impact on women in the country.

To follow Galtung's logic, and for TJ to really be transformative, in this thesis the violation of ESC rights is understood, however, more largely, than the ones committed by a direct perpetrator, as it will be further detailed through the subsequent chapters of this thesis.

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<sup>860</sup> African Union supra note 65 at §1: 'This Transitional Justice Policy (TJP) is conceived as a continental guideline for African Union (AU) Member States to develop their own context-specific comprehensive policies, strategies and programmes towards democratic and socio-economic transformation, and achieving sustainable peace, justice, reconciliation, social cohesion and healing;' 'the specific objectives of the AUTJP include the following: (...) Defining the policy agenda for holistic and inclusive socio-economic transformation and development of societies emerging out of periods of conflict, serious human rights and humanitarian law violations, legacies of exclusion and historical injustices' at § 10; § 38 (iii): 'Relevant socio-economic development programmes focusing on members of society whose livelihoods have been disrupted by recurrent violence and marginalization should complement such measures;' § 100 (ii) (iv). It also mentions socioeconomic rights in its cross-cutting issues (Section 3) related to children and youth and older persons/ Also see Vienna Declaration, World Conference on Human Rights, Vienna, 14 - 25 June 1993, UN Doc. A/CONF.157/24 (Part I) at 20 (1993), para. 5.

<sup>861</sup> Diana Sankey 'Towards recognition of subsistence harms: Reassessing approaches to socioeconomic forms of violence in transitional justice' (2014) *International Journal of Transitional Justice* 8, no. 1: 121-140 at 122.

<sup>862</sup> Ibid at 122.

<sup>863</sup> Ibid at 127.

<sup>864</sup> Ibid at 128/ IOM *Central African Republic Crisis Response Plan 2023* (2023), online at: <https://reliefweb.int/report/central-african-republic/central-african-republic-crisis-response-plan-2023>: Substance harms can be particularly concerning in the context of the CAR, where 3.4 million people are still being considered in need (57% of the population) in 2023, among whom 2 million are in acute need (across water, sanitation and hygiene, health, education, food, livelihood and shelter), and 505,059 people are still being displaced.

<sup>865</sup> Pre-Trial Chamber II, Warrant of Arrest for Mahamat Nouradine Adam supra note 746, § 11.

<sup>866</sup> Pre-Trial Chamber II, Warrant of Arrest for Maxime Jeoffroy Eli Mokom, supra note 786 §9.

Structural violence, among which gender inequality, also disproportionately affects women's access to ESC rights in the CAR and places their 'actual somatic and mental realizations (...)' below their potential realizations,<sup>867</sup> by depriving them of access to education for example. This form of violence can be said to be conflict-related as it has been aggravated by the numerous conflicts in the country, even though no direct perpetrator can always be identified. As seen in the introduction, the numerous conflicts in the CAR, as well as the constant insecurity in which women live in, affect their capacity to enjoy their rights to health and education among others. Structural violence is therefore also a serious form of violence in the same way as direct violence as it also impairs or nullifies women's enjoyment of human rights and fundamental freedoms under general international law or human rights conventions and constitutes discrimination within the meaning of Article 1 of CEDAW. Harm is therefore understood here as taking away someone's choice. In that respect, recent truth commissions have been given expanded mandates to engage more directly with ESC rights violations,<sup>868</sup> even though not always taking into account ESC rights violations resulting from structural violence.

In South Africa, it has been widely documented that the SATRC, by placing ESC rights violations in the background, failed to consider the abuses suffered primarily by women. Abuses that then entrenched gender inequality in the country.<sup>869</sup> The Kenya National Dialogue and Reconciliation however, showed the link between violations of socio-economic rights and the aggravation of gender inequalities.<sup>870</sup> The TRC of Sierra Leone (2000-2005) was also an important example in the fight against socio-economic rights violations, taking into account third-generation rights such as the right to development and the right to peace. The Commission examined the economic, social, and cultural dimensions of specific violations, such as access to education and health,<sup>871</sup> with particular attention to how these violations affected women and children.<sup>872</sup> Nonetheless, if the Commission 'found that

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<sup>867</sup> Matthew Evans 'Structural violence, socioeconomic rights, and transformative justice' (2016) *Journal of Human Rights* 15, no. 1: 1-20 at 3 – referring to Galtung op cit note 225 at 168.

<sup>868</sup> CSVr supra note 907 at 4: 'Examples include the Kenyan truth commission's engagement with land expropriation, and the Tunisian truth commission's engagement with corruption as a key part of their respective mandates.'

<sup>869</sup> Cahill-Ripley op cit 332 at 209.

<sup>870</sup> CSVr Policy Brief, *State responsiveness to conflict-related violence against women: Transitional Justice trends from 13 African cases* (2018) at 2, online at: <https://www.csvr.org.za/pdf/SGBV%20and%20TJ%20Policy%20Brief.pdf>

<sup>871</sup> Cahill-Ripley op cit 332 at 204 referring to See Sierra Leone Truth and Reconciliation Commission *Witness to Truth – Report of the Sierra Leone Truth and Reconciliation Commission Vol. 2*, Chapter 2 Findings (Sierra Leone Truth and Reconciliation Commission 2004) para 489; para 490.

<sup>872</sup> United Nations Human Rights Office of the High Commissioner supra note 915 at 20-21.

women bore the brunt of economic and social rights violations such as destruction of property, forced evictions and displacement,' the legal analysis however 'never explicitly framed these abuses as human rights violations (right to housing, food and water for example).'<sup>873</sup>

In Timor Leste, the Commission for Reception, Truth and Reconciliation (CAVR) (2001-2005) operated as an independent statutory body investigating the political conflict of 1974-2005.<sup>874</sup> The regulations that established the Commission contained a broad definition of human rights violations, including violations of socio-economic rights.<sup>875</sup> In the CAVR process, violations of socio-economic rights were addressed as such and brought to the forefront of the CAVR's concerns, although ultimately they were not addressed on an equal footing with violations of civil and political rights.<sup>876</sup> More importantly, the example of Timor Leste illustrates that 'truth and reconciliation commissions have the potential to address both direct grave violations of economic and social rights and more structural ongoing violations of these rights, if they are brought to the foreground of the mandate and crucially the focus remains throughout the process.'<sup>877</sup> As such, the work of the CAVR should be welcomed and built on for the future as an example of good practice.<sup>878</sup>

More recent examples also illustrate this trend. Another example of considering socioeconomic rights is the Tunisian Truth and Dignity Commission (CDT). The Commission considered the structural context making women particularly vulnerable to violence in Tunisia.<sup>879</sup> In Colombia, the Constitutional Court has ruled on important cases concerning socioeconomic rights in implementing the Justice and Peace law, which is an integral part of the country's TJ framework. In the case of IDP,<sup>880</sup> the Court held that internal displacement in Colombia constitutes a violation of several human rights, including the right to a minimum standard of living; health; non discrimination; the education of children up to

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<sup>873</sup> Cahill-Ripley op cit 332 at 204 referring to Sierra Leone Truth and Reconciliation Commission, *Witness to Truth – Report of the Sierra Leone Truth and Reconciliation Commission Vol.3B*, Chapter Three Women and the Armed Conflict in Sierra Leone (Sierra Leone Truth and Reconciliation Commission 2004) 185, para 386; See also Vol.2, Chapter 2 Findings: Women, para 497; para 499.

<sup>874</sup> Laplante op cit note 305 at 348.

<sup>875</sup> United Nations Human Rights Office of the High Commissioner supra note 915 at 18 referring to "Chega! The report of the Commission for Reception, Truth and Reconciliation in Timor- Leste (CAVR)", part 2, paras 10-16.

<sup>876</sup> Cahill-Ripley op cit 332 at 206.

<sup>877</sup> Cahill-Ripley op cit 332 at 207.

<sup>878</sup> Ibid at 207.

<sup>879</sup> UN Women supra note 963 at 111.

<sup>880</sup> United Nations Human Rights Office of the High Commissioner supra note 915 at 29 referring to T-025/04, Judgement of 22 January 2004, in particular sect. 9.

the age of 15; work and return in safety and dignity.<sup>881</sup> The Court used follow-up orders to monitor compliance with its judgment. In Order 092/08, dealing with internally displaced women, the Court ordered the state to establish gender programs, some aimed at securing ESC rights, such as health programs, psychosocial support, and education programs for women over the age of 15.<sup>882</sup> The case of *El Salado*,<sup>883</sup> also illustrates Colombia's failure to respect and realise the right to health of internally displaced women.<sup>884</sup>

Regarding cultural rights, the National Inquiry into Missing and Murdered Indigenous Women and Girls (MMIWG) collected testimonies related to massive cultural rights violations, as a result of Canada's colonial policies and ideologies at the time. It concluded that these harms constituted their own form of violence, in addition to contributing to the physical and structural violence experienced by Indigenous women and girls. By broadly conceiving of violence to include acts of cultural violations and linking these abuses to international human rights standards, the MMIWG showed how TJ measures can also address cultural rights violations meaningfully.<sup>885</sup> Ultimately, recognising ESC rights not only expands the narrative, so that women are not just seen as victims of sexual violence,<sup>886</sup> it also helps better address the root causes of GBV.

- (iv) Addressing the root causes of GBV

The CVJRR should 'Elucidate serious violations of human rights, determine the nature, causes and extent of these violations by integrating the circumstances, factors, context and motives that led to them.'<sup>887</sup> The CVJRR is not constrained by the practicalities of a criminal trial, it can therefore encompass a more 'comprehensive agenda for addressing conflict, its roots and consequences,'<sup>888</sup> and therefore address the gender norms and ideology at the root of VAW. The CVJRR can go beyond consideration of the harmful act itself to also question the meaning of this harm in its context and what this act means for the victims.<sup>889</sup> It can also

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<sup>881</sup> Ibid at 30.

<sup>882</sup> Ibid at 30.

<sup>883</sup> Ibid at 30 referring to T-045/10, Judgement of 2 February 2010.

<sup>884</sup> Ibid at 31.

<sup>885</sup> Colin Luoma 'Closing the cultural rights gap in transitional justice: Developments from Canada's National Inquiry into Missing and Murdered Indigenous Women and Girls' (2021) *Netherlands Quarterly of Human Rights* 39, no. 1 (2021): 30-52 at 32.

<sup>886</sup> Swaine op cit note 79 at 270.

<sup>887</sup> Law establishing the CVJRR supra note 885, art.6.

<sup>888</sup> Anushka Sehmi 'Judicializing economic violence as means of dismantling the structural causes of atrocity in the Democratic Republic of Congo' (2020) *International Journal of Transitional Justice* 14, no. 3: 423-442 at 442.

<sup>889</sup> Swaine op cit note 79 at 278.

investigate the causes of gender-specific violations.<sup>890</sup> For example, General Recommendation No. 19 of the CEDAW Committee calls on states to pay attention to how gender hierarchies, both in peacetime and during armed conflict, impede or nullify women's enjoyment of human rights and fundamental freedoms.<sup>891</sup>

VAW could therefore be apprehended in a context of structural discrimination<sup>892</sup> which would also lead to the study of the ideology at the root of these inequalities, what Galtung calls cultural violence. The Guatemalan Commission for Historical Clarification, for example, was not explicitly mandated to examine the root causes of the conflict but devoted the first chapter of its report to this issue. In doing so, the Commission recognised that racism and discrimination were critical factors in the atrocities committed against the Maya population.<sup>893</sup> The MMIWG inquiry also demonstrated the links between Indigenous gender-based violence and Canada's colonial policies and ideologies.<sup>894</sup> The MMIWG Inquiry relied on Galtung's definition of cultural violence and observed that colonial policies included 'racist ideologies' and stemmed 'from racist beliefs deeply embedded in Canadian culture'.<sup>895</sup> Commissioners were then able to situate physical violence against Indigenous women and girls within the broader context of cultural and colonial harm.<sup>896</sup> The Colombian truth Commission's report also dedicated one of its chapter to analyse the continuity of patriarchy in Colombia.<sup>897</sup>

(v) Moving Forward

The CVJRR has developed its intervention strategy accompanied by an operational plan. This strategy is about ensuring that all those who will participate in the process of seeking truth, justice, reconciliation and a future reparations program, will work in complementarity towards the achievement of a common objective that is the rebuilding of the foundations of Central African society.<sup>898</sup> The CVJRR is also required to educate for peace, dialogue, social

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<sup>890</sup> Opongo op cit note 934 at 42.

<sup>891</sup> Henn op cit note 136 at 77 referring to CEDAW, *General Recommendation 19*, 1992, para. 7/ Also see UN Committee on the Elimination of Discrimination Against Women (CEDAW), *General recommendation No. 19, Violence against women*, 1992 § 6 & 7.

<sup>892</sup> Swaine op cit note 79 at 272.

<sup>893</sup> United Nations Human Rights Office of the High Commissioner supra note 915 at 21.

<sup>894</sup> Luoma op cit note 974 at 35.

<sup>895</sup> Ibid at 45-46.

<sup>896</sup> Ibid at 46.

<sup>897</sup> Comisión de la Verdad, *Hay futuro si hay verdad : Informe Final de la Comisión para el Esclarecimiento de la Verdad, la Convivencia y la No Repetición*. -- Primera edición. -- Bogotá : Comisión de la Verdad, 2022, section 10.5, at 598.

<sup>898</sup> Interview recorded on the 29/12/2022.

cohesion, the promotion of respect for differences, equality between the sexes, democratic values and the emergence of a national consciousness.<sup>899</sup> Ultimately, as it will be seen in subsequent chapters, the language of transformation is about moving forward and reinventing a more just social order.

## Conclusion

This chapter shows that years of feminist activism have brought significant advances for women in a few decades. Starting from a conception of rape as an unavoidable consequence of wars and armed conflicts to a conception of rape as an attack on the honour of women and their family before seeing it, in a more radical way, as an attack on their physical integrity, the road has been long and winding. Once sexual violence, including rape, was recognised as an international crime, more and more voices were raised to recognise gendered crimes as going beyond sexual violence, which the Rome Statute allows, notably thanks to the crime of gender persecution. However, in the context of transitional justice, strictly focusing on gender crimes also seemed, for many, too limited. Such a legalistic approach did not allow one to take into account the complexity and diversity of VAW including violations that do not fall within the strict definition of international crimes. It also made it more difficult to deal with the diversity of the harmful consequences that this violence could have on the victims. Therefore, the work of extra-judicial mechanisms, such as truth and reconciliation commissions, seemed a necessary complement to criminal justice. If it is today accepted that transitional justice must take into account the physical, psychological, and socioeconomic consequences that violations of civil and political rights can have on women, the debate today arises as to whether transitional justice can take into account violations of women's socioeconomic and cultural rights and if so, to what extent. This debate arises because it will have, as will be seen in the following three chapters, significant consequences on the very definition of transitional justice. By including both direct and structural ESC violations, which the mandate of the CVJRR seems to enable, this thesis takes part in understanding transitional justice in a radical sense and places it entirely within a broader peacebuilding project. The three chapters that follow will illustrate why and how.

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<sup>899</sup> Law establishing the CVJRR supra note 885, art.6.

### III. Interactional justice

In this thesis, interactional justice is a category that integrates both retributive justice and restorative justice. *Interactional justice and reconciliation* are oriented on human rights violations, and especially the violations of civil and political rights, rather than structural injustice, where reparation for individual victims is given precedence over the demand for deeper structural reforms.<sup>900</sup> Although the transformative effects of these TJ processes are not always their primary function, these effects can however be unintended by helping to transform certain socio-economic structures<sup>901</sup> and agent's relationships. Interactional justice's main purpose is to settle accounts between agents for wrongful conduct or unjust interactions that result in undeserved harms, losses or injuries,<sup>902</sup> while interactional reconciliation helps refocus attention on the rights and needs of victims through measures such as: 'apology, punishment, compensation, reparations, and forgiveness.'<sup>903</sup> In TJ, retributive and restorative justice are often seen as the two types of justice designed to deal with gross human rights violations. They have in common that they both demand the greatest possible inclusion of victims,<sup>904</sup> and can be individualised according to the needs of each them.<sup>905</sup> For example, Security Council resolution 1325 (2000) recognises the importance of women's participation in all efforts to maintain and promote peace and security,<sup>906</sup> while Resolution 2467 (2019)<sup>907</sup> calls for the meaningful participation of women in TJ processes. General recommendation No. 30 on women in conflict prevention, conflict and post-conflict situations calls on states to '(e)nsure women's equal representation at all decision making levels in national institutions and mechanisms, including in (...) the TJ mechanisms (judicial and non-judicial) dealing with crimes committed during the conflict.'<sup>908</sup> The recommendation also stresses that women should be 'involved in the design, operation and monitoring of TJ

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<sup>900</sup> Bessone op cit note 865 at 54.

<sup>901</sup> Evans op cit note 953 at 7.

<sup>902</sup> Lu op cit note 283 at 33.

<sup>903</sup> Ibid at 37-38.

<sup>904</sup> Yasmine Ahmed, Sara Duddy, Claire Hackett, Patricia Lundy, Mary McCallan, Gemma McKeown, Andrée Murphy et al. 'Developing gender principles for dealing with the legacy of the past' (2016) *International Journal of Transitional Justice* 10, no. 3: 527-537 at 535 – Principle 2.

<sup>905</sup> Ibid at 535 – Principle 2. – Also see: 'a gender and sensitive approach or perspective involves the duty to consider and address the views, experiences, and needs of all individuals with diverse sexual orientation and gender identities, while acknowledging the complexity and intersectionality of their experiences and maintaining a holistic and relational focus.' See *inter alia* Supra note 41 UN Doc A/75/174 § 4-5; Philipp Schulz 'Towards Inclusive Gender in Transitional Justice: Gaps, Blind-Spots and Opportunities' (2020) 14 *Journal of Intervention and Statebuilding* 691.

<sup>906</sup> *Security Council resolution 1325 (2000)* supra note 289.

<sup>907</sup> *Resolution 2467 (2019)* supra note 297.

<sup>908</sup> General Recommendation No. 30 supra note 223 at § 46.b.



mechanisms at all levels so as to guarantee that their experience of the conflict is included, their particular needs and priorities are met and all violations suffered are addressed; and ensure their participation in the design of all reparations programmes.<sup>909</sup> Structural barriers that may prevent women from accessing TJ mechanisms, such as poverty, should therefore also be addressed. Some barriers can indeed be strongly gendered due to a distribution of gender roles preventing women from accessing specific resources.<sup>910</sup> Ultimately, everyone must be able to express themselves in their language.<sup>911</sup> In the CAR, the TJ mechanisms created in the country are the result of a collective consultation with the population held during the Bangui forum in 2015.<sup>912</sup> Delegates, such as community leaders or deputies from the regions, took part in this forum. Moreover, initiatives in identifying victims and consulting them on the types of reparations they want have been implemented, even though slowly.<sup>913</sup> A study was carried out for the UNDP in 2022, for example.<sup>914</sup> This chapter briefly explains why these types of justice, while increasingly inclusive of victims, remain nonetheless limited in terms of social change for women in the CAR.

First, if addressing the violations of ESC rights can offer new perspectives for victims of GBV in the CAR, with this new approach new challenges and questions emerge, and the limits of the transformative TJ project, conceptualised as retributive and restorative justice, arise. The definition of ‘victim’ in interactional justice remains restricted to a particular set of victims: the person directly harmed by an individual or collective violation and her close family or dependents. However, virtually all women living in the CAR find their capacities restrained by the conflict. If the direct victims of direct GBV suffer acutely from the consequences of the conflict, trauma, psychological sequelae among others, can also be experienced by other women. The constant fear of potentially being a victim of rape is just one example. The psychological consequences of a crime, even if individual, often has wider repercussions on the whole community or even society. As to ESC rights, taking the violations of HLP rights into account, although very necessary to allow displaced women to recover their property for example and for the state to take full responsibility for these violations, generally do not take into account the broader problem of poverty, access to

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<sup>909</sup> General Recommendation No. 30 supra note 223 at 81.e. / also see Guidance Note, supra note 319, principle 6, which also notes that measures must be taken to ensure that victims can participate in the reparation process in ways that are acceptable to their culture and religion; *see also* Nairobi Declaration op cit note 144, principle 1(D); African Union supra note 65 § 103.

<sup>910</sup> Yasmine Ahmed et al. supra note 992 at 535-536 – Principle 3.

<sup>911</sup> Interview recorded on the 16/09/2022.

<sup>912</sup> Interview recorded on the 13/09/2022 (1).

<sup>913</sup> Interview recorded on the 31/09/2022.

<sup>914</sup> *Ibid.*

inheritance, dispossession of land and the massive violation of a broader set of ESC rights, affecting a large part of the population in the CAR. A restricted definition of the victims who can access specific reparations loses its meaning when applied in conditions of structural inequalities.<sup>915</sup> The individualisation of reparations for the violation of socio-economic rights, therefore, while necessary for direct victims, seems to reach its full potential mainly when a society is reasonably just in terms of distribution. However, focusing only on specific victims quickly becomes problematic in unequal societies.

Furthermore, transforming the situation of a limited group of victims, even if these reparations are also collective, do not transform the unequal and discriminatory structure that gave rise to these violations or that impede on women's full enjoyment of their rights. Restorative justice, even though it adopts a broader definition of perpetrators, still focuses on direct violence where an agent or individual can clearly be pointed out as responsible for the harms caused to the victims, while leaving untouched structural violence. However, the economic and social transformation, the changing of gender norms that structural violence implies are needed by a much broader category of women in the CAR, if not all. The question therefore arises as to how far TJ mechanisms need to address ESC rights to be truly transformative. In the CAR, disadvantaged victims used reparation-related resources primarily to secure their economic and social rights.<sup>916</sup> Women being among the most destitute, this shows that if justice is primarily sought through retributive and restorative measures, instead of in its distributive forms, justice misses the objective of an equitable distribution of resources between citizens, which are by far one of the main concerns of the communities affected by the conflict.<sup>917</sup>

This observation reinforces the need for TJ mechanisms that also focus on empowering women to realise their rights. A capacity that has often been largely limited by the conflict or even rendered non-existent, either due to the destruction of infrastructure or due to a lack of personnel, whether medical, educational, or judicial. Therefore, even if the practice of reparations, as it will be further detailed below, is today not limited to restorative justice and to an act of restitution or proportionate compensation that restores the victim to the status *quo ante*,<sup>918</sup> a transformative approach in its most demanding version requires that measures aimed at individualised victims be complemented by 'initiatives aimed at structural

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<sup>915</sup> Mani op cit note 279 at 120.

<sup>916</sup> Picco and Yaliki supra note 104 at 41-42.

<sup>917</sup> Picco & Duthie op cit note 544.

<sup>918</sup> Margaret Urban Walker 'Transformative reparations? A critical look at a current trend in thinking about gender-just reparations' (2016) *International Journal of Transitional Justice* 10, no. 1: 108-125 at 118.

change, economic development or redistribution.<sup>919</sup> If by broadening the definition of reparation too broadly, reparations could lose some of their distinctive normative characteristics, what is abundantly clear, however, is that social and economic justice matters enormously for gender justice in the CAR. Nesiah notes: ‘Reparations framed in human rights terms can often focus on events disconnected from their enabling conditions and their structural work or distributive impact.’<sup>920</sup>

These observations contribute to the emergence of a theory of TJ that links individual recognition of harm and violence to broader social processes of transformation.<sup>921</sup> Understanding human rights violations in this way is essential for two reasons. First, it allows consideration of the broader impact of serious human rights violations and their repercussions on a much more comprehensive part of society. In terms of gendered crimes, these crimes have repercussions on the whole group of women since they put every woman at risk of experiencing the same crime or violation. This approach also makes it possible to consider the intergenerational consequences of trauma,<sup>922</sup> and of a lack of education,<sup>923</sup> and other violations. Secondly, it makes it possible to re-emphasise the persistence of the structural inequalities women suffer in the CAR.<sup>924</sup> Women's rights in health, housing, education, among others, can be violated in many ways and often not only by direct perpetrators or agents but also because of structural violence.<sup>925</sup> Because a gender analysis situates harms within a broader understanding of structural gender inequality, a broader perspective is therefore needed to grasp the terrain on which TJ take shape. That is why some restorative justice proponents also call for a more ‘transformative approach that simultaneously works on behaviors, relationships, structures, and systemic injustices.’<sup>926</sup> This thesis will however not delve too much into the limits of interactional justice for social change as it is today commonly agreed that these mechanisms can only provide a limited change in terms of transformation. Some authors even warning against the use of these mechanisms for such purpose.

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<sup>919</sup> Ibid at 122.

<sup>920</sup> Vasuki Nesiah ‘A Double Take on Debt: Reparations Claims and Regimes of Visibility in Politics of Refusal’ (2022) *Osgoode Hall LJ* 59: 153 at 157.

<sup>921</sup> Duggan & Jacobson op cit note 1467 at 153.

<sup>922</sup> De Greiff op cit note 515 at 43.

<sup>923</sup> UN Women supra note 100 at 48.

<sup>924</sup> Geoff & Wiebelhaus-Brahm op cit note 336 at 57.

<sup>925</sup> Cahill-Ripley op cit 332 at 195.

<sup>926</sup> McGill op cit note 339 at 89.

### (a) Retributive Justice

Retributive justice can contribute to the TJ transformation project since prosecutions can, in part, provide an authoritative interpretation of specific violations and thereby signal normative change.<sup>927</sup> It can also form the basis of a shared vision of what is permitted and what is not, contributing to the country's civic and national reconciliation.<sup>928</sup> It can sometimes 'serve the needs of victims, offering a direct therapeutic and moral response to the pain they have suffered.'<sup>929</sup> The trial provides a forum for victims to speak about their experiences in public while taking an active part in the justice process, which can be restorative.<sup>930</sup> Trials can also mark a significant change for women who are recognised not only as victims but also as citizens, bearers of rights, and, therefore, full members of society.<sup>931</sup> Punishing perpetrators of human rights violations is also seen as a means of fighting impunity, deterring others from committing the same act, and ensuring non-repetition.<sup>932</sup> However, as discussed below, these claims are often limited and several limitations arise here. If the criminal procedure can have a symbolic role for the victims, the few victims having access to the criminal procedure limits the extent of the expected change. Moreover, retributive justice allows only a few perpetrators to be prosecuted. This implies that only a small group of victims of SGBV will have access to this type of justice and may be eligible for reparations. This is assuming that the victims were aware of the work of these courts, were able to become civil parties, that GBC have been included in the charges, that the alleged perpetrator has been convicted, and that the court has the means to finance the reparations expected by the victims.<sup>933</sup>

Structural or cultural violence, although increasingly considered by international criminal tribunals, particularly in the reparation phase, can also only be partially dealt with by these tribunals. What is commonly referred to as transformative reparations may therefore be limited to the individual level and only consist of avoiding the reproduction of discriminatory

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<sup>927</sup> Macdonald op cit note 869 at 85 referring to Jaime Malamud-Goti 'Transitional governments in the breach: why punish state criminals?' (1990) *Hum. Rts. Q.* 12: 1.

<sup>928</sup> Ibid at 85 referring to Jaime Malamud-Goti 'Transitional governments in the breach: why punish state criminals?' (1990) *Hum. Rts. Q.* 12: 1.

<sup>929</sup> Ibid at 85 referring to Aryeh Neier *War Crimes: Brutality, Genocide, Terror and the Struggle for Justice* (1998) at 49 and Naomi Roht-Arriaza *Impunity and Human Rights in International Law and Practice* (1995) at 19.

<sup>930</sup> Layús op cit note 12 at 36.

<sup>931</sup> Ibid at 36.

<sup>932</sup> McGill op cit note 339 at 83.

<sup>933</sup> Also see Rashida Manjoo 'Introduction: reflections on the concept and implementation of transformative reparations' (2017) *The International Journal of Human Rights* 21, no. 9: 1193-1203 at 1196/ Moffett op cit note 751 at 1204.

practices against female victims who have been able to become civil parties. Limiting these remedies to the individual level could however lead to the limitations raised by Brachthäuser and Haffner, noting that: ‘there is a tension between the task of courts to serve justice to perpetrators and victims and the genuinely political question of just social norms.’<sup>934</sup> Yet even if these reparations succeed in being more far-reaching, it may also be beyond the mandate of criminal courts to facilitate institutional and social change within a state since these mechanisms do not address state responsibility.<sup>935</sup> Therefore:

This structural limitation will restrict the ICC’s effectiveness in remedying victims’ harm, and certainly its ability to transform victims’ lives. (...) This is where international criminal courts differ from international human rights bodies, which do determine State responsibility and can make reparations orders/recommendations including State measures of satisfaction and guarantees of non-repetition.<sup>936</sup>

To illustrate this point, the following sections will mainly deal with the work of the SCC and the ICC, even though dealing briefly with retributive justice at the domestic level, namely how these jurisdictions have integrated victims into their proceedings, established the criminal responsibilities associated with SGBCs and how they can grant reparations to victims in the future.

(i) A limited justice for victims

While retributive justice is essential for some victims of SGBC, only a few of them can access the courts. This type of justice can therefore only reach a limited number of victims of direct violence, which considerably limits its scope in terms of social change. Even if victims manage to access the courts and become civil parties, the therapeutic effect of such procedures is still very controversial today and therefore does not guarantee a transformative effect for the victims participating in the procedure. This is shown in the following sections.

*(i.1) Definition of victims and legal standing to bring a case before the courts*

Retributive justice focuses only on a small number of victims. Domestic courts are competent to prosecute and judge crimes falling under territoriality principles and active and passive

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<sup>934</sup> Franziska Brachthäuser & Anton Haffner ‘Transformative Reparation: Should Reparation Change Societies?’ (2018) *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht, ZAORV= Heidelberg Journal of International Law, HJIL* 78, no. 3: 587-589 at 589.

<sup>935</sup> Leyh & Fraser op cit note 1230 at 53.

<sup>936</sup> Ibid at 54.

nationality.<sup>937</sup> However, SGBCs have so far barely been prosecuted in national courts.<sup>938</sup> A quick glance at the central African legal framework shows that the new Constitution adopted in 2016 protects women and children against violence.<sup>939</sup> Despite some shortcomings,<sup>940</sup> the law also guarantees protection against violence. The CAR Criminal Code, for example, protects women and men from physical and mental harm, including sexual violence.<sup>941</sup> Act No 06.032<sup>942</sup> on the Protection of Women against Violence guarantees women two types of protection against violence: social protection provided by social workers and legal protection provided by a judge. It also makes domestic violence illegal.<sup>943</sup> Furthermore, GBV is now recognised as discrimination against women,<sup>944</sup> which creates several positive obligations for the state, including due diligence. In its General Recommendation No. 19, the CEDAW Committee urges states to exercise due diligence to ‘prevent, investigate and, per national law, punish acts of violence against women, whether the state or private persons perpetrate

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<sup>937</sup> Christiane Hennau & Jacques Verhaegen *Droit pénal général* (3<sup>e</sup> ed) (2003) 71/ Art. 3 of the 1935 Harvard Draft Convention on Jurisdiction with Respect to Crime recognizes that a state may properly exercise jurisdiction ‘with respect to any crime committed in whole or in part within its territory [including] . . . (a) Any participation outside its territory in a crime committed in whole or in part within its territory’. See ‘Draft Convention on Jurisdiction with Respect to Crime (Harvard Draft Convention)’, (1935) 29 *AJIL* 439.

<sup>938</sup> Amnesty International ‘One step forward, two steps backwards: Justice in the Central African Republic’ (2021) 7.

<sup>939</sup> See Constitution of 2016, art 7, online

[https://constituteproject.org/constitution/Central\\_African\\_Republic\\_2016.pdf?lang=en/](https://constituteproject.org/constitution/Central_African_Republic_2016.pdf?lang=en/)

<sup>940</sup> The criminalization of witchcraft disproportionately affects women who are often sent in jail or are the victims of mob justice, see: Marco Simoncelli & Davide Lemmi *Elderly people in the war-torn Central African Republic are being accused of witchcraft, with fatal consequences* (2020) / See Amnesty International’s website, Central African Republic, online at: <https://www.amnesty.org/en/countries/africa/central-african-republic/report-central-african-republic/>: ‘The United Nations Human Rights Council (HRC), in its concluding observations on the country’s third periodic report, pinpointed that article 105 of the Criminal Code allows the perpetrator of an abduction to marry the victim’ – See article 105 of the Penal Code of 2010: ‘When a minor thus abducted or diverted has married her abductor, the latter can only be prosecuted on the complaint of the persons who have the capacity to request the annulment of the marriage and only after this annulment has been pronounced.’, online at: <https://www.ilo.org/dyn/natlex/docs/SERIAL/88116/100661/F1881819351/CAF-88116.pdf>.

<sup>941</sup> Act No. 06/032 of 15 December 2006, the Law on the Protection of Women against Violence addresses physical, sexual or psychological abuses (art. 1). Sexual violence can be punishable of 6 months to 3 years imprisonment and a fine (art. 24). In addition, rape is a criminal offense under the Penal Code (art. 87). Aggravated forms of rape and sexual violence include the rape of an underaged victim (below 18 years old) and the perpetration of rape by an ascendant, a figure of authority or someone who work in an educational institution (Penal Code, art. 87). Even if the Penal code does not refer to marital rape, the Law on the Protection of Women against Violence punishes it (art. 2).

<sup>942</sup> *Ibid.*

<sup>943</sup> Domestic violence is considered a criminal offence under article 27 of the Act No. 06/032 of 15 December 2006, the Law on the Protection of Women against Violence. The Law recognises violence perpetrated within the family and covers physical, sexual and psychological violence.

<sup>944</sup> *General recommendation No. 19*, supra note 917 at §1; Egyptian initiative for personal rights and interrights v. Arab Republic of Egypt (Communication No. 323/2006) (2011) ACHPR 85; (16 December 2011) paras 87–90; See also the decision by the ECOWAS Community Court in *Dorothy Chioma Njemanze & 3 Ors v. Federal Republic of Nigeria*, Suit no. ECW/CCJ/APP/17/14, 12 October 2017.

these acts.<sup>945</sup> If it fails to provide adequate measures to protect women from GBV, the state may therefore violate its obligations under the right to non-discrimination guaranteed by CEDAW.<sup>946</sup>

Before the ICC, victims are ‘natural persons who have suffered harm as a result of the commission of any crime within the jurisdiction of the Court,<sup>947</sup> and ‘may include organizations or institutions that have sustained direct harm to any of their property which is dedicated to religion, education, art or science or charitable purposes, and to their historic monuments, hospitals and other places and objects for humanitarian purposes.’<sup>948</sup> Before the SCC, in accordance with the provisions of Article 40, paragraph (2) of the Organic Law and Article 2 of the Code of Criminal Procedure, a person who claims to be injured by a crime within the jurisdiction of the Court may, by filing a complaint, bring civil action before the Investigating Chamber.<sup>949</sup> The procedure for becoming a civil party before the SCC more or less follows French law, according to which victims can file a complaint before the special prosecutor or before the investigating judge with a civil party application.<sup>950</sup> Victims can either be witnesses or civil parties and receive reparations if they are civil parties.<sup>951</sup> Before the ICC, victims can participate to the procedure by expressing their own views and concerns (art. 68(3) of the Rome Statute), and can receive reparations (art. 75 of the Rome Statute). The granting of reparations to victims and the provisions relating to their participation are two of the key provisions of the Rome Statute. This bears witness to a justice that is increasingly centered on the victims, which has led some authors to say that a restorative shift has been initiated within international criminal justice.<sup>952</sup> For women to access retributive justice, protection must be guaranteed.

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<sup>945</sup> *General recommendation No. 19* Ibid at §9/ The Maputo Protocol also creates a number of positive State obligations in the area of violence against women, see art. 2, art. 4, para. 2 (a), and art. 4, para. 2 (b).

<sup>946</sup> *General recommendation No. 19* Ibid at §24/ Also see *Security Council resolution 1325 (2000)* supra note 289 and subsequent resolutions on WPS.

<sup>947</sup> ICC Rules of Procedure and Evidence, Rule 85 (a), online at: <https://www.icc-cpi.int/sites/default/files/Publications/Rules-of-Procedure-and-Evidence.pdf>.

<sup>948</sup> Ibid, Rule 85 (b).

<sup>949</sup> Central African Republic, Organic Law 18-010 on the rules of procedure and evidence before the CPS, July 2018, art. 74 (A)/ See Act 10.002 of 6 January 2010 Central African criminal procedure code, art. 2: The civil action for compensation for the damage caused by a crime, an offence or a contravention, belongs to all those who have personally suffered from the damage directly caused by the offence.

<sup>950</sup> Interview recorded on the 09/11/2022/ Also see SCC *Règlement intérieur de la Cour Pénale Spéciale de la République Centrafricaine* (2018), art 67(D)/ SCC *investigation, prosecution and investigation strategy* (2020) art. 26/ Organic Law 18-010 supra note 1077, art. 40.

<sup>951</sup> Juan-Pablo Perez-Leon-Acevedo ‘Victims at the Central African Republic’s Special Criminal Court’ (2021) *Nordic Journal of Human Rights*, 39:1, 1-17 at 2/ See CAR’s Criminal Procedure Code, Articles 56–62.

<sup>952</sup> Luke Moffett & Clara Sandoval ‘Tilting at Windmills: Reparations and the International Criminal Court’ (2021) *Leiden Journal of International Law* 34, no. 3: 749-769 at 751 referring to C. Muttukumaru ‘Reparations

(i.2) Victims' protection

Victims of SGBV must be accompanied throughout the legal process. This framework was encouraged by the UN<sup>953</sup> and put in place by the ICC.<sup>954</sup> Although much remains to be done, the ICC is one of the most advanced legal systems in guaranteeing victims' rights.<sup>955</sup> The ICC Registry includes, among others, a Victims Participation and Reparations Section and a Victims and Witnesses Unit, as well as two independent entities, the Office of Public Counsel for Victims and the Trust Fund Benefit of the victims.<sup>956</sup> In addition, Article 68(1) of the Rome Statute provides that the Court shall take appropriate measures for the safety, physical and psychological well-being, dignity, and privacy of victims and witnesses. In this regard, special measures must be implemented to facilitate the testimony of victims if necessary, and the Victims and Witnesses Unit is staffed with trauma experts related to crimes of sexual violence (Article 43(6) of the Rome Statute).

The SCC, on its part, has a registry divided into several sections, including a Victims and Witnesses Support and Protection Unit, a Communications and Outreach Unit, an Information Management Unit, and a Victims and Defence Unit.<sup>957</sup> The existence of a Victims and Witnesses Support and Protection Unit within the SCC Registry is a significant step forward as it contrasts with the lack of protection for victims and witnesses at the level of ordinary.<sup>958</sup> The Victims and Witnesses Support and Protection Unit ensures, among other things, the safety, physical and psychological well-being, dignity and respect for the privacy of victims and witnesses through administrative, logistical, security, medical, psychological and social assistance.<sup>959</sup> The Victims and Defence Unit takes, *inter alia*, all necessary

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to Victims' in R. S. Lee (ed.) *The International Criminal Court: The Making of the Rome Statute; Issues, Negotiations, Results* (1999), 262 at 264.

<sup>953</sup> *Report of the Special Rapporteur on violence against women, its causes and consequences, Ms. Radhika Coomaraswamy, submitted in accordance with Commission on Human Rights resolution 2001/49: Cultural practices in the family that are violent towards women*, 31 January 2002, UN Doc E/CN.4/2002/83 /*Report of the High Commissioner for Human Rights, pursuant to Human Rights Council Resolution 9/11*, UNHRCOR, 2009, UN Doc A/HRC/12/19 paras 60-61.

<sup>954</sup> Articles 16 to 19 Of the Rules of Procedure and Evidence of the International Criminal Court (ICC) set the tone by establishing the competence of the Victims and Witnesses Division, see Article 16(1)(d).

<sup>955</sup> FIDH, OCDH & Ligue Centrafricaine des Droits de l'Homme supra note 589 at 25.

<sup>956</sup> FIDH, OCDH & Ligue Centrafricaine des Droits de l'Homme supra note 589 at 25.

<sup>957</sup> FIDH, OCDH & Ligue Centrafricaine des Droits de l'Homme supra note 589 at 20 referring to Law on the rules of procedures and evidence, art. 42 B.

<sup>958</sup> Ibid at 45 referring to FIDH, LCDH, OCDH and REDRESS, *Intégrer les droits des victimes dans les procédures de la Cour pénale spéciale en République centrafricaine (Integrating victims' rights in the proceedings of the Special Criminal Court in the Central African Republic)*, September 2017, at 16, online at: [https://redress.org/wp-content/uploads/2017/12/CAR\\_Paper\\_Rules\\_FINAL\\_FRENCH.pdf](https://redress.org/wp-content/uploads/2017/12/CAR_Paper_Rules_FINAL_FRENCH.pdf).

<sup>959</sup> Organic Law 18-010 supra note 1077, art. 46.



measures to inform victims of their rights in the proceedings.<sup>960</sup> In the *Parquet v. Issa Sallet Adoum alias Bozizé ; Yaouba Ousmane ; Mahamat Tahir* case, victims of sexual violence were allowed to testify behind closed doors during the trial.<sup>961</sup> The Section also used special measures to protect the identity of minor victims and some witnesses, per article 151 (D) (d) and (e) of the Rules of Procedure and Evidence (RPE).<sup>962</sup> Ultimately, special attention is paid to victims of sexual violence<sup>963</sup> and judges are vigilant in controlling how witnesses or victims are questioned.<sup>964</sup>

This contrasts with domestic tribunals where victims of SGBV have greater reasons to fear stigma,<sup>965</sup> because of the lack of protection for victims and witnesses in criminal proceedings. During the trial of Rodrigue Ngaibona, a former leader of the *anti-balaka*,<sup>966</sup> some victims did not testify for fear of reprisals.<sup>967</sup> The same was true in the *Bangassou* case, the trial of *anti-balaka* militia leaders who were sentenced to life imprisonment for war crimes and crimes against humanity committed in Bangassou between 2016 and 2017.<sup>968</sup> During this trial insufficient protection of victims and witnesses was noted: ‘the requests for anonymity by the parties’ lawyers were rejected, and the absence of closed sessions led to the high exposure of the civil parties.’<sup>969</sup>

As the presence of male investigators has sometimes proven to silence female victims,<sup>970</sup> more women are now working at the ICC.<sup>971</sup> The hope is also that ‘by changing

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<sup>960</sup> Ibid, art. 47 (B) (a).

<sup>961</sup> Human Rights Watch supra note 827/ Cour Pénale Spéciale supra note 126 para 103/ Organic Law 18-010 supra note 1077, art. 118 (A) (b).

<sup>962</sup> Cour Pénale Spéciale supra note 126 para 106 / Organic Law 18-010 supra note 1077, arts 151(D), 153(A), 155(B) and art 170 (B) : The Court does not admit any evidence relating to the prior or subsequent sexual behavior of a victim or witness.

<sup>963</sup> Organic Law 18-010 supra note 1077, art. 151 (A) & art. 151 (E).

<sup>964</sup> SCC *Règlement intérieur de la Cour Pénale Spéciale de la République Centrafricaine* (2018) article 67 (b).

<sup>965</sup> Report of the Secretary-General, *Central African Republic*, 2020, UN Doc S/2020/545, para. 71, online at: <https://documents-dds-ny.un.org/doc/UNDOC/GEN/N20/141/01/PDF/N2014101.pdf?OpenElement> / Also see: Enrica Picco and Arnaud Yaliki *Étude sur les options et les modalités de réparations en République Centrafricaine* (VERSION FINALE NON PUBLIEE) (July 2021) at 49: ‘For example, in the Hausa neighborhood of Bouar, four Muslim women were raped while in the bush, but they did not come to the local legal clinic to seek support to file a complaint.’

<sup>966</sup> Rugiririza supra note 897/ See Criminal Court of Bangui, Judgment, Arrêt criminel No. 003 du 22 janvier 2018, *Affaire Ministère Public et autres contre Ngaibona Rodrigue alias Général Andjilo*, 22 January 2018.

<sup>967</sup> FIDH, OCDH & Ligue Centrafricaine des Droits de l’Homme supra note 589 at 13.

<sup>968</sup> Justiceinfo.net, Gaël Grilhot *Central African Republic: National Court gets tough on Bangassou crimes* (2020), online at: <https://www.justiceinfo.net/en/43747-central-african-republic-national-court-gets-tough-on-bangassou-crimes.html>.

<sup>969</sup> FIDH, OCDH & Ligue Centrafricaine des Droits de l’Homme supra note 589 at 14.

<sup>970</sup> Rita Shackel ‘International Criminal Court Prosecutions of Sexual and Gender-Based Violence: Challenges and Successes’ in *Rethinking Transitional Gender Justice* (2019) 206.

<sup>971</sup> See ICC’s website, International Criminal Court marks international women’s day, (consulted on the 22<sup>nd</sup> of March 2023), online at: <https://www.icc-cpi.int/news/international-criminal-court-marks-international-womens-day-0> / Also see the launch of the ICC’s strategy on Gender Equality and Workplace Culture, ICC’s website, The ICC launches its first strategy on Gender Equality and Workplace Culture, (consulted on the 22<sup>nd</sup> of March

the players, the nature of the game will change in turn, thereby allowing a different set of priorities to emerge.<sup>972</sup> In the *Akayesu* case, the presence of Navanethem Pillay, for example, played a crucial role in her interest for GBC and her expertise in the matter.<sup>973</sup> It has also be outlined that the inclusion of women should also be complemented by the work of other professionals, such as psychologists, so that court staff is prepared to deal with inconsistencies in the testimonies of traumatised victims.<sup>974</sup> On the other hand, the representation of women within the SCC remains low: The presence of women among the members of this Court was in 2023, only 27% for magistrates, 0% for national executives, 0% for clerks, 9.3% for national lawyers and 20% for judicial police officers.<sup>975</sup> Despite these guarantees, a number of women, victims of SGBC, however remain excluded from such procedures because of structural barriers.

### *(i.3) Structural barriers*

Despite these numerous guarantees, proving rape or sexual violence remains, however, often extremely difficult<sup>976</sup> especially if GBV is committed during an armed conflict.<sup>977</sup> These difficulties can contribute to exclude a large number of victims from these procedures. In the *Parquet v. Issa Sallet Adoum alias Bozizé ; Yaouba Ousmane ; Mahamat Tahir* case, for example, the SCC noted that when victims could not go to the hospital immediately after the commission of the alleged acts, medical certificates were not issued until several months later without mention of sexual assault.<sup>978</sup> Medical coverage for the specific care of rape survivors

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2023), online at: <https://www.icc-cpi.int/news/icc-launches-its-first-strategy-gender-equality-and-workplace-culture/> However, Angela Mudukuti recalls that as of July 2021, in terms of gender diversity, there was 48.1% women working at the ICC but 81% of these women worked at lower positions, see Angela Muduki *What can intersectionality mean for international justice* (episode 3) at 54:40, online at: <https://emergentjusticecollective.org/WebinarSeries>. / Also see Independent Expert Review of the International Criminal Court and the Rome Statute system, Final Report (2020) at § 138, online at: [https://asp.icc-cpi.int/sites/asp/files/asp\\_docs/ASP19/IER-Final-Report-ENG.pdf](https://asp.icc-cpi.int/sites/asp/files/asp_docs/ASP19/IER-Final-Report-ENG.pdf). / There are currently 9 female judges out 18 working at the ICC, see ICC's website, *current judges* (consulted on the 22<sup>nd</sup> of March 2023), online at: <https://www.icc-cpi.int/judges/judges-who-s-who>.

<sup>972</sup> Bell & O'Rourke op cit note 287 at 30.

<sup>973</sup> Council Chambers, Madibeng Building, University of Johannesburg, International Law and Justice for Victims of the Gross Human Rights Violation of Sexual and Gender-Based Violence, 28 – 29 November 2019, Navanethem Pillay: Judge Navanethem Pillay notices that some male judges can face difficulties in using the words 'vagina' and 'rape' for example. Such was the case of the Judge coming from Senegal in the *Akayesu* case. Therefore, she was the one dealing with these questions and terms. Still according to her, before female judges sat on the bench of international courts, rape as war crimes had never been prosecuted as other crimes were considered more serious (as murder) and therefore seen as the main priority.

<sup>974</sup> Ibid, Bonita Meyersfeld/ Oosterveld op cit note 66 at 444.

<sup>975</sup> UN Women supra note 100 at 20.

<sup>976</sup> Anyeko, Seelinger & Freccero supra note 1038.

<sup>977</sup> UNODC *Handbook on Gender Dimensions of Criminal Justice Responses to Terrorism* (2019) at 189.

<sup>978</sup> Cour Pénale Spéciale supra note 126 para. 348.

remains indeed very low throughout the territory of the CAR. Of the 625 rape survivors who reported their case to GBVIMS actors in 2018, 39% of the 1,621 rape cases had access to medical care services within 72 hours. These difficulties have been reported to be due to structural barriers such as the poor mastery of the protocol for the clinical treatment of cases of rape by certain healthcare personnel, the level of extreme poverty of the majority of survivors, and the paid issuance of medical certificates to survivors of GBV in public health facilities.<sup>979</sup>

The insecurity prevailing in the country often makes it practically impossible for victims to reach tribunals.<sup>980</sup> In that regard, the National Security Sector Reform Strategy was adopted with the aim of bringing greater security to the population by reforming the police and judicial systems.<sup>981</sup> Nevertheless, the public security service remained ineffective in rural areas at least until 2021, especially in areas under the control of armed groups.<sup>982</sup> The United Nations Multidimensional Integrated Stabilisation Mission in the Central African Republic (MINUSCA), a UN peacekeeping mission that started in 2014,<sup>983</sup> has also been deployed in all prefectures of the country to help disarm non-state actors.<sup>984</sup> However, the mission only controls the main towns of the CAR.<sup>985</sup> In the CAR, justice is expensive due to the payment of several fees when filing a complaint,<sup>986</sup> automatically excluding a large part of the population. If NGOs provide financial assistance to some victims, it quickly becomes costly for them as well.<sup>987</sup> In addition, victims often live too far from the nearest court with limited access due to poor roads and infrastructure.<sup>988</sup> This situation is generally aggravated for women caring for children or with little access to family financial resources.<sup>989</sup>

Besides, victims of SGBC may be reluctant to go to court for fear of possible negative consequences, such as ostracism if loved ones learn that they have been raped.<sup>990</sup> For

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<sup>979</sup> UN Women supra note 100 at 53.

<sup>980</sup> Kohetto op cit note 538 at 7.

<sup>981</sup> el Gantri & Yaliki op cit note 545 at 24

<sup>982</sup> Ibid at 16 & 17/ also see FIDH op cit note 132 at 17.

<sup>983</sup> See United Nations Peacekeeping's website, MINUSCA Fact sheet (consulted on the 23th of March 2023), online at: <https://peacekeeping.un.org/en/mission/minusca>.

<sup>984</sup> Tim Glawion & Lotje De Vries 'Ruptures revoked: why the Central African Republic's unprecedented crisis has not altered deep-seated patterns of governance' (2018) *The Journal of Modern African Studies*, 56(3), 421-442 at 433.

<sup>985</sup> Ibid at 433.

<sup>986</sup> el Gantri & Yaliki op cit note 545 at 23.

<sup>987</sup> Ibid at 23/ also see Law No. 20.005 on the organization of legal aid in the CAR, online at: <https://violences-sexuelles.ifjd.org/app/uploads/sites/2/2021/05/7.-Loi-portant-sur-lorganisation-de-laide-legale-en-RCA-1.pdf>.

<sup>988</sup> Report of the United Nations Team of Experts on Rule of Law – Sexual Violence in Conflict, 24 February to 2 March 2013.

<sup>989</sup> Cahn op cit note 192 at 60.

<sup>990</sup> Shackel op cit note 1090 at 206.

example, in the *Bemba* case, witness PPPP-0001 testified to the brutal impact of the stigma she suffered after being raped, as she was abandoned by her partner, marginalised by other villagers, and lost her job.<sup>991</sup> This fear of social stigma is often compounded by other obstacles, such as the ongoing conflict and the displacement of many victims, preventing most of them from meeting their legal representatives.<sup>992</sup> Some structural barriers can however be overcome thanks to the work of International Organisations (IO) and Non-Governmental Organisations (NGOs).

*(i.4) The role of International Organisations and Non-Governmental Organisations*

Civil society is vital in the CAR and provides services not provided by the state, often in partnership with International Non-Governmental Organisations (INGOs).<sup>993</sup> In particular, organizations such as the Association of Women Lawyers of the Central African Republic play a vital role in raising awareness among the population of their rights.<sup>994</sup> This association, for example, offers legal and judicial assistance to Central Africans, including victims of SGBV,<sup>995</sup> and helps victims refer cases to the Mixed Unit for Rapid Intervention and Repression of Sexual Violence against Women and Children (UMIRR).<sup>996</sup> UMIRR was created by decree n° 15.007 of January 08, 2015. It is a mixed unit composed of police officers working closely with the Ministry of Social Affairs and Humanitarian Action and the Ministry of Public Health and Population and its mission is to ‘prevent and reduce all forms of sexual violence against women and children,’<sup>997</sup> as well as violations against men,<sup>998</sup> which involves legal, psychological and material assistance.<sup>999</sup> However, the services often

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<sup>991</sup> Rosie Fowler ‘Great expectations: A critique of the International Criminal Court’s commitment to victims of sexual and gender-based violence’ (2021) *Journal of International Criminal Law* 2, no. 1: 27-52 at 42-43.

<sup>992</sup> FIDH *The Bemba Case: Heavily criticised, the ICC must maintain victims’ legal representation as the establishment of assistance programmes for victims is awaited* (2018), online at: <https://www.fidh.org/en/region/Africa/central-african-republic/the-bemba-case-heavily-criticised-the-icc-must-maintain-victims-legal>.

<sup>993</sup> Interview recorded on the 13/12/2022 (1).

<sup>994</sup> OpinioJuris *The digital dialogue series – The fight against impunity for Conflict-related Sexual Violence in the Central African Republic* (February 2021), Online at: <http://opiniojuris.org/2021/02/16/the-digital-dialogue-series-the-fight-against-impunity-for-conflict-related-sexual-violence-in-the-central-african-republic/>.

<sup>995</sup> UN Women supra note 100 at 20, noting however that: ‘Law No. 2.00.05 of January 14, 2020 on the organization of legal aid in the Central African Republic, which establishes the legal framework for this assistance, is an opportunity for victims of violence in the CAR to have legitimate access to justice, mandatory and free of charge. Despite the existence of the Central African Legal Aid Strategy 2017-2022, this law remains little known to the populations.’

<sup>996</sup> el Gantri & Yaliki op cit note 545 at 16.

<sup>997</sup> Ibid at 14.

<sup>998</sup> Ibid at 14.

<sup>999</sup> Massias & Besse op cit note 123.

remain incomplete due to a lack of financial means.<sup>1000</sup> In 2018 the Director of UMIRR cited ‘significant limitations for the effective functioning of the unit, including its location, lack of infrastructure and most notably of measures to safeguard the protection of survivors and witnesses.’<sup>1001</sup> The UN Panel of Experts also reported that ‘of the 320 cases of sexual violence that were submitted by the Unit to the Bangui Criminal Court between June 2017 and June 2018, few had resulted in trials.’<sup>1002</sup>

NGOs or the UN often help victims access retributive justice mechanisms by meeting victims living in the provinces, informing them of the existing procedures in which they could participate, and supporting them in the event of participation.<sup>1003</sup> They can also intervene to ensure that victims' rights are respected during the proceedings, particularly by ensuring that victims play a central role in all proceedings before the SCC. UNDP, for example, has supported victims of SGBV in the CAR through legal aid clinics that include lawyers, paralegals, and psychosocial assistance<sup>1004</sup> and by closely coordinating its action with UMIRR.<sup>1005</sup> Civil society and International Organisations (IO) consequently play a crucial role with regard to access to retributive justice mechanisms.<sup>1006</sup> In addition, global civil society can provide expertise and lessons learned from other countries' experiences with TJ.<sup>1007</sup> INGOs such as Amnesty International and Human Rights Watch can therefore also play a leading role in the CAR. However many obstacles remain. In general, the most important is for victims to know about the work of the courts<sup>1008</sup> despite the work of NGOs and IO.

#### *(i.5) Outreach activities*

The ICC Outreach Unit was launched in 2007 to promote a better understanding of the work and role of the ICC, improve access to proceedings and foster greater participation of local

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<sup>1000</sup> Ibid.

<sup>1001</sup> All Survivors Project Foundation Central African Republic, submission to the United Nations Human Rights Committee, 128<sup>th</sup> Session, 2-27 March 2020, online at: [https://tbinternet.ohchr.org/Treaties/CCPR/Shared%20Documents/CAF/INT\\_CCPR\\_CSS\\_CAF\\_41353\\_E.pdf](https://tbinternet.ohchr.org/Treaties/CCPR/Shared%20Documents/CAF/INT_CCPR_CSS_CAF_41353_E.pdf).

<sup>1002</sup> Ibid.

<sup>1003</sup> FIDH, OCDH & Ligue Centrafricaine des Droits de l'Homme supra note 589 at 45.

<sup>1004</sup> UNDP supra note 186 at 25.

<sup>1005</sup> UNDP supra note 186 at 26

<sup>1006</sup> FIDH, OCDH & Ligue Centrafricaine des Droits de l'Homme supra note 589 at 45.

<sup>1007</sup> Eric Brahm ‘Transitional justice, civil society, and the development of the rule of law in post-conflict societies’ (2006) *Int'l J. Not-for-Profit L.* 9: 62 at 64 / See Margaret E. Keck & Kathryn Sikkink *Activists beyond Borders: Advocacy Networks in International Politics* (1998).

<sup>1008</sup> Ruth Rubio-Marín ‘Introduction: a gender and reparations taxonomy’ (2009) *The gender of reparations: unsettling sexual hierarchies while redressing human rights violations* at 12.

communities in its activities, with particular emphasis on specific groups such as women.<sup>1009</sup> Nonetheless, in the CAR, the success of this strategy has been limited. For example, during the investigation and prosecution of the *Bemba* case, the ICC Outreach Unit developed a three-phase activity plan based on providing basic information about the ICC and the *Bemba* case, while making the procedure accessible to affected populations in Bangui, launching radio series in Sango and French, and the organisation of sensitisation workshops and meetings outside of Bangui.<sup>1010</sup> Despite these efforts, it was reported that more than half of the women interviewed in a 2009 outreach assessment did not listen to or have access to the radio.<sup>1011</sup>

In terms of public awareness of the work of the ICC, a significant disparity existed between people living in Bangui (63%) and people living outside Bangui (7% in Ouham).<sup>1012</sup> A gender gap was also observed, with 21.5% of women being aware of the existence of the ICC against 42.3% of men.<sup>1013</sup> While awareness of the work of the ICC can be seen as a first step towards ‘understanding the role, mandate, functioning and activities of the Court,’ it does not necessarily translate into ‘accurate knowledge or positive perceptions and attitudes about the Court and knowledge about the judicial process in general.’<sup>1014</sup> The result of the study showed ‘that higher level of education and wealth is associated not only with greater awareness but also with greater knowledge about the Court.’<sup>1015</sup> Overall, ‘the study (...) suggests that knowledge and awareness about the Court are, on average, higher among members of an urban, male, educated and wealthy elite who have frequent access to the media and are targeted for informational meetings.’<sup>1016</sup> The ICC's outreach strategy also failed to explain to victims in the *Bemba* case the consequences of the acquittal, including reparations, which significantly impacted the image of the ICC in the CAR.<sup>1017</sup>

In situation II in the CAR, on September 26, 2022, the ICC team appeared on national Central African television with the interview being conducted in French and Sango.<sup>1018</sup>

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<sup>1009</sup> D’Aoust op cit note 717 at 220.

<sup>1010</sup> Patrick Vinck & Phuong N. Pham ‘Outreach evaluation: The international criminal court in the Central African Republic’ (2010) *International Journal of Transitional Justice* 4, no. 3: at 7, online at: <https://hhi.harvard.edu/files/humanitarianinitiative/files/outreach-evaluation.pdf?m=1612900431>.

<sup>1011</sup> Ibid at 11.

<sup>1012</sup> Ibid at 12.

<sup>1013</sup> Ibid at 13.

<sup>1014</sup> Ibid at 14.

<sup>1015</sup> Ibid at 17.

<sup>1016</sup> Ibid at 19.

<sup>1017</sup> FIDH, OCDH & Ligue Centrafricaine des Droits de l’Homme supra note 589 at 28/ Also see FIDH op cit note 132.

<sup>1018</sup> ICC’s website, *Bangui gets ready for the trial opening in the Said case* (September 2022), online at: <https://www.icc-cpi.int/about/outreach/activities/activity/bangui-gets-ready-trial-opening-said-case>.



Billboards have also been placed in Bangui and in some other cities such as Bossangoa, Berbérati, Mbaïki and Bria.<sup>1019</sup> A screening was organised in Bangui to raise public awareness of the *Yekatom & Ngaiïssona, Said and Mokom* cases. About 200 people attended.<sup>1020</sup> However most of the outreach activities, although sometimes taking place in some provincial towns,<sup>1021</sup> occur in Bangui. The same issues raised in the *Bemba* case therefore most certainly arise in situation II. As for the SCC, although the trial hearings, in the *Parquet v. Issa Sallet Adoum alias Bozizé ; Yaouba Ousmane ; Mahamat Tahir* case, were broadcast on the radio in French and other languages,<sup>1022</sup> the outreach activities of the SCC were limited, and there was no outreach in person, in part because of the current crisis and the lack of security in the country.<sup>1023</sup> The lack of outreach services has led to a significant decline in trust and interest in the work of the Court among a part of the population, particularly outside Bangui. This has been reinforced by limited access to the SCC website, which requires an internet connection, which can be very difficult depending on the province.<sup>1024</sup> In 2020, half of the population also did not have a good knowledge of the SCC.<sup>1025</sup> Adequate communication is however essential to ensure the effective and informed participation of victims who wish to participate in ongoing retributive justice efforts, including by becoming civil parties. The lack of information thus deprives part of the population of the possibility of participating in retributive justice processes in the CAR.<sup>1026</sup>

#### *(i.6) Testifying before the courts*

Even if, despite these limitations, victims of SGBC decide to take part in the retributive justice processes, the chances that they will be able to directly present their point of view before the ICC remain low. In the *Bemba* case, it was reported that out of the 5,229 victims who were granted participant status in the case, the Court allowed only three victims to present their views and concerns,<sup>1027</sup> which limited the ability of this group of victims to speak about their experiences in public and thus benefit from a possible therapeutic effect by

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<sup>1019</sup> ICC's website, *Billboards: a way to announce the start of a trial* (September 2022), online at: <https://www.icc-cpi.int/about/outreach/activities/activity/billboards-way-announce-start-trial>.

<sup>1020</sup> ICC's website, *Pop-up installation in Bangui attracts passers-by* (June 2022), online at: <https://www.icc-cpi.int/about/outreach/activities/activity/pop-installation-bangui-attracts-passers>.

<sup>1021</sup> ICC's website, *Bossangoa: on the road again* (June 2022), online at: <https://www.icc-cpi.int/about/outreach/activities/activity/bossangoa-road-again>.

<sup>1022</sup> Interview recorded on the 09/11/2022.

<sup>1023</sup> Human Rights Watch *supra* note 827.

<sup>1024</sup> FIDH, OCDH & Ligue Centrafricaine des Droits de l'Homme *supra* note 589 at 20.

<sup>1025</sup> Harvard Humanitarian *supra* note 217 at 32.

<sup>1026</sup> FIDH, OCDH & Ligue Centrafricaine des Droits de l'Homme *supra* note 589 at 21.

<sup>1027</sup> Fowler *op cit* note 1128 at 41.

participating in the legal process. According to article 68(3) of the Rome Statute: ‘Where the personal interests of the victims are affected, the Court shall permit their views and concerns to be presented and considered at stages of the proceedings determined to be appropriate by the Court and in a manner which is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial.’ A counsel for victims however highlighted that uncertainty persists as to the meaning and scope of this article:

Some early ICC decisions—including from the Appeals Chamber—held that victims’ interventions need not be limited to harm they have suffered and that victims can be heard on the individual criminal responsibility of the accused. Part-way through the Ongwen trial, however, Trial Chamber IX ruled that victims could not make submissions on individual criminal responsibility, essentially restricting their contribution to the issue of ‘harm’.<sup>1028</sup>

This narrow interpretation of the scope of personal interests leads to the limitation of victims’ interventions. Such an interpretation was adopted to some extent in the *Yekatom and Ngaissona* case.<sup>1029</sup> Moreover, civil party participation has great chances to be merely symbolic for most victims constituted as civil parties before the SCC too, due to the high volume of victims expected, meaning that ‘their participation will be largely intermediated through common lawyers and take place mainly via written rather than oral submissions.’<sup>1030</sup>

When the SCC issued its first verdict on 31 October 2022 against Issa Sallet Adoum, Ousman Yaouba, and Tahir Mahamat, INGOs also noted many issues. Human Rights Watch noted a shortage of staff and resources.<sup>1031</sup> Defense or civil party lawyers were not provided the necessary means to carry out their work: This lack of resources resulted in a suspension of the hearing and delays in the proceedings due to disputes over fees.<sup>1032</sup> For the lawyers of the civil parties: ‘the lack of resources affects their capacity to meet with victims, to talk to them - collectively and/or individually - particularly in the provinces, and to follow up on the various cases in progress.’<sup>1033</sup> Despite the protections provided to victims, Human Rights Watch also reported that lawyers representing victims were concerned about the safety of witnesses testifying in open court.<sup>1034</sup> The consultations conducted by FIDH in June and July 2022 also revealed that there were still gaps in the implementation of protection measures

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<sup>1028</sup> FIDH Laetitia Bonnet *Whose Court is it? Judicial handbook on victims’ rights at the International Criminal Court* (April 2021) at 50 citing M. Hirst & S. Sahyouni *Effective Legal Representation* (2020).

<sup>1029</sup> *Ibid* at 50.

<sup>1030</sup> Perez-Leon-Acevedo *op cit* note 1097 at 13.

<sup>1031</sup> Human Rights Watch *supra* note 827.

<sup>1032</sup> Cour Pénale Spéciale *supra* note 126 paras 99 & 100.

<sup>1033</sup> FIDH, OCDH & Ligue Centrafricaine des Droits de l’Homme *supra* note 589 at 19.

<sup>1034</sup> Human Rights Watch *supra* note 827/ Cour Pénale Spéciale *supra* note 126 para. 103.



and that there was an urgent need for improvement, especially in a crisis such as the present one.<sup>1035</sup>

In addition, testifying as a victim witness has not always proven to have the desired therapeutic effect for the victims of SGBC. Despite the rules providing sensitivity to SGBC victims, the ICL process has often proven unsuitable for dealing with the complex and emotional narrative of victims who struggle to express trauma coherently or linearly.<sup>1036</sup> It has been reported that in the *Bemba* case, the president of the court had to reprimand the defense for being insensitive towards a victim even though the person was made vulnerable by socio-economic circumstances.<sup>1037</sup> In addition to language and translation constraints, the narrative of the victims is often in contradiction with the Court's necessity to extract specific facts to determine the responsibility of the accused, creating a disconnect between the victim's experience and what is legally valid.<sup>1038</sup> According to Article 68(3) of the Statute the manner in which victims participate should not be prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial. This makes 'potentially therapeutic storytelling impossible.'<sup>1039</sup> More generally, Mertus describes the dichotomy between the prosecutor's imperative to produce a narrative focused on the perpetrator of multiple rapes and the victims' desire to tell complex stories of their victimisation, their resistance, and their survival.<sup>1040</sup>

#### (i.7) *The expressivist function of ICL*

ICL is sometimes called expressivist<sup>1041</sup> in the sense that the role of this law is mainly to persuade by transforming certain normative discourses and creating common discursive

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<sup>1035</sup> FIDH, OCDH & Ligue Centrafricaine des Droits de l'Homme supra note 589 at 45 referring to FIDH, LCDH, OCDH and REDRESS *Intégrer les droits des victimes dans les procédures de la Cour pénale spéciale en République centrafricaine (Integrating victims' rights in the proceedings of the Special Criminal Court in the Central African Republic)*, September 2017, at 16, online at : [https://redress.org/wp-content/uploads/2017/12/CAR\\_Paper\\_Rules\\_FINAL\\_FRENCH.pdf](https://redress.org/wp-content/uploads/2017/12/CAR_Paper_Rules_FINAL_FRENCH.pdf).

<sup>1036</sup> Fowler op cit note 1128 at 42/ Also see Hilary Charlesworth & Christine Chinkin 'Building Women into Peace: the international legal framework' (2006) *Third World Quarterly* 27, no. 5: 937-957 at 949; Nicola Henry 'Witness to rape: The limits and potential of international war crimes trials for victims of wartime sexual violence' (2009) *International Journal of Transitional Justice* 3, no. 1: 114-134; Michelle Staggs Kelsall & Shanee Stepakoff ' "When we wanted to talk about rape": Silencing sexual violence at the Special Court for Sierra Leone' (2007) *The International Journal of Transitional Justice* 1, no. 3: 355-374.

<sup>1037</sup> Fowler op cit note 1128 at 43 referring to *Prosecutor v. Jean-Pierre Bemba Gombo*, Case No. ICC-01/05-01/08, Transcript (3 May 2012) [https://www.icc-cpi.int/Transcripts/CR2012\\_05411.PDF](https://www.icc-cpi.int/Transcripts/CR2012_05411.PDF).

<sup>1038</sup> Fowler op cit note 1128 at 42.

<sup>1039</sup> Ibid at 42.

<sup>1040</sup> See Julie Mertus 'Shouting from the Bottom of the Well the Impact of International Trials for Wartime Rape on Women's Agency' (2004) 6(1) *International Feminist Journal of Politics* 110-128.

<sup>1041</sup> Stahn op cit note 655 at 428.

spaces.<sup>1042</sup> It would thus make it possible to transmit to citizens disapproval of specific violations<sup>1043</sup> and promote a dialogue on human rights<sup>1044</sup> to influence on ‘the generation and perception of norms.’<sup>1045</sup> In this sense, trials transcend notions of retaliation and deterrence to function ‘as communicative bodies, pronouncing on the moral wrongs and narrating an official history, while also reinforcing respect for the rule of law.’<sup>1046</sup>

However, for the law to successfully shape social norms, the message understood, rather than the message sent, is crucial.<sup>1047</sup> In multicultural contexts, such as the CAR, the message received may differ significantly from the message intended due, among other things, to language barriers.<sup>1048</sup> This echoes the ‘expressivist’ conception of political institutions according to which the fair character of law – and here of a norm – must be evaluated according to the ‘objective social meaning’ it expresses.<sup>1049</sup> This meaning can only appear ‘when the law or practice is inserted into a more global system, the “social” as a system of constitutive norms, institutions, and practices on interpreting a shared agreement.’<sup>1050</sup> The norm is then considered analogous to a linguistic utterance, and the analysis then goes further: The utterance is drawn from a semantic system known to all speakers whose meaning goes beyond the conscious intention of the sender or the comprehension of the receiver but draws from the situation of the utterance itself. Therefore, taking culture into account makes it possible to know the objective meaning expressed by a norm, a symbol, or a decision. Hence the need to contextualise and historicise the practice or the text to be interpreted.<sup>1051</sup> This is consistent with post-modernist and critical realist views, in which '(t)he subject matter of social science is heavily dependent upon meaning – this is the significance of the hermeneutic explanation/understanding distinction.’<sup>1052</sup>

Macdonald notes, for example, that while previous studies have attempted to establish causal links between TJ and respect for human rights, there needs to be more empirical data

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<sup>1042</sup> Ibid at 428.

<sup>1043</sup> Office of the United Nations High Commissioner for Human Rights *Rule-of-Law Tools for Post-Conflict States: Maximizing the Legacy of Hybrid Courts* (2008) at 6.

<sup>1044</sup> Ibid at 18.

<sup>1045</sup> Stahn op cit note 655 at 13.

<sup>1046</sup> Leyh op cit note 2 at 570 referring to Mark Drumbl *Atrocity and Punishment, and International Law* (2007).

<sup>1047</sup> Jaya Ramji-Nogales ‘Designing bespoke transitional justice: A pluralist process approach’ (2010) *Mich. J. Int'l L.* 32: 1 at 8.

<sup>1048</sup> Ibid at 8.

<sup>1049</sup> Magali Bessone *Faire justice de l'irréparable: Esclavage colonial et responsabilités contemporaines* (2019) 160.

<sup>1050</sup> López & Potter op cit note 368 at 13.

<sup>1051</sup> Bessone op cit note 865 at 161.

<sup>1052</sup> López & Potter op cit note 368 at 13.

to support normative and theoretical claims about the benefits of trials.<sup>1053</sup> She notes that the expressivist function of ICL may be limited due to a disconnect between international and local understandings of justice, giving the example of the population in Cambodia, among whom Tara Urs found that legal concepts such as ‘defence rights, reasonable doubt and evidentiary standards’ were both unknown and alienating to the general population, or in Sierra Leone, where Tim Kelsall noted that the Court did not take into account the issue of magic during the trial and chose to judge only what is considered ‘material,’ which did not allow these judicial decisions to have meaning for some part of the population.<sup>1054</sup> As seen in Chapter 1, the concept of justice can be challenging to translate in the CAR because it risks taking on different meanings depending on the populations concerned. More generally, one interviewee indicated that definitions of justice in the country are based more on the notion of reconciliation and reparation than on retribution.<sup>1055</sup> Therefore, the SCC and the ICC must engage through in-depth contextual, cultural, and linguistic outreach programs with victims and communities if ICL is to fulfill its expressivist role. This ‘requires creativity and a willingness to re-examine preconceived ideas,’<sup>1056</sup> as well as understanding concepts that do not necessarily come from Western countries. This approach is aligned with modern accountability approaches that emphasise context more.<sup>1057</sup>

### *Conclusion*

Only women victims of SGBC can access retributive justice, excluding from its scope a large number of women victims of other SGBV or of structural violence. Moreover, even the victims of SGBC can find difficult to access retributive justice mechanisms, either because of a lack of knowledge about these mechanisms, structural barriers or the fear of testifying before a court. As to the expressivist role of ICL, it can also appear to be limited for most women in the CAR. Retributive justice therefore falls short in terms of social change. It is also a type of justice that can hold only a very small number of individuals responsible for

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<sup>1053</sup> Anna Macdonald ‘From the ground up: what does the evidence tell us about local experiences of transitional justice?’ (2015) *Transitional Justice Review* 1, no. 3: 4 at 75 & 85 referring to Fletcher & Weinstein op cit note 1701.

<sup>1054</sup> Ibid at 87 referring to Erica Harper ‘Delivering Justice in the Wake of Mass Violence: New Approaches to Transitional Justice’ (2005) *Journal of Conflict and Security Law* 10.2: 149–185 and Tara Urs ‘Imagining locally-motivated accountability for mass atrocities: voices from Cambodia’ (2007) *International Journal on Human Rights* 7:4: 61-99 and Tim Kelsall *Culture under cross-examination: international justice and the Special Court for Sierra Leone* (2009) at 3.

<sup>1055</sup> Interview recorded on the 31/09/2022.

<sup>1056</sup> Macdonald op cit note 869 at 113.

<sup>1057</sup> Stahn op cit note 655 at 118.

such crimes, which can considerably limit the ones that feel responsible for reforms and structural change in the long term, as a mean to prevent re-occurrence.

- (ii) A narrow mode of liability

Three different cases will be successively studied: the *Bemba* case, the Situation II in the CAR, and the only case judged to date by the SCC, the *Issa Sallet Adoum, Ousman Yaouba, and Tahir Mahamat* case.

(ii.1) *The Bemba case*

The *Bemba* case is the first case where rape and sexual violence were among the most important charges. On 21 March 2016, the Trial Chamber III of the ICC, beyond a reasonable doubt, found Jean-Pierre Bemba responsible as a military commander for murder, rape, and pillage constituting crimes against humanity and war crimes and was sentenced to 18 years of imprisonment.<sup>1058</sup> According to the rules of the ICC, a military commander or a person effectively acting as a military commander ‘shall be criminally responsible for crimes within the jurisdiction of the Court committed by forces under his or her effective command and control, or effective authority and control as the case may be, as a result of his or her failure to exercise control properly over such forces’ (art. 28.a.) where the military commander ‘knew or, owing to the circumstances at the time, should have known that the forces were committing or about to commit such crimes’ (art. 28. a.i). They can also be convicted if they failed to take all necessary and reasonable measures within their power to ‘prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution’ (art. 28.a-ii). The *Bemba* case ‘was the first verdict in which the Trial Chamber had an opportunity to lay out its interpretation of the elements of command responsibility.’<sup>1059</sup>

The Trial Chamber interpreted ‘effective control’ as requiring that ‘the commander have the material ability to prevent or repress the commission of the crimes or to submit the

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<sup>1058</sup> Trial Chamber III, Decision on Sentence pursuant to Article 76 of the Statute, 21 June 2016, No.: ICC-01/05-01/08-3399, §41-42. [[https://www.icc-cpi.int/CourtRecords/CR2016\\_04476.PDF](https://www.icc-cpi.int/CourtRecords/CR2016_04476.PDF)] Also see *Prosecutor v. Jean-Pierre Bemba Gombo*, Judgment, supra note 693.

<sup>1059</sup> Susana SáCouto & Patricia Viseur Sellers ‘The bemba appeals chamber judgment: Impunity for sexual and gender-based crimes’ (2018) *Wm. & Mary Bill Rts. J.* 27: 599 at 607.

matter to the competent authorities,<sup>1060</sup> whether or not there were intermediate subordinates between the commander and the forces that committed the crimes.<sup>1061</sup> Following this interpretation, the Trial Chamber found that Bemba exercised effective control over the MLC forces operating in the CAR based on his role as President of the MLC and Commander-in-Chief of its armed forces, but also, among other reasons, because he had direct lines of communication with the forces operating on the ground and had disciplinary powers over MLC members, including the power to open investigations and establish courts-martial.<sup>1062</sup> Finally, the Trial Chamber found that although certain measures had been taken to respond to the alleged crimes, ‘those measures were insufficient, meaning the accused had failed in his duties to prevent, repress, and punish the crimes.’<sup>1063</sup> This judgment was considered a step forward in recognising SGBC by the ICC and a means of encouraging military leaders and other superiors to take all necessary measures to prevent or punish the commission of such crimes when committed by forces under their command or by their subordinates.<sup>1064</sup> The UN, as well as former ICC Prosecutor Bensouda, praised this Judgment as the noteworthy exception to the overwhelming impunity that prevails in the CAR<sup>1065</sup> and an ‘important step in the long quest for justice for the victims of the events of 2002 and 2003 in the Central African Republic.’<sup>1066</sup>

However, on 8 June 2018, the Appeals Chamber reversed the Judgment of the trial Chamber. A majority of the Appeals Chamber found that the Trial Chamber had erred in convicting Bemba. First, because some acts ‘did not fall within the “facts and circumstances described in the charges.”’<sup>1067</sup> Secondly, it found ‘that the Trial Chamber had erred in convicting Bemba for those acts which were adequately described in the charges and proven beyond a reasonable doubt because the Trial Chamber made a number of errors that “resulted in an unreasonable assessment of whether [ ] Bemba failed to take all [the] necessary and

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<sup>1060</sup> Ibid at 607 referring to Trial Chamber III, Decision on Sentence pursuant to Article 76 of the Statute, 21 June 2016, No.: ICC-01/05-01/08- 3399, paras 170 & 183.

<sup>1061</sup> Ibid at 607 referring to Trial Chamber III, Decision on Sentence pursuant to Article 76 of the Statute, 21 June 2016, No.: ICC-01/05-01/08- 3399, para 184.

<sup>1062</sup> Ibid at 607 referring to Trial Chamber III, Decision on Sentence pursuant to Article 76 of the Statute, 21 June 2016, No.: ICC-01/05-01/08- 3399, para 697.

<sup>1063</sup> Ibid at 607 referring to Trial Chamber III, Decision on Sentence pursuant to Article 76 of the Statute, 21 June 2016, No.: ICC-01/05-01/08- 3399, para 727.

<sup>1064</sup> *Policy Paper on Sexual and Gender-Based Crimes* supra note 649.

<sup>1065</sup> United Nations, Mapping Project supra note 119 at 233.

<sup>1066</sup> CPI, Bureau du procureur, *Déclaration du Procureur de la CPI, Mme Fatou Bensouda, à propos de la reconnaissance de la culpabilité de M. Jean-Pierre Bemba* (21 mars 2016).

<sup>1067</sup> SáCouto & Sellers op cit note 1150 at 610 referring to *The Prosecutor v. Jean-Pierre Bemba Gombo* (2018) Judgment on appeal, supra note 694 at para. 196.

reasonable measures” required to avoid liability under Article 28 of the Rome Statute.<sup>1068</sup> When reaching its conclusion, the Appeals Chamber noted that ‘(It) is not the case that a commander is required to employ every single conceivable measure within his or her arsenal, irrespective of considerations of proportionality and feasibility. Article 28 only requires commanders to do what is necessary and reasonable under the circumstances.’<sup>1069</sup> Galand specifies that from the outset, the majority relativises article 28 as requiring commanders to do only what is necessary and reasonable in the circumstances. In contrast, article 28 refers to the duty ‘to take all necessary and reasonable measures within his or her power.’<sup>1070</sup>

This is all the more troubling given that most acts adequately described in the charges and proven beyond a reasonable doubt were acts of sexual violence. Nevertheless, the majority gave very little consideration to whether the measures taken by Bemba were adequate concerning these allegations of sexual violence.<sup>1071</sup> As SáCouto and Sellers note, in determining whether necessary and reasonable measures were taken, the ability of those measures to adequately address sexual crimes should have been considered.<sup>1072</sup> However, the majority ignored the fact that the two main mechanisms set up to investigate allegations of crimes committed by Bemba's troops in the CAR failed to adequately follow up on reports of rape (the Mondonga inquiry) or limited themselves to allegations of pillaging (the Zongo Commission).<sup>1073</sup> Similarly, the majority of the Appeals Chamber did not consider why the court-martial that investigated the Bomengo case limited its work only to charges of pillage.<sup>1074</sup> There is also no indication that Bemba took any other steps to investigate these allegations of rape or sexual violence.<sup>1075</sup> Despite these shortcomings, the majority did not consider the quality of the measures Bemba took to prevent or repress sexual violence.<sup>1076</sup>

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<sup>1068</sup> Ibid at 610 referring to *The Prosecutor v. Jean-Pierre Bemba Gombo* (2018) Judgment on appeal, supra note 694 para. 193.

<sup>1069</sup> *The Prosecutor v. Jean-Pierre Bemba Gombo* (2018) Judgment on appeal, supra note 694 § 8.

<sup>1070</sup> Alexandre Skander ‘Bemba and the Individualisation of War: Reconciling Command Responsibility under Article 28 Rome Statute with Individual Criminal Responsibility’ (2020) *international criminal law review* 20, no. 4: 669-700 at 678.

<sup>1071</sup> SáCouto & Sellers op cit note 1150 at 611 referring to *The Prosecutor v. Jean-Pierre Bemba Gombo* (2018) Judgment on appeal, supra note 694 para. 119/ Also see Susana SáCouto & Katherine Cleary ‘The Importance of Effective Investigation of Sexual Violence and Gender-Based Crimes at the International Criminal Court’ (2009) 17 AM. U. J. GENDER, SOC. POL’Y & L. 337, 356.

<sup>1072</sup> Ibid at 615.

<sup>1073</sup> Ibid at 615.

<sup>1074</sup> Ibid at 617.

<sup>1075</sup> Ibid at 617.

<sup>1076</sup> Ibid at 617.

This case law can be seen as a third-generation case in which the linkage between superiors and subordinates gradually loosened.<sup>1077</sup> This gradual leniency towards military superior exposes the ICC's limits for delivering justice in the CAR.<sup>1078</sup> Moreover, the majority's focus 'on the number of crimes, to the exclusion of the nature of those crimes, as the relevant means by which to assess the measures Bemba took to prevent or repress crimes was particularly troubling, as war-crimes investigations, have historically suffered from insufficiencies when it comes to sexual-violence allegations.'<sup>1079</sup> This acquittal therefore raises the question of the persistence of old cultural norms in the practice of ICL.<sup>1080</sup> According to Chappell, old cultural norms refer to the behaviours and mentalities of judges and prosecutors, which must also change to allow the prosecution of SGBC<sup>1081</sup> or consider these crimes grave enough to make charges regarding them.<sup>1082</sup>

Texts have been adopted to this effect. For example, the Rome Statute includes a broad range of SGBC,<sup>1083</sup> requires the Prosecutor to be aware of the nature and prevalence of SGBCs and requires the Prosecutor to effectively investigate these crimes (Article 54). In addition, the ICC guidance document on sexual and gender-based crimes is a valuable tool to strengthen the prosecution and investigation of SGBC.<sup>1084</sup> Nevertheless, the *Bemba* case law bodes ill for the successful prosecution of cases involving SGBC, particularly for high-ranking defendants who did not clearly order the crimes or were not physically present during the commission of those crimes.<sup>1085</sup> Additionally, in 2019, Shackel wrote that: 'in its 15-year history, the Court has only seen eight matters reach the trial stage with charges for SGBC on the indictment. Of these, six have had charges confirmed, and to date, only two have led to convictions (with one of these pending appeals).'<sup>1086</sup>

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<sup>1077</sup> Robert Cryer 'Prosecuting the leaders: Promises, politics and practicalities' (2009) *Goettingen J. Int'l L.* 1: 45 at 58.

<sup>1078</sup> Maupas supra note 1148/ Also see, Carayannis op cit note 99 at 261.

<sup>1079</sup> SáCouto & Sellers op cit note 1150 at 618.

<sup>1080</sup> Emma Palmer & Sarah Williams 'A "Shift in Attitude"? Institutional Change and Sexual and Gender-Based Crimes at the Extraordinary Chambers in the Courts of Cambodia' (2017) 19(1) *International Feminist Journal of Politics* 22-38 at 24.

<sup>1081</sup> Louise Chappell *The Politics of Gender Justice at the International Criminal Court: Legacies and Legitimacy* (2015) 109–10 citing Solange Mouthaan 'The Prosecution of Gender-Based Crimes at the ICC: Challenges and Opportunities' (2011) 11 INT'L CRIM. L. REV. 775.

<sup>1082</sup> Oosterveld op cit note 66 at 446.

<sup>1083</sup> Askin op cit note 643 at 347-348.

<sup>1084</sup> Oosterveld op cit note 66/ Chappell op cit note 1172.

<sup>1085</sup> SáCouto & Sellers op cit note 1150 at 602: 'It is worth noting that a majority of the Bemba Appeals Chamber concluded that Bemba could not be found liable for the crimes they found to have been established beyond reasonable doubt—the vast majority of which were rapes—in part because he was a "remote" commander.'

<sup>1086</sup> Shackel op cit note 1090 at 190.

However, a change could be on the way. On the 8th of July 2019, the Trial Chamber VI of the ICC<sup>1087</sup> found Ntaganda guilty as an indirect perpetrator of rape and sexual slavery as a crime against humanity and a war crime and sentenced him to thirty years in prison, a decision that the Appeals Chamber has upheld.<sup>1088</sup> In addition, Ongwen has been found guilty of forced marriage as an 'other inhumane act' within article 7(1)(k), forced pregnancy within article 7(1)(g), constituting crimes against humanity, and forced pregnancy under article 8(2)(e)(vi), constituting a war crime.<sup>1089</sup> The conviction and sentence were upheld on appeal.<sup>1090</sup> The ICC has also charged Al Hassan with sexual slavery and forced marriage as inhumane acts constituting crimes against humanity. His trial is still ongoing.<sup>1091</sup> These recent developments give hope for another outcome to Situation II in the CAR.

*(ii.2) The Situation II in the CAR*

Ngaïssona is allegedly responsible for crimes of rape, constituting war crimes and crimes against humanity. He was, however, charged under other modes of liability than Bemba, which are as follows: '(i) facilitating the commission of the crimes as set out in the confirmed charges by aiding, abetting or otherwise assisting in their commission under article 25(3)(c) of the Statute; or (ii) contributing in any other way to the commission of those crimes by a group of persons acting with a common purpose under article 25(3)(d)(i) or (ii) of the Statute.'<sup>1092</sup> Saïd is charged with direct-co-perpetration under art. 25(3)(a) and ordering or inducing under art. 25(3)(b) of the Rome Statute in his capacity as alleged de facto director of the Central Office for the Repression of Banditry (OCRB).<sup>1093</sup> Although Louis Mazangue was the officially appointed director, paragraph 70 of the decision confirming the charges underlines that Saïd was ultimately responsible for the management of the installation and

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<sup>1087</sup> *The Prosecutor v Bosco Ntaganda*, Judgment, ICC-01/04-02/06, (8 July 2019) (International Criminal Court, Chamber VI) § 1199.

<sup>1088</sup> ICC, Ntaganda case: ICC Appeals Chamber confirms conviction and sentencing decisions (March 2021), online at: <https://www.icc-cpi.int/news/ntaganda-case-icc-appeals-chamber-confirms-conviction-and-sentencing-decisions>.

<sup>1089</sup> *Ongwen* Judgment supra note 673 § 3116.

<sup>1090</sup> *The Prosecutor v Dominic Ongwen*, Judgment on the appeal of Mr Ongwen against the decision of Trial Chamber IX of 4 February 2021 entitled "Trial Judgement", ICC-02/04-01/15 A, (15 December 2022) (International Criminal Court, The Appeals Chamber) § 1104.

<sup>1091</sup> See ICC's website, Al Hassan case, (consulted on the 24<sup>th</sup> of October 2022), online at: <https://www.icc-cpi.int/mali/al-hassan>.

<sup>1092</sup> Pre-Trial Chamber III, Situation in the Central African Republic II in the case of the *Prosecutor v. Alfred Yekatom and Patrice-Edouard Ngaïssona*, Decision on the confirmation of charges against Alfred Yekatom and Patrice-Edouard Ngaïssona, ICC-01/14-01/18 (11 December 2019) § 25.

<sup>1093</sup> Ringin supra note 681.



was referred to as the ‘colonel’ and ‘commander’ of the OCRB, often referring to himself as the ‘appointed head of the OCRB.’<sup>1094</sup>

However, the definition of the elements of co-perpetration remains unclear.<sup>1095</sup> The ICC has generally applied a more rigid approach to Article 25(3) of the Rome Statute than the theory of joint criminal enterprise (JCE) liability applied by the ad hoc tribunals, which has resulted in acquittals for sexual violence in almost all cases, except for the recent *Prosecutor v. Bosco Ntaganda*,<sup>1096</sup> and *Ongwen* cases. In the *Katanga* case, for example, the Chamber found that crimes of sexual violence were not part of the common purpose of the attack.<sup>1097</sup> According to the Chamber's interpretation of Rule 25(3)(d)(ii), knowledge of a general criminal intent is not sufficient to prove that the accused knew the criminal intent of the group to commit each of the crimes forming part of the common purpose. Moreover, the accused must have been aware that this intention existed ‘when engaging in the conduct which constituted his or her contribution.’<sup>1098</sup> It will likely be challenging to prove that those accused of SGBV knew about every crime committed as required by this doctrinal construct, given that sexual violence – even when widespread – often occurs because it is condoned and authorised rather than explicitly ordered or planned.<sup>1099</sup>

In the *Ntaganda* case, although the Chamber found that certain acts of sexual violence did not expressly fall within the common plan, it nevertheless found that their commission was a virtual certainty, given the circumstances prevailing at the time, and therefore was nevertheless part of the plan.<sup>1100</sup> Notwithstanding the Chamber's broad approach to the common plan, it remains that indirect co-perpetrator liability requires the Chamber to assess the accused's control over the crime by their essential contribution to it and their ability to prevent its commission.<sup>1101</sup> Although the Chamber found that such control was present in this case, cases in which sexual violence takes place as part of the plan but where the evidence of

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<sup>1094</sup> Ibid note 681.

<sup>1095</sup> Janet H. Anderson *CPI-RCA-II : Le Procureur fait le Paris du Plan Commun, dans le chaos de la Guerre Civile* (25 March 2021), online at : <https://www.justiceinfo.net/fr/75275-cpi-rca-ii-procureur-pari-plan-commun-chaos-guerre-civile.html>.

<sup>1096</sup> Susana SáCouto, Leila Nadya Sadat & Patricia Viseur Sellers ‘Collective criminality and sexual violence: Fixing a failed approach’ (2020) *Leiden Journal of International Law* 33, no. 1: 207-241 at 210 referring to *Prosecutor v. Bosco Ntaganda*, Judgment, Case No. ICC-01/04-02/06, T. Ch. VI, 8 July 2019. The Trial Chamber convicted Bosco Ntaganda of rape and sexual slavery as an indirect co-perpetrator pursuant to Art. 25(3)(a) of the Rome Statute.

<sup>1097</sup> Ibid at 225 referring to Situation in the Democratic Republic of the Congo in the case of *the Prosecutor v. Germain Katanga*, Judgment, Case No. ICC-01/04-01/07, Trial Chamber II, 7 March 2014, paras. 1657–64.

<sup>1098</sup> Ibid at 228 referring to Katanga Trial Chamber Judgement, para. 1642.

<sup>1099</sup> Ibid at 228-229, Katanga Trial Chamber Judgement at para. 1412.

<sup>1100</sup> Ibid at 238 referring to Ntaganda supra note 1178, at para. 775.

<sup>1101</sup> Ibid at 238.

the accused's control over the crime is less compelling would likely fail.<sup>1102</sup> Moreover, it remains to be seen whether *Ntaganda* represents a one-time exceptions, with the *Ongwen* case, or a partial attempt to correct the court's previous failures to recognise and understand how sexual violence evolves within the context of collective criminal conduct.<sup>1103</sup> This ambiguity could therefore lead Ngaïssona's defense to argue that Ngaïssona could not have foreseen the commission of crimes committed by false *anti-balaka* or uncontrollable elements,<sup>1104</sup> which could also fail to secure a conviction for sexual violence at the judgment stage.

(ii.3) *The Issa Sallet Adoum, Ousman Yaouba, and Tahir Mahamat case*

The SCC, however, has taken a slightly different approach than the ICC. In the *Issa Sallet Adoum, Ousman Yaouba, and Tahir Mahamat* case, Bozizé was charged as a person effectively exercising the function of a military commander per article 57 of the organic law. The SCC found ‘that the accused had the capacity to prevent the rapes of six women in this village as well as the capacity to investigate and repress these crimes and refer them to the competent authorities for the purposes of investigation and prosecution’ He was thus held responsible for the crime of rape committed by his subordinates per Articles 87 and 153 of the Criminal Code of the CAR.<sup>1105</sup> The Court adopts the same approach, regarding the reasonable measures that a superior must take, as in the *Bemba* case, specifying that these measures will be assessed on a case-by-case basis.<sup>1106</sup> The Court interprets ‘necessary measures’ as any essential measures that the superior must take to fulfill the obligation to prevent or punish the commission of an offense in the circumstances at the time. While the expression ‘reasonable measures’ is understood as all measures that the superior is able to take in the circumstances of the moment.<sup>1107</sup> The SCC’s analysis of whether reasonable measures were taken nevertheless seems more flexible than that adopted by the ICC in the *Bemba* case since, even if Bozizé did not clearly order the crime, the simple fact of not having given the orders to prevent it (omission) was considered by the Court as a serious breach of the obligations of prevention.<sup>1108</sup> The SCC also notes that due to the circumstances, Bozizé should have known that his subordinates had committed crimes of rape due to his

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<sup>1102</sup> Ibid at 238.

<sup>1103</sup> Ibid at 238.

<sup>1104</sup> Anderson supra note 1186.

<sup>1105</sup> Cour Pénale Spéciale supra note 126 para. 400.

<sup>1106</sup> Ibid para. 235.

<sup>1107</sup> Ibid para. 383.

<sup>1108</sup> Ibid para. 296.

proximity to the scene of the crimes, his knowledge of the attack, and the objectively controllable number of elements under his command. Bozizé also failed to make diligent inquiries to establish the facts or report them to the competent authorities.<sup>1109</sup>

Section 55(d) of the SCC Organic Law further provides for joint criminal enterprise and therefore reverts to the type of liability retained by the ad hoc tribunals. In the *Issa Sallet Adoum, Ousman Yaouba, and Tahir Mahamat* case, Ousman Yaouba and Tahir Mahamat were found responsible for the ‘extended’ form of the joint criminal enterprise, considering that ‘all the participants are acting with a common criminal aim, all are driven by the same criminal intent in the execution of the common criminal aim and one of the participants commits an act which, although beyond the scope of the common purpose, is nevertheless attributed to the other members, since it is a natural and foreseeable consequence of the achievement of the criminal purpose.’<sup>1110</sup> This mode of responsibility can be praised as it better illustrates how crimes of SGBV play out during times of mass violence: most of this violence being usually not explicitly planned or orchestrated from the outset but rather committed ‘because the atmosphere of war and the violence, anarchy, and chaos it produces allow it to happen.’<sup>1111</sup>

Moreover, while the ICC mainly deals with hierarchical superiors, the organic law at the origin of the creation of the SCC does not provide for the selection of defendants likely to be brought before the SCC.<sup>1112</sup> According to the investigation, prosecution, and investigation strategy adopted by the SCC in 2020, it is closely linked to the crimes committed. It follows cumulative selection criteria,<sup>1113</sup> which can be reassessed over time.<sup>1114</sup> The SCC can therefore conduct trials in a broader range of cases. However, assigning responsibility can also be problematic when a subordinate receives a criminal order and feels strong pressure to obey.<sup>1115</sup> The crime may appear legitimate due to the trust that subordinates place in the

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<sup>1109</sup> Ibid para. 299.

<sup>1110</sup> Cour Pénale Spéciale supra note 126 para. 227.

<sup>1111</sup> SáCouto, Sadat & Sellers op cit note 1187 at 235 referring to K. Askin ‘Prosecuting Gender Crimes Committed in Darfur: Holding Leaders Accountable for Sexual Violence’ in S. Totten and E. Markusen (eds.), *Genocide in Darfur: Investigating the Atrocities in the Sudan* (2009) at 142.

<sup>1112</sup> Grebenyuk op cit note 795 at 13.

<sup>1113</sup> *Stratégie d’enquêtes, de poursuites et d’instruction* supra note 798, para 49.

<sup>1114</sup> Ibid para 70.

<sup>1115</sup> Alette Smeulers ‘Why Serious International Crimes Might Not Seem “Manifestly Unlawful” to Low-level Perpetrators: A Social–Psychological Approach to Superior Orders’ (2019) *Journal of International Criminal Justice* 17, no. 1: 105-123 at 117.

orders of the superior and the context in which the crime occurs.<sup>1116</sup> The criminal liability of subordinates can therefore also be problematic in many respects.

(ii.4) *Conclusion*

The above cases suggest that accurately capturing and characterising individual contributions to collective criminal conduct, mainly when involving SGBCs, remains challenging for international tribunals.<sup>1117</sup> Despite significant advances in the development of sophisticated theories designed to hold individuals accountable for their role in the most serious crimes and the recognition of rape and other forms of sexual violence as war crimes, crimes against humanity, and even acts of genocide, judges struggle to understand and situate SGBV when they happen in the context of other atrocity crimes.<sup>1118</sup> This difficulty is emphasized by the fact that, unlike domestic crimes, international crimes generally involve the efforts of many individuals, often acting together. This poses a challenge for those tasked with judging them<sup>1119</sup> and establishing individual responsibility: either because certain individuals mainly responded to the orders of their superiors, or because they were not present at the scene of the crime or did not directly order its commission. These cases, therefore, reveal the difficulty of establishing individual responsibility in the context of structured injustices. Lu defines a *structured injustice* as ‘wrongful acts or objectionable outcomes committed or produced by individuals (...) attributed to their roles within corporate agents or highly organized and/or purposive social groups.’<sup>1120</sup>

The seriousness and intensity of the crimes create the need to hold someone accountable both for prevention<sup>1121</sup> and to guarantee the victim's right to have her aggressor prosecuted.<sup>1122</sup> However, in structured injustice, individual responsibility loses its clarity.<sup>1123</sup> Instead, an individual's action is often linked to the criminal activities of a group, a collective that moreover relies heavily on contextual elements such as conflict or oppression.<sup>1124</sup> Criminal justice therefore, if exercised alone, runs the risk of being perceived only as symbolic justice aimed at a few individuals during trials for international crimes without,

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<sup>1116</sup> Ibid at 122.

<sup>1117</sup> SáCouto, Sadat & Sellers op cit note 1187 at 229.

<sup>1118</sup> Ibid at 229.

<sup>1119</sup> Ibid at 207/ Alexandre Skander op cit note 1161 at 674.

<sup>1120</sup> Lu op cit note 283 at 89.

<sup>1121</sup> Ibid at 106-107.

<sup>1122</sup> Stahn op cit note 655 at 125.

<sup>1123</sup> Ibid at 125/ Also see Ramji-Nogales op cit note 863 at 9.

<sup>1124</sup> Ibid at 125 / Also see Krista K. Thomason ‘Transitional justice as structural justice’ (2015) *Theorizing Transitional Justice*: 71-80 at 75-76.

however, exhausting the reality of the abuses suffered.<sup>1125</sup> This is so since, even in the most promising scenarios where the political will and legal and material resources exist, where SGBC charges are successful, and the person who committed or ordered the acts is convicted, trials reach only a tiny percentage of all those who have committed SGBV.<sup>1126</sup> This selectivity automatically leads to a truncated and partial account of the atrocities, their causes and consequences.<sup>1127</sup>

Most importantly, while it is necessary to attribute individual culpability to those who are often considered most responsible for serious crimes committed during an armed conflict, it is also important, for the sake of transformation, to avoid cultivating the idea that SGBV are isolated acts, being the consequence of deviant individual decisions and actions, without taking into account the structural and cultural violence that allowed these crimes to be committed.<sup>1128</sup> Sanctioning an isolated offender, although a leader, without treating and transforming society as a whole quickly appears insufficient because it ignores the continuum of violence in the lives of women in the CAR.<sup>1129</sup> Therefore, if the indictment of the perpetrators of SGBC can be an essential and necessary step for the victims and for, perhaps, changing certain social attitudes, a court decision alone is a limited solution to transform harmful gender norms profoundly ingrained in society.<sup>1130</sup>

(iii) Reparation regimes

If the victims of SGBC succeed in becoming civil parties, and that their offender is found guilty, they may be entitled to reparations. Judicial reparations procedures generally operate on a case-by-case basis and individualise compensation measures, adapting each to compensate in proportion to the harm suffered by each victim.<sup>1131</sup> It is also a way of giving

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<sup>1125</sup> Bessone op cit note 865 at 103.

<sup>1126</sup> Mani op cit note 279 at 101.

<sup>1127</sup> Charlesworth & Chinkin op cit note 1139 at 948-949.

<sup>1128</sup> Kamari Maxine Clarke 'The rule of law through its economies of appearances: The making of the African warlord' (2011) *Indiana journal of global legal studies* 18, no. 1: 7-40 at 13/ Kastner & Roy-Trudel op cit note 476 at 154.

<sup>1129</sup> Erin Daly 'Transformative justice: Charting a path to reconciliation' (2001) *Int'l Legal Persp.* 12: 73 at 105.

<sup>1130</sup> Laura Green 'First-Class Crimes, Second-Class Justice: Cumulative Charges for Gender-Based Crimes at the International Criminal Court' (2011) *International Criminal Law Review* 11: 529-541 at 541/ Waldorf op cit note 50 at 173/ Mani op cit note 279 at 101.

<sup>1131</sup> Ruth Rubio-Marín op cit note 1108 at 4.

recognition to the victims in ICL.<sup>1132</sup> However, as will be seen below, their transformative potential is also limited.

*(iii.1) Reparations granted by the ICC*

While the ICTY and ICTR delivered token justice by convicting the main perpetrators of SGBC, they had neither the power nor the mandate to award reparations to victims.<sup>1133</sup> Introducing a reparations regime under the Rome Statute of the ICC has therefore marked an unprecedented shift in international criminal justice, allowing victims to access reparations in cases successfully prosecuted before the ICC.<sup>1134</sup> In the ICC Statute, reparation is governed by Article 75 and Article 79 and explained in Rules 94 to 99 of the ICC Rules of Procedure and Evidence (RPE). When ordering reparations, the ICC must assess the damage, loss, or injury suffered by the victim. Based on this assessment, the Court may award individual and collective reparations.<sup>1135</sup> Articles 75(1) and 75(2) of the Rome Statute allow the Court to award different types of reparations, including restitution, compensation, and rehabilitation, to victims of international crimes. Although the provisions refer to three types of reparations, the Court may award other reparations by rule 91(1)(f) of the ICC RPE.<sup>1136</sup> The ICC indeed understands Article 75 of the Rome Statute as non-exhaustive ‘noting that “[o]ther types of reparations, for instance those with a symbolic, preventative or transformative value, may also be appropriate”.’<sup>1137</sup> In addition, the Court can order reparations either directly against the convicted person (Article 75(2) of the Rome Statute) or through the Trust Fund for Victims (TFV) (Article 79(2) of the Rome Statute). So far, only four cases have reached the reparations phase: the *Lubanga*, *Katanga*, and *Al Mahdi* cases, as well as the *Ntaganda*

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<sup>1132</sup> Mia Swart ‘The Lubanga Reparations Decision: A Missed Opportunity?’ (2012) *Polish yearbook of international law* 32: 169-188 at 175.

<sup>1133</sup> Olga Jurasz ‘Reparations for Gendered Harm at the International Criminal Court: Towards Transformative and Gender-Just Reparations?’ (2019) 235.

<sup>1134</sup> *Ibid* at 235-236.

<sup>1135</sup> Moffett & Sandoval *op cit* note 1098 at 756.

<sup>1136</sup> The ICC has also recognised that ‘other types of reparations, for instance those with a symbolic, preventative or transformative value, may also be appropriate.’ – see *The Prosecutor v. Thomas Lubanga Dyilo*, ICC-01/04-01/06-3129-AnxA, The Appeals Chamber, Order for Reparations, para. 222.

<sup>1137</sup> Brianne McGonigle Leyh & Julie Fraser ‘Transformative reparations: changing the game or more of the same?’ (2019) *Cambridge International Law Journal* 8, no. 1: 39-59 at 47 referring to *The Prosecutor v Thomas Lubanga Dyilo* (Lubanga) Trial Chamber I, Decision Establishing the Principles and Procedures to be Applied to Reparations ICC-01/04-01/06- 2904 (7 August 2012) [222]; *Lubanga*, Appeals Chamber, Judgment on the Appeals Against the ‘Decision Establishing the Principles and Procedures to be Applied to Reparations’ of 7 August 2012 with Amended Order for Reparations (Annex A) and Public Annexes 1 and 2 ICC-01/04-01/06-3129 (3 March 2015) [202]; *The Prosecutor v Germain Katanga* (Katanga) Trial Chamber II, Order for Reparations Pursuant to Article 75 of the Statute ICC-01/04-01/ 07-3728-tENG (24 March 2017) [297].

cases. Preparations for reparations had taken place in the *Bemba* case, but they were halted after the acquittal.<sup>1138</sup>

(iii.1 -a) Order of reparations directly against the convicted person

In the *Bemba* case, most GBC victims interviewed by FIDH indicated they wanted to receive compensation in cash, particularly for food or medicine, pay rent or buy land or rebuild their destroyed homes.<sup>1139</sup> Some also requested rehabilitative reparations because they suffered from the physical and psychological consequences of the sexual violence they had endured.<sup>1140</sup> Unfortunately, none of these victims enjoyed the benefits of reparations due to Bemba's acquittal. Recent developments in how the ICC awards reparations to victims of SGBC are nonetheless interesting and shed light on the types of reparations the ICC could award to victims in Situation II in the CAR. The *Lubanga* case was the first to award reparations, drawing from the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law (UN Basic Principles) as well as the reparation jurisprudence of the Inter-American and European Courts of Human Rights.<sup>1141</sup> However:

despite the fact that reparation orders at the ICC have tried to borrow from human rights law, they are framed in narrower terms. At the ICC, reparations can be ordered against the convicted person, for the extent of his/her criminal liability, and to those that are recognized as victims by the Court. This is in contrast to human rights courts where reparation is awarded against the state and is focused on remedying proven victims' harm (...).<sup>1142</sup>

Consequently, the reparation order must not go beyond the crimes for which the author has been convicted.<sup>1143</sup> Generally, reparations also focus solely on direct victims, meaning individuals who themselves suffer harm, and on indirect victims, meaning sufficiently close family members.<sup>1144</sup> The scope of transformative reparations is therefore greatly limited.

In that regard, the *Ntaganda* case has expanded on the Lubanga's principles<sup>1145</sup> and confirms that when awarding reparations, the ICC can, first, take a gender-sensitive

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<sup>1138</sup> FIDH Laetitia Bonnet op cit note 1131 at 57.

<sup>1139</sup> FIDH op cit note 132 at 26.

<sup>1140</sup> Ibid at 26-27.

<sup>1141</sup> Moffett & Sandoval op cit note 1098 at 751.

<sup>1142</sup> Ibid at 751.

<sup>1143</sup> Ibid at 752/ See Lubanga, on the appeals against Trial Chamber II's 'Decision Setting the Size of the Reparations Award for which Thomas Lubanga Dyilo is Liable' ICC-01/04-01/06 A7 A8, 18 July 2019, para. 3.

<sup>1144</sup> Ibid at 755 referring to Katanga, ICC-01/04-01/07-3728, 24 March 2017, paras. 113, 121.

<sup>1145</sup> Ibid at 751.

approach<sup>1146</sup> that applies equally to cases involving gender-based crimes and those that do not. This approach relies heavily on a ‘gender-inclusive understanding of the nature and wide spectrum of gendered harms.’<sup>1147</sup> In the *Ntaganda* case, for example the Chamber stated that:

When designing reparations for victims of sexual and gender-based violence, the especially grave nature and consequences of sexual violence crimes, in particular against children, must be recognised. Reparations should reflect and address the multifaceted harm suffered by victims, noting that both their relatives and their communities may be impacted. Reparation measures should take into account the potential obstacles, including stigma and ostracism, involved in seeking and obtaining access to reparations. It is paramount that they do not reinforce pre-existing discriminatory patterns, but rather seek to transform them to ensure that everyone has equal access to reparations. In addition, while stressing the importance of broad rehabilitation measures, that include a cultural perspective, the Court should also adopt a gender-sensitive approach in relation to all other modalities, such as compensation.<sup>1148</sup>

The Court also explicitly held that ‘[a] gender-inclusive and sensitive perspective should integrate intersectionality as a core component,’<sup>1149</sup> and highlighted the victims’ multiple and intersecting identities, including their age, gender, and ethnicity, as an element for consideration,<sup>1150</sup> in order to avoid treating victims as a single, homogeneous group.<sup>1151</sup> Ultimately, the transformative aspect of reparations was encouraged in the *Lubanga*<sup>1152</sup> and *Ntaganda* cases. In the *Ntaganda* case, the Chamber stated that the transformative purpose of reparations is to promote structural change ‘by dismantling the discriminations, stereotypes, and practices that may have contributed to creating the conditions for the crime to occur.’<sup>1153</sup> However, the ICC does not specify the practical means by which transformative and gender-sensitive reparations can be achieved. In this regard, the NGO Women’s Initiative for Gender Justice clarified that these types of reparations can both rehabilitate the victim individually as well as contribute to the more global transition of the society in which the victims live tending ‘towards a community based on non-violence and non-discrimination for all its members.’<sup>1154</sup>

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<sup>1146</sup> *The Prosecutor v. Bosco Ntaganda*, icc-01/04-02/06 (Reparations Order), supra note 669, paras 194-195.

<sup>1147</sup> Jurasz op cit note 1226 at 236.

<sup>1148</sup> *The Prosecutor v. Bosco Ntaganda*, icc-01/04-02/06 (Reparations Order), supra note 669, para. 66.

<sup>1149</sup> Ibid, para. 60.

<sup>1150</sup> Ibid, para. 53.

<sup>1151</sup> Debevoise & Plimpton supra note 672 at 22.

<sup>1152</sup> *The Prosecutor v. Thomas Lubanga Dyilo*, ICC-01/04-01/06-3129-AnxA, The Appeals Chamber, Order for Reparations, 03 March 2015 § 34, § 67.

<sup>1153</sup> *The Prosecutor v. Bosco Ntaganda*, icc-01/04-02/06 (Reparations Order), supra note 669, para. 94.

<sup>1154</sup> Leyh & Fraser op cit note 1230 at 47 referring to Lubanga, Trial Chamber I, Observations of the Women’s Initiatives for Gender Justice on Reparations ICC-01/04-01/06-2876 (10 May 2012) [13], [17].



However, these reparations risk, at the individual level, being limited to victims who have been able to become civil parties since the powers of the Court are limited to the individual whose criminal responsibility is established by a conviction. At the collective and structural level, these reparations can, moreover, be problematic because it is difficult to see how a judicial institution, which does not deal with the responsibility of the state, could order a state to take measures such as changing its laws or reform its public policies in order to bring about concrete change for women living in the country.<sup>1155</sup> Transformative reparations could therefore rather mean a ‘reparative complementarity’ with the state.<sup>1156</sup> In the CAR, it can possibly mean that the ICC will collaborate with the CVJRR in regards to reparations. However, as this commission is not yet operational, it is still too early to know how potential future transformative reparations, in the *Ngaïssona* case for example, will be granted by the ICC.

(iii.1- b) Order of reparations through the Trust Fund for Victims

The Fund plays a dual role. First, it is responsible for paying the reparations awarded by the Court. The TVF acts as a repository of assets seized through fines and forfeitures from convicted individuals, forming the basis for reparations for victims (see article 79 of the Rome Statute).<sup>1157</sup> The Fund may also receive funds from, among others, voluntary contributions from governments, international organisations, individuals, companies, and other entities.<sup>1158</sup> Secondly, the TVF plays a ‘humanitarian role as an agency providing physical, psychological and material support to victims, their families and communities through assistance programs.’<sup>1159</sup> Unlike reparations, the Fund’s ‘assistance mandate’ is not linked to the conviction of the accused.<sup>1160</sup> The Fund however cannot undertake projects that would ‘predetermine an issue before the Court, cause prejudice to the rights of the accused, or compromise any of the issues related to victims’ participation.’<sup>1161</sup> It must therefore receive the approval of the competent Chamber before starting its assistance activities.<sup>1162</sup> Fowler

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<sup>1155</sup> Moffett op cit note 751 at 1212 referring to Leila Ullrich ‘Can Reparations Transform Societies? The Practice of “Transformative Justice” at the International Criminal Court (ICC)’ (presentation at the Oxford Transitional Justice Research Seminar, 9 March 2016).

<sup>1156</sup> Ibid at 1215.

<sup>1157</sup> Jurasz op cit note 1226 at 245.

<sup>1158</sup> Roht-Arriaza, Naomi, and Katharine Orlovsky ‘A complementary relationship: Reparations and development’ (2009) *Transitional justice and development: Making connections*: 170-213 at 201.

<sup>1159</sup> Jurasz op cit note 1226 at 245.

<sup>1160</sup> Ibid 245.

<sup>1161</sup> Roht-Arriaza & Orlovsky op cit note 1251 at 201.

<sup>1162</sup> Ibid at 201.

argues that the Fund can initiate programs to educate and empower victims of GBV, address their physical and psychological needs, address stigma and discrimination, promote inclusion, and engage in anti-stigma and educational discourse. This could help dismantle the ingrained social norms that perpetuate GBV.<sup>1163</sup> The TFV indeed has outlined that ‘reparations should contribute to transformation and present an “opportunity to overcome structural conditions of inequality and exclusion”,’<sup>1164</sup> and has already provided support to numerous victims of GBV.<sup>1165</sup> However, in practice, the impact of the Fund on the populations affected by a conflict is often limited.

In the CAR I situation, the Fund launched a pilot assistance project in Bangui to support victims and their families living in precarious conditions and suffering from long-term harm due to CRSV.<sup>1166</sup> This pilot assistance program targeted victims who suffered harm due to rape and sexual violence perpetrated in 2002-2003. Its initial target was approximately 200 victims in acute vulnerability for having suffered directly or indirectly from these crimes and who could not fully support themselves.<sup>1167</sup> The pilot program provided for interventions in the following areas: ‘Medical support for people suffering from pathologies linked to HIV/AIDS; Access to food security and nutritional support; Access to psychological care; Access to education for dependents of victims; Access to housing for homeless victims; Assistance in launching income-generating activities.’<sup>1168</sup> The assistance, however, came 20 years after the 2003 conflict, with the start of the assistance program in 2021. The children targeted by the assistance programs, such as access to education, had therefore turned adults when the program started.<sup>1169</sup> Moreover, this program only partially responded to the demand for justice from women victims of sexual violence<sup>1170</sup> as it was deemed too limited and unambitious, given the post-conflict situation in the CAR and the number of victims represented in the *Bemba* case.<sup>1171</sup>

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<sup>1163</sup> Fowler op cit note 1128 at 49.

<sup>1164</sup> Leyh & Fraser op cit note 1230 at 47 referring to Lubanga Trust Fund for Victims, Observations on Reparations in Response to the Scheduling Order of 14 March 2012 ICC-01/04-01/06-2872 (25 April 2012) [72].

<sup>1165</sup> Swart op cit note 1225 at 179.

<sup>1166</sup> el Gantri & Yaliki op cit note 545 at 33.

<sup>1167</sup> Interview recorded on the 31/09/2022.

<sup>1168</sup> Picco and Yaliki supra note 1041 at 34-35.

<sup>1169</sup> Interview recorded on the 31/09/2022.

<sup>1170</sup> Ibid.

<sup>1171</sup> Ibid.

Another comprehensive assistance program has been launched addressing harm occurred in both the CAR I and CAR II situations.<sup>1172</sup> Recipients benefit from the program for five years. The program complements any future remedies that the courts may subsequently order in situation II and was launched on February 1, 2021.<sup>1173</sup> In 2022, for example, 994 victims of sexual violence and their families benefited from physical and psychological rehabilitation assistance and socio-economic support in the province of Lobaye.<sup>1174</sup> The renewal of this aid is subject to the availability of funds.<sup>1175</sup> 14,678 survivors of sexual violence and their families have also benefited from physical and psychological reintegration services in Begoua and Damara in the Ombella Mpoko prefecture.<sup>1176</sup> In total, by 30 June 2022, a total of 6232 individuals (1742 males and 4490 females) received assistance through the TFV assistance programme in the CAR.<sup>1177</sup> In addition, a total of 50 victims of rape and sexual violence, as well as their partners, received training on positive masculinity to strengthen their knowledge on gender equality and empowerment, while 8,296 people, including survivors of sexual violence, participated in community peace education and awareness-raising activities on the elimination of all forms of VAW in the CAR.<sup>1178</sup> However, monitoring and evaluation activities have been largely hampered in the provinces for economic, security and health reasons.<sup>1179</sup>

Although these programs are a first step towards some form of assistance to victims of GBV, they remain restricted to a limited number of victims and do not cover the whole country. The *Bemba* case is a good example, where the assistance provided by the Fund only targeted 200 victims in the country's capital, thus excluding the majority of other victims. Moreover, this Fund is dependent on the contributions it receives: contributions that are made on a voluntary basis and, therefore, which in no way oblige states Parties to the ICC to contribute or give priority to this Fund over other development aid projects.<sup>1180</sup> Ultimately, this program remains humanitarian aid and cannot be confused with a reparations program. One respondent noted that victims are therefore unlikely to perceive this aid as a form of

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<sup>1172</sup> The trust Fund for Victims' website, *Updated Information on Central African Republic programme activities in 2022*, (last consulted on the 18<sup>th</sup> of April 2023), online at:

<https://www.trustfundforvictims.org/node/366>.

<sup>1173</sup> Picco and Yaliki supra note 1041 at 34-35.

<sup>1174</sup> The trust Fund for Victims' website, supra note 1265.

<sup>1175</sup> Ibid.

<sup>1176</sup> Ibid.

<sup>1177</sup> Ibid.

<sup>1178</sup> Ibid.

<sup>1179</sup> Ibid.

<sup>1180</sup> Fowler op cit note 1128 at 50.

justice since humanitarian aid is already present in the country.<sup>1181</sup> This form of assistance therefore does not recognise the victim status of female victims of SGBC.<sup>1182</sup>

*(iii.2) Reparations granted by the SCC*

The law on the creation of the SCC does not contain any provisions regarding the right to reparation of victims.<sup>1183</sup> The RPE of the SCC however complement these provisions.<sup>1184</sup> The SCC may grant individual reparation measures or collective reparation measures that are adapted to the nature and extent of the damages suffered by the civil parties.<sup>1185</sup> The SCC may order ‘monetary compensation, training, and socio-professional integration measures, medical and psychological care measures or aimed at the establishment of an agrarian or industrial development fund or the setting up of educational programmes.’<sup>1186</sup> Therefore, these reparations also have the potential to be transformative although subject to the same limitations as the ones granted by the ICC. However, in the case of the SCC, the biggest challenge will be to find the funds to finance these reparations.

In that regard, the Assise Section may invite the victim and defense assistance service created within the Registry to seek external funding,<sup>1187</sup> while ensuring that these reparations remain consistent with those awarded by the ICC and national courts.<sup>1188</sup> A special fund should also be created as it could partly solve the problem of the underfunding of the SCC by attracting more donors,<sup>1189</sup> even if the problem of financing it also arises<sup>1190</sup>. The SCC is indeed currently only funded up to half of its budget, and only the endowment of the United States can, as of 2023, constitute a sure source for possible reparations.<sup>1191</sup>

A FIDH report also underlines that for reparations to have a tangible impact on their beneficiaries, victims must be duly consulted on their needs and expectations.<sup>1192</sup> Only one

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<sup>1181</sup> Interview recorded 31/09/2022.

<sup>1182</sup> Interview recorded 31/09/2022.

<sup>1183</sup> Justice Info, Nader I. Diab Réparations en Centrafrique: la CPS doit y penser maintenant (Juillet 2019), online at : <https://www.justiceinfo.net/fr/les-debats-justiceinfo/opinions/41801-reparations-en-centrafrique-la-cps-doit-y-penser-maintenant.html>.

<sup>1184</sup> Organic Law 18-010 supra note 1077.

<sup>1185</sup> Ibid, art 129 (A) & 129 (B).

<sup>1186</sup> el Gantri & Yaliki op cit note 545 at 26/ Also see Perez-Leon-Acevedo op cit note 1097 at 14/ Organic Law 18-010 supra note 1077, art 129 (B).

<sup>1187</sup> Organic Law 18-010 supra note 1077, art 129 (D) / Also see Perez-Leon-Acevedo op cit note 1097 at 14.

<sup>1188</sup> el Gantri & Yaliki op cit note 545 at 26.

<sup>1189</sup> Interview recorded on the 09/11/2022.

<sup>1190</sup> Justiceinfo.net, Jean-Fernand Koena *Centrafrique : La Cour Spéciale Confrontée à la Question des Réparations* (2023), online at : <https://www.justiceinfo.net/fr/111911-centrafrique-cour-penale-speciale-cps-reparations.html>.

<sup>1191</sup> Ibid.

<sup>1192</sup> FIDH, OCDH & Ligue Centrafricaine des Droits de l’Homme supra note 589 at 47.

meeting with the victims of the *Issa Sallet Adoum (alias Bozize), Yaouba Ousman, and Mahamat Tahir* case was held in Koundjili and Lemouna to ask them about their expectations in terms of reparation. The civil parties consulted, around forty, estimated collective and individual reparations at 1.38 billion CFA francs (about 2.1 million euros). Their lawyers asked for a sum of 30 million CFA francs (about 45,000 euros) for each widow, 20 million for each orphan, 60 to 600 million for the raped women, as well as the construction of basic social infrastructure, schools and hospitals, as reparations.<sup>1193</sup> As the Court has just rendered its first decision in this case, its compensation strategy could soon become more apparent. However, at the time of writing this thesis, the reparations order had not yet been made public.

## Conclusion

This section tends to illustrate the inherent limits, in terms of social change, of retributive justice. Only a limited number of victims and perpetrators can be considered by this type of justice, even if it works well, which is, as illustrated above, not yet the case in the CAR. In terms of reparations, while international and hybrid criminal tribunals increasingly include in their mandates the granting of transformative reparations, the fact remains that these reparations will necessarily be limited to a small number of individuals, even if these are collective. It is also questionable whether criminal courts, which cannot judge state responsibility, can have a tangible impact on public policies and institutional changes. This is why authors who have been interested in the term transformative justice have often focused their work mainly on the mandates of truth and reconciliation commissions, which, by considering the collective responsibility of the state, as well as the responsibility of other actors, would allow both the inclusion of a larger number of victims who can participate in restorative justice and the granting of reparations which could have a greater structural impact.

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<sup>1193</sup> Koena supra note 1283.

(c) Restorative justice

The mandate of the CVJRR allows restorative justice to occur in the CAR. The procedure before the CVJRR may seem ‘fairly similar to that of a judicial body, with the possibility to file a complaint, the power to act on its own motion, public or closed testimony depending on the circumstances, the possibility to request searches and to hear “any person likely to facilitate its work aimed at establishing the facts”.’<sup>1194</sup> The CVJRR can rely on expansive powers to conduct its investigations (articles 51-53) and can allow amicable arrangements between the parties in terms of reparation, compensation, or settlement at the end of the hearing sessions (article 59). Amicable settlements reached between the parties have the force of *res judicata*, so that failure to respect or implement them may lead to referral to courts and tribunals with jurisdiction.<sup>1195</sup>

However, if the procedure seems similar to that of a court, reconciliation takes precedence over legal retribution in restorative justice.<sup>1196</sup> Restorative justice is, in fact, more a matter of relational transformation<sup>1197</sup> to achieve what is called in this thesis interactional reconciliation, meaning reconciliation between the parties to the conflict, whether between individuals or between individuals and the state. This means it is a type of justice that is more ‘holistic, integrative, inclusive, participatory, democratic, and committed to subsidiarity,’ and entails ‘practices that are flexible and contextual; based on dialogue and encounter; non-adversarial, multi-party, and future-focused.’<sup>1198</sup> In restorative theory, offenders are responsible not because of the violation of the law but for the harm done to their victims and the community to which they often both belong.<sup>1199</sup> This type of justice, therefore, offers the parties affected by the crimes to be part of the solution,<sup>1200</sup> and, since it is more victim-focused, does not depend on the conviction of an accused for reparations.<sup>1201</sup> Ultimately, restorative justice, in the words of Tutu, translates:

the spirit of *ubuntu*, the healing of breaches, the redressing of imbalances, the restoration of broken relationships. This kind of justice seeks to rehabilitate both the victim and the perpetrator, who should be given the opportunity to be reintegrated into the community he or she has injured by his or her offence. This is a far more personal approach, which sees the

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<sup>1194</sup> FIDH, OCDH & Ligue Centrafricaine des Droits de l’Homme supra note 589 at 31 referring to Law establishing the CVJRR supra note 885, Articles 44, 54, 51, 55 and 59.

<sup>1195</sup> Ibid at 31 referring to Law establishing the CVJRR supra note 885, Articles 44, 54, 51, 55 and 59 / Also see Interview recorded on the 29/12/2022.

<sup>1196</sup> Gentile & Foster op cit note 60 at 511.

<sup>1197</sup> Lambourne op cit note 65 at 46/ Also see Murphy op cit note 467 at 145.

<sup>1198</sup> Jennifer J. Llewellyn & Daniel Philpott ‘Restorative justice and reconciliation: Twin frameworks for peacebuilding’ in *Restorative justice, reconciliation, and peacebuilding* (2014) 23.

<sup>1199</sup> McGill op cit note 339 at 88.

<sup>1200</sup> Daniel W. Van Ness ‘Accountability’ in *Restorative justice, reconciliation, and peacebuilding* (2014) 124.

<sup>1201</sup> Moffett op cit note 751 at 1207.

offence as something that has happened to people and whose consequence is a rupture in relationships. Thus we would claim that justice or restorative justice is being served when efforts are being made to work for healing, for forgiveness and for reconciliation.<sup>1202</sup>

This approach to justice has long been encouraged by early feminist literature, which advocate for ‘alternative, non-litigious, dispute resolution and non-confrontational negotiation techniques’<sup>1203</sup> better suited to deliver justice to women victims. Therefore, what first appeared with the South African TRC as compromises based on ‘truth for amnesty’ is ‘hereby reconceptualized, away from a notion of a problematic “justice gap” and towards a notion of an innovative “bottom up” mechanism (...),’<sup>1204</sup> arguably capable of delivering a ‘differently textured accountability by moving beyond adversarial justice as adjudications of individual guilt toward a more complex account of individual, communal, and institutional accountability.’<sup>1205</sup> This section, therefore, proposes to explore how restorative justice, which has yet to begin in the CAR, can be transformative for victims of SGBV in the country.

(i) Victims and Perpetrators

Restorative justice is often seen as better suited to the needs of victims of SGBV ‘as their procedures are more flexible, and evidentiary standards and costs are considerably lower.’<sup>1206</sup> TRCs depart from strict top-down legal proceedings,<sup>1207</sup> and victims can participate in restorative justice on their terms. TRCs give voice to women's stories<sup>1208</sup> in forums where they can speak about their experience of violence and express ‘their multiple justice needs and priorities’<sup>1209</sup> which can contrast with the procedure before criminal courts as seen above. For example, in Peru, ‘(T)he decision to not use the CVR as a forum for victims and perpetrators to meet enabled victims greater freedom to organise their narratives according to their own political, emotional and psychological needs.’<sup>1210</sup> Women can also testify about the economic and social violence they endure, and as seen in Chapter 2, include a larger set of

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<sup>1202</sup> Keevy op cit note 504 at 383 referring to D. Tutu *No future without forgiveness* (1999) at 51-52.

<sup>1203</sup> Charlesworth, Chinkin & Wright op cit note 372 at 615-616.

<sup>1204</sup> Bell & O'Rourke op cit note 287 at 40.

<sup>1205</sup> Ibid at 40.

<sup>1206</sup> Guidance Note supra note 319 at 6.

<sup>1207</sup> Reilly op cit note 274 at 163.

<sup>1208</sup> Bell & O'Rourke op cit note 287 at 33.

<sup>1209</sup> Wendy Lambourne & Vivianna Rodriguez Carreon ‘Engendering transitional justice: A transformative approach to building peace and attaining human rights for women’ (2016) *Human Rights Review* 17, no. 1: 71-93 at 79.

<sup>1210</sup> Sofia Macher ‘Quechua Women: Agency in the Testimonies of the CVR—Peru Public Hearings’ in *Rethinking Transitional Gender Justice* (2019) 244.

GBV.<sup>1211</sup> Ultimately, GBV can be linked to the wider structure that allowed it in the first place, and therefore be ‘conceptualized as part of a pattern of multidimensional exclusion across race, class, gender and other dimensions.’<sup>1212</sup> The inclusion of women in restorative justice processes is therefore essential.

*(i.1) Gender sensitivity and inclusion*

In recent years, TRCs have tended to be more gender-sensitive with the creation of gender units, as in Peru,<sup>1213</sup> by implementing measures to encourage women's participation,<sup>1214</sup> thematic hearings dedicated to women, as in South Africa,<sup>1215</sup> and special research teams dedicated to VAW like in Colombia.<sup>1216</sup> In Sierra Leone, free transport to and from the Commission was provided to women victims of sexual violence to attend and participate in the Commission's public thematic hearing on the experience of women.<sup>1217</sup> The Truth, Justice, and Reconciliation Commission (TJRC) of Kenya held 39 separate hearings for women nationwide, provided translation services, and covered transport and childcare costs if required to facilitate their presence. The TJRC has also engaged the services of counselors to provide psychosocial support before, during, and after the hearings.<sup>1218</sup>

In the CAR, The law creating the CVJRR ensures that the commission has a gender-balanced composition.<sup>1219</sup> Of the 11 commissioners appointed, five are women.<sup>1220</sup> The Commission can also integrate SGBV into its work since gender justice is explicitly part of its mandate.<sup>1221</sup> Gender is therefore supposed to appear in the work of the CVJRR from the design and planning phase through implementation to the drafting of a final report,<sup>1222</sup> first by identifying issues specific to women and then by assessing how these issues may be

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<sup>1211</sup> Cahill-Ripley op cit 332 at 210.

<sup>1212</sup> McGill op cit note 339 at 83.

<sup>1213</sup> Lambourne & Carreon op cit note 1307 at 79.

<sup>1214</sup> Ibid at 79.

<sup>1215</sup> Ruth Rubio-Marín ‘The gender of reparations in transitional societies’ in *The gender of reparations: Unsettling sexual hierarchies while redressing human rights violations* (2009) 76.

<sup>1216</sup> Ibid at 76.

<sup>1217</sup> Asia Justice and Rights supra note 607 at 167.

<sup>1218</sup> UN Women supra note 963 at 111.

<sup>1219</sup> Law establishing the CVJRR supra note 885, art 7/ Also see Supra note 41 UN Doc A/75/174 § 14: ‘It is essential to achieve gender parity or balance among commission members. This: (a) brings greater visibility to the political decision to include a gender perspective in commission work, (b) ensures the presence of women at the highest decision-making levels of commissions; and (c) brings commissions closer to women victims.’

<sup>1220</sup> Central African Republic, *Décret 20.435 entérinant la désignation des membres de la Commission Vérité, Justice, Réparation et Réconciliation (Decree 20.435 approving the appointment of the members of the Truth, Justice, Reparation and Reconciliation Commission)*, 30 December 2020.

<sup>1221</sup> Law establishing the CVJRR supra note 885, art 6 paras 9 and 10.

<sup>1222</sup> Interview recorded on the 29/12/2022.



influenced by gender inequalities<sup>1223</sup> while ensuring that these inequalities are not perpetuated or reinforced inadvertently.<sup>1224</sup> The CVJRR will also offer protection to victims and witnesses, paying particular attention to the most vulnerable (article 44). This includes psychological assistance to victims,<sup>1225</sup> and the creation of an environment conducive to the testimony of victims.<sup>1226</sup> To this end, the law creates a unit for the protection and support of victims and witnesses.<sup>1227</sup> Rubio-Marin also notes that a supportive environment includes the possibility for the victims to testify confidentially, especially for victims of sexual violence.<sup>1228</sup> In addition, UNDP and UN Women participated in the development of a gender handbook to assist commissioners in the search for truth and reparations.<sup>1229</sup>

Given the structural barriers that may prevent some victims from participating, it is often recommended that consultations be conducted in the local or vernacular dialect of the populations concerned and organised in a decentralised manner: ‘in proximity to the places of residence or displacement of the marginalized persons and groups identified.’<sup>1230</sup> This is all the more important since, as Rubio-Marin and de Greiff argue, ‘by providing both recognition and a space for participation, reparations contain “transformative” potential.’<sup>1231</sup> It is, therefore, essential to also reach out to women living in rural areas. In the CAR, UNDP and UN Women organised discussion workshops in Bangui and the provinces to explain to the population the mandate of the Commission.<sup>1232</sup> However, if the population living in the capital, as seen in the previous chapter, has a rather good knowledge of the mechanisms of TJ, many people living in the provinces still do not understand the role of the CVJRR,<sup>1233</sup> and often think of the Commission as a judicial mechanism.<sup>1234</sup> In the future, seven regions have also been identified to set up CVJRR community relays.<sup>1235</sup> However, it is very likely that the activities organised in the provinces will not be the same as in the capital since the public hearings will take place mainly in Bangui.<sup>1236</sup> This centralisation of restorative justice runs

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<sup>1223</sup> Ibid.

<sup>1224</sup> Ibid.

<sup>1225</sup> Law establishing the CVJRR supra note 885, art 58.

<sup>1226</sup> Ibid, arts 52 and 54.

<sup>1227</sup> Ibid, art 36.

<sup>1228</sup> Rubio-Marin op cit note 1313 at 80.

<sup>1229</sup> Interview recorded on the 13/12/2022 (1).

<sup>1230</sup> Supra note 41 UN Doc A/75/174 § 90.

<sup>1231</sup> Roger Duthie ‘Toward a development-sensitive approach to transitional justice’ (2008) *The International Journal of Transitional Justice* 2, no. 3: 292-309 at 296 citing Ruth Rubio-Marin & Pablo de Greiff ‘Women and Reparations’ (2007) *International Journal of Transitional Justice* 1(3): 325.

<sup>1232</sup> Interview recorded on the 13/12/2022 (1).

<sup>1233</sup> Ibid.

<sup>1234</sup> Ibid.

<sup>1235</sup> Ibid.

<sup>1236</sup> Ibid.

the risk of excluding many women from the CVJRR procedure, which is reinforced by a still limited outreach activity on the work of the CVJRR.<sup>1237</sup>

The full participation of women and girls at every stage of the reparation process has however been encouraged by the Nairobi Principles (2 B), emphasising the need to take into account women's and girls' specific circumstances (2E) and by recent research led by the LSE Centre for Women, Peace, and Security.<sup>1238</sup> Limiting public hearings to the capital therefore risks limiting CAR's ambition to have a holistic, inclusive and transparent reparations program. This program, according to a respondent, implies that direct and indirect victims of serious human rights violations be individually identified through several activities, such as data collection and victim identification surveys.<sup>1239</sup> The victims must, in a second phase, be invited to participate effectively in the development of the national program of reparations.<sup>1240</sup> As of 2023, consultations has been held with some associations of victims of sexual violence. A committee in charge of victims of sexual violence has been created, composed of a gynecologist, a magistrate, a psychologist, and other experts and is considered the focal point of the CVJRR in developing reparation measures.<sup>1241</sup> Consultations with some of the victims also took place and it appeared that the victims of sexual violence had high expectations in terms of economic rehabilitation.<sup>1242</sup>

*(i.2) A larger set of victims*

In the CAR, determining who is or is not a victim is highly complicated.<sup>1243</sup> Within the framework of the CVJRR's mandate, the categories of victims targeted by the reparation measures could be considerably broadened since the CVJRR will consider the victims of SGBC but also the victims of human rights violations and the gendered impact of these violations. In article 44 of Title VI of the CVJRR, the law establishes that any natural or legal person, any group of people harmed by an individual, collective or massive violation of human rights, can seize the CVJRR by filing a complaint.<sup>1244</sup> With respect to interim

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<sup>1237</sup> Justiceinfo.net, Rodrigue Le Roi Bengua *Centrafrique : Une Commission au pieds du mur* (February 2023), online at : <https://www.justiceinfo.net/fr/112120-centrafrique-commission-verite-au-pied-du-mur.html>.

<sup>1238</sup> Centre for Women, Peace, Security, LSE, Our Generation for Inclusive Peace (OGIP) – Policy Brief (05/2022), at 4, online at: <https://www.lse.ac.uk/women-peace-security/assets/documents/An-inclusive-and-sustainable-approach-to-relief-and-recovery-policy-brief-05.pdf>.

<sup>1239</sup> Interview recorded on the 29/12/2022.

<sup>1240</sup> Ibid.

<sup>1241</sup> Interview recorded on the 19/12/2022.

<sup>1242</sup> Interview recorded on the 13/12/2022 (1).

<sup>1243</sup> Interview recorded on the 31/09/2022.

<sup>1244</sup> Law establishing the CVJRR supra note 885.

reparation measures, the CVJRR will target victims who need urgent support during the deposition or hearing process.<sup>1245</sup> In more general terms, the Basic Principles and Guidelines define ‘victims’ as:

persons who individually or collectively suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights, through acts or omissions that constitute gross violations of international human rights law, or serious violations of international humanitarian law. Where appropriate, and in accordance with domestic law, the term “victim” also includes the immediate family or dependants of the direct victim and persons who have suffered harm in intervening to assist victims in distress or to prevent victimization.<sup>1246</sup>

This includes family members, such as children or partners of victims of conflict-related sexual violence.<sup>1247</sup>

It is generally encouraged to ‘allow children born of rape to be recognized as autonomous victims of a sexual violations; and recognize as autonomous violations, for example, the interruption of the life plan of persons who sought the release of a relative, or of persons caring for a relative with disabilities due to torture, which are experiences often faced by women.’<sup>1248</sup> Victims can also be ‘close family members or dependents of the direct victim and persons who, by intervening to help victims who were in a critical situation or to prevent persecution, have suffered harm.’<sup>1249</sup> This calls to ‘use a definition of the family that does not restrict the meaning to a rigid or legalistic concept, or to dominant cultural views, and that includes people who are emotionally attached to or in a dependent relationship with the primary victims.’<sup>1250</sup> As discussed in Chapter 1, unions not recognised by state law nonetheless reflect the natural web of dependencies in the CAR. In this regard, reparations programs in South Africa, Peru, and Guatemala have all at least taken steps to recognise informal unions.<sup>1251</sup>

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<sup>1245</sup> Interview recorded on the 29/12/2022.

<sup>1246</sup> Supra note 33 UN General Assembly, *Basic Principles* § 8/ Also see African Union supra note 65 § 21: ‘The concept of **victims** is used in this policy to refer to persons who individually or collectively suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights, through acts or omissions that constitute gross violations of international human rights law, or serious violations of international humanitarian law.’

<sup>1247</sup> Guidance Note supra note 319 at 3.

<sup>1248</sup> Supra note 41 UN Doc A/75/174 § 29 (c).

<sup>1249</sup> Commission Africaine des droits de l’homme et des Peuples, Directives et Principes sur le droit à un procès équitable et à l’assistance judiciaire, Doc. OC/OS(XXX) 247(2001), Section S(n), online at: [https://redress.org/wp-content/uploads/2017/12/CAR\\_Paper\\_Rules\\_FINAL\\_FRENCH.pdf](https://redress.org/wp-content/uploads/2017/12/CAR_Paper_Rules_FINAL_FRENCH.pdf).

<sup>1250</sup> Supra note 41 UN Doc A/75/174 § 29 (d).

<sup>1251</sup> Rubio-Marín op cit note 1313 at 94.

Reparations have also often been awarded to victims who were unable to testify before a truth commission due to structural barriers or fear of stigma. In Peru,<sup>1252</sup> all rape victims were included as beneficiaries of symbolic and economic reparations in the follow-up to the Commission de la Verdad y Reconciliacion (CVR) report;<sup>1253</sup> the same was true in Timor Leste.<sup>1254</sup> This approach could make it possible to take into account, in the reparations granted by the CVJRR, women living in the provinces, who have not been able to go to Bangui, and who can nevertheless be qualified as victims. TRCs are also increasingly encouraged to consider domestic violence, often aggravated by conflict due to deprivation, insecurity, and stress.<sup>1255</sup> The work of the CVJRR can therefore include a broader set of victims since the notions of family, indirect and direct victims are understood more broadly than the definition usually given by international criminal tribunals. Moreover, these mechanisms can establish not only individual responsibilities for massive violations of human rights but also collective ones.

### *(i.3) Individual and collective liability*

The perpetrators, in restorative justice, can be either a collective entity such as the state, a natural person, a legal person, or another entity found responsible for violations of international human rights law and international humanitarian law.<sup>1256</sup> The CVJRR can establish individual or collective non-judicial responsibilities of legal persons and private groups such as moral, political, social and economic responsibilities, in the commission of violations falling within the provisions of the law.<sup>1257</sup> Instead of focusing on the individual responsibility of a few actors, the CVJRR can therefore also deal with the responsibility of a collective agent such as the state. This approach allows for a better analysis of the structural

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<sup>1252</sup> In Peru victims were defined as: ‘According to the CVR, the beneficiaries of the Plan will be any individual or group of individuals who suffered acts or omissions that amount to violations or abuses of international human rights law, including those who were subjected to forced disappearance, kidnapping, extrajudicial execution, murder, enforced displacement, arbitrary detention and violation of due process, enforced recruitment, torture and rape, as well as those who were wounded, injured or killed as a result of attacks by the armed opposition groups, regardless of who the perpetrator was, what relationship he or she had with the victim and what the victim may have done in the past.’ See Amnesty International *Peru: The Truth and Reconciliation Commission- A first step towards a country without injustice* (2004) at 23 referring to *Final Report*, Volume IX, ‘Comprehensive Plan for Reparations’ at 149.

<sup>1253</sup> Lambourne & Carreon op cit note 1307 at 81.

<sup>1254</sup> Guidance Note supra note 319 at 11.

<sup>1255</sup> The Washington Post, Chen Reis & Marie E. Berry *How do we reduce sexual and gender violence in conflict? Consider these five key issues* (2019), online at: <https://www.washingtonpost.com/politics/2019/05/21/how-do-you-reduce-sexual-gender-violence-conflict-consider-these-five-key-issues/>. – Oslo conference.

<sup>1256</sup> Guidance Note supra note 319 at 4.

<sup>1257</sup> Law establishing the CVJRR supra note 885, art. 6 § 4.

causes of VAW and opens up greater possibilities for reparation and reconciliation. It also makes it possible to include collective crimes in the state's duty of due diligence instead of limiting them to the establishment of individual responsibilities, which can lead, as seen above, to an acquittal and, therefore, a lack of reparation for the victims.

The state has duties to respect; that is to say, it cannot encroach on the enjoyment of individual freedom or rights. To prevent the violation of a right or freedom, the state may need to take proactive measures, for example, to prevent state agents from acting in certain ways or to provide redress if a duty has been breached.<sup>1258</sup> In the *Social and Economic Rights Action/Center for Economic and Social Rights v. Nigeria (SERAC and CESR)* case, for example, the African Commission on Human and Peoples' Rights endorsed the notion of duties to respect the enjoyment of ESC rights.<sup>1259</sup> The Commission concluded that the government of Nigeria had failed in its obligations to respect the rights to health and a healthy environment by directly 'attacking, burning and destroying several Ogoni villages and homes.'<sup>1260</sup> The Commission also found that there had been violations of the right to housing: "At a very minimum, the right to shelter obliges the Nigerian Government not to destroy the housing of its citizens and not to obstruct efforts by individuals or communities to rebuild lost homes."<sup>1261</sup> In the CAR, specific waves of violence, such as the scorched earth campaign by government troops during the armed conflict in the northwest of the country in 2006, are of particular concern because of the scale of the destruction of civilians' property and blatant disregard for the fundamental principles of humanitarian law.<sup>1262</sup> The CVJRR can therefore find that the state has, in this situation, failed in its duty to respect. The likely disproportionate impact these violations have had on women can also be considered. The obligation to respect is not subject to progressive realisation but has an immediate effect.

The state also has an obligation to protect individuals against interference by third parties in the enjoyment of their rights. This obligation is generally of immediate effect as well.<sup>1263</sup> It is therefore also necessary to assess whether the state could have taken measures to prevent violations from occurring, even if they were committed by other non-state actors,

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<sup>1258</sup> International Commission of Jurists *Courts and the Legal enforcement of economic, social and cultural rights: Comparative experience of justiciability*, Human Rights and Rule of Law series: No 2 (2008) at 42.

<sup>1259</sup> See African Commission on Human and Peoples' Rights, *SERAC and CESR v. Nigeria*, Communication N° 155/96, October 13-27, 2001.

<sup>1260</sup> *Ibid* para 54.

<sup>1261</sup> *Ibid* paras 61-62.

<sup>1262</sup> MINUSCA *op cit* note 119 at 26.

<sup>1263</sup> United Nations Human Rights Office of the High Commissioner *supra* note 915 at 12.

and therefore failed in its duty to protect its citizens adequately.<sup>1264</sup> For example, the Inter-American Court of Human Rights considered the massacres perpetrated by paramilitary groups in Colombia as a violation by the state of its duty to protect ESC rights. The massacres caused the forced eviction and displacement of the civilian population, as well as the loss of their homes and livelihoods. The state was found responsible, among other things, for its failure to protect the civilian population from attacks by paramilitary groups, which the court said were the responsibility of the Colombian army, which controlled the entire area.<sup>1265</sup> *Acts or omissions* may therefore constitute gross violations of international human rights law or serious violations of international humanitarian law (Principle V).<sup>1266</sup> Recent reparations programs, such as those in Peru or Guatemala, embrace this broad notion of state liability by omission.<sup>1267</sup> This development is promising for women because, in the CAR, non-state agents are primarily responsible for certain types of violations against women, including forced marriage and sexual slavery. Ultimately, this approach leads to a wider range of possibilities for women in terms of reconciliation.

(ii) Interactional Reconciliation

Although the law establishing the CVJRR does not mention amnesties, one of its missions is to ‘put in place a programme of actions to promote forgiveness and reconciliation’.<sup>1268</sup> Restorative justice is indeed often associated with the concept of reconciliation. Although the two terms are not identical, they share a strong common filiation<sup>1269</sup> due to their common attachment to a relational conception of justice.<sup>1270</sup> Reconciliation is sometimes understood as forgiveness,<sup>1271</sup> the recalibration of feelings of shame and guilt between agents.<sup>1272</sup> Conversely, it can leave unchanged ‘people’s sentimental attitudes toward those who wronged them or contributed to their suffering and losses.’<sup>1273</sup> Ultimately, reconciliation is a word that

<sup>1264</sup> Rubio-Marín op cit note 1313 at 86.

<sup>1265</sup> International Commission of Jurists supra note 1356 at 46 referring to Inter-American Court of Human Rights, *Mapiripán Massacre v. Colombia*, September 15, 2005, paras. 167-189 (violation of the right to freedom of movement and residence); *Ituango Massacres v. Colombia*, July 1, 2006, paras. 172-200 (violation of the right to property and the right to privacy, family life and home) and 204-235 (violation of the right to freedom of movement and residence).

<sup>1266</sup> Supra note 33 UN General Assembly, *Basic Principles* § 15/ Also see Aoláin, O’Rourke & Swaine op cit note 140 at 118.

<sup>1267</sup> Rubio-Marín op cit note 1313 at 87.

<sup>1268</sup> FIDH, OCDH & Ligue Centrafricaine des Droits de l’Homme supra note 589 at 44.

<sup>1269</sup> Llewellyn & Philpott op cit note 1296 at 16.

<sup>1270</sup> Ibid at 28.

<sup>1271</sup> See Ruth Kattumuri & Amalie Kvame Holm ‘Reconciliation and transitional justice: the contribution of forgiveness towards healing and restoration’ in *Global Civil Society 2011* (2011).

<sup>1272</sup> Lu op cit note 283 at 192.

<sup>1273</sup> Ibid at 192/ Also see Mark Gibney (ed.) *The age of apology: Facing up to the past* (2008).

can mean many things ranging from '(c)hanging hearts, changing minds, restoring relationships, forgiveness, apology, (...), former enemies shaking hands and agreeing to put the past behind them (...).'<sup>1274</sup> It is a word that travels well 'across languages and religions while allowing different peoples to impute somewhat different meanings to it as it travels.'<sup>1275</sup> Given that the meaning given to reconciliation differs depending on the context, reconciliation is likely to be best achieved if it is rooted in the values and beliefs of the nation or communities in transition.<sup>1276</sup> This section therefore proposes to study what is understood by reconciliation at the level of the community and at the national level.

*(ii.1) Interactional reconciliation at the community level*

At the community level, such a process is often recommended to be context-sensitive.<sup>1277</sup> Using the work of Engle Merry, Braithwaite argues for restorative justice discourse to be vernacularised into the language of local tradition in most contexts to link the restorative justice process 'with the cultural, religious, and moral identities of the people living through these circumstances and processes.'<sup>1278</sup> Therefore, more 'traditional'<sup>1279</sup> modes of justice are seen as an appropriate option in the CAR. The mandate of the CVJRR allows for the use of 'traditional and neo-traditional mechanisms of reparation and reconciliation.'<sup>1280</sup> The CVJRR can organise rituals 'in accordance with the prevailing customs or practices in the region concerned.'<sup>1281</sup> In general, the inclusion of traditional justice into TJ's mechanisms has been gaining more traction in recent years. This approach can be important because, as seen in chapter 1 of this thesis, some women may feel more comfortable with a type of justice rooted in their traditions and using their languages.

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<sup>1274</sup> John Braithwaite 'Traditional justice' in *Restorative Justice, Reconciliation, and Peacebuilding* (2014) 225.

<sup>1275</sup> Ibid at 225-226.

<sup>1276</sup> Thomason op cit note 1217 at 72.

<sup>1277</sup> Kattumuri & Holm op cit 1369 at 38.

<sup>1278</sup> Jason A. Springs 'Doing Justice Differently: From Revolution to Transformation in Restorative Justice and Political Reconciliation' in *Restorative Justice, Reconciliation, and Peacebuilding* (2014) 247.

<sup>1279</sup> Traditional systems are often referred to by other terms, such as 'customary, informal, community-based, grassroots, indigenous and local' – See Tim Allen & Anna Macdonald 'Post-conflict traditional justice: a critical overview' (2013) at 2. / Also see the African Union *Transitional Justice Policy* (2019): '**Traditional and complementary** justice mechanisms are the local processes, including rituals, which communities use for adjudicating disputes and for restoring the loss caused through violence in accordance with established community-based norms and practices. They include traditional adjudicative processes such as clan or customary courts and community-based dialogue.'

<sup>1280</sup> Law establishing the CVJRR supra note 885, art. 6 para. 8.

<sup>1281</sup> Ibid, articles 61 & 59.

The General Assembly of the UN underlined that 'transitional justice processes should be adapted to ensure cultural appropriateness and consistency with customary legal practices and concepts concerning justice and conflict resolution,<sup>1282</sup> therefore '(t)ruth processes and reparations programmes should be designed in a way that respects the cultures and values of indigenous peoples.'<sup>1283</sup> The African Union Transitional Justice Policy (AUTJP), adopted in 2019, also recognises the importance of customary norms and traditional justice mechanisms in addressing the legacies of violence on the African continent.<sup>1284</sup> This policy tends to be a home-grown toolkit 'unique to Africa, rich in its progressive methodologies and approaches, and rooted in African shared values, traditional justice systems, and experiences.'<sup>1285</sup> It was adopted by the AU, of which the CAR is a member, to advance the goals of the AU's Agenda 2063: The Africa We Want.<sup>1286</sup> The text emphasises the need to use traditional and complementary justice mechanisms 'alongside the formal mechanisms to address the justice, healing, and reconciliation needs of affected communities with due regard to the ACHPR and the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa.'<sup>1287</sup> This text therefore encourages TJ mechanisms to be open to alternative ideas and concepts that are often marginalised, or even ignored, in mainstream TJ discourse.<sup>1288</sup> The African Commission Study on Transitional Justice and Human Rights (2019) also underscores that 'the African Charter, in affirming the African values of social cohesion and providing for a "right to culture," establishes a firm legal basis for relying on and making use of local or indigenous mechanisms as a vehicle for TJ.'<sup>1289</sup>

The integration of traditional justice into TJ mechanisms aligns with recent doctrine according to which local legal tradition should also be included in an African TJ context.<sup>1290</sup>

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<sup>1282</sup> United Nations Expert Mechanism on Indigenous Peoples, *Access to Justice in the Promotion and Protection of The Rights of Indigenous Peoples*, A/HRC/24/50 (2013), para 84.

<sup>1283</sup> Ibid, Annex para. 13.

<sup>1284</sup> CSVR, Nomathamsanqa Masiko-Mpaka *Policy Brief: Traditional Transitional Justice Mechanisms-Lessons from Africa* (2020) at 4, online at: <https://www.csvr.org.za/publications/2853-traditional-transitional-justicemechanisms-lessons-from-africa>; 'The AUTJP advocates for institutional and legal reforms that embrace alternative and indigenous conflict resolution practices that foster accountability, integration and reconciliation.'/ African Union supra note 65 at para 56.

<sup>1285</sup> African Union supra note 65 at iv (foreword).

<sup>1286</sup> Opongo op cit note 934 at 38.

<sup>1287</sup> African Union supra note 65 at para 18.

<sup>1288</sup> Frank Haldemann *Transitional Justice for Foxes: Conflict, Pluralism and the Politics of Compromise* (2022) at 30.

<sup>1289</sup> African Commission Study on Transitional Justice and Human Rights (2019) Adopted by the African Commission on Human and Peoples' Rights, para 62, available online at: <https://www.achpr.org/news/viewdetail?id=185>.

<sup>1290</sup> Daniel Mekonnen 'Indigenous legal tradition as a supplement to African transitional justice initiatives' (2010) *African Journal on Conflict Resolution* 10, no. 3/ Bert Ingelaere 'The Gacaca courts in Rwanda' in



Traditional justice often has the advantage of being part of the socio-cultural environment of the populations affected by the massive violation of human rights,<sup>1291</sup> and fits into the transformative agenda of TJ, according to which TJ must go 'beyond individual-centered and retributive forms'<sup>1292</sup> of justice to draw on and adapt African traditional justice or dispute resolution mechanisms.<sup>1293</sup> This makes the CVJRR the perfect forum to serve as 'a place of production of knowledge and practices of memory by others' languages and in others' temporalities and places,<sup>1294</sup> and to be a means for women to bear witness to experiences of suffering that are not always mediated by and consistent with the project of international law.<sup>1295</sup> The concept of *ubuntu* as justice, for example, implies a type of reconciliation that goes beyond interactional reconciliation between the victim and her offender, it is a justice based on the notion of harmony 'in terms of the proper relationship between a human person and the universe, between the person and nature, between the person and another person ... it regulates the relationship of the universe.'<sup>1296</sup> This type of reconciliation could therefore also imply a reconciliation that goes beyond individuals to also take into account the community of victims and perpetrators and their natural surroundings.

These modes of 'traditional' restorative justice should not, however, be integrated uncritically,<sup>1297</sup> because justice can be meted out based on a person's status, hierarchical position and accomplishment and based on their closeness to ancestors, which can sometimes sideline women's interests.<sup>1298</sup> Rather, it is about giving a voice back to women in forums that may seem more familiar to them without ignoring the complexity and diversity of traditions in the CAR. Therefore, the reintegration of traditional means of reconciliation must be based on an intersectional perspective since definitions and adherence to these practices may differ from one woman to another.<sup>1299</sup> As a result, the heterogeneity of attitudes and experiences

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Huyse, Luc and Mark Salter (ed.) *Traditional justice and reconciliation after violent conflict: Learning from African experiences* (2008) / Also see Orentlicher op cit note 4.

<sup>1291</sup> Ibid Ingelaere.

<sup>1292</sup> African Commission Study supra note 1387, para 201.

<sup>1293</sup> Ibid para 201.

<sup>1294</sup> Angela Santamaría, Dunen Muelas, Paula Caceres, Wendi Kuetguaje & Julian Villegas 'Decolonial sketches and intercultural approaches to truth: Corporeal experiences and testimonies of indigenous women in Colombia' (2020) *International Journal of Transitional Justice* 14, no. 1: 56-79 at 63.

<sup>1295</sup> Grewal op cit note 494 at 82.

<sup>1296</sup> Kevy op cit note 504 at 375 referring to M.J. Bhengu *Ubuntu: The Global Philosophy for Humankind* (2006) at 30.

<sup>1297</sup> Giada Girelli *Understanding transitional justice: a struggle for peace, reconciliation, and rebuilding* (2017) at 237.

<sup>1298</sup> Kevy op cit note 504 at 384/ Also see Allen & Macdonald op cit note 1377 at 13-14.

<sup>1299</sup> Macdonald op cit note 869 at 96-97 referring to Gearoid Millar 'Assessing Local Experiences of Truth-Telling in Sierra Leone: Getting to "Why" through a Qualitative Case Study Analysis' (2010) *International Journal of Transitional Justice* 4: 477-496.

towards customs and rituals within and between different groups must be considered. This is to guard against ‘what Adam Branch has called the “ethnojustice” agenda, which mistakenly views traditional systems of justice as “a single, coherent and positive system... universally, consensually and spontaneously adhered to by all members of that culture.”’<sup>1300</sup> Therefore, what is called ‘traditional justice’ might rather be ‘an umbrella word including a more bottom up examination of the “mundane” and unspectacular reparative and restorative activities that people in affected communities undertake,<sup>1301</sup> and a means for women to bear witness to their experiences of suffering on their terms and using their own words and symbols.<sup>1302</sup> Ultimately, what is or is not restorative takes on particular meaning in each social and political context and history and is intimately linked to the harm suffered by the victims.<sup>1303</sup>

Moreover, since religion is also an essential part of people’s beliefs in the CAR, the CVJRR can contribute to reconciliation through traditional or religious leaders. In a Resolution adopted on 19 December 2016<sup>1304</sup> the UN Security Council recalled the importance of religious leaders in the search for peaceful solutions to emerge from the crisis. In this regard, the TRC of Sierra Leone is an excellent example since it was given the power to ‘seek assistance from traditional and religious leaders to facilitate its public sessions and in resolving local conflicts arising from past violations or abuses or in support of healing and reconciliation.’<sup>1305</sup>

## *(II.2) Interactional reconciliation at the national level*

Where intersectionality is an essential concept for understanding the experience of each victim in retributive justice, a universalism inspired by the philosophy of ubuntu is reintroduced here to speak of national reconciliation.<sup>1306</sup> The concept of *ubuntu* has indeed been used in the South African TJ to extend the notion of ethnic community to the national community. This broadening of the term community has made it possible to re-imagine what

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<sup>1300</sup> Ibid at 107 referring to Adam Branch *Displacing Human Rights: War and Intervention in Northern Uganda* (2011) at 163.

<sup>1301</sup> Ibid at 107 referring to Pilar Alcalá & Erin Baines ‘Editorial Note’ (2012) *International Journal Transitional Justice*, 6:3: 386.

<sup>1302</sup> Grewal op cit note 494 at 82.

<sup>1303</sup> Layús op cit note 12 at 33.

<sup>1304</sup> Conseil de Sécurité des Nations Unies, Résolution S/AC.51/2016/3 du 16 décembre 2016, Groupe de travail sur le sort des enfants en temps de conflit armé, Conclusions concernant le sort des enfants en temps de conflits armés en République Centrafricaine at 5.

<sup>1305</sup> CSVR supra note 1382 at 7.

<sup>1306</sup> Radio France, Souleymane Bachir Diagne ‘Une pensée, trois continents et sept langues’ – Episode 5/5 : La traduction comme humanisme, online at : <https://www.radiofrance.fr/franceculture/podcasts/a-voix-nue/la-traduction-comme-humanisme-4195700>.

living together, and national reconciliation could mean. Given that the state, in restorative justice, is very often also a perpetrator, a vertical reconciliation between the state and the Central African citizens is therefore also necessary. The *ubuntu* philosophy can offer an opportunity to re-imagine justice in the CAR by emphasizing the improvement of relations between citizens and between citizens and the state.<sup>1307</sup> These considerations suggest that desirable and ethically justifiable achievements of justice through *ubuntu* would be those that improve relations between citizens by encouraging reconciliation, cooperation and harmony among them.<sup>1308</sup> In that respect, *ubuntu* could be a concept used to fashion an ordered society.<sup>1309</sup> This is so since ‘the concept of *ubuntu* equates justice “in terms of the proper relationships between a human person and the universe, between the person and nature, between the person and other persons.”’<sup>1310</sup> Restorative justice could therefore offer an avenue contributing to transforming relations between citizens. Taking the past into account indeed, far from being limited to correcting unfair individual transactions, also contributes to recreating relations between citizens on a more equitable future basis.<sup>1311</sup>

Here, the limited number of women who can participate in restorative justice processes and ask for reparations poses a problem. It is indeed difficult to determine which person should take part in this national reconciliation and subsequently be the beneficiary of reparations when the violations of rights, whether civil and political or ESC, have been massively suffered and have affected not only the direct victims but also their descendants and all the women living in the same country.<sup>1312</sup> The diminished agency produced by mass violations, and the continual insecurity that such violations manifest, usually have consequences for all women.<sup>1313</sup> Gender is therefore by itself a risk factor for women.<sup>1314</sup> Indeed, in contexts of massive human rights violations, non-victims often feel that after what happened to the victims, no one can be safe, and no one can know what to expect. The result

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<sup>1307</sup> Martin Ajei & Richmond Kwesi ‘Consciencism, Ubuntu, and Justice’ (2010) *Nigerian Journal of Philosophy* 26 (2018) at 83 citing Metz & Gaie op cit note 2042 at 277.

<sup>1308</sup> Ibid at 83 citing Metz & Gaie op cit note 2042 at 277.

<sup>1309</sup> Moeketsi Letseka ‘Ubuntu and justice as fairness’ (2014) *Mediterranean journal of social sciences* 5, no. 9: 544 at 549.

<sup>1310</sup> Ibid at 549 referring to Keevy op cit note 504 at 375.

<sup>1311</sup> McGill op cit note 339 at 89.

<sup>1312</sup> See for example, *Report of the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence, Transitional justice measures and addressing the legacy of gross violations of human rights and international humanitarian law committed in colonial contexts*, GA, 2021, UN Doc A/76/180, § 57 online at: <https://documents-dds-ny.un.org/doc/UNDOC/GEN/N21/197/81/PDF/N2119781.pdf?OpenElement>.

<sup>1313</sup> De Greiff op cit note 515 at 45.

<sup>1314</sup> Karen Engle, Vasuki Nesiiah & Dianne Otto ‘Feminist Approaches to International Law’ (2021) *U of Texas Law, Public Law Research Paper* 716 at 8 referring to Mary Robinson ‘Connecting Human Rights, Human Development, and Human Security’ in *Human Rights in the ‘war on terror’* (2004) at 308.

is a general weakening of agency, which goes beyond that of the direct victims or their family members.

For example, it is not uncommon for victims of mass abuse to lead a much more reclusive life than before the violations, to withdraw from public spaces, to see their economic situation impacted, to disengage from social relations, and above all, to refrain from complaining to authorities and formal institutions. This is also true for non-victims.<sup>1315</sup> As a result, women in ‘wider society—allied stakeholders who did not experience the direct effects of large-scale past abuses, but ultimately live the indirect social, economic and political consequences of the past (including the risks of recurrence)’<sup>1316</sup> also see their rights being undermined. While those who experience grave human rights violations are often left with a deep and lasting sense of fear and uncertainty, this effect is not limited to those who have suffered bodily violations; it applies to much larger groups.<sup>1317</sup> The violation violates the immunity that every woman should have against GBV.<sup>1318</sup> Conflict, therefore, affects women as survivors of violence, as members of a society in crisis, and as part of the social and economic network in which they exist.<sup>1319</sup> These limitations will be further analysed when dealing with human rights reparations. If limiting the access to women to the national reconciliatory process can already be problematic, these shortcomings are even more obvious when it comes to repair women victims of human rights violations.

(iii) Human Rights reparations

Under international law, the perpetrators must provide reparation, whether the perpetrator is a natural person, a legal person, or the state.<sup>1320</sup> If the parties responsible for the harm suffered are unable or unwilling to meet their obligations, states should endeavour to establish reparation and assistance programs for victims.<sup>1321</sup> Moreover, natural and legal persons today are considered direct beneficiaries of reparations.<sup>1322</sup> In the CAR, consultations revealed a

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<sup>1315</sup> De Greiff op cit note 515 at 43.

<sup>1316</sup> UN Women, UNDP supra note 320 at 26.

<sup>1317</sup> De Greiff op cit note 515 at 42.

<sup>1318</sup> Sen op cit note 469 at 341.

<sup>1319</sup> Thomason op cit note 1217 at 79/ Also see Manjoo op cit note 1287 at 1197.

<sup>1320</sup> Aurélien Pradier, Maxine Rubin & Hugo van der Merwe ‘Between transitional justice and politics: Reparations in South Africa’ (2018) *South African Journal of International Affairs*, 25(3), 301–321 at 305/ Supra note 33 UN General Assembly, *Basic Principles*, Principle 9 & 16.

<sup>1321</sup> Guidance Note supra note 319 at 4 referring to Supra note 33 UN General Assembly, *Basic Principles*, principles 15 and 16.

<sup>1322</sup> See International Law Commission, Draft Articles on Responsibility of States for Internationally Wrongful Acts. General Commentary, *Yearbook of the International Law Commission* (2001) vol. II, Part Two, 91 (Article 33, para. 3) (‘ILC Draft Articles, General Commentary’).

need for cooperation between judicial actors, such as the SCC, and the CVJRR, including a form of complementarity between the reparations ordered. This could be part, as seen in the previous section, of what some authors have called a reparative complementarity between the ICC, the TVF and other domestic reparation programmes.<sup>1323</sup> These discussions are partly reflected in the findings of a study conducted in 2021 by Enrica Picco, with the support from UN Women, MINUSCA, and UNDP.<sup>1324</sup> In that regard, the FIDH, Observatoire Congolais des Droits de l'Homme (OCDH) & Ligue Centrafricaine des Droits de l'Homme note that 'given the impossibility of prosecuting all those responsible for crimes committed during the successive crises in CAR, it is essential that the relevant actors reflect on the means of repairing the harm suffered by the thousands of victims who are still waiting, in Bangui and in the provinces.'<sup>1325</sup> Given that the CVJRR can go beyond individual responsibilities and also establish the responsibility of the state and other actors in the violation of human rights, this section proposes to explore the extent to which these reparations can be transformative for women in the CAR.

*(iii.1) An overview*

In April 2005, The UN Basic Principles were approved.<sup>1326</sup> This document does not create legally binding international obligations but sets out international standards concerning reparations for violations of IHL and International Human Rights Law (IHRL).<sup>1327</sup> Reparation is guided by the ideal of full restitution (*restitutio in integrum* in its Latin expression). This means that states should try to erase all the effects of the crime and undo the harm caused to put the victims in the situation they were in before the crime occurred which is a classical expression of corrective justice.<sup>1328</sup> Reparations are nonetheless declined into different modalities: Restitution that 'should, whenever possible, restore the victim to the original situation before the gross violations of international human rights law or serious violations of international humanitarian law occurred';<sup>1329</sup> Compensation that 'should be

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<sup>1323</sup> Moffett & Sandoval op cit note 1098 at 769.

<sup>1324</sup> FIDH, OCDH & Ligue Centrafricaine des Droits de l'Homme supra note 589 at 45 referring to Picco and Yaliki supra note 104.

<sup>1325</sup> Ibid at 46.

<sup>1326</sup> Supra note 33 UN General Assembly, *Basic Principles*.

<sup>1327</sup> Jurasz op cit note 1226 at 242.

<sup>1328</sup> Rodrigo Uprimny Yepes 'Transformative reparations of massive gross human rights violations: between corrective and distributive justice' (2009) *Netherlands Quarterly of Human Rights* 27, no. 4 (2009): 625-647 at 629/ See, for example, *Case Concerning the Factory at Chorzów (Germany v. Poland)*, Merits, (1928) PCIJ Series A No. 17, 47.

<sup>1329</sup> Supra note 33 UN General Assembly, *Basic Principles* § 19.

provided for any economically assessable damage, as appropriate and proportional to the gravity of the violation and the circumstances of each case, resulting from gross violations of international human rights law and serious violations of international humanitarian law;<sup>1330</sup> Rehabilitation that ‘should include medical and psychological care as well as legal and social services,’<sup>1331</sup> Satisfaction that ‘should include, where applicable, any or all of the following: (a) Effective measures aimed at the cessation of continuing violations; (...) (e) Public apology, including acknowledgement of the facts and acceptance of responsibility; (...);’<sup>1332</sup> and Guarantees of non-repetition that ‘should include, where applicable, any or all of the following measures, which will also contribute to prevention: (a) Ensuring effective civilian control of military and security forces; (...) (h) Reviewing and reforming laws contributing to or allowing gross violations of international human rights law and serious violations of international humanitarian law.’<sup>1333</sup>

Reparation programs can be individual or collective even though there is, to this day no definition of collective reparations in international law.<sup>1334</sup> Collective reparations have the potential to recognise collective and structural violations of human rights,<sup>1335</sup> including gender inequality, and challenge certain social norms through community reintegration programs, for example.<sup>1336</sup> On the other hand, individual reparations should be tailored to compensate each individual in proportion to the harm suffered.<sup>1337</sup> Their awards, therefore, ‘ought to take account of the victim’s situation, with particular attention to how gender and the system of structural discrimination may have positioned her within social and economic structures.’<sup>1338</sup> Ultimately, individual and collective reparations should complement and reinforce each other.<sup>1339</sup> The goal is not to choose one form of reparation over another but to understand the strengths and limitations of each and to combine them in a culturally appropriate and creative way.<sup>1340</sup>

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<sup>1330</sup> Ibid § 20.

<sup>1331</sup> Ibid § 21.

<sup>1332</sup> Ibid § 22/ Also see Guidelines on Combatting Sexual Violence and its Consequences in Africa supra note 669 at 43.

<sup>1333</sup> Supra note 33 UN General Assembly, *Basic Principles* § 23.

<sup>1334</sup> Guidance Note supra note 319 at 7 / Manjoo op cit note 1287 at 1197, Manjoo notes that: ‘the term ‘collective reparations’ is ambiguous: “collective” is used to qualify “reparations”, that is, the types of goods distributed or the mode of distributing them; alternatively, the term is used to qualify the “subject” who receives them, namely, collectivities, including ethnic or racial groups who might have been particularly targeted.’

<sup>1335</sup> Pradier, Rubin & van der Merwe op cit note 1418 at 303.

<sup>1336</sup> Jurasz op cit note 1226 at 255.

<sup>1337</sup> Ruth Rubio-Marín ed. *The gender of reparations: unsettling sexual hierarchies while redressing human rights violations* (2009) 4.

<sup>1338</sup> Jurasz op cit note 1226 at 255.

<sup>1339</sup> Guidance Note supra note 319 – Principle 3.

<sup>1340</sup> Roht-Arriaza & Orlovsky op cit note 1251 at 189.

The traditional restitutive approach to reparations as been said to be ‘insufficient for women, who traditionally find themselves in conditions of exclusion, inequality and discrimination. A return to the situation before the violation is insufficient as it does not imply the effective enjoyment of their rights. Reparations should aspire to subvert the pre-existing structural inequality that may have engendered the violence suffered by women.’<sup>1341</sup> The Nairobi Declaration was therefore developed to promote a more gender-sensitive approach to reparations and has shifted the paradigm of reparation programs from corrective to transformative.<sup>1342</sup> The Nairobi Declaration calls for greater recognition of particular experiences of women and girls in designing, awarding, and delivering reparations. It also advances a concept of inclusive, gender-sensitive, and transformative reparations.<sup>1343</sup> Gender-responsive and transformative reparations are meant to consider pre-existing gender relations and gendered power imbalances to ensure a fair assessment of the harms inflicted on women and men.<sup>1344</sup> This gender-transformative approach also allows for equal access to reparations programs and to their benefit, as well as taking care not to reinforce pre-existing patterns of gender discrimination but rather to attempt to transform them.<sup>1345</sup> This may mean not conforming to pre-existing patterns of women's land ownership, education, or employment.<sup>1346</sup> An intersectional approach is also important as it ‘can bring about a real narrowing of existing gender gaps.’<sup>1347</sup> This means that the calculation of ‘harm’ for reparation must take into account the ‘before,’ ‘during,’ and ‘after’ the specific harm, depending on the social and economic context in which the person suffering the harm was positioned.<sup>1348</sup>

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<sup>1341</sup> Supra note 41 UN Doc A/75/174 at para 31.

<sup>1342</sup> Also see Manjoo op cit note 1287 at 1196.

<sup>1343</sup> Jurasz op cit note 1226 at 243/ Also see Aoláin, O'Rourke & Swaine op cit note 140 at 124 referring to Resolutions 1888, 1889, 1960, and 2106/ General Recommendation No.30 supra note 223 / Guidance Note supra note 319 at 2/ Nairobi Declaration op cit note 144 at 2 §3: ‘That reparation must drive post-conflict transformation of socio-cultural injustices, and political and structural inequalities that shape the lives of women and girls; that reintegration and restitution by themselves are not sufficient goals of reparation, since the origins of violations of women’s and girls’ human rights predate the conflict situation.’

<sup>1344</sup> Guidance Note supra note 319 at 4-5.

<sup>1345</sup> Ibid at 4-5.

<sup>1346</sup> Schulz op cit note 993 at 697/ Also see *Report of the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence, Sustainable Development Goals and transitional justice: leaving no victim behind*, GA, 2022, UN Doc A/77/162, § 35 (c) (d) online at: <https://documents-dds-ny.un.org/doc/UNDOC/GEN/N22/425/76/PDF/N2242576.pdf?OpenElement/>. Supra note 41 UN Doc A/75/174 § 31, 38.

<sup>1347</sup> Supra note 41 UN Doc A/75/174 § 40/ Also see *Resolution 1960 (2010)* supra note 293, Preamble § 13/ Aoláin, O'Rourke & Swaine op cit note 140 at 103.

<sup>1348</sup> Aoláin, O'Rourke & Swaine Ibid at 108.

Finally, reparations programs are said to reach their best potential if combined.<sup>1349</sup> Therefore, they should be comprehensive, meaning that beyond financial compensation, reparations should include rehabilitation, satisfaction, restitution, and guarantees of non-recurrence, and be implemented in combination with other TJ mechanisms.<sup>1350</sup> Past experiences show that a reparation program's complexity, mainly a combination of material and symbolic reparations, and consistency, especially the provision of reparations with truth and justice, can be more critical in determining victim satisfaction than its global munificence.<sup>1351</sup> The complexity and lack of resources should, besides, not be excuses for not pursuing reparations in their various forms.<sup>1352</sup>

*(iii.2) Reparations in the CAR: What can be expected in terms of transformation*

In the CAR, three agreements were negotiated and signed during the Bangui Forum, which was held from May 4, 2015, to May 11, 2015: a ‘Republican Pact for Peace, National Reconciliation, and Reconstruction in the Central African Republic’; a ‘Commitment of armed groups to end the recruitment and use of child soldiers’; and an ‘Agreement on disarmament, demobilization, reintegration, repatriation and integration into the uniformed corps of the Central African State.’<sup>1353</sup> The provisions relating to reparations are contained in the Republican Pact for Peace. In addition, the Bangui Forum recommended granting reparations for the harm suffered by the victims and their medico-socio-psychological supervision.<sup>1354</sup> The Central African government has also included TJ measures in the Justice Sector Policy 2020-2024, approved in December 2019.<sup>1355</sup> In addition, the Global Fund for Survivors of Sexual Violence in Conflict (GSF), established at the initiative of Nobel Peace Prize laureates Dr. Denis Mukwege and Ms. Nadia Murad, launched a program of temporary reparations for survivors of conflict-related sexual violence to address any shortcomings of the CVJRR, TFV of the ICC and the SCC. This fund aims to reach as many survivors as possible, offering them recognition and interim relief.<sup>1356</sup>

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<sup>1349</sup> Ruth Rubio-Marin & Dorothy Estrada-Tanck ‘Transitional Justice Standards on Reparations for Women Subjected to Violence in the CEDAW Committee’s Evolving Legal Practice’ (2020) *International Journal of Transitional Justice* at 574-575/ Also see Guidance Note supra note 319 – Principle 1.

<sup>1350</sup> UN Doc A/77/162 supra note 1444 § 35 (a) / Also see Yepes op cit note 1426 at 643.

<sup>1351</sup> Ruth Rubio-Marin op cit note 1108 at 16.

<sup>1352</sup> UN Doc A/77/162 supra note 1444 § 34.

<sup>1353</sup> Central African Republic, General Report of the Bangui National Forum, May 2015/ S/2015/576 supra note 472.

<sup>1354</sup> Picco and Yaliki supra note 104 at 17.

<sup>1355</sup> *Politique sectorielle de la justice : 2020-2024* op cit note 537 Axe V.

<sup>1356</sup> Picco and Yaliki supra note 104 at 36.



However, the CVJRR's operationalisation remains one of the priorities of the Bangui Forum, particularly concerning reparations that must be part of the Commission's final recommendations.<sup>1357</sup> The CVJRR law stipulates that the mission of the CVJRR is to propose a national program of reparations, whether material, moral or symbolic, and to propose the creation of a special fund for the reparation of victims (articles 3 and 6).<sup>1358</sup> This fund will make it possible to recognise the responsibility of the state, which will be in charge of financing it, thanks to a specific item in the state budget and a call for contributions from international partners.<sup>1359</sup> At the same time, the state should ensure that the fund is an independent and impartial body, free from corruption and outside influences.<sup>1360</sup> The CVJRR can therefore recommend 'the adoption of a national reparation plan for victims [...], whether in the form of restitution, compensation, rehabilitation, satisfaction or guarantees of non-repetition.'<sup>1361</sup>

In this vein, the Commission has identified four critical points for the definition of a comprehensive program of reparations aimed at remedying the consequences of serious national events and the most serious crimes: reparation to the Central African people for the harm suffered from major historical events and for the most serious violations; the need to prioritise natural persons as victims; the need to implement forms of reparations that respond to the consequences of these violations and that go beyond simple compensation.<sup>1362</sup> Reparations must also avoid any discrimination in consideration of victims; Consider gender in the restorative process; Consider displaced persons and refugees; Give a special place to victims of sexual violence; and promote the socio-economic reintegration of victims.<sup>1363</sup> In general, the victims consulted tended to request individual reparations.<sup>1364</sup> According to some NGOs, including FIDH, ideally, reparations from the fund should include both individual and collective benefits.<sup>1365</sup>

Many of those interviewed, mainly victims of sexual violence, still suffered from the physical and psychological consequences of the crimes committed against them. A large majority stressed the need to consider this suffering before considering any other type of

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<sup>1357</sup> Ibid at 17 referring to *Politique sectorielle de la justice : 2020-2024* op cit note 537.

<sup>1358</sup> Law establishing the CVJRR supra note 885 art. 40 al. 2 / Also see el Gantri & Yaliki op cit note 545 at 33.

<sup>1359</sup> Interview recorded on the 14<sup>th</sup> of December 2022.

<sup>1360</sup> Ibid.

<sup>1361</sup> Law establishing the CVJRR supra note 885 art 65.

<sup>1362</sup> Interview recorded on the 29/12/2022.

<sup>1363</sup> Ibid.

<sup>1364</sup> Interview recorded on the 31/09/2022.

<sup>1365</sup> FIDH, OCDH & Ligue Centrafricaine des Droits de l'Homme supra note 589 at 46.

more lasting and collective reparation.<sup>1366</sup> This suffering should therefore be the subject of interim reparation measures since these victims urgently need support. The Harvard Humanitarian Initiative has also highlighted the need for psychological support for women.<sup>1367</sup> In another study, female victims mainly sought rehabilitation in training and employment, while victims of sexual violence sought medical and psychological care. In general, women seemed to be the group most affected by the trauma caused by the conflict.<sup>1368</sup> In terms of rehabilitation, it is crucial to provide contextual and appropriate interventions related to mental health with community models and practices rooted in the culture of those affected. African scholars such as Honwana point out that programs for rape survivors in Africa should adopt gendered definitions and understandings of distress and trauma, diagnosis and healing, and even an understanding of childhood, ontologies and socio-cultural patterns identical to those found in the country or community concerned.<sup>1369</sup> Therefore, in the particular case of traumatic distress, ‘notions of ill health and healing cannot be “universalised” because how individuals and groups express, embody, and ascribe meaning to traumatic experiences and events are intrinsically related to specific social and cultural contexts.’<sup>1370</sup>

The Harvard Humanitarian Initiative has also highlighted women's need for goods such as cash or farm animals.<sup>1371</sup> Most victims also favoured pecuniary or material reparations such as the reconstruction of houses,<sup>1372</sup> or compensation.<sup>1373</sup> Material reparations are often most directly connected to economic transformation.<sup>1374</sup> However, these types of reparations should also be implemented with caution. A recent study on the impact of individual lump sum payments in Canada highlights that this influx of money can harm the relationship between the victim and their community,<sup>1375</sup> which similarly may have the same

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<sup>1366</sup> Ibid at 46.

<sup>1367</sup> Harvard Humanitarian Initiative (HHI), *Étude sur les enquêtes de perception 2017-2020* (2020) online at: <http://www.peacebuildingdata.org/research/car>.

<sup>1368</sup> Picco and Yaliki supra note 104 at 53.

<sup>1369</sup> Colleen Duggan & Ruth Jacobson ‘Reparation of sexual and reproductive violence: Moving from codification to implementation’ (2009) *The gender of reparations: Unsettling sexual hierarchies while redressing human rights violations*: 121-161 at 147 citing Alcinda Honwana *Okusiakala ondalo yokalye: Let Us Light a New Fire: Local Knowledge in the Post-War Healing and Reintegration of War-Affected Children in Angola* (1998).

<sup>1370</sup> Ibid at 147 citing Alcinda Honwana *Okusiakala ondalo yokalye: Let Us Light a New Fire: Local Knowledge in the Post-War Healing and Reintegration of War-Affected Children in Angola* (1998)/ Also see UN Doc A/77/162 supra note 1444 § 35 (b).

<sup>1371</sup> Harvard Humanitarian Initiative (HHI) supra note 1465.

<sup>1372</sup> Interview recorded on the 31/09/2022.

<sup>1373</sup> Ibid.

<sup>1374</sup> Geoff & Wiebelhaus-Brahm op cit note 336 at 57.

<sup>1375</sup> Duggan & Jacobson op cit note 1467 at 142.

effect in some areas in the CAR. This experience suggests that governments should seek ways to work with affected communities to offset the potential adverse effects that the sudden influx of cash may have on them.<sup>1376</sup> In this regard, African philosophy can provide conceptual frameworks for critical reflections.<sup>1377</sup>

The word *ubuntu*, for example, combines two words: Ubu and ntu. Ubu means ‘being’ in so far as ‘it is enfolded’ meaning ‘before it manifests itself in the concrete form or mode of existence of a particular entity.’<sup>1378</sup> This enfolded being is always oriented towards unfolding,<sup>1379</sup> expressed in the word ntu. Thus, ‘as a general be-ing, Ubu has the potential of infinite manifestations.’<sup>1380</sup> Two implications flow from this definition: ‘The first is that each human being has an intrinsic source of agency. The second implication is its theoretical basis for the notion of solidarity in the community,’<sup>1381</sup> which has definite implications for value preferences and social organisation.<sup>1382</sup> These suggest that ‘the ideals of solidarity and mutual concern for others would facilitate a distributive system that value the ethics of sharing above the individual accumulation of goods, especially when this accumulation subverts the stated ideals.’<sup>1383</sup> In addition to upsetting well-established cultural and social norms, the sudden acquisition of material wealth within a community can also sometimes lead to the accusation of witchcraft.<sup>1384</sup> Therefore, targeting a small number of women, in terms of material reparations, can in some contexts be divisive within communities and within the “woman” group itself. On the other hand, community benefits, which may appear to be the best alternative, must be carefully designed in contexts where women have limited access to reparations.<sup>1385</sup> As a result, non-monetary forms of compensation that have a stronger connection to cultural conceptions of reparation may sometimes be more appropriate.<sup>1386</sup> Transformative reparations are also often framed as overturning a property system that excludes women.<sup>1387</sup> This approach is particularly interesting for displaced or refugee women

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<sup>1376</sup> Ibid at 143.

<sup>1377</sup> Letseka op cit note 1407 at 549.

<sup>1378</sup> Ajei & Kwesi op cit note 1405 at 70 citing Ramose op cit note 585 at 41.

<sup>1379</sup> Ibid at 70 citing Ramose op cit note 585 at 41.

<sup>1380</sup> Ibid at 70 citing Ramose op cit note 585 at 50.

<sup>1381</sup> Ibid at 70.

<sup>1382</sup> Ibid at 70-71.

<sup>1383</sup> Ibid at 83.

<sup>1384</sup> Keevy op cit note 504 at 392.

<sup>1385</sup> Supra note 41 UN Doc A/75/174 § 36.

<sup>1386</sup> Macdonald op cit note 869 at 102 referring to Elizabeth Lira ‘The Reparations Policy for Human Rights Violations in Chile’ in De Greiff (ed) *The Handbook of Reparations* (2008) at 55.

<sup>1387</sup> UN Women supra note 963 at 117.

in the CAR. This may involve addressing informal forms of ownership or possession,<sup>1388</sup> or as in the Colombian Victims Law, prioritising female heads of households in judicial and administrative processes.<sup>1389</sup> The same can be true about the inheritance system.<sup>1390</sup>

In addition, the Harvard Humanitarian Initiative has shown that women seek recognition for their suffering.<sup>1391</sup> Symbolic reparation measures can facilitate the psychological and social rehabilitation of victims. Their main goal is to give victims the recognition they deserve. Thinking about symbolic reparations through the lens of gender offers the opportunity to explore whether men and women receive their share of symbolic recognition and encourages a conversation about whether and why different groups of people may require different forms of symbolic redress.<sup>1392</sup> The notion of ‘symbolic’ has indeed great chances of having multiple meanings<sup>1393</sup> in the CAR – which will, in most cases, be determined by ethnicity, geography and other variables along gender. Finally, it raises the question of the transformative potential of symbolic repair ‘and the possibly gendered meanings that may be captured, reproduced, or transformed through symbolic measures.’<sup>1394</sup> Boesten argues, for example, that memorial arts can be transformative if they are explicitly political and future-oriented and designed as contestation, challenge, and debate tools.<sup>1395</sup>

Finally, guarantees of non-recurrence offer another significant opportunities for transforming gender relations. They can spark a conversation about the underlying structural causes of violence and its gendered manifestation.<sup>1396</sup> Institutional or legal reforms could be a way to ensure non-repetition.<sup>1397</sup> Such safeguards can establish concrete obligations for the State to examine the foreseeable consequences of its past acts or omissions and adopt measures to prevent such consequences from recurring for women.<sup>1398</sup> Guarantees of non-repetition can also, arguably, contribute to reparation for victims in two ways: by reducing the risk that victims will be exposed to the same or greater levels of violence in the future and

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<sup>1388</sup> Rubio-Marín op cit note 1313 at 104-105/ See also Rhodri C. Williams ‘The Contemporary Right to Property Restitution in the Context of Transitional Justice’ (2007) ICTJ Occasional Paper Series.

<sup>1389</sup> UN Women supra note 963 at 117.

<sup>1390</sup> Rubio-Marín op cit note 1313 at 105.

<sup>1391</sup> Harvard Humanitarian Initiative (HHI) supra note 1465.

<sup>1392</sup> Rubio-Marín op cit note 1313 at 114.

<sup>1393</sup> Duggan & Jacobson op cit note 1467 at 150.

<sup>1394</sup> Rubio-Marín op cit note 1313 at 114.

<sup>1395</sup> Jelke Boesten ‘Recalling violence: Gender and memory work in contemporary post-conflict Peru’ in *Rethinking transitional gender justice* (2019) at 181.

<sup>1396</sup> Rubio-Marín op cit note 1313 at 117.

<sup>1397</sup> Ibid 117.

<sup>1398</sup> Ibid 117-118.

by giving victims a sense of satisfaction and rehabilitation because their victimization has not been without consequences and has resulted in positive social changes.<sup>1399</sup>

However, if limited to the victims and their community, these reparations can only partly enable what Lu calls existential reconciliation. Existential reconciliation responds to existential alienation, a type of alienation that appears when considering the cultural and psychological damage of unequal relationships.<sup>1400</sup> Existential reconciliation is therefore the resolution of agents' alienation from themselves, a legacy often precipitated by the disruption or collapse of social frames that grounded and oriented agents' capacities for self-realisation in the social world.<sup>1401</sup> Henn also notes that guarantees of non-repetition, the most promising type of reparation in terms of transformation, if only linked to the individual victim undermine the rule of law.<sup>1402</sup> From a theoretical point of view, guarantees of non-repetition derive from the state's primary obligation to comply with a treaty. This obligation remains in force whether or not a victim seeks compensation. Thus, guarantees of non-repetition are not secondary obligations owed to the victim. Instead, they are due to all citizens and best placed between the primary and secondary levels of state obligations.<sup>1403</sup> Ultimately, since administrative programs are meant to provide reparation for violation of rights rather than simply compensating for the loss of wealth, '(r)eparations then become mainly a form of recognizing victims as citizens and equal rights bearers.<sup>1404</sup> It is therefore important to avoid a potentially unequal message and the divisions between victims that could result. How to explain, for example, that IDP or refugee women could be beneficiaries of reparation programs while girls deprived of an education due to the conflict could not? The inclusion of ESC rights within the framework of transitional justice therefore requires a more radical transformation agenda, which is essential in terms of GBV and in order to consider the continuum of VAW.

## Conclusion

It is today essential to address the historic and current root causes that explain why women's bodies are repeatedly attacked by state and non-state armed actors in the context of mass atrocities.<sup>1405</sup> While the state's obligation to prosecute all GBC and respect and protect every

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<sup>1399</sup> Ibid 117.

<sup>1400</sup> Moga-Kpely & Zewei op cit note 213 at 14.

<sup>1401</sup> Lu op cit note 283 at 38 & 39.

<sup>1402</sup> Henn op cit note 136 at 202.

<sup>1403</sup> Henn op cit note 136 at 210.

<sup>1404</sup> Ruth Rubio-Marín op cit note 1108 at 4.

<sup>1405</sup> Kather supra note 221.

women's rights is essential, the TJ in the CAR requires understanding the state's obligations of truth, reparation, and prevention in its broadest sense. While the concepts of retributive and restorative justice shed light on the existence of a continuum of TJ to which transformative justice also belongs, they are not entirely satisfactory if the intention is to reduce structural violence.<sup>1406</sup> Regarding retributive justice, GBC seems to end its journey as a fragment of itself: 'what is seeded in gender norms and perpetrated en masse is sliced and scored through the tribunals' jurisdictional limits.'<sup>1407</sup> Moreover, in terms of restorative justice, the victim-specific dimension of reparations, even in its most expansive version, remains powerful when there is an identifiable status quo ante, but 'in situations where "injustice is the default state of people or groups" when there is no "descriptive baseline" to which they could relate, there is literally nothing to "fix" since the situation has always been "broken."'<sup>1408</sup>

The various critiques described in this section make it abundantly clear that there are severe gaps in how TJ has traditionally approached the concept of harm,<sup>1409</sup> and victim. It is a fragmenting narrative of violence and subsequent reparation, which in gender terms, misses much of the issue as it obscures the continuum of VAW. This raises, as Bell and O'Rourke put it, 'fundamental questions about what exactly TJ is transiting "from" and "to".'<sup>1410</sup> If TJ aims to ensure gender justice in its broadest sense, then TJ must go further in its approach to justice. Drawing on Galtung's twin goals of negative peace and positive peace, Mani is clear that a holistic approach is needed to achieve justice and peace.<sup>1411</sup> If inequality is not addressed during the transition, it is not easy to see how the TJ project would contribute to the goal of justice.<sup>1412</sup> This will require moving beyond 'legalistic, monolithic, and individualized' notions of victimization to situate victims within broader gender discrimination patterns.<sup>1413</sup>

This is not to say that GBV perpetrators have no responsibility in the acts they committed. By addressing structural injustice, TJ does not rule out retributive and restorative justice, tackling direct forms of VAW remains paramount, but this project however indicates

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<sup>1406</sup> McGill op cit note 339 at 88.

<sup>1407</sup> Fowler op cit note 1128 at 44.

<sup>1408</sup> Bessone op cit note 865 at 138.

<sup>1409</sup> Janine Natalya Clark 'Harm, Relationality and More-than-Human Worlds: Developing the Field of Transitional Justice in New Posthumanist Directions' (2022) *International Journal of Transitional Justice* at 5.

<sup>1410</sup> Nagy op cit 335 at 276.

<sup>1411</sup> Ibid at 277.

<sup>1412</sup> Cahill-Ripley op cit 332 at 195.

<sup>1413</sup> Nesiah op cit note 26 at 38.

that more is needed.<sup>1414</sup> Prevention requires reparations to address underlying inequalities to be truly transformative,<sup>1415</sup> even though it is often difficult to see beyond individual acts and consider the structures of power and social relations that have enabled this violence.<sup>1416</sup> As personal and structural forms of violence are interrelated, ‘sustained attention to questions of redistributive justice—redressing the unequal distribution of economic, social and political power’<sup>1417</sup> is also required.

This project is political rather than legal. Justice and reparations are conceptualised as one facet of a transitional project that signals and models a break with a past political order and a commitment to a different agenda of moral and political values, including gender equality.<sup>1418</sup> This involves engaging with gender as a political project to achieve the social change needed to prevent further harm to women on a large scale.<sup>1419</sup> The focus of TJ on the extraordinary violence of conflict indeed ‘erases the relevance of how violence is a constant in women’s lives.’<sup>1420</sup> Åsa Regnér, Deputy Executive Director of UN Women, stresses that all tools must be used to tackle the gender inequality that is the cause of conflict and crisis. It is, therefore, essential to make power structures visible, including through the invaluable tool of TJ. If introspection into the past is not used to address gender inequality, the opportunity to change things more crucially is missed.<sup>1421</sup> Ultimately, this type of justice could also be conceptualised as a broad version of restorative justice, which addresses the interactional reconciliation between individuals among themselves or with the state, and structural reconciliation, which includes a fairer redistribution between each citizen in terms of equality and rights. The next chapter will therefore be about ‘correcting the background conditions that make some people more vulnerable to wrongful acts than others.’<sup>1422</sup>

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<sup>1414</sup> Thomason op cit note 1217 at 76/ also see Ní Aoláin, Fineman & Zinsstag op cit note 592 at 59 referring to Paul Gready *The Era of Transitional Justice The Aftermath of the Truth and Reconciliation Commission in South Africa and Beyond* (2010).

<sup>1415</sup> Lambourne & Carreon op cit note 1307 at 82 referring to N. Valji *A window of opportunity: Making transitional justice work for women* (2012) UN Women, New York.

<sup>1416</sup> Swaine op cit note 79 at 285 citing R. W. Connell *Gender and Power: Society, the Person and Sexual Politics* (2003) at 107.

<sup>1417</sup> Lambourne & Carreon op cit note 1307 at 78.

<sup>1418</sup> UN Doc A/77/162 supra note 1444 § 7.

<sup>1419</sup> Swaine op cit note 79 at 285 citing R. W. Connell *Gender and Power: Society, the Person and Sexual Politics* (2003) 141.

<sup>1420</sup> Swaine op cit note 79 at 283.

<sup>1421</sup> Asa Regner, *The gender-transformative potential of transitional justice: How dealing with the past processes can work for and with women* (2023) at 20:40, online at: <https://berghof-foundation.org/news/gender-transformative-potential-transitional-justice>.

<sup>1422</sup> Lu op cit note 283 at 263.

#### IV. Distributive Justice: the first step towards structural justice

According to the African Union *Transitional Justice Policy*: ‘Special chapters on women and girls should detail issues of discrimination and inequality affecting them. Reports should include recommendations to advance women’s and girls’ rights.’<sup>1423</sup> It adds: ‘TJ mechanisms should strive not only to deliver justice for women, but also to transform fundamental gender biases in transitional societies that hinder women from claiming and enjoying their socio-economic and political rights. Gender-sensitive TJ processes should reveal patterns of gender abuse, improve access to justice for women, inform institutional reform to promote gender justice and create a space for women to inform sustainable peacebuilding.’<sup>1424</sup> It also includes a section on redistributive (socio-economic) justice.<sup>1425</sup> The new focus of TJ on gross violations of ESC rights therefore helps address structural forms of injustice, including those based on gender.<sup>1426</sup> Structural injustice has been defined by Lu as a type of injustice which results ‘from social structural processes in which many individuals and corporate agents may participate.’<sup>1427</sup>

This thesis will therefore deal with structural justice, meant to deal both with structural and cultural violence. It will indeed be argued in this chapter that the first step towards structural justice is to reduce structural violence against women, violence often exacerbated by conflict and which exposes them to the risk of being victims of personal and direct violence. Structural violence has been identified as an essential issue by scholars. It requires studying various related and overlapping fields, such as peacebuilding, TJ, and human rights.<sup>1428</sup> Galtung defines *structural violence* as social injustice, meaning that: ‘Resources are unevenly distributed, as when income distributions are heavily skewed, literacy/education unevenly distributed, medical services existent in some districts and for some groups only, and so on. Above all, the power to decide over the distribution of

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<sup>1423</sup> African Union supra note 65 § 53 (vii).

<sup>1424</sup> Ibid § 54 & 104 (ii).

<sup>1425</sup> Ibid § 67-70.

<sup>1426</sup> Rubio-Marin & Estrada-Tanck op cit note 1447 at 572.

<sup>1427</sup> Lu op cit note 283 at 100: ‘Tracy Isaacs has characterized such injustices as “wrongful social practice” and includes among them “racist, sexist, homophobic, and other discriminatory practices that perpetuate oppression or lead to the exploitation of groups of people.”’ / Marion Young *Responsibility for Justice* (2011) 52: Young defines structural injustice this way: Structural injustice occurs when social processes put large groups or persons under systematic threat of domination or deprivation of the means to develop and exercise their capacities, at the same time that these processes enable others to dominate or to have a wide range of opportunities for developing and exercising capabilities available to them.

<sup>1428</sup> Evans op cit note 953 at 3-4.



resources is unevenly distributed.<sup>1429</sup> Therefore, this chapter will focus on distributive justice as a solution to structural violence.

Conflicts in the CAR have increased women's vulnerability due to social dislocation and the loss of social networks of survival induced by pre-existing gender inequalities. It has also deepened their exclusion from social, cultural, economic, and political life. This situation undermines positive peace for women since '(p)peace can only prevail if issues such as systematic discrimination, unequal distribution of wealth and social services, (...) can be addressed in a legitimate and fair manner by trusted public institutions.'<sup>1430</sup> The transformative objectives of TJ therefore require going beyond retributive and restorative justices to also engage in 'multidisciplinary approaches sustained over a prolonged period of time.'<sup>1431</sup> This makes the field of TJ sit 'at the nexus of several different areas of work – from development to peacebuilding and humanitarian - and contributes towards their different and complementary objectives.'<sup>1432</sup> The broader notion of redistributive justice in transition:

encompasses recognition of structural inequalities and exclusions, and their intersectional impact on women's potential to participate as equals in a transitional society. In articulating this broader notion of transition, we begin to see how the totality of reform is part of the TJ paradigm. This means that a meaningful change in a transitional society constitutes a wide and not a narrow class.<sup>1433</sup>

This approach requires seeing GBV as part of the system of institutions from which it arises,<sup>1434</sup> by considering the bigger picture of injustices affecting women in the CAR and considering not only the personal violence they endure but also the structural one.

#### (a) A brief overview of distributive justice

With this approach, citizenship rights continue to be prioritised, although understood more deeply than the limited and liberal interpretation of rights, to consider the real capacities of citizens,<sup>1435</sup> which is crucial for the 'transformative' agenda of TJ.<sup>1436</sup> This thesis is based on Mani's model, which includes distributive justice as one of the three critical dimensions of

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<sup>1429</sup> Galtung op cit note 225 at 171.

<sup>1430</sup> Supra note 40 United Nations, *Guidance Note* Principle 9.

<sup>1431</sup> UNDP supra note 186 at 14.

<sup>1432</sup> Ibid 186 at 15/ Also see Susan Forde, Stefanie Kappler & Annika Björkdahl 'Peacebuilding, Structural Violence and Spatial Reparations in Post-Colonial South Africa' (2021) *Journal of Intervention and Statebuilding* 15, no. 3: 327-346 at 332/ Cahill-Ripley op cit 332 at 211.

<sup>1433</sup> Ní Aoláin & Rooney op cit note 465 at 354.

<sup>1434</sup> Thomason op cit note 1217 at 76.

<sup>1435</sup> McGill op cit note 339 at 96.

<sup>1436</sup> Evans op cit note 953 at 5.

restorative justice.<sup>1437</sup> Distributive justice requires addressing both the fundamental structural inequalities that women experience and the historical injustices to which they are subjected.<sup>1438</sup> It is also about considering the often intersectional nature of gender inequality in specific contexts.<sup>1439</sup> Distributive justice, therefore, is not about establishing the appropriate amount to compensate for past injustices but about redistributing unequally distributed resources more equitably.<sup>1440</sup>

Distributive justice can be conceived in a two-stage process. First:

(t)he backward-looking phase must seek to redress deep-rooted historical injustices stemming from structural and systemic inequalities between groups in the actual possession of, access to, and opportunities for economic and political power which, in some way, contributed to conflict. That is, distributive justice in post-conflict societies must consist, first and fundamentally, in examining the past.<sup>1441</sup>

Secondly, 'the distributive justice response must seek to address inequalities directly (...). This would require the development of philosophical and conceptual approaches to distributive justice that are unselfconsciously egalitarian.'<sup>1442</sup> Therefore, 'the justice of a distribution is determined by how things are distributed (who has what) as judged by some structural principle (s) of just distribution.'<sup>1443</sup> Nussbaum's and Sen's approach to inequality, based on their concepts of capabilities and functionings, might provide the most promising path.<sup>1444</sup>

These core capabilities include longevity (life), health, and bodily integrity, which are greatly diminished for victims of GBV; the exercise of emotions, which requires 'not having one's emotional development blighted by fear and anxiety' and which, as seen in the previous chapter, can affect all women when sexual violence is massively used as a weapon of war; the ability to use practical reason which relates to the feeling of control over one's life plans, and which again can be significantly diminished for most women in the CAR due to the fear of being victims of violence themselves but also due to the breakdown of social and family structures in the country; the ability to play, in the sense of being able to laugh and enjoy recreational activities; and the ability to have basic control over one's political and material environment.<sup>1445</sup> All, or at least many, of these capabilities, are greatly diminished or

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<sup>1437</sup> Lambourne op cit note 65 at 42.

<sup>1438</sup> Forde, Kappler & Björkdahl op cit note 1542 at 332 (talking about inequalities in general).

<sup>1439</sup> Boesten op cit note 112 at 515.

<sup>1440</sup> Bessone op cit note 865 at 137.

<sup>1441</sup> Mani op cit note 279 at 179.

<sup>1442</sup> Ibid at 179.

<sup>1443</sup> Robert Nozick 'Distributive justice' (1973) *Philosophy & Public Affairs*: 45-126 at 50.

<sup>1444</sup> Mani op cit note 279 at 179-180.

<sup>1445</sup> De Greiff op cit note 515 at 53.

undermined through abuse.<sup>1446</sup> In the CAR, these capabilities can rarely be actively realised (functionings) because of the ongoing conflict and pervasive gender inequalities in the country.<sup>1447</sup>

This thesis will therefore posit, like Sen and Nussbaum, that the goal of distributive justice should not be the pursuit of some ‘equality of possessions or end states (well-being)’ but rather the equality of freedom to pursue these capabilities, which means, for example, that:

(i) if we wish to bring all citizens of a nation to the same level of educational attainment, we will need to devote more resources to those who encounter obstacles from traditional hierarchy or prejudice. Thus, women's literacy will prove more expensive than men's literacy in many parts of the world. This means that if we operate only with an index of resources, we will frequently reinforce inequalities that are highly relevant to well-being. An approach focusing on resources does not go deep enough to diagnose obstacles that can be present even when resources seem to be adequately spread around, causing individuals to fail to avail themselves of opportunities that they in some sense have, such as free public education, the right to vote, or the right to work.<sup>1448</sup>

In other words, it is a question of asking the question: Considering the variety of capabilities that seem to be of central importance for human life, does the person have the freedom to realise them or not?<sup>1449</sup>

Since 1993, the Human Development Reports of the UNDP have chosen this conceptual framework for comparisons of development policies between countries.<sup>1450</sup> The introduction of this thesis shows that the 2030 Agenda for Sustainable Development is part of the UNDP Sustainable Development Goals (SDGs) and its prevention agenda. Goal 5 enshrines the standalone goal of gender equality and includes nine specific targets, including ending GBV.<sup>1451</sup> This goal, along with SDG 10 on inequality and SDG 4 on education, among others, has important links to TJ, including in shaping the provision of reparations.<sup>1452</sup> TJ mechanisms have an important role to play in achieving this agenda since the link between TJ and the Sustainable Development Goals, as noted in the introduction, has been firmly

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<sup>1446</sup> Ibid at 53.

<sup>1447</sup> Martha C. Nussbaum *Creating Capabilities: The human development approach* (2011) at 25.

<sup>1448</sup> Martha C. Nussbaum ‘Capabilities and human rights’ *Fordham L. Rev.* 66 (1997): 273 at 284.

<sup>1449</sup> Ibid at 285.

<sup>1450</sup> Ibid at 275 referring to United Nations Development Programme, Human Development Report 1996; United Nations Development Programme, Human Development Report 1993. HDI is a composite of three basic components of human development: longevity (measured by life expectancy), knowledge (measured by a combination of adult literacy and mean years of schooling), and standard of living (measured by income relative to the poverty level) at 100.

<sup>1451</sup> Sandra Fredman, Jaakko Kuosmanen & Meghan Campbell ‘Transformative equality: Making the sustainable development goals work for women’ (2016) *Ethics & International Affairs* 30, no. 2: 177-187.

<sup>1452</sup> UNDP supra note 186 at 15 referring to Resolutions on Sustaining peace: General Assembly (A/RES/70/262) and S/RES/2282 supra note 317.

established, and the contributions of TJ to peacekeeping and human development have been duly formalised.<sup>1453</sup>

TJ can indeed help to understand better the relationship between past, present and future: ‘Through this more historical approach, TJ can help to better unlock systemic issues, such as inequality, discrimination (...),’<sup>1454</sup> and ‘be at the beginning of breaking a continuous cycle of structural violence.’<sup>1455</sup> For that reason, it is essential to anchor TJ in the framework of the SDGs, not only rhetorically but also operationally.<sup>1456</sup> The CAR is actively engaged in this agenda. However, the country will not be able to meet its commitments by 2030 unless immediate and intensified action is taken quickly. The review is particularly alarming with regard to SDG 16, which highlights the need for an in-depth reform to make justice independent and impartial as well as to resolve the deep gender inequalities in the country.<sup>1457</sup> This thesis will therefore address two categories of distributive justice: rights and inequalities. ‘Rights’ shall mean civil and political rights and ESC rights. ‘Inequality’ will be understood as gender inequality. This reconceptualisation of TJ also calls for a reconceptualisation of the beneficiaries of TJ: Women should be integrated into these processes not only as victims but also as citizens.

#### (b) From Victims to Citizens

The concept of participation first gained prominence in the 1970s and 1980s within international development circles.<sup>1458</sup> Today, UNDP recognises the importance of participation for the overall development process.<sup>1459</sup> Enabling women's participation in peace processes is also part of the commitments made by resolution 1325<sup>1460</sup> and subsequent WPS resolutions, such as resolution 1889.<sup>1461</sup> In Africa, the Maputo Protocol recalls the Security Council resolution 1325 in its preamble and states that women have ‘the right to

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<sup>1453</sup> UN Doc A/77/162 supra note 1444 § 2.

<sup>1454</sup> Ibid § 7.

<sup>1455</sup> Ibid § 7.

<sup>1456</sup> Ibid § 8.

<sup>1457</sup> Picco & Duthie op cit note 544.

<sup>1458</sup> Patricia Lundy & Mark McGovern ‘Whose justice? Rethinking transitional justice from the bottom up’ (2008) *Journal of law and society* 35, no. 2: 265-292 at 280.

<sup>1459</sup> Roht-Arriaza & Orlovsky op cit note 1251 at 179/ Also see UN Commission on Human Rights, *Report on the Global Consultation on the Realization of the Right to Development as a Human Right*, UN Doc. E/CN.4/1990/9/Rev.1 (26 September 1990), para. 48/ Aguirre & Pietropaoli op cit 54 at 368/ Declaration of Principles and Programme of Action of the World Employment Conference, UN Doc. E/5857 (1976), art. 3.

<sup>1460</sup> Ní Aoláin & Rooney op cit note 465 at 345.

<sup>1461</sup> *Resolution 1889 (2009)* supra note 292, Preamble § 10 & 11.

participate in promoting and maintaining peace.<sup>1462</sup> In that regard, the CAR has adhered to UN Security Council Resolution 1325 on the role of women in peacebuilding.<sup>1463</sup> Women-centered strategies also have ‘a solid pedigree in feminist thinking, focused on building theory from the bottom up, based on practices of talking, sharing, storytelling and consciousness raising.’<sup>1464</sup> Ultimately, this approach has gained traction in the transformative justice literature. Gready and Robins note:

Transformative justice entails a shift in focus from the legal to the social and political, and from the state and institutions to communities and everyday concerns. Transformative justice is not the result of a top-down imposition of external legal frameworks or institutional templates, but of a more bottom-up understanding and analysis of the lives and needs of populations.<sup>1465</sup>

This approach requires removing barriers that might impede meaningful inclusion and building the capacity and confidence of marginalised communities and individuals to participate more fully in TJ.<sup>1466</sup> The key to adopting a people-centered approach to TJ is to shift to a perspective that values people's lived experiences as a guide to contributing to meaningful change. TJ processes can help advance this methodology by integrating women's voices and experiences and building a justice architecture that enables action on the demands made by these voices.<sup>1467</sup> In that regard, TJ should ‘recognize the multiple justice needs and aspirations of victims regarding reparations, truth, memory and the changing of abusive structures’ which calls for ‘adopting holistic perspectives on transitional justice,’ meaning that ‘(i)nstead of seeing women as solely victims either be in a passive way or as providers of evidence or statements in truth-seeking processes or as recipients of reparations, women’s agency in the fight for justice, either to overcome victimhood or prevent violence, should also be part of the transitional justice’s project.’<sup>1468</sup> In this respect, TJ is thought of as a process<sup>1469</sup> where recognition of ‘all women and girls, lesbian, gay, bisexual, transgender, queer and intersex individuals’<sup>1470</sup> becomes central to the TJ project.

In the CAR, some women have been included in the reconciliation process. In 2003, the government launched a national consultation, bringing together all the actors of the

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<sup>1462</sup> Charlesworth & Chinkin op cit note 1139 at 943/ See African Union, *Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa*, 11 July 2003, at Preamble § 7.

<sup>1463</sup> Groupe de la Banque Africaine de Développement supra note 242 at 2.5.6.

<sup>1464</sup> Ní Aoláin op cit note 274 at 225.

<sup>1465</sup> Paul Gready & Simon Robins ‘From Transitional to Transformative Justice: A New Agenda for Practice’ in Briefing Note TFJ-01 June 2014 (2014) at 1.

<sup>1466</sup> McGill op cit note 339 at 94.

<sup>1467</sup> UN Doc A/77/162 supra note 1444 § 16.

<sup>1468</sup> Ibid § 17.

<sup>1469</sup> Ibid § 30.

<sup>1470</sup> ICTJ op cit note 53 at 5.

Central African public scene, including, among others, political parties, civil society, and trade unions. This debate took the name of ‘National Dialogue.’ Women were included in this meeting;<sup>1471</sup> however, the dialogue was organised to discuss the political and security situation of the country<sup>1472</sup> but did not refer to GBV.<sup>1473</sup> The concerns of female soldiers and women accompanying ex-combatants, as well as women's organisations have been taken into account in the disarmament, demobilization and reconstruction (DDR) programme, and in the process of reform of the security sector (RSS).<sup>1474</sup> The Bangui Forum dealt with the role of women in national reconciliation,<sup>1475</sup> and other recommendations suggested the establishment of strategic and priority axes of community violence reduction programs, including sexual violence and violence based on gender and the socio-economic situation of women.<sup>1476</sup>

However, the national consultation of July 2019 to create the CVJRR covered only a minimal part of the territory, mainly the capital and its surroundings. The most vulnerable populations, those living in areas under the control of armed groups and the one million Central Africans displaced within the country or refugees in neighbouring countries, were not consulted.<sup>1477</sup> In October 2021, a ‘workshop to approve the basic texts of the CVJRR’ was held in Bangui. Although the workshop participants worked on ‘adopting a provisional work plan and approving the framework of the national strategy,’<sup>1478</sup> it seems that the inclusion of women in the design of TJ processes and mechanisms has been limited. The CVJRR could go further and be the ideal forum to facilitate the participation of women and reflect with them on the measures needed to combat gender inequalities in the CAR.<sup>1479</sup>

In terms of equality, such a forum could allow the identification of shared experiences between women of sometimes different backgrounds and bring out common values and

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<sup>1471</sup> Groupe de la Banque Africaine de Développement supra note 242 at 2.5.5.

<sup>1472</sup> Bagayoko op cit note 430 at 28.

<sup>1473</sup> Ibid at 40.

<sup>1474</sup> Groupe de la Banque Africaine de Développement supra note 242 at 2.5.5.

<sup>1475</sup> République Centrafricaine *Rapport général du Forum de Bangui* (2015) at 38-39.

<sup>1476</sup> République Centrafricaine *Forum de Bangui : Atelier thématique ‘Gouvernance’, document annexe du rapport général adopté à la plénière du Forum* (2015) at 17, see online at : <https://jfaki.blog/wp-content/uploads/2016/05/forum-de-bangui-rapport-general.pdf>.

<sup>1477</sup> Justiceinfo.net, Enrica Picco, La Commission Vérité Centrafricaine peut-elle échapper aux mauvaises augures ? (27 February 2020), online at : <https://www.justiceinfo.net/fr/43903-la-commission-verite-centrafricaine-peut-elle-echapper-aux-mauvais-augures.html>.

<sup>1478</sup> FIDH, OCDH & Ligue Centrafricaine des Droits de l’Homme supra note 589 at 32 referring to Réseau des journalistes pour les droits de l’Homme RJDH – Centrafrique ‘Centrafrique: Vers la validation des textes de base de la CVJRR’ (Central African Republic: Progress towards the approval of the basic texts of the CVJRR), (6 October 2021), online at : <https://www.rjdhrca.org/centrafrique-vers-la-validation-des-textes-de-base-de-la-cvjrr/>.

<sup>1479</sup> Law establishing the CVJRR supra note 885, art. 6 para. 9 / See Swaine op cit note 79 at 278.

principles through spaces for dialogue.<sup>1480</sup> It is then a question of recognising the agency of women and their privileged position in order to identify the discriminations with which they are confronted.<sup>1481</sup> This approach tends to shift the discourse from consultation to co-creating and designing solutions and projects not for women but with them,<sup>1482</sup> which in itself is a necessary process for the realisation of women's rights.<sup>1483</sup> Therefore, women's public participation can be an act of recognition that sends 'society a powerful message of inclusion and political agency,'<sup>1484</sup> which can be sustainable for women in the future.<sup>1485</sup> The participation of women from different communities or social and economic backgrounds may also better reflect other epistemologies.<sup>1486</sup> More specifically: 'To ignore local knowledge, structures, and processes is to risk the likelihood of developing ineffective reforms and mechanisms,'<sup>1487</sup> because of 'blind spots'.<sup>1488</sup> It is then a question of understanding gender justice as rooted in the values and the change women seek,<sup>1489</sup> and thus of empowering them to design the appropriate legal and political mechanisms to remedy discrimination.<sup>1490</sup>

This is a 'fundamentally feminist approach, seeking to better understand the social world by exposing aspects that have until now been ignored or misrepresented.'<sup>1491</sup> The first-feminist generation was already pinpointing the need to take women's voices seriously:

Christine Littleton has said, "Feminist method starts with the very radical act of taking women seriously, believing that what we say about ourselves and our experience is important

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<sup>1480</sup> UNDP supra note 186 referring to Report of the Special Rapporteur, The promotion of truth, justice, reparation and guarantees of non-recurrence: Note by the Secretariat, Human Rights Council, A/HRC/34/62, 27 December 2016, New York, NY, at 5-6/ Laplante op cit note 305 at 353 citing Donald L. Hafner & Elizabeth B. L. King 'Beyond Traditional Notions of Transitional Justice: How Trials, Truth Commissions, and Other Tools for Accountability Can and Should Work Together' (2007) *Boston College International and Comparative Law Review* 30(1): 94.

<sup>1481</sup> UN Doc A/77/162 supra note 1444 § 21 & 22.

<sup>1482</sup> Ibid § 31.

<sup>1483</sup> Lundy & McGovern op cit note 1568 at 281 citing K. Kenny 'The Right to Participate in International Human Rights Field work' (2000) *International Human Rights Network* 18.

<sup>1484</sup> UN Women, UNDP supra note 320 at 61.

<sup>1485</sup> Lundy & McGovern op cit note 1568 at 280.

<sup>1486</sup> Jenevieve Mannell, Safua Akeli Amaama, Ramona Boodoosingh, Laura Brown, Maria Calderon, Esther Cowley-Malcolm, Hattie Lowe et al. 'Decolonising violence against women research: a study design for co-developing violence prevention interventions with communities in low and middle income countries (LMICs)' (2021) *BMC public health* 21, no. 1: 1-13 at 9/ Gready & Robins op cit note 27 at 296.

<sup>1487</sup> UN Women, UNDP supra note 320 at 45.

<sup>1488</sup> UN Doc A/77/162 supra note 1444 § 23.

<sup>1489</sup> Gready & Robins op cit note 27 at 296/ Anne Menzel 'The pressures of getting it right: Expertise and victims' voices in the work of the Sierra Leone Truth and Reconciliation Commission (TRC)' (2020) *International Journal of Transitional Justice* 14, no. 2: 300-319 at 306.

<sup>1490</sup> Ní Aoláin op cit note 274 at 221.

<sup>1491</sup> Ibid at 225.

and valid, even when (or perhaps especially when) it has little or no relationship to what has been or is being said about us."<sup>1492</sup>

Lewis suggests that 'to garner the support of local women in gender-based reform, their concerns and priorities, including the concerns arising from their political, religious and ethnic identities, must not merely be taken into account but must control the process, even if the result desired appears counter-intuitive to gender reform advocates elsewhere.'<sup>1493</sup> This means that the CVJRR must constantly seek to listen to and give voice to women, particularly the poorest, most marginalised, and most excluded from formal processes.<sup>1494</sup>

The mandate and mission of truth commissions have evolved. It is less about bringing people before a formal hearing to testify about their prejudice than enrolling them in a public process where everyone can debate current problems and issues.<sup>1495</sup> In this respect, women would benefit from being heard without the filter of a professional<sup>1496</sup> and from producing stories that are exempt from reinterpretation by experts according to recognised standards.<sup>1497</sup> Sriram cautioned that TJ mechanisms can form an imposed agenda that does not suit local social and political legal cultures and that implies a single category of 'woman', rather than seeing this category as 'a constantly shifting signifier of multiple meaning.'<sup>1498</sup>

If a new politics of mutual respect is the goal, it will only be born 'through a painful labour that avoids soothingly self-serving narratives and faces the unpleasant, humbling, and complicated, but agency-sensitive and thus potentially liberating, truths revealed by understanding the many faces of gender structural injustice.'<sup>1499</sup> Since women are not a monolithic group, they should not be expected to speak with a unified voice, which can make consensus building difficult.<sup>1500</sup> The *ubuntu* philosophy could be useful in designing research methods that allow for a more nuanced conceptualisation of gender that intersects with group

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<sup>1492</sup> Charlesworth, Chinkin & Wright op cit note 372 at 634 citing Littleton 'Feminist Jurisprudence: The Difference Method Makes' (1989) (Book Review), 41 STAN. L. 751, 764.

<sup>1493</sup> Lewis op cit note 374 at 137-138.

<sup>1494</sup> Ní Aoláin op cit note 274 at 225.

<sup>1495</sup> Joseph Geng Akech 'Rethinking Transitional Justice in South Sudan: Critical Perspectives on Justice and Reconciliation' (2020) *International Journal of Transitional Justice* at 591.

<sup>1496</sup> Menzel op cit note 1599 at 314.

<sup>1497</sup> Ibid at 307.

<sup>1498</sup> Brown & Ní Aoláin op cit note 914 at 136 referring to Jackie Stacey 'Untangling Feminist Theory,' in Diane Richardson and Victoria Robinson (ed) *Introducing Women's Studies: Feminist Theory and Practice* (1993) at 64.

<sup>1499</sup> Lu op cit note 283 at 142.

<sup>1500</sup> UNDP supra note 186 at 24.



identities and provides a more subtle articulation of gender roles in the CAR.<sup>1501</sup> This paradigm can prove useful for external actors who will intervene as experts.<sup>1502</sup>

Moreover, the rhetoric of participation should be clear of other interests within communities. It is therefore essential to promote measures of ‘diagonal representation,’ meaning to create opportunities for participation at all ‘levels’ and not rely solely on the ‘leaders’ of the communities concerned.<sup>1503</sup> It is also important for Commissioners to be aware of what is called the phenomenon of ‘adaptive preferences’, whereby people aspire to achieve particular goals, such as claiming certain rights, only in contexts where these wishes have meaning. Poverty and victimisation can lower people's expectations, which can impact their willingness to exercise their capabilities.<sup>1504</sup> Finally, inclusive TJ will work with both men and women to think together about the most appropriate interventions.<sup>1505</sup>

Ultimately, this new approach changes the typology. Women participate in TJ mechanisms not only as victims but also as citizens,<sup>1506</sup> meaning, *inter alia*, holders of rights.<sup>1507</sup> In this thesis, the concept of citizenship transcends women who suffered from GBV to include all of the female inhabitants of the CAR who have faced or can face gender discrimination. The current socio-economic disadvantage of some not being the only sufficient sign of alienation and oppression for which transformative reparations could be justified.<sup>1508</sup> This division would indeed take the risk of constituting a factor of division within the women's solidarity groups themselves.<sup>1509</sup> Moreover, naming groups with well-defined social boundaries when it comes to gender discrimination is complex. DAW being structural, involves many groups and categories of women. Some are subject to a systematic social process of domination and alienation while, on the contrary, others are the partial beneficiaries of this system but suffer nonetheless from obstacles affecting their life projects or the realisation of these.<sup>1510</sup> In particular, existential alienation, the distorted relationship to oneself, weighs on all women living in a discriminatory structural context.<sup>1511</sup> It would

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<sup>1501</sup> Ní Aoláin & Rooney op cit note 465 at 351.

<sup>1502</sup> SwissPeace, Briony Jones, Elisabeth Braumgartner & Sidonia Gabriel *A transformative approach to dealing with the past* (2015) at 11.

<sup>1503</sup> Lundy & McGovern op cit note 1568 at 283.

<sup>1504</sup> De Greiff op cit note 515 at 44-45.

<sup>1505</sup> UN Women, UNDP supra note 320 at 29/ Gready & Robins op cit note 324 at 353.

<sup>1506</sup> Sanne Weber ‘From victims and mothers to citizens: Gender-just transformative reparations and the need for public and private transitions’ (2018) *International Journal of Transitional Justice* 12, no. 1: 88-107 at 107.

<sup>1507</sup> See Rubio-Marín op cit note 1313/ Giotis op cit note 486 at 104.

<sup>1508</sup> Bessone op cit note 865 at 146.

<sup>1509</sup> Ibid 144.

<sup>1510</sup> Ibid 145.

<sup>1511</sup> Ibid 145.

therefore be contrary to justice to grant this fact a moral and political value such that only the most economically disadvantaged would be entitled to demand distributive justice.<sup>1512</sup> Once we conceive of citizens as claimants and bearers of rights, the responsibility of the institutions that must uphold these rights is brought to light, as well as the structures that have made or continue to make possible the violation of these rights.<sup>1513</sup>

(c) Moral, political, social and economic responsibilities

Article 6 § 4 of the law relating to the creation, organisation and operation of the CVJRR stipulates that the CVJRR must establish the individual and/or collective non-judicial responsibilities of legal persons and private groups, such as moral, political, social and economic responsibilities, in the perpetration of violations falling under the provisions of the law by clarifying their causes and reasons so that they are not repeated.<sup>1514</sup> Indeed, while some institutions can be held responsible for upholding the rights of citizens, when there is structural injustice, the system ‘an overlapping set of social forces, laws, and policies’ is also unjust.<sup>1515</sup> Therefore, it is also essential to understand who or what made this system unfair even though the causes are many. Standard approaches to retributive and restorative justice focus only on the narrow category of direct perpetrators. However, ignoring structural injustice leaves out the system's beneficiaries who enabled or still enable the injustice to be perpetrated.<sup>1516</sup> For example, in her recent account of *justice and reconciliation in global politics*, Lu argues that some agents share responsibility for structural injustice because they contribute to the processes that cause it. This is so because unjust structures have a causal implication in contemporary illicit conduct, and because those who still participate in these structures but fail to fulfill their responsibility to remedy them are morally responsible for such failure and the consequences of structural injustices.<sup>1517</sup>

Therefore, considering the structural and socio-economic dimensions of GBV should draw attention to state responsibility, or one of the structures, and world-systemic forces.

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<sup>1512</sup> De Greiff op cit note 515 at 53.

<sup>1513</sup> Marcus Lenzen ‘Roads less traveled? Conceptual pathways (and stumbling blocks) for development and transitional justice’ (2009) *Transitional justice and development: Making connections*: 76-109 at 95.

<sup>1514</sup> Law establishing the CVJRR supra note 885

<sup>1515</sup> Thomason op cit note 1217 at 75.

<sup>1516</sup> Mani op cit note 279 at 122.

<sup>1517</sup> Alasia Nuti *Injustice and the reproduction of history: Structural inequalities, gender and redress* (2019) at 185 / see Lu op cit note 283 at 259: ‘My argument does make the concept of political responsibility more controversial, because such responsibility can include reparative obligations to victims of wrong- doing. This is because the causal implication of structural injustice in contemporary wrongful conduct makes those who perpetuate such structural injustice partially liable for the harms or injuries that result from wrongful conduct.’

This is partially implied in the Nairobi Declaration which stipulates that ‘the fundamental nature of the struggle against impunity demands that all reparation programmes must address the responsibility of all actors, including state actors, foreign governments and inter-governmental bodies, non-governmental actors, such as armed groups, multinational companies and individual prospectors and investors’ (Nairobi Declaration, para. 5). In theory, ‘request for reparation can be directed at any level of society: the state, local government, private actors, individual perpetrators of mass atrocity or the international community.’<sup>1518</sup> However, so far little attention has been paid to reparations for structural injustices in TJ. In the CAR, the CVJRR could highlight these types of responsibilities.

(i) The role of the CVJRR

UNDP notes that: ‘There is growing research and debate on what constitutes a truth commission: what their functions are and whether they are focused primarily on past violations or also include on-going and systemic violations,’<sup>1519</sup> and therefore participate to the broader goals of peace and development. In the CAR, the CVJRR's mission is to identify all influences and interferences harmful to the Nation at the international level; Propose institutional reforms as guarantees of non-recurrence and demand reparations from states that have facilitated the commission of crimes in the CAR.<sup>1520</sup> As seen in Chapter 2, when structural violence enters the scene, it is mainly in the background. However, transformative justice requires a broader approach encompassing gender inequality, structural violence, and historical injustices to be truly transformative. In that respect, as official investigative bodies, TRCs can ask not only what happened during political violence and armed conflict, but also why the violence happened.<sup>1521</sup> The CVJRR, through its broad mandate and mission, can therefore generate an in-depth understanding of the gendered nature of conflict and the structural nature of violence.<sup>1522</sup> Tackling ‘the root causes of conflict is the connecting factor between the dealing- with- the- past paradigm and the prevention paradigm (...) Thus, addressing exclusions becomes the primary task of sustaining peace and ensuring short- and long-term prevention.’<sup>1523</sup>

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<sup>1518</sup> Macdonald op cit note 869 at 100.

<sup>1519</sup> UNDP supra note 186 at 35.

<sup>1520</sup> Interview recorded on the 29/12/2022.

<sup>1521</sup> Laplante op cit note 305 at 334.

<sup>1522</sup> Swaine op cit note 79 at 267.

<sup>1523</sup> UNDP supra note 186 at 57.

It is, therefore, essential initially to put violations of every rights back at the center of the work of the CVJRR in order to make reparation a ‘political imperative.’<sup>1524</sup> These violations, indeed, point to the failure of states to provide a minimum standard of living for all citizens.<sup>1525</sup> Once these violations have been established, a structural analysis makes it necessary to identify their structural causes, and thus allow the CVJRR to issue recommendations on ‘reforms necessary to prevent the recurrence of the acts denounced.’<sup>1526</sup> This could be done either as a framework for future action or to assess whether the action already taken is adequate.<sup>1527</sup> For example, the various objectives captured in the report of ‘Never Again’ (‘Nunca Más’) in Argentina include not only the need for justice with regard to past crimes but also the need to deactivate the political, institutional, social mechanisms and cultural factors that made the violence possible.<sup>1528</sup> Other TRCs have adopted this transformative approach.<sup>1529</sup> There is therefore a clear shift in expectations surrounding a truth commission whose work is increasingly expected to look to the future, not just deal with past abuses in isolation.<sup>1530</sup>

Structural reform recommendations within the framework of a rights-based analysis will further give women groups in the CAR a powerful lobbying tool to challenge government inaction or resistance.<sup>1531</sup> The CVJRR can thus be the perfect mechanism to hold agents accountable for rights violations, seeking redress for direct and deliberate acts of violence that violate rights, and seeking redress, where appropriate, for more structural endemic violations.<sup>1532</sup> These types of accountability can be mentioned in the CVJRR's final report as ‘final reports increasingly seek to understand that human rights violations build on previous situations of inequality, hierarchical relations, discrimination and ethnic, social and gender inequity, which are exacerbated during and after human rights violations.’<sup>1533</sup> In this thesis, the responsibility of the state as well as the responsibility of the actors who enabled or still enable structural inequalities that persist today will successively be analysed.

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<sup>1524</sup> Waldorf op cit note 50 at 176.

<sup>1525</sup> Laplante op cit note 305 at 347/ Supra note 40 United Nations, *Guidance Note* at 10.

<sup>1526</sup> Law establishing the CVJRR supra note 885, art 65.

<sup>1527</sup> Evans op cit note 953 at 9.

<sup>1528</sup> Rolando Ames Cobián & Félix Reátegui ‘Toward systemic social transformation: Truth commissions and development’ in *Transitional justice and development: Making connections* (2009) at 148.

<sup>1529</sup> UN Doc A/77/162 supra note 1444 § 27 / Naomi Roht-Arriaza ‘Measures of non-repetition in transitional justice: The missing link?’ in Paul Gready and Simon Robins (ed) *From Transitional to Transformative Justice (CUP), Forthcoming, UC Hastings Research Paper* 171 (2016) at 35 referring to See <http://tjrc.ph/about/about-tjrc/> Nagy op cit 335 at 286/ Also see UN Women supra note 963 at 111.

<sup>1530</sup> Cahill-Ripley op cit 332 at 190/ UNDP supra note 186 at 57.

<sup>1531</sup> Laplante op cit note 305 at 350.

<sup>1532</sup> Cahill-Ripley op cit 332 at 212.

<sup>1533</sup> Supra note 41 UN Doc A/75/174 § 26.

(ii) The responsibility of the state

In the CAR, when asked who should repair harm suffered by victims, most respondents identified the state as the primary actor in reparation. According to those interviewed, the main reason is that the state is responsible since it could not prevent the events that led to severe violations of international humanitarian law and human rights.<sup>1534</sup> In 2018, the Pharos Observatory analysed a survey's results in Bangui, Bouar, Kaga-Bandoro, Bria, and Bambari. It concluded that while many victims sought compensation for the damage suffered, 20% of those questioned also considered that it was 'necessary to repair or rebuild the burnt houses.' They then appealed to the state.<sup>1535</sup>

Beyond this observation, the moral obligation to impute responsibility to the state rests on a consequentialist moral principle aimed at improving the structure of the state.<sup>1536</sup> This assumes that the structure is inequitable and must be transformed because it hinders a fair distribution of rights between men and women. Reparation then takes on its whole meaning in this objective of political transformation. The sense of responsibility is thus radically modified; from legal, it becomes political, and instead of being a responsibility only for past acts, it becomes a responsibility for the present.<sup>1537</sup> Sen's work indeed reinforces the idea that states have a positive duty to ensure basic minimum standards for all citizens and recognises the indivisibility of all rights,<sup>1538</sup> as reflected in the preamble to the ICESCR and Commentary (CG) No. 9 of the CESCR.<sup>1539</sup> ESC rights are also now part of the Bill of Rights of the CAR's Constitution and several laws, as seen in Chapter 1, guarantee these rights.<sup>1540</sup>

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<sup>1534</sup> Picco and Yaliki supra note 104 at 44-45.

<sup>1535</sup> Observatoire Pharos *République Centrafricaine : Justice et priorité aux victimes* (2018) online at: <https://www.observatoirepharos.com/wp-content/uploads/2016/09/ObsPharos-rapport-final-RCA.pdf>.

<sup>1536</sup> Bessone op cit note 865 at 203.

<sup>1537</sup> Ibid 203.

<sup>1538</sup> Sen op cit note 469 / Also see Priscila Neves-Silva, Giselle Isabelle Martins & Léo Heller 'Human rights' interdependence and indivisibility: A glance over the human rights to water and sanitation' (2019) *BMC International Health and Human Rights* 19, no. 1 (2019): 1-8 at 5: They conclude that human rights are indivisible and interdependent/ Vienna Declaration, World Conference on Human Rights, Vienna, 14 - 25 June 1993, UN Doc. A/CONF.157/24 (Part I) at 20, para. 5: '[A]ll human rights are universal, indivisible and interdependent and interrelated. The international community must treat human rights globally in a fair and equal manner, on the same footing, and with the same emphasis.'

<sup>1539</sup> CESCR, General Comment N° 9, *The domestic application of the Covenant* (Nineteenth session, 1998), U.N. Doc. E/C.12/1998/24 (1998), para. 2.

<sup>1540</sup> Although these rights are now justiciable and the state may also have legal responsibility, this section will only address the political responsibility of the state to respect, protect and fulfill these rights / See Eric Simo 'Les droits économiques et sociaux dans la jurisprudence constitutionnelle africaine' (2023) *La Revue des droits de l'homme. Revue du Centre de recherches et d'études sur les droits fondamentaux* 23, online at : <https://journals.openedition.org/revdh/16213#ftn118/>

This involves considering what human rights theory calls the negative and positive obligations of the state. State obligations can be divided into three parts: duties to respect, duties to protect, and duties to fulfill. As seen in the previous chapter, negative obligations – often associated with the duty to respect – essentially require a state to refrain from intrusions and abuses.<sup>1541</sup> In contrast, positive human rights obligations require a state to take preventive and protective measures actively – often associated with the obligation to protect and fulfill – when an individual or specific group of individuals is at risk of being seriously harmed or when an overall social context interferes with the enjoyment of human rights.<sup>1542</sup> It has to be mentioned that neither ESC nor civil and political rights offer a single model of obligations or enforcement. No right can be reduced to a single duty of the state, such as to refrain from acting or to provide something. The traditional distinction that civil and political rights impose only negative duties and ESC entail only positive duties for states is therefore inaccurate.<sup>1543</sup> For the sake of this section, when historically developed structures within a society cause structural discrimination against specific social groups, and violence against them is general, positive obligations are crucial.<sup>1544</sup>

Under Article 2(c) of CEDAW, state parties must ensure, through competent public institutions, adequate protection of women against any act of discrimination. The obligation to protect also requires states parties to ‘protect women from discrimination by private actors and take steps directly aimed at eliminating customary and all other practices that prejudice and perpetuate the notion of inferiority or superiority of either of the sexes, and of stereotyped roles for men and women.’ The responsibility of the state may therefore be engaged in the event of failure to exercise due diligence to prevent or respond to certain acts or omissions of non-state actors.<sup>1545</sup> In addition to the duty to protect, this thesis argues that TJ mechanisms should also consider the state's duty to fulfill. Duties to fulfill impose on a state obligations to facilitate, provide and promote access to rights. This is mainly the case when this access is limited or non-existent. In these circumstances, the state is expected to be a proactive agent, capable of increasing access to a range of ESC rights, among others.<sup>1546</sup>

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<sup>1541</sup> Henn op cit note 136 at 93.

<sup>1542</sup> Ibid at 94.

<sup>1543</sup> International Commission of Jurists supra note 1356 at 10.

<sup>1544</sup> Henn op cit note 136 at 94.

<sup>1545</sup> *Report of the Special Rapporteur on violence against women, its causes and consequences, State responsibility for eliminating violence against women*, HRC, 2013, UN Doc A/HRC/23/49, § 11/ Also see Henn op cit note 136 at 97 citing IACtHR, *Velasquez-Rodriguez v. Honduras*, Judgment (Merits), 29 July 1988 para. 175.

<sup>1546</sup> International Commission of Jurists supra note 1356 at 48.

Therefore, the obligation to fulfill ESC rights requires implementing measures aimed at changing discriminatory social and cultural patterns that disadvantage vulnerable groups.<sup>1547</sup> Cases concerning the obligation to fulfill involve access to the provision of services and consist in assessing the existence of the applicable legislation and regulations necessary for the provision of these services. Even if such norms and policies exist, they must meet standards of reasonableness, adequacy, equality, and non-discrimination.<sup>1548</sup> The obligation to fulfill also requires state parties to take a wide range of measures to ensure that women and men enjoy equal rights *de jure* and *de facto*.<sup>1549</sup> The first conceptual element that helps determine a state's responsibilities for ESC rights is the idea of core content. This concept implies a definition of the absolute minimum necessary, without which the right would be unrecognisable or meaningless.<sup>1550</sup> With regard to certain rights, such as the right to education, for example, there is a broad consensus on the minimum basic content of the service to be provided by the state, meaning universal primary education free and compulsory.<sup>1551</sup> Accordingly, the right to education is recognised in the CAR Constitution.<sup>1552</sup> Moreover, ESC rights in the CAR are now justiciable.<sup>1553</sup>

In 2011, however, in the CAR, there was a difference of 21 percentage points in school access between urban and rural areas to the advantage of urban areas.<sup>1554</sup> The situation remains the same today, where in rural areas, for lack of means, many parents become teachers.<sup>1555</sup> There is also a strong disparity in the provision of health and medical-related infrastructure between Bangui and more remote provincial regions.<sup>1556</sup> This unequal distribution of resources can violate standards of equality (such as in education),<sup>1557</sup> and particularly impact girls living in rural areas.<sup>1558</sup> Thus, the Central African government will have to ensure that the allocation of resources is redistributed fairly among the districts and that no part of the population is discriminated against because of factors such as ethnicity or

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<sup>1547</sup> Ibid at 49.

<sup>1548</sup> Ibid at 49.

<sup>1549</sup> *General Recommendation No. 28* supra note 71.

<sup>1550</sup> International Commission of Jurists supra note 1356 at 23.

<sup>1551</sup> Ibid at 23.

<sup>1552</sup> See Constitution of 2016, art 9, online

[https://constituteproject.org/constitution/Central\\_African\\_Republic\\_2016.pdf?lang=en/](https://constituteproject.org/constitution/Central_African_Republic_2016.pdf?lang=en/)

<sup>1553</sup> See Simo op cit note 1650 § 29 /Also see *SERAC and CESR v. Nigeria* supra note 1357 § 68.

<sup>1554</sup> Groupe de la Banque Africaine de Développement supra note 242 at 4.5.1.

<sup>1555</sup> Interview recorded on the 14/12/2022 / Also see UN Women supra note 100 at 39-40.

<sup>1556</sup> UN Women Ibid at 50.

<sup>1557</sup> International Commission of Jurists supra note 1356 at 58.

<sup>1558</sup> UN Women supra note 100 at 40.

geography,<sup>1559</sup> which could particularly affect women of some ethnicity or geographical areas, given that, as seen in the introduction, there is also a significant gender gap in access to school. A law on administrative districts<sup>1560</sup> has recently been adopted. This law aims to decentralise state services to make them more efficient and delegates part of the power to the regional governments, which must implement the policies of economic, social, and cultural development and land use planning for their regions. Whether this decentralisation of state services allows a better distribution of the rights to health and education throughout the Central African territory remains to be seen.

Some human rights, however, are only comprehensible if certain types of institutions exist or can be brought into existence, such as a rudimentary administrative state.<sup>1561</sup> International human rights can play a role primarily in societies with certain 'defining features of modernization'<sup>1562</sup> such as a minimal legal system.<sup>1563</sup> Their implementation requires a centralised state capable of formally and materially ensuring their application.<sup>1564</sup> In the CAR, this requirement still needs to be met. The CAR fits the definition of a 'weak state' where informal institutions hold as much, if not more, power than formal institutions. The term 'weak states' refers to:

places where (...) informal networks, rather than state ministries, are the main channels of service delivery and allocation of public resources. The problem of low state capacity generally reflects long colonial histories more than crises, although factors such as economic shocks, terms of trade, and corrupt or incompetent rule make a difference.<sup>1565</sup>

Effective government control may not extend beyond the capital's limits even after a successful transition.<sup>1566</sup> This is the case of the CAR.<sup>1567</sup> Smith goes as far as describing the CAR's state as a phantom state because experienced by most central Africans as 'sorely lacking'.<sup>1568</sup> In addition to being a weak state, the CAR is also a war-torn state as 'civil war is territorially extensive and involves most social groups which in turn challenge state-

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<sup>1559</sup> See for example Supreme Court of Israel, H CJ 727/00, *Committee of the Heads of Arab Municipalities in Israel v. Minister of Construction and Housing*, 56(2) P.D.79.

<sup>1560</sup> Act 21.001 of 21 January 2021 on administrative districts.

<sup>1561</sup> Beitz op cit note 371 at 30.

<sup>1562</sup> Ibid at 57.

<sup>1563</sup> Ibid at 57.

<sup>1564</sup> Ibid at 13/ Also see Helen Quane 'Legal Pluralism and International Human Rights Law: Inherently Incompatible, Mutually Reinforcing or Something in Between?' (2013) *Oxford Journal of Legal Studies* 33, no. 4: 675-702 at 682.

<sup>1565</sup> Charles T. Call 'The fallacy of the 'Failed State'' (2008) *Third World Quarterly* 29, no. 8: 1491-1507 at 1502.

<sup>1566</sup> Pádraig McAuliffe 'Structural causes of conflict and the superficiality of transition' in *Theorizing Transitional Justice* (2015) 102.

<sup>1567</sup> Interview recorded on the 16<sup>th</sup> of September 2022.

<sup>1568</sup> Smith op cit note 566 at 17.



building.<sup>1569</sup> Some zones being said ‘autonomous’ such as the north-eastern region of the country<sup>1570</sup> marked by a minimal government presence. ‘Economic rights’ have therefore often been described as ‘manifesto rights’<sup>1571</sup> since they ‘are not necessarily correlated with the duties of any assignable persons’ because ‘under widely prevalent conditions of scarcity and conflict, (they may) be impossible for *anyone* to discharge.’<sup>1572</sup> However, if socio-economic rights can only be realised ‘progressively’ by each state, there is a duty of other agents to assist and cooperate in the fulfilment of these rights (ICESCR, art. 2.1.).<sup>1573</sup>

(iii) Duty to assist

Even when the responsibility lies with the state, other agents have a duty to assist. This stems from the legal philosophy of John Rawls. Rawls wrote of the ‘society of well-ordered peoples’ and on duty ‘to provide various kinds of assistance to societies burdened by defective domestic institutions (...),’<sup>1574</sup> due to some ‘unfavourable’ historical, social, or economic conditions.<sup>1575</sup> In the CAR, in March 2018, the International Center for Transitional Justice (ICTJ) reported that most Muslim refugees in Cameroon and Chad believe that compensation should come from the international community as it can provide the necessary funds and guarantee a fair distribution.<sup>1576</sup> Concerning the limited resources of the Central African state, it was also suggested that the country's technical and financial partners finance the aid fund for victims through direct contributions.<sup>1577</sup>

This type of responsibility could be linked to the right to development, seen as ‘a collective or solidarity right that responds to the phenomenon of global interdependence’.<sup>1578</sup> The 1986 United Nations Declaration on the Right to Development describes the content of the right as the entitlement ‘to participate in, contribute to, and enjoy economic, social,

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<sup>1569</sup> Call op cit note 1674 at 1502.

<sup>1570</sup> Louisa Lombard ‘The Autonomous Zone Conundrum: Armed Conservation and Rebellion in North-Eastern CAR’ in *Making Sense of the Central African Republic* (2015) at 144.

<sup>1571</sup> Beitz op cit note 371 at 120 citing Joel Feinberg *Social philosophy* (1973) at 67 and 95.

<sup>1572</sup> Ibid at 120 citing Joel Feinberg *Social philosophy* (1973) at 67 and 94.

<sup>1573</sup> Ibid at 26, also referring to the Committee on Economic, Social and Cultural Rights that later held that ‘the phrase “to the maximum of its available resources” was intended by the drafters of the Covenant to refer to both the resources existing within a State and those available from the international community through international cooperation and assistance.’ UN Committee on Economic, Social and Cultural Rights, 5th session, *Report on the Fifth Session*, suppl. 3, annex III, *General Comment 3 (1990), The Nature of State Parties’ Obligations*, Economic and Social Council Official Records, 1991 (E/1991/23), 86.

<sup>1574</sup> Lu op cit note 283 at 154.

<sup>1575</sup> Gentile & Foster op cit note 60 at 515/ See John Rawls *The Law of Peoples* (1993) at 39 & 106-8.

<sup>1576</sup> ICTJ “*I Am 100% Central African: Identity and Inclusion in the Experience of Central African Muslim Refugees in Chad and Cameroon* (2017).

<sup>1577</sup> Picco and Yaliki supra note 104 at 44-45.

<sup>1578</sup> Charlesworth, Chinkin & Wright op cit note 372 at 638-639.

cultural and political development, in which all human rights and fundamental freedoms can be fully realized.<sup>1579</sup> The Declaration clearly promotes accountability through international cooperation.<sup>1580</sup> The Beijing Declaration also recognises that poverty exacerbates discrimination and has its origins ‘both in the national and international domain.’<sup>1581</sup> It specifies that implementing the Platform for Action requires ‘the commitment of governments and the international community.’<sup>1582</sup> The Nairobi Declaration stipulates ‘that national governments bear primary responsibility to provide remedy and reparation within an environment that guarantees safety and human security, and that the international community shares responsibility in that process’ (Nairobi Declaration, para. 6).

Former Special Rapporteur on violence against women, its causes and consequences, Yakin Ertürk, emphasises that ‘while the state remains the primary duty bearer with respect to ensuring the human rights of each individual, in a globalized world where transnational space is expanding and non-State actors are gaining influence over diverse spheres, there is a need to broaden our understanding of the due diligence obligation beyond individual States.’<sup>1583</sup> The UN General Assembly recognises:

that the scale and nature of the challenge of sustaining peace calls for close strategic and operational partnerships between the United Nations, national Governments and other key stakeholders, including international, regional and subregional organizations, international financial institutions, civil society organizations, women’s groups, youth organizations, and the private sector, taking into account national priorities and policies.<sup>1584</sup>

For example, in Sierra Leone, reparations for sexual violence survivors have been funded by UN entities.<sup>1585</sup> In that regard, Cahn has theorized the notion of ‘social services’ which may be ‘provided by the community, by the government, non-governmental organizations, multilateral institutions, or other donors.’<sup>1586</sup> This means going beyond interactional justice and involving accountable external states,<sup>1587</sup> the society of states as a whole, and global civil society in reparation.<sup>1588</sup> This type of accountability transcends compensation theory because it goes beyond attempts to measure the specific losses caused

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<sup>1579</sup> Ibid at 639.

<sup>1580</sup> Aguirre & Pietropaoli op cit 54 at 368 referring to *Report of the Open-ended Working Group on the Right to Development on its Third Session*, UN Doc. E/CN.4/2002/28/Rev.1 (11 April 2002), para. 52.

<sup>1581</sup> UN Women, Beijing +5 Political declaration and Outcome, Introduction at 8.

<sup>1582</sup> Ibid, Introduction at 10 and 12.

<sup>1583</sup> A/HRC/4/34 supra note 478 § 4.

<sup>1584</sup> A/RES/70/262 supra note 312 at 3.

<sup>1585</sup> Guidance Note supra note 319 at 10.

<sup>1586</sup> Cahn op cit note 192 at 36.

<sup>1587</sup> See Lombard op cit note 3: Lombard pinpoints that placing a divide between external actors and national actors ignores the fact that the formers have for a long time become fully woven into the tapestry of Central African politics.

<sup>1588</sup> Lu op cit note 283 at 26.

by violence.<sup>1589</sup> It is also devoid of an acknowledgment of guilt and acceptance of criminal responsibility<sup>1590</sup> and may be administered and funded by entities with no connection to the crime.<sup>1591</sup> This notion of ‘social services’ therefore calls for an ‘ecological model of social reconstruction,’<sup>1592</sup> meaning that different layers of society must intervene in social reconstruction.<sup>1593</sup> An ecological approach helps to conceptualise how conflict-related sexual violence prevention efforts can take place at several interacting levels: supranational, institutional/structural, community, and individual.<sup>1594</sup>

The SDGs for 2030 are indeed part of a dynamic of mobilisation of the entire international community, for example, ‘... in favor of a single and renewed agenda for education that is holistic, ambitious and mobilizing, which leave no one behind.’<sup>1595</sup> Therefore, the evolution of reparation practices following major political catastrophes slowly shows that the responsibility to help and repair the victims often goes beyond the direct perpetrators and involves the society of states as a whole.<sup>1596</sup> In the CAR, the focus has so far been mainly on DDR.<sup>1597</sup> However, it is essential that international partners also focus on transformative reparations as it will be further seen below. Ultimately, beyond a duty to assist, other agents can also be considered politically responsible to repair because they participated or still participate in creating structures of gender inequality in the CAR.

(iv) The responsibility of beneficiaries/ enablers

The continuum of historical and longstanding structural discrimination and fundamental rights deprivations experienced by women brings one to question other types of responsibility. This type of accountability involves looking at the structures that have facilitated the violation of human rights and humanitarian law in the CAR.<sup>1598</sup> Some TJ institutions have already pushed beyond their mandate to investigate transnational dimensions of accountability, such as the Guatemalan Truth Commission's investigation into

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<sup>1589</sup> Cahn op cit note 192 at 37-38.

<sup>1590</sup> Ibid at 37-38.

<sup>1591</sup> Ibid at 37-38.

<sup>1592</sup> Gready & Robins op cit note 27 at 294 / see Laurel E. Fletcher & Harvey M. Weinstein ‘Violence and social repair: Rethinking the contribution of justice to reconciliation’ (2002) *Human Rights Quarterly* 24, no. 3: 573-639 at 637.

<sup>1593</sup> Gready & Robins op cit note 27 294.

<sup>1594</sup> Stop Rape Now supra note 307 at 18/ Also see Aoláin, O'Rourke & Swaine op cit note 140 at 133.

<sup>1595</sup> UN Women supra note 100 at 41/ Also see l’Agenda 2063 de l’Union africaine pour éducation / Stratégie Continentale d’Éducation pour l’Afrique 2016- 2025 » (SCEA).

<sup>1596</sup> Lu op cit note 283 at 44.

<sup>1597</sup> Interview recorded on the 13/12/2022 (2).

<sup>1598</sup> Supra note 30 E/CN.4/2005/102/Add.1, Principle 8 (c).

the role of the United States in human rights violations in Guatemala.<sup>1599</sup> However, most truth commissions do not investigate the role of outside actors in internal human rights abuses, with the notable exception of East Timor, where the CAVR held Indonesia and other states responsible for reparation.<sup>1600</sup> Following a survey conducted in the CAR in 2017-2020, the majority of respondents identified, in addition to the state, the international community (38%), France (38%), those responsible for the crimes (35%), or international organizations (34%) as responsible for paying reparations.<sup>1601</sup> Regarding financing a fund to help victims, some also suggested tapping into the private sector, with taxes on mining permits or exploiting natural resources.<sup>1602</sup>

To identify the actors responsible for structural violence against women in the CAR, one must look to causal factors that are generalizable globally. In Africa, colonialism can be one.<sup>1603</sup> As Kimberly Fils-Aimé said in her thesis, the status of women within a society is determined by several underlying factors: the history of the development of a nation, of which colonialism is a part, its customs and traditions, and its economic climate. These pre-existing or still-existing factors are manifested and aggravated in a conflict since a culture of violence targets the most vulnerable, such as women.<sup>1604</sup> This approach aligns with a certain definition of African feminism. For example, Steady defines African feminism as follows: ‘African feminism combines racial, sexual, class and cultural dimensions of oppression to produce a more inclusive brand of feminism through which women are viewed first and foremost as human, rather than sexual beings. It can be defined as that ideology which encompasses freedom from oppression based on the political, economic, social and cultural manifestations of racial, cultural, sexual and class biases.’<sup>1605</sup>

In this case, one no longer speaks of perpetrators but beneficiaries or enablers. The difference is that this is not a demand for criminal justice anymore but for social

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<sup>1599</sup> Nesiah op cit note 26 at 40.

<sup>1600</sup> Nagy op cit 335 at 284.

<sup>1601</sup> Harvard Humanitarian Initiative (HHI) supra note 1465.

<sup>1602</sup> Picco and Yaliki supra note 104 at 44-45.

<sup>1603</sup> Okome op cit note 378 at 15.

<sup>1604</sup> Alan Cairns ‘Coming to Terms with the Past’ in *Politics and the past: on repairing historical injustices* (2003) at 85.

<sup>1605</sup> Keevy op cit note 504 at 413 referring to P.Y.A. Reed ‘African Womanism and African Feminism: A Philosophical, Literary, and Cosmological Dialectic on Family’ (2001) *The Western Journal of Black Studies*. 25 (3): 168-176 at 170.

justice.<sup>1606</sup> The beneficiaries or enablers are thus understood as beneficiaries or enablers of a system that is built on past or current socio-economic injustices, these injustices particularly impacting women in the CAR. It is a section that sees inequality as structural, as built into the social and economic fabric of societies, and tries to understand what made the CAR's society so unequal in the first place, and what contributes to maintain it as unequal today. Other structural causes could also be studied, such as former Central African governments' gender policies since independence, as this period is also included into the CVJRR's mandate. However, due to lack of space, this section will only deal with colonialism and the activities of private actors in analysing the root causes of gender inequality in the CAR as well as the factors that maintain and still reproduce these inequalities today.

#### *(iv.1) Colonialism*

Memorialization as a new pillar of TJ contributes to the approach that 'events that took place a long time ago, such as the slave trade,'<sup>1607</sup> are now part of the right to know the truth about such violations both as an individual right of each victim or of the members of their family and as a collective right, the 'full and effective exercise of which (...) offers a vital guarantee against the repetition of violations.'<sup>1608</sup> Adopting a historical perspective can therefore inform about the causes that have contributed to gender inequality and the inequitable distribution of rights between men and women in the CAR today and question who is responsible for the transformation of these unequal structures today. Lu notes:

'[...] moral responsibility for wrongful acts can certainly be attributed to the colonizing state and culpable individuals, but some share of historical responsibility should also be attributed to all states, especially the dominant ones, that contributed to perpetuating the unjust social structures of a colonial international system [...] Acknowledging colonialism as structural injustice does not displace assessments of agents' liability for wrongful actions but identifies other agents that contribute to the production of colonial injustices and raises the question of their remedial responsibilities' (Lu, 2017: 127).

This is so since, even though not direct perpetrators they nonetheless 'participated in the production of unjust structural social processes that enabled or supported the increased vulnerability of members of a group to objectionable social and political relations.'<sup>1609</sup> This

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<sup>1606</sup> John Torpey 'Introduction: Politics and the past' in *Politics and the Past: On Repairing Historical Injustices* (2003) at 10 citing Mahmood Mamdani 'Degrees of reconciliation and forms of justice: making sense of the African experience' (1997) *makalah dipresentasikan di konferensi Justice or Reconciliation* at 6.

<sup>1607</sup> *Supra* note 40 UN Doc A/HRC/45/45 § 24.

<sup>1608</sup> *Ibid* § 27 referring to *supra* note 30 E/CN.4/2005/102/Add.1.

<sup>1609</sup> Lu *op cit* note 283 at 257.

type of responsibility could be conceptualised as a way to rewrite the social contract between former colonising states in the central African region, the ones that took part to the Berlin Conference for example, and former colonised ones.

This approach takes on its full meaning in the transformative TJ project,<sup>1610</sup> since the new challenge of TJ, understood as such, is improving or eradicating the effects of gender inequalities.<sup>1611</sup> To identify and address these inequalities, it is essential to understand their deep roots and the gender divisions that have developed historically.<sup>1612</sup> Failure to broaden the analysis would render the effects of TJ ‘negligible’ in terms of social change.<sup>1613</sup> Therefore, scholars writing from a transformative justice perspective posit that searching for the deep institutional imprints of gender inequality, among others, implies that colonialism cannot be ignored.<sup>1614</sup>

The issue of reparations by former colonial powers has arisen since the Durban World Conference on Racism.<sup>1615</sup> Recently, TJ mechanisms have been created to address the colonial legacies of settler colonial states such as Australia, Belgium, and Canada, among other countries.<sup>1616</sup> Such truth-seeking has also been carried out in formerly colonised states; in 2019, for example, the National Land Commission of Kenya determined that the Kipsigis and Talai peoples had been victims of historical land injustices perpetrated during the colonial period and adopted recommendations addressed to the governments of the United Kingdom, Kenya, and transnational corporations that retain ownership of land expropriated from these victims.<sup>1617</sup> Finally, the recent agreement between Germany and Namibia also includes recognition of the genocide against the Herero and Nama peoples (albeit with some reservations) public apologies, and development aid in compensation.<sup>1618</sup>

To satisfactorily address the colonial legacy, the link between past violations and their implications for current events, such as economic and social injustices, must be

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<sup>1610</sup> Bill Rolston & Fionnuala Ní Aoláin ‘Colonialism, Redress and Transitional Justice: Ireland and Beyond’ (2018) *State Crime J.7* (2018): 329 at 333.

<sup>1611</sup> Ibid at 334.

<sup>1612</sup> Ibid at 334.

<sup>1613</sup> Ibid at 334.

<sup>1614</sup> Ibid at 340/ Also UN Doc A/76/180, supra note 1410 at § 5, 6 & 7.

<sup>1615</sup> See Ulrika Sundberg ‘Durban: The Third World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance’ in *Revue Internationale de Droit Pénal* (2002) (Vol.2) at 301/ See also Joshua Castellino ‘Entrenched Structural Discrimination and the Environment: Recovery-Based International Law Response to Colonial Crime’ (2022) Torkel Opsahl Academic EPublisher (TOAEP), Policy Brief Series No. 140 at 2.

<sup>1616</sup> UN Doc A/76/180, supra note 1410 at § 13.

<sup>1617</sup> Ibid § 44.

<sup>1618</sup> Ibid § 18.

established.<sup>1619</sup> A well-founded claim could have the following factors: ‘A human injustice must have been committed; It must be well documented; The victims must be identifiable as a distinct group; The current members of the group must continue to suffer harm, Such harm must be causally connected to past injustice.’<sup>1620</sup> The MMIWG in Canada has, for example, been ‘able to address historical grievances against indigenous peoples, and to situate contemporary physical violence against indigenous women and girls in the broader context of colonial harm.’<sup>1621</sup> In the case of the former independent colonies, although the power structures were reformed at independence, ‘it is important to analyse whether there was any continued application of some of these policies and how they subsequently influenced the emergence of conflicts and human rights violations. In a number of cases, the marginalization of victimized communities continued after independence.’<sup>1622</sup>

Philosophically and legally, the distinction between compensation for lost development rights and reparations for violating human rights is essential.<sup>1623</sup> The legal, moral, political and philosophical basis for asking a government to compensate victims for acts of violence and human rights violations is different from trying to imagine what would have been the case if the violence had not occurred and therein compensating a whole group of individuals for lost opportunities.<sup>1624</sup> In that respect, recognising the continued resonance of these prejudices could pave the way for theorising about the nature of historical prejudices.<sup>1625</sup> According to Nuti, the inequalities put in place during colonialism survive long after many of the economic and social structures underpinning them have changed.<sup>1626</sup> Thus, women in the CAR could be conceptualised as a ‘historical-structural group’ insofar as the exact position of women is rooted, as briefly discussed below, in a history of injustice still structurally reproduced. This may explain how specific dimensions of gender inequality characterising the ‘private’ sphere, such as domestic violence and the gendered division of domestic labour, are significantly linked to a structurally reproduced unjust history.<sup>1627</sup>

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<sup>1619</sup> Ibid § 46.

<sup>1620</sup> Roy L. Brooks ‘Reflections on reparations’ (2003) *Politics and the past: On repairing historical injustices*: 103-114 at 107/ See Mari J. Matsuda ‘Looking to the bottom: Critical legal studies and reparations’ (1987) *HaRv. cR-cll Rev.* 22: 323.

<sup>1621</sup> UN Doc A/76/180, supra note 1410 at § 47.

<sup>1622</sup> Ibid § 49.

<sup>1623</sup> Elazar Barkan ‘Restitution and Amending Historical Injustices’ *Politics and the Past: On Repairing Historical Injustices (World Social Change)* (2003) at 97.

<sup>1624</sup> Ibid at 97.

<sup>1625</sup> Balint, Evans & McMillan op cit note 337 at 214.

<sup>1626</sup> Nuti op cit note 1627 at 179.

<sup>1627</sup> Ibid at 179.

Approaching past injustices as long-term structures does not imply claiming that they persist over time in the same form as when they first appeared.<sup>1628</sup>

Instead, these past injustices are thought of as significantly structuring the present by establishing, even though sometimes only partially, the ground conditions under which individuals and collective agents interact.<sup>1629</sup> Therefore, this analysis suggests that there are historical injustices that are mistakenly seen as past but are instead reproduced in the current social fabric and international order.<sup>1630</sup> Thus, thinking in terms of the division of 'past' and 'present' is theoretically and normatively problematic; Instead, representing the past as an unfair history that keeps repeating itself will help understand better the colonial forms of knowledge and structural arrangements that continue to define gender relations today and shape the life experiences and aspirations of the groups of individuals they encompass.<sup>1631</sup>

In the CAR context, it is essential to be clear about what is and is not characteristic of pre-colonial gender relations. However, research to date has yet to answer these questions conclusively.<sup>1632</sup> Nonetheless, it is now well documented that women had varying statuses as farmers, traders, mothers, elders, members of secret societies, and religious figures in pre-colonial times.<sup>1633</sup> There is also evidence that African women occupied important political, economic, and social positions before the imposition of colonialism.<sup>1634</sup> However, roles and statuses were largely transformed during the colonial period, significantly disrupting 'the organic growth of the continent's socio-political processes.'<sup>1635</sup> Although gender relations were far from egalitarian, women nonetheless played complementary and equally important roles to those of men in many socio-political arrangements.<sup>1636</sup> With colonialism, a new type of patriarchy was introduced, which greatly diminished the socio-political status of women in

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<sup>1628</sup> Ibid at 27.

<sup>1629</sup> Ibid at 27-28.

<sup>1630</sup> Ibid at 51/ Also see Bill & Ní Aoláin op cit note 1719 at 335 – See Ismael Muvingi 'Sitting on Powder Kegs: Socioeconomic Rights in Transitional Societies' (2009) *International Journal of Transitional Justice* 3(2): 163–182.

<sup>1631</sup> Balint, Evans & McMillan op cit note 337 at 202/ Also see Barkan op cit note 1732 at 99/ General Assembly resolution on the Programme of activities for implementation of the International Decade for People of African Descent (A/RES/69/16) United Nations, 1 December 2014, [http://www.un.org/en/events/africandescendecade/pdf/A.RES.69.16\\_IDPAD.pdf](http://www.un.org/en/events/africandescendecade/pdf/A.RES.69.16_IDPAD.pdf) / Verene A. Shepherd 'Reparations & the Right to Development' Office of the High Commissioner for Human Rights (April 6, 2016), online at: [http://www.ohchr.org/Documents/Issues/Racism/W\\_GEAPD/Session16/VereneShepherd.pdf](http://www.ohchr.org/Documents/Issues/Racism/W_GEAPD/Session16/VereneShepherd.pdf) / United Nations Human Rights Office of the High Commissioner supra note 915 at 17-20/ Also see Nagy op cit 335 at 282 & 285.

<sup>1632</sup> Okome op cit note 378 at 12.

<sup>1633</sup> Pamela Scully 'Should we give up on the State? Feminist theory, African gender history and transitional justice' (2009) *African Journal on Conflict Resolution* 9, no. 2 at 35-36.

<sup>1634</sup> Okome op cit note 378 at 15.

<sup>1635</sup> Tamale op cit note 423 at 92.

<sup>1636</sup> Ibid at 92.



society by altering 'the ideology of gender in Africa' and transforming 'women's subjectivity and active agency.'<sup>1637</sup>

Therefore, juxtaposing what she calls 'classic patriarchy' which engenders women's complete dependence on men with what she calls 'negotiable patriarchy' evident in many African contexts, Kandiyoti explains, for example, that: '(T)he insecurities of African polygyny for women are matched by areas of relative autonomy that they clearly strive to maximize.'<sup>1638</sup> Under negotiable patriarchies, 'African women's forms of subordination left immense flexibility and room for subjectivities, deviations, and dialogue.'<sup>1639</sup> By turning the institution of the family or household into a 'corporate entity (...) colonialism diminished the ways that women could navigate marital and marketplace spaces.'<sup>1640</sup> This means that 'the colonists introduced a conceptual separation between the public and private spheres in Africa with a legal separation of state law from personal law,<sup>1641</sup> prior to which the home was most often 'both an enclosed space and a political economy.'<sup>1642</sup> Therefore the private/public distinction is sometimes said to be a historical construct based on a conception of modernity shared among Western countries.<sup>1643</sup>

As for the CAR, most of the country's social, political, and economic arrangements were considerably modified during the colonial period. Until the 19th century, most Central Africans lived scattered in villages without centralised power.<sup>1644</sup> The 'forest peoples' lived in compact villages. The size of the villages generally varied from 30 to 250 people.<sup>1645</sup> These social forms were initially disrupted by the trans-Saharan slave trade network with the growth of centralised authority in certain societies such as that of the Sara.<sup>1646</sup> In the 18th century, however, these outside forces posed only a limited threat: disgruntled subordinate peoples could move into new territories.<sup>1647</sup> Most peoples, therefore, still lived dispersed, like the Banda and the Gbaya to the west.<sup>1648</sup> The second half of the 19th century was a period of

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<sup>1637</sup> Ibid at 92.

<sup>1638</sup> Ibid at 92-93 citing Deniz Kandiyoti 'Bargaining with patriarchy' (1988) *Gender & society* 2, no. 3: 274-290 at 277.

<sup>1639</sup> Ibid at 93.

<sup>1640</sup> Ibid at 92 referring to Maria Mies *Patriarchy and accumulation on a world scale: Women in the international division of labour* (2014).

<sup>1641</sup> Ibid at 180.

<sup>1642</sup> Ibid at 180 citing Karen Tranberg Hansen 'Introduction: domesticity in Africa' (1992) *African encounters with domesticity* 3, no. 31: 160 at 5.

<sup>1643</sup> Ibid at 180.

<sup>1644</sup> Lombard op cit note 3 at 39.

<sup>1645</sup> Jan Vansina 'The peoples of the forest' in *History of Central Africa* 1 (1983) at 83.

<sup>1646</sup> Cordell op cit note 102 at 49.

<sup>1647</sup> Ibid at 57.

<sup>1648</sup> Ibid at 58.

great upheavals, modifying many customary patterns of social organisation, political action, and economic exchange. At this time, sultanates and vassals of, among others, the political entities Wadai and Sokoto were created.<sup>1649</sup> Under pressure from the Fulani and their Mbum allies, for example, some Gbaya groups adopted the Mbum style of compact villages comprising several clans, each with its neighbourhood.<sup>1650</sup> Except for the southwestern forest margins, North-Central Africa was eventually drawn into the Muslim economy until, in the 1880s, the Europeans made their way to North Central Africa.<sup>1651</sup>

At the end of the 19th century, the sultanates had to coexist with these new European foreign powers, mainly France, which quickly seized this part of Africa called, at the time, Ubangui-Chari.<sup>1652</sup> However, this new colony quickly lost its appeal to the French state, which leased it to profit-making companies for thirty years at the beginning of the 20th century.<sup>1653</sup> At the end of this interval, thirty years of cotton cultivation by the colonial government ensued, often at the cost of numerous cases of abuse on the local populations.<sup>1654</sup> Colonisation ended in 1960 with almost no infrastructure built in the country, such as schools or roads,<sup>1655</sup> contrasting with the so-called indirect ‘benefits’ of colonisation that other Africans in the Central African region enjoyed.<sup>1656</sup> It should however be noted that ‘Although some African workers might have come to the mines spontaneously, the colonial tax system greatly increased the pressures propelling Africans to work for money incomes.’<sup>1657</sup>

Austen and Headrick also point out that opportunities for upward mobility were significantly less than in the colonies with ‘more thriving economies, respect for traditional social forms and a better educational apparatus.’<sup>1658</sup> If economic and social misery is difficult to quantify, it is nevertheless possible to say that the first three decades of European domination brought about continuous disruptions. Before Europeans entered Central Africa, there were ‘disease, epidemics, famines, small-scale warfare, and large-scale slave raiding.’<sup>1659</sup> However, the disparity between means of coercion and defense mechanisms,

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<sup>1649</sup> Lombard op cit note 3 at 6.

<sup>1650</sup> Cordell op cit note 102 at 68.

<sup>1651</sup> Ibid at 70.

<sup>1652</sup> Lombard op cit note 3 at 6.

<sup>1653</sup> Ibid at 7/ Also see International Crisis Group *Central African Republic: Anatomy of a Phantom State* (2007) at 2, online at: [https://www.files.ethz.ch/isn/50168/136\\_central\\_african\\_republic.pdf](https://www.files.ethz.ch/isn/50168/136_central_african_republic.pdf).

<sup>1654</sup> Lombard Ibid at 8.

<sup>1655</sup> Ibid at 8.

<sup>1656</sup> Bruce Fetter *Colonial Rule and Regional Imbalance in Central Africa* (1983) at Chap. 1: People and Resources: A Spatial Perspective on the Colonization of Central Africa at 1-21.

<sup>1657</sup> Ibid at 4.

<sup>1658</sup> Ralph Austen & Rita Headrick ‘Equatorial Africa under colonial rule’ in *History of Central Africa 2* (1983) at 27-28.

<sup>1659</sup> Ibid at 34.

even on the Islamic frontier, can hardly be compared of what it became after the imposition of colonial rule. To the famines previously produced by drought were added the famines produced by man, since ‘surpluses,’ however non-existent, were required to supply the administration.<sup>1660</sup> At the same time, labour was recruited during sowing or harvesting seasons.<sup>1661</sup> To understand the gender inequalities that persist in the CAR today, it therefore seems important to analyse the impact that the disruption of these socio-economic systems has had on the division of labour, the institution of the family, social norms, and, more specifically, on gender roles.

Customary norms have also been disrupted. The French, inspired by Christianity and the rationality of the philosophers of the Age of Enlightenment, felt estranged from the traditional patrilineal societies of West and Equatorial Africa when they arrived on the African continent. They, therefore, interpreted certain traditional practices as undermining the individual rights of women.<sup>1662</sup> Marriage, for example, was not a contract between two individuals as in France but rather an alliance between two sets of kinship groups in which a woman's fertility was the most critical asset.<sup>1663</sup> As a result, some key concepts of European cultures, such as consent, were limited. By changing the laws of the countries they colonised, the French hoped to give women access to a higher status. By way of illustration, the Mandel decree was promulgated in 1939. It fixed the minimum legal age for contracting marriage at 14 for women while declaring the consent of the spouses indispensable for its validity.<sup>1664</sup> However, since these laws did not consider the context they were intended to regulate or the historical antecedents of the practices concerned, they did not have the intended effect of raising the status of African women or their emancipation.<sup>1665</sup>

On the contrary, they often created complicated situations in which women who decided to refuse marriage against their parent's wishes or divorce their husbands could no longer find their place in the society to which they belonged.<sup>1666</sup> Polygyny is another example. It has been observed that the introduction of monogamous restrictions has caused unrest in the Uganda Protectorate, for example.<sup>1667</sup> As a result, the surplus of single women turned to prostitution while the domestic burdens of married women increased. Other

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<sup>1660</sup> Ibid at 34-35.

<sup>1661</sup> Ibid at 35.

<sup>1662</sup> Marlène Dobkin ‘Colonialism and the Legal Status of Women in Francophonie Africa’ in: *Cahiers d'études africaines*, vol. 8, n°31, 1968. pp. 390-405.

<sup>1663</sup> Ibid at 392.

<sup>1664</sup> Ibid at 395.

<sup>1665</sup> Ibid at 397.

<sup>1666</sup> Ibid.

<sup>1667</sup> Tamale op cit note 423 at 197.

traditions have been similarly corrupted on the continent,<sup>1668</sup> which was reinforced by the Berlin Conference which subordinated indigenous constitutional systems to new norms and altered the nature of existing customs and traditions at the time.<sup>1669</sup> The problem today is not so much to disrupt customary norms with a broader set of capabilities as to completely ignore the choice that women can make under the umbrella of other norms. According to Lu, disalienation indeed ‘involves the difficult struggle to construct alternatives to colonial modernities. Just as not all colonial modernities have been alienating and unjust in the same ways, there is not just one authentic alternative but several possible nonalienating alternatives or a plurality of postcolonial modernities that agents may pursue.’<sup>1670</sup>

It has been reported that because the colonial period was extremely predatory, the conditions the post-colonial government inherited at independence in 1960 were the starting point for poor governance and the resulting instability.<sup>1671</sup> After its independence, the CAR was indeed subjected to a succession of authoritarian regimes which committed, tolerated, and were unable to prevent serious violations of international human rights law and IHL. These cycles have ‘weakened the country’s human and institutional development, deepened inequalities and encouraged a general climate of impunity.’<sup>1672</sup> For example, women and youth are primary targets of witchcraft due to the overlap of customary and state orders, undermining the social division of labour, and other family norms.<sup>1673</sup> Therefore, it was reported that the new normative order in the CAR must be more coherent to allow for social stability and produce meaning for everyone's position.<sup>1674</sup> Indeed, ‘(B)y accusing young people and women of sorcery, people intend to protect what they believe should still be the normalcy of their lives, the redistribution of wealth and economic opportunities.’<sup>1675</sup>

In the growing global concern to redress historical injustices,<sup>1676</sup> the CVJRR's mandate suffers from shortcomings as it does not include colonialism and only covers facts from 1959 to 2019. A constructive dialogue around the theme of gender justice would require that this period is also documented. The effects of colonialism are far-reaching and continuous, as ‘it affected political institutions, social structures that continue to exist within

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<sup>1668</sup> Ibid at 197.

<sup>1669</sup> Berihun Adugna Gebeye *Legal Syncretism: A Theoretical Framework for Understanding African Constitutionalism* (2019) (thesis) 108.

<sup>1670</sup> Lu op cit note 283 at 278.

<sup>1671</sup> MINUSCA op cit note 119 at 28.

<sup>1672</sup> Ibid at 28.

<sup>1673</sup> Marchal op cit note 527 at 61.

<sup>1674</sup> Ibid at 61.

<sup>1675</sup> Ibid at 61.

<sup>1676</sup> Torpey op cit note 1715 at 8.

the institutional memories of governance structures in Africa.<sup>1677</sup> Ignoring this part of the CAR history would amount to disregarding past lessons and therefore take the risk of perpetuating ‘the repetition compulsion’ cycle.<sup>1678</sup> The absence of the colonial period in the mandate of the CVJRR also keeps a range of gendered experiences of human rights violations and a historical understanding of gender norms and power relations out of the loop of future investigations. Therefore, extending the temporal competence of the CVJRR to the colonial period could allow, if not to consider all the crimes committed during this period, at least to understand better what happened and why gender roles are distributed the way they are today. This could therefore clearly identify the political responsibility of the former colonial countries in the economic and social reconstruction of the CAR today. Lessons could be learned from the Truth Commission of Mauritius, ‘which examined over 370 years of its history,’<sup>1679</sup> or the TRC in Burundi<sup>1680</sup> that expanded its mandate to cover the colonial period.

#### *(iv.2) Private sector*

Some structural injustices are more contemporary and cut through the Central African social fabric through the interplay between transnational capitalist interests and domestic politics. The breakdown of the distinction between the three different generations of human rights and between women's rights and human rights ‘broadens the target of action beyond the state, but expands it also to encompass a variety of non-state actors, including, among others, multilateral actors, financial and development institutions, guerrilla movements, religious orders, and family.’<sup>1681</sup> These institutions confront women on a daily and mostly pervasive basis in Africa.<sup>1682</sup> Therefore, the political responsibility to combat structural injustice, as understood by Lu, is also shared by international and transnational institutions due to the globalised nature of contemporary gender injustices.<sup>1683</sup> Indeed, the global private sphere

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<sup>1677</sup> CSVSR, Mbalenhle Matandela *Addressing Gender Justice and Colonialism through Transitional Justice in Africa* (2020) at 3, online at: <https://www.csvr.org.za/publications/2852-addressing-gender-justice-and-colonialism-through-transitional-justice-in-africa>.

<sup>1678</sup> Joinet Op Cit note 35 at 24/ See United Nations, Mapping Project supra note 119 at 326 : ‘It is quite possible that the negation of historical events in CAR is one of the causes of the recurrence of crimes in Central Africa. The lack of reliable documentation due to the looting and destruction of government and administrative buildings, courts, civil registries, schools, hospitals and other similar sources of crucial information is a challenge for future transitional justice processes in CAR.’

<sup>1679</sup> CSVSR supra note 907 at 5.

<sup>1680</sup> Asia Justice and Rights supra note 607 at 44.

<sup>1681</sup> Oloka-Onyango & Tamale op cit note 233 at 712.

<sup>1682</sup> Ibid at 712.

<sup>1683</sup> Lu op cit note 283 at 265-266.

impacts the local space in a variety of different and complex ways in Africa.<sup>1684</sup> In sum, what in Africa appears to be a local political event is compounded by the frustrations and tensions unleashed by global forces.<sup>1685</sup> For example, the Sierra Leone commission has done important work linking the details of the gender dimensions of property rights to the political economy of the diamond trade as part of the search for the truth about factors of vulnerability, abuse, and impunity. This is an example of the powerful potential of TJ institutions to make these connections and expose how established power hierarchies and abuses are activated and reproduced through these structures.<sup>1686</sup>

In that respect the CEDAW Committee observed that ‘Indigenous Women and Girls are heavily impacted by existential threats connected to climate change, environmental degradation, the loss of biodiversity, and barriers to access food and water security.’<sup>1687</sup> It adds: ‘Extractive activities of business enterprises and other industrial, financial, public, and private actors often have a devastating impact on the environment, air, land, waterways, oceans, territories, and natural resources of Indigenous Peoples and may infringe the rights of Indigenous Women and Girls.’<sup>1688</sup> It notes ‘One of the root causes of discrimination against Indigenous Women and Girls is the lack of effective implementation of their rights to self-determination, autonomy, and related guarantees, as manifested inter alia in the continued dispossession of their lands, territories, and natural resources. The Committee acknowledges that the vital link between Indigenous Women and their lands often forms the basis of their culture, identity, spirituality, ancestral knowledge, and survival. (...)’<sup>1689</sup> The Aka Pygmies, the Babézzélé Pygmies are considered as falling under the definition of indigenous peoples given by the UN.<sup>1690</sup> Their way of life and biodiversity have already been largely impacted by armed groups.<sup>1691</sup> Although these recommendations relate specifically to indigenous women, these private entities have an impact on the way of life of many more women in the CAR as it will be seen below.

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<sup>1684</sup> Oloka-Onyango & Tamale op cit note 233 at 702.

<sup>1685</sup> Mannell et al. op cit note 1596 at 2.

<sup>1686</sup> Nesiha op cit note 26 at 38.

<sup>1687</sup> CEDAW Committee on the Elimination of Discrimination Against Women (CEDAW), *General Recommendation No. 37 on the gender-related dimensions of disaster risk reduction in the context of climate change*, 13 March 2018, CEDAW/C/GC/37, paras. 1-9.

<sup>1688</sup> CEDAW GR 39 supra 111 para. 7.

<sup>1689</sup> Ibid para. 11.

<sup>1690</sup> IWGIA supra note 105.

<sup>1691</sup> Ibid.

(iv.2 -a) Armed groups

Armed groups in the CAR, at least until 2019, administratively controlled parts of the country, to the point of collecting taxes from the population.<sup>1692</sup> In the CAR, the state was sometimes prevented from providing public services in the provinces, such as free education, because these regions were under the control of armed groups. A ‘non-State armed group’ is here defined as:

an illegal entity under domestic law that is currently or has previously been engaged in armed violence, has some degree of de facto command structure and the capacity to control the actions of its individual members and that, where it is exercising a governance function over civilian populations, is capable of administering such functions in compliance with international human rights standards.<sup>1693</sup>

International humanitarian law has long been the primary regulatory framework for addressing the conduct of non-state armed groups in conflict.<sup>1694</sup> The application of human rights standards to the actions of non-state armed groups is however more complex:

‘Historically, human rights law has been regarded as applying only to states. However, from the late 1980s onwards, a norm has gradually evolved that where non-state armed groups control a territory and fulfil state-like functions, they can be held to a minimum of accountability under international human rights law.’<sup>1695</sup> Consequently, in various situations such as those in Afghanistan, the Democratic Republic of the Congo, or El Salvador,

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<sup>1692</sup> Interview recorded on the 14/12/2022 / Also see Ministère de la Promotion de la Femme, de la Famille et de la Protection de l’Enfant Plan d’Action National de Mise en Œuvre de la Résolution ‘Femmes, Paix et Sécurité’ du Conseil de Sécurité des Nations Unies et ses Résolutions Connexes 2019-2022 (2<sup>ème</sup> Génération) (2019), at 10, online at : [http://1325naps.peacewomen.org/wp-content/uploads/2022/10/PAN-2-R1325-RCA\\_2019-002.pdf](http://1325naps.peacewomen.org/wp-content/uploads/2022/10/PAN-2-R1325-RCA_2019-002.pdf).

<sup>1693</sup> *Report of the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence, Roles and responsibilities of non-State actors in transitional justice processes*, GA, 2022, UN Doc A/HRC/51/34, § 54 online at: <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G22/404/91/PDF/G2240491.pdf?OpenElement/>. Also see Pre-Trial Chamber II, Warrant of Arrest for Maxime Jeoffroy Eli Mokom, supra note 786 § 12: ‘The Chamber finds that there are reasonable grounds to believe that the Seleka and the Anti-Balaka qualify as armed groups within the meaning of article 8(2)(f) of the Statute, since, as the case may be, (i) they exhibit a sufficient degree of organisation, with commanders controlling militants within their respective bases, (ii) orders were circulated down the chain of command and were obeyed by subordinates, and (iii) they possessed military equipment, including firearms and heavy weapons, and had the ability to plan military operations and put them into effect.’

<sup>1694</sup> Ibid § 49 referring to Geneva Conventions of 12 August 1949, art. 3; and Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), arts. 4–5 and 7.

<sup>1695</sup> Ibid § 49 referring to Nigel Rodley ‘Can armed opposition groups violate human rights?’ in Kathleen Mahoney and Paul Mahoney, eds. *Human Rights in the Twenty-first Century* (1993); David Petrasek *Ends and means: human rights approaches to armed groups* (2000)/ Katharine Fortin, *The Accountability of Armed Groups under Human Rights Law* (2017)/ Daragh Murray *Human rights obligations of non-state armed groups* (2016).

international bodies have recognised that non-state armed groups must respect human rights standards in the territories under their control, particularly in matters of health, education, and complaints of violations of the human rights of the civilian population.<sup>1696</sup> Therefore, international human rights standards can provide TJ with a broader accountability framework to address violations by non-state armed groups than the narrower focus of IHL.<sup>1697</sup> The Peruvian case, for example, extensively considered human rights abuses committed by a guerrilla group.<sup>1698</sup>

In that respect, the Special Rapporteur notes that ‘non-State armed groups and ex-combatants have a legal, political and moral duty to engage with truth-seeking initiatives concerning their involvement in past violations of humanitarian and human rights law,’<sup>1699</sup> and ‘should contribute to reparations programmes. In order to facilitate that contribution, there is a strong case for clarifying the international legal obligations of non-state actors to provide reparations for gross violations of human rights and humanitarian law.’<sup>1700</sup> Regarding political accountability, non-state armed groups may agree to provide reparations as part of broader political negotiations. For example, the 2019 peace agreement in the CAR resulted in a commitment from the 14 armed groups signing this agreement to provide reparations, including the restitution of property and other assets and their contribution to a trust fund for victims.<sup>1701</sup>

#### (iv.2-b) Concessionary politics

Private companies, particularly in the mining sector, sometimes operate outside state control in the CAR.<sup>1702</sup> In terms of gender equality, it would be interesting for the CVJRR to analyse the impact that the activity of these concessions has on the gender division of labour, the propensity of women to enter the sex industry and what this implies in terms of vulnerability in conflict and post-conflict periods as well as in terms of transformation and non-

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<sup>1696</sup> Ibid § 50.

<sup>1697</sup> Ibid § 50 online/ See *Security Council resolution 1325 (2000)* supra note 289, Preamble § 13 / *Resolution 1888 (2009) on Women, Peace and Security*, supra note 291, Preamble § 21 / *Resolution 1960 (2010)* supra note 293, Preamble § 9.

<sup>1698</sup> United Nations Human Rights Office of the High Commissioner supra note 915 at 55.

<sup>1699</sup> UN Doc A/HRC/51/34 supra note 1802 § 67.

<sup>1700</sup> Ibid § 81.

<sup>1701</sup> Ibid § 83 referring to Laura Íñigo Álvarez ‘The obligation to provide reparations by armed groups: a norm under customary international law?’ (2020) *Netherlands International Law Review*, vol. 67, No. 3/ See *Accord politique pour la paix et la réconciliation en République centrafricaine* of 2019, art. 5 (i), art. 12 (even though these reparations are intended only for the victims of the conflict).

<sup>1702</sup> Interview recorded on the 14/12/2022.



recurrence.<sup>1703</sup> In this thesis, ‘Concessions’ refer to formal legal arrangements by which land is temporarily demarcated for specific uses. Hardin defines ‘concessions:’

not only as formal legal acts that enable the demarcation of spatial units for utilization and management of ecosystems but also as social processes. The formation of concessions and the succession of concessionary economies over time play out through three key phases: prospecting for resources; mapping boundaries; and negotiating the circumstances of extraction, production, and redistribution of wealth therein.<sup>1704</sup>

In colonial times, the system of concessionary companies proved to be an economic failure.<sup>1705</sup> Even where profit rates were high, accumulated capital was minuscule, given the production inefficiency and the repatriation of profits to Europe.<sup>1706</sup> Today, concessionary politics still contribute to the country's poverty and hinder the population's access to public services.<sup>1707</sup> For example, the diamond mining and trading industry has been reported to contribute to the country's chronic political instability and economic malaise.<sup>1708</sup> Moreover, while the staff of some concessions can sometimes play a positive role in providing medical, educational, and infrastructure services to the families of their workers,<sup>1709</sup> the flows of aid and expertise to the forest regions where they operate nevertheless suggest that the proliferation of concessions in the Congo Basin has profound effects on local political and economic structures.<sup>1710</sup>

Recently, Sierra Leone's truth commission has addressed the role of foreign actors in the conflict, including the diamond industry.<sup>1711</sup> The South African Truth Commission (SATRC) also found that some companies, particularly the mining industry, had profited from apartheid policies. As a result, the SATRC recommended that these companies play a role in developing new reconstruction and development programs in the country.<sup>1712</sup> Among other things, the SATRC suggested a wealth tax for these companies.<sup>1713</sup> Here, however, it

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<sup>1703</sup> UN Women supra note 100 at 33-34.

<sup>1704</sup> Hardin op cit note 499 at S115.

<sup>1705</sup> Austen & Headrick op cit note 1767 at 39.

<sup>1706</sup> Ibid at 54.

<sup>1707</sup> Stephen Smith, T. Carayannis & L. Lombard ‘The elite’s road to riches in a poor country’ in *Making Sense of the Central African Republic* (2015) 115.

<sup>1708</sup> Ned Dalby ‘A Multifaceted Business’ in *Making Sense of the Central African Republic* (2015) 138.

<sup>1709</sup> Hardin op cit note 499 at S120.

<sup>1710</sup> Ibid at S124.

<sup>1711</sup> Global Initiative for Justice, Truth and Reconciliation *The Role of the Private Sector in Transitional Justice Processes in Africa* (2021) 28-29, online at: <https://gijtr.org/wp-content/uploads/2021/06/ABA-ROLI-The-Role-of-the-Private-Sector-in-TJ-Processes-in-Africa-June-2021-Report-Secure.pdf>. / Also UN Doc A/HRC/51/34 supra note 1802 § 33.

<sup>1712</sup> Ibid at 28-29.

<sup>1713</sup> Ibid at 29.

would not only be a question of determining the role of these private actors in the conflict unfolding in the CAR, although this could also be an option, but also of seeing how these private institutions contribute to the commission of human rights violations, in particular through the establishment of activities that aggravate the country's structural violence, including gender-based structural violence.

In a 2020 report on conflict-affected regions, the Working Group on the issue of human rights and transnational corporations and other business enterprises noted that businesses should engage in relevant TJ processes and contribute to truth, justice, reparation, and guarantees of non-recurrence, where appropriate.<sup>1714</sup> It should also be noted that the state has a duty of due diligence. In *SERAC and CESR v. Nigeria*, for example, the African Commission on Human and Peoples' Rights found violations in the failure of the state to regulate and prevent the behavior of a private oil company that polluted natural resources and destroyed the traditional livelihoods of the Ogoni people. In addition, the Commission considered that the state had failed in its duties to protect the rights to health, to a healthy environment, and to protect against the degradation of the wealth and natural resources of the population.<sup>1715</sup>

Participants in the third African Youth Training Session for TJ, held in Malabo on November 2-3, 2022, also addressed this issue, referring to the *Supplementary Note to the African Union Transitional Justice Policy on Environment and Natural Resources in Transitional Justice Processes and Mechanisms*. This document provides a set of principles promoting the integration of environmental and natural resource governance into TJ processes and mechanisms in Africa, including considering environmental and natural resource atrocities that violate the economic, social, and cultural rights of populations.<sup>1716</sup> This new approach is interesting for analysing how concession politics can impact the natural environment of certain communities in the CAR, in particular, given the impact it can have on women's socioeconomic rights, given that a lot of them live from the exploitation,

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<sup>1714</sup> UN Doc A/HRC/51/34 supra note 1802 § 31 referring to UN General Assembly, 75<sup>th</sup> session, Issues of human rights and transnational corporations and other business enterprises, 21 July 2020, UN Doc A/75/212, para. 85.

<sup>1715</sup> International Commission of Jurists supra note 1356 at 46 referring to *SERAC and CESR v. Nigeria* supra note 1357. On the duties to protect, see paras. 46, 61 and 65. On the findings of violations to these duties, see paras. 55, 57-58 and 66. For a comment, see F. Coomans 'The Ogoni Case Before The African Commission on Human and Peoples' Rights' (2003) *International and Comparative Law Quarterly*, Vol. 52, p. 749-760.

<sup>1716</sup> Mutoy Mubiala 'Mass Deforestation as an Alarming Form of Ecocide: Adopting Transitional: Justice Measures to Complement Criminalization' (2022) Torkel Opsahl Academic EPublisher (TOAEP), Policy Brief Series No. 139 at 4 referring to Munini Mutuku 'Supplementary Note to the African Union Transitional Justice Policy on Environment and Natural Resources in Transitional Justice Processes and Mechanisms' (2022) Bosch Alumni Network and Environmental Building, Nairobi at 6.

transformation and commercialisation of natural resources.<sup>1717</sup> In Ecuador, it was noted that this type of violence, beyond affecting the social and economic rights of the people concerned, also has a direct impact on their cultural rights ‘When we’re talking about the rights of nature, we’re not just talking about protecting plants and animals, but about respecting nature’s cosmologies and its spiritual worlds.’<sup>1718</sup>

The *ubuntu* philosophy, for example, is a holistic view of life where one is connected to the natural world, the world of their ancestors and the yet-to be born as much as their contemporary.<sup>1719</sup> In southwestern CAR, land is seen as a fundamental factor in the social integration of indigenous Aka peoples, and has great socio-cultural value.<sup>1720</sup> Lewis, in that regard, talks about the colonisation of the environment in which nature, certain human bodies and other species are seen only as resources for privileged groups.<sup>1721</sup> This can be induced by corporate control of a land, for example.<sup>1722</sup> Therefore, some authors call for TJ mechanisms to recognise the responsibility of non-state actors not only for civil and political rights violations but also for the violations of ESC rights.<sup>1723</sup> Moyo adds: ‘In fact postcolonial legal theorists have pointed out that international financial institutions, structural adjustment and trade liberalization policies insensitivity to budgetary actualities of postcolonial states weaken the economic, social and cultural rights of people in these societies.’<sup>1724</sup> This type of responsibility for structural injustices leads to a rethinking of the very notion of reparation.

#### (d) Transformative reparations

While reparations and development constitute two distinct and separate rights, creating links with development actors and programs could be beneficial in providing lasting and

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<sup>1717</sup> UN Women supra note 100 at 55 / Groupe de la Banque Africaine de Développement supra note 242 at 5.3.4.

<sup>1718</sup> Time, Mélissa Godin *The Fight to Save Ecuador’s Sacred River* (2022), online at: <https://time.com/6224546/fight-to-save-ecuador-piatua-river/>.

<sup>1719</sup> Keevy op cit note 504 at 343.

<sup>1720</sup> Landry Kevis Kossi ‘La gouvernance foncière dans un contexte de pluralisme juridique chez les autochtones Aka en Centrafrique’ (2018) *African Journal on Land Policy and Geospatial Sciences* 1, no. 3: 129-145 at 132.

<sup>1721</sup> Feminism, modernity and being human in contemporary Africa. Desiree Lewis and S.N. Nyeck, online at: <https://www.youtube.com/watch?v=nziMfe0Sws4> at 49:10.

<sup>1722</sup> Ibid at 50:00.

<sup>1723</sup> Moyo op cit note 568 at 271.

<sup>1724</sup> Ibid at 270 referring to JT Gathii ‘Representations of Africa in Good Governance Discourse: Policing and Containing Dissidence to Neo-Liberalism’ (1998-1999) *Third World Legal Studies* 65 at 67/ Also see A Orford ‘Feminism, Imperialism and the Mission of International Law’ (2002) 71 *Nordic Journal of International Law* 275.

transformative reparations,<sup>1725</sup> especially in a country affected by massive gender inequality. The individualised compensation of certain groups of victims, if necessary, should not, however, call into question the need for future socio-economic justice and forms of reparations aimed at redistributing rights fairly between women and men and thus contributing to potentially reducing violence against women in the CAR.<sup>1726</sup> Transformative reparations understood in this broader sense often face the critique of 'development as reparation.' It is often said that development programs should respond to the general socio-economic needs of the population, and reparations should be reserved for the most severe violations of civil and political rights. This vision nevertheless risks reproducing a hierarchical distinction between political and civil rights, on the one hand, and ESC rights, on the other, so often criticised, in particular by feminist scholars who consider that such a hierarchy disadvantages the poorest, including women.<sup>1727</sup>

Similarly, Dwyer argues that reconciliation in its broadest sense can only be achieved by implementing social and economic programs that concretely address the substantial injustices of the past.<sup>1728</sup> Unlike the individualised version of reconciliation, as seen in the previous chapter with interactional reconciliation, this approach targets broader social and political change processes, thus what Lu calls structural reconciliation.<sup>1729</sup> Rashida Manjoo, former Special Rapporteur on violence against women, its causes and consequences, notes in this regard that reparations offer the possibility of addressing 'pre-existing inequalities, injustices, prejudices, and biases or other social perceptions and practices that enabled violations to occur, including discrimination against women and girls.'<sup>1730</sup>

Therefore, if direct forms of GBV are only the tip of the iceberg, TJ, to be a vector of change, will also have to provide reparations that can transform the structural conditions that made GBV possible. This reconceptualisation leads to transformative reparation, which assumes that 'reparations should address the structural causes of conflict, removing the conditions that enabled or caused the violations, to give survivors a new starting point for a different future.'<sup>1731</sup> However, social and economic rights are often narrowly defined in

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<sup>1725</sup> Guidance Note supra note 319 – Principle 5.

<sup>1726</sup> Evans op cit note 953 at 7.

<sup>1727</sup> Rubio-Marín op cit note 1313 at 110 / Also see Aoláin, O'Rourke & Swaine op cit note 140 at 120.

<sup>1728</sup> Laplante op cit note 305 at 349.

<sup>1729</sup> Ibid at 349.

<sup>1730</sup> Rashida Manjoo (Special Rapporteur on Violence Against Women, Its Causes and Consequences), *First Rep. on Violence Against Women, Its Causes and Consequences*, Summary, U.N. Doc. A/HRC/14/22 (Apr. 19, 2010).

<sup>1731</sup> Weber op cit note 1616 at 89-90.

TJ.<sup>1732</sup> It is, therefore, a question here of stretching the logic of reparation and asking oneself: what type of reparation is best suited to the violation of ESC rights which mainly affects women in the CAR? Within the framework of a bottom-up and capacity-centred approach to development, the strongest links can be established with TJ in general and reparations programs in particular.<sup>1733</sup>

(i) Definition

Although Lu saw political responsibility for structural injustice as going beyond reparations understood as corrective reparations, the concept of transformative reparations, because it is forward-looking, allows this type of responsibility to be reintegrated into a responsibility to repair. These types of reparations are forward-looking and are meant to repair an unjust social, economic and political order. According to Manjoo: ‘in order for reparations to be transformative, they must operate on three levels: individual, institutional and structural.’<sup>1734</sup> Therefore, if the idea of transformative reparation first referred to the individual level, as seen in the previous chapter, it can today also refer to the social level. This change stems from a desire to understand how a reparations project, which aims to recognise victims as equal rights holders, can respond to the fact that certain groups were not equal rights holders before the violent episode took place.<sup>1735</sup>

The social aspect of reparations is of particular interest in the context of structural discrimination.<sup>1736</sup> At the social level, reparations must strive to have a transformative effect on social inequalities. They thus have the potential to trigger significant social and economic change, even if they alone cannot transform the root causes of violations.<sup>1737</sup> Gready defines ‘structural socio-economic reform’ as follow ‘Socio-economic rights broadly comprise the following: the redistribution of wealth, resources, and power towards the alleviation of inequality and poverty; to that end, access to education, health, food, water, housing, work and other economic and social rights essential to human dignity.’<sup>1738</sup> ‘Transformative reparations’ can then be understood as reparations capable of ‘challenge[ing] unequal and

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<sup>1732</sup> Gready & Robins op cit note 324 at 346-347.

<sup>1733</sup> Roht-Arriaza & Orlovsky op cit note 1251 at 205.

<sup>1734</sup> Manjoo op cit note 1287 at 1197.

<sup>1735</sup> Ruth Rubio-Marín op cit note 1108 at 17.

<sup>1736</sup> Henn op cit note 136 at 172.

<sup>1737</sup> UNDP supra note 186 at 43/ Also see Simeon Gready ‘The case for transformative reparations: In pursuit of structural socio-economic reform in post-conflict societies’ (2022) *Journal of Intervention and Statebuilding* 16, no. 2: 182-201 at 182.

<sup>1738</sup> Ibid at 183.

intersecting power relations and structures of exclusion.<sup>1739</sup> In the context of this thesis, these types of reparation respond to the social, political, economic,<sup>1740</sup> and cultural exclusions of women and improve their conditions.

UNDP notes that:

Institutional reforms as part of reparations should be considered to confront discriminatory governance across spheres, enabling equitable and inclusive distribution of social justice and development opportunities and addressing drivers of conflict. Such reforms can advance transformative initiatives that mitigate gender, ethnic, religious, racial, and other social cleavages, advancing social cohesion and enhancing economic performance.<sup>1741</sup>

The concept of transformative reparations is ‘meant to be sensitive to the needs of those humiliated and offended by terrible crimes and those whose dignity and freedom have been impaired because of structural inequalities. The notion of transformative reparation is, in that sense, an effort to take seriously in a transitional context the principle of the interdependence of civil and political rights with economic, social, and cultural rights.’<sup>1742</sup> These reparations however differ from ‘reparation in its legal sense,’<sup>1743</sup> they can instead be seen as an instrument for improving distributive justice,<sup>1744</sup> which can participate in the objective of prevention or simply aim to ‘overcome some forms of inequality and poverty because they are unjust, even if they are not factors that would generate new cycles of violence.’<sup>1745</sup>

From an international law perspective, no concern arises when a state conceptualises or controls the conceptualisation of transformative reparation within the context of TJ programs.<sup>1746</sup> If the concept of transformative reparations in its most expansive version is, in some way, contrary to the dominant legal doctrines on reparations, it is also ‘a possible and reasonable interpretation of the current international legal standards, which, far from weakening victims’ right to reparation, makes it more meaningful because it shows that victims’ compensation is compatible with pursuing a more just society for all.’<sup>1747</sup> The Nairobi Declaration on Women’s and Girls’ Right to a Remedy and Reparation (2007), for

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<sup>1739</sup> Pradier, Rubin & van der Merwe op cit note 1418 at 303.

<sup>1740</sup> McGill op cit note 339 at 96.

<sup>1741</sup> UNDP supra note 186 at 47.

<sup>1742</sup> Sahla Aroussi ‘Perceptions of justice and hierarchies of rape: Rethinking approaches to sexual violence in Eastern Congo from the ground up’ (2018) *International Journal of Transitional Justice* 12, no. 2: 277-295 at 293.

<sup>1743</sup> Ibid at 293.

<sup>1744</sup> Yepes op cit note 1426 at 646-647.

<sup>1745</sup> Ibid at 646-647.

<sup>1746</sup> Henn op cit note 136 at 176.

<sup>1747</sup> Yepes op cit note 1426 at at 646-647.

example, asserts that 'reparation must drive post-conflict transformation of socio-cultural injustices, and political and structural inequalities that shape the lives of women and girls; that reintegration and restitution by themselves are not sufficient goals of reparation, since the origins of violations of women's and girls' human rights predate the conflict situation.'<sup>1748</sup> Arbour, at a conference held in 2006 called for TJ to 'make the gigantic leap' that would enable justice to be fully realised in post-authoritarian and post-conflict societies:

Transitional justice must have the ambition of assisting the transformation of oppressed societies into free ones by addressing the injustices of the past through measures that will procure an equitable future. It must reach to, but also beyond the crises and abuses committed during the conflict which led to the transition, into the human rights violations that pre-existed the conflict and caused, or contributed to it. When making that search, it is likely that one would expose a great number of violations of economic, social and cultural (ESC) rights and discriminatory practices. (2006: 3–4)<sup>1749</sup>

A 2012 UN Women policy brief asserts:

In order to achieve their maximum potential for advancing gender justice, reparations programmes must be both targeted and transformative: targeted in that priority should be given to specific vulnerable or in-need groups, and transformative in that they should aim to redress underlying inequalities.<sup>1750</sup>

UN Women identifies institutional reforms as forms of reparation that could directly address discriminatory laws and policies and align reparations with structural and development initiatives aimed at social transformation.<sup>1751</sup> The CEDAW Committee also supports this view.<sup>1752</sup> It calls, for example, for TJ mechanisms to 'secure a transformative change in women's lives,'<sup>1753</sup> and states: 'Rather than re-establishing the situation that existed before the violations of women's rights, reparations measures should seek to transform the structural inequalities which led to the violations of women's rights, respond to women's specific needs and prevent their re-occurrence.'<sup>1754</sup> Furthermore, the UN policy and operational guidance, as requested by the UN Secretary-General in his 2014 Guidance Note on Reparations for Conflict-Related Sexual Violence, establishes that 'reparations should strive to be transformative, including in design, implementation and impact,'<sup>1755</sup> which can be

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<sup>1748</sup> Nairobi supra note 72, art. 3.

<sup>1749</sup> Arbour op cit note 55.

<sup>1750</sup> UN Women *A Window of Opportunity: Making Transitional Justice Work for Women* (2012) 18.

<sup>1751</sup> Walker op cit note 1506 at 113 referring to UN Women *A Window of Opportunity: Making Transitional Justice Work for Women* (2012).

<sup>1752</sup> Rubio-Marin & Estrada-Tanck op cit note 1447 at 582.

<sup>1753</sup> Walker op cit note 1506 at 113 referring to General Recommendation No. 30 supra note 223, para. 77.

<sup>1754</sup> Ibid at 114 referring to General Recommendation No. 30 supra note 223, para. 79.

<sup>1755</sup> Guidance Note supra note 319 at 1 (A.4).

interepreted as an invitation to ‘go beyond corrective justice to also include distributive justice in the forms of development measures or social services’<sup>1756</sup> and, by doing so, ‘transform structures of gendered inequality and discrimination.’<sup>1757</sup>

This idea of transformative reparation has increasingly been discussed in the context of legal proceedings and has been applied to non-conflict contexts.<sup>1758</sup> For example, the Inter-American Court of Human Rights, in *González et al. “Cotton Field” v. Mexico*, after finding the state of Mexico responsible, stated that reparations should seek rectification.<sup>1759</sup> The argument was that returning the victims to their initial situation (*restitutio ad integrum*) would be wrong since that situation was one of structural discrimination. As for TJ mechanisms, transformative reparations have gained ground in recent years, even if the process has been slow and has yet to be conceptualised as such. In Sierra Leone, for example, the reparations program made some recommendations to remedy economic and social rights violations. However, these reparations were not conceptualised as reparations for violations of the ESC rights of those affected by these violations.<sup>1760</sup> In Colombia, Morocco, and Peru, collective reparations programs have responded to the needs of specific communities and regions.<sup>1761</sup> In Colombia, for example, some local communities have called for a reparations program to specifically address economic and social rights violations, including the right to land restitution.<sup>1762</sup> In Peru, the CVR adopted a transformative mandate, according to which: “the CVR should address the root causes of conflict ... and that it should utilize methodologies and a participatory process that would strengthen democratic citizenship and individually and collectively empower survivors and affected communities”, for example

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<sup>1756</sup> Weber op cit note 1616 at 90.

<sup>1757</sup> Ibid at 90.

<sup>1758</sup> Henn op cit note 136 at 173.

<sup>1759</sup> *Gonzalez et al. (“conton field”) v Mexico (Preliminary Objection, Merits, Reparations, and Costs)*, I/ACtHR, Judgment of 16 November 2009 § 450.

<sup>1760</sup> Cahill-Ripley op cit 332 at 204.

<sup>1761</sup> UN Doc A/77/162 supra note 1444 § 27.

<sup>1762</sup> Cahill-Ripley op cit 332 at 209 referring to N. Summers ‘Colombia’s Victims’ Law: Transitional Justice in a Time of Violent Conflict?’ (2012) 25 *Harvard Human Rights Journal* 220/ Also see Leyh & Fraser op cit note 1230 at 45: ‘The most well-known example is Colombia’s 2011 Victims Law, which establishes a comprehensive programme for victims’ rights in response to the more than 50 years of conflict between the State and non-State armed groups (most notably the FARC-EP). The Victims Law explicitly mentions the ‘transformative character’ of the reparations it aims to provide. Although the law does not provide any specific guidance on how transformation should be achieved, the IACtHR has played an important role in monitoring the reparations processes. Nevertheless, questions have been raised about its efficacy.’



through its extensive reparations plan.<sup>1763</sup> The European Union (EU) has also mentioned in its TJ policy that it supports forward-looking processes.<sup>1764</sup>

Gready therefore proposes this definition of collective reparations: ‘forms of distribution of public goods or services that are designed for the benefit of all members of a [victimized] region, group, or community, rather than for specific individual victims.’<sup>1765</sup> According to him, defined as such, ‘the scope of collective reparations lends itself to the more indirect benefits of forward-looking distributive justice (...).’<sup>1766</sup> In this thesis collective reparations, even though redistributive, are not *per se* designed for a victimised group, but rather for regiving to women the capabilities to enjoy their rights, as citizens. Transformative reparations therefore go a step further than targeting a specific group to rather address past gender discriminations that affect the whole of society in the CAR. If community-based approaches are important, it is argued that they should not overlook the need for a change at the legal and policy-changing level for women.<sup>1767</sup>

Transformative reparations, understood as such, enable ‘a concrete connection between sustaining peace and working towards achieving the SDGs.’<sup>1768</sup> UNDP however notes that if reparations need to be connected with development, development should not replace reparations: ‘Combining development and social services with reparations is the premise of transformative reparations. Nevertheless, the Special Rapporteur, in numerous reports, and victims’ organizations themselves, have warned against Governments’ portraying broader development measures as alleged reparations. Although collective reparations can include development-oriented services, the former cannot be substituted by the latter (...).’<sup>1769</sup>

(ii) Transformative reparations and development: what are the differences?

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<sup>1763</sup> Leyh & Fraser op cit note 1230 at 45 referring to Rebekka Friedman ‘Implementing Transformative Justice: Survivors and Ex-Combatants at the Comisión de la Verdad y Reconciliación in Peru’ (2018) 41 *Ethnic and Racial Studies* 701 at 706.

<sup>1764</sup> Ibid at 45 referring to Foreign Affairs Council Conclusions 13576/15 (16 November 2015) laying down the EU’s support to transitional justice, commencing implementation of ‘The EU’s Policy Framework on Support to Transitional Justice’ (annex to annex) [9].

<sup>1765</sup> Gready op cit note 1846 at 185 referring to Sam Szoke-Burke ‘Not Only “Context”: Why Transitional Justice Programs Can No Longer Ignore Violations of Economic and Social Rights’ (2015) *Texas International Law Journal* 50 (3): 465–494 at 486.

<sup>1766</sup> Ibid at 185.

<sup>1767</sup> See Brianne Mcgonigle Leyh ‘Truth Commissions and Social Justice: “Wishful Thinking or Not Very Thoughtful Wishing”?’ in Sarkin, Jeremy, ed. *The global impact and legacy of truth commissions* (2019) (not necessarily talking about women’s rights)/ She also does not necessarily endorse the same definition of transformative reparations as she sees the role of truth commissions as limited at 188.

<sup>1768</sup> UNDP supra note 186 at 45.

<sup>1769</sup> UN Doc A/77/162 supra note 1444 § 35 (f).

Transformative reparations defined as such make the concept of reparation almost identical to that of development.<sup>1770</sup> This can be problematic as many states have attempted to merge the two types of programs and blur their differences to pass off as reparations what was, in fact, the provision of social services. It is, therefore, essential to distinguish between the two types of programs to preserve the victims' right to reparation.<sup>1771</sup> The Central African actors interviewed in a survey led by Picco and Yaliki unanimously declared that humanitarian aid cannot be considered a reparation for the harm suffered.<sup>1772</sup> This opinion was shared not only by civil society organisations but also by members of the national courts and the authorities and concerned all forms of humanitarian aid (in particular, health, water, food, and shelter) and recovery (for example, training and socio-economic reintegration programmes).<sup>1773</sup>

Transformative remedies must, therefore, first be grounded in the state's duty to respect, protect and fulfill ESC rights and in the principle of non-discrimination. The Central African state's general duty is to ensure minimum material conditions for all its citizens so that they can live in dignity.<sup>1774</sup> What distinguishes reparations from assistance is the moral and political content of reparations, positing that women are entitled to reparations because the state has violated their rights.<sup>1775</sup> Thus, those who receive reparations are, by definition, rights holders with a claim against the state. Once women begin to see themselves as rights-holders rather than passive recipients of the benefits that the government chooses to provide or not, they can begin to claim their rights and continue to do so in contexts unrelated to reparations.<sup>1776</sup> It is close to the 'rights-based approach to development,' which, Peter Uvin explains, differs from other development approaches in that it is 'about helping people realize claims to rights, not providing them with charity.'<sup>1777</sup>

Ultimately, a refocusing on the duties of the state can avoid what Carayannis and Lombard have called 'the humanitarian accordion':<sup>1778</sup>

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<sup>1770</sup> Yepes op cit note 1426 at 635.

<sup>1771</sup> Ibid at 635.

<sup>1772</sup> Picco and Yaliki supra note 104 at 43.

<sup>1773</sup> Ibid at 44.

<sup>1774</sup> Yepes op cit note 1426 at 635.

<sup>1775</sup> Roht-Arriaza & Orlovsky op cit note 1251 at 179.

<sup>1776</sup> Roht-Arriaza & Orlovsky op cit note 1251 at 179.

<sup>1777</sup> Roger Duthie 'introduction' in De Greiff Pablo & Roger Duthie (eds) *Transitional Justice and Development, Making Connections* (2009) at 18 / Also see Rita Shackel & Lucy Fiske 'Making Clients Out of Citizens: Deconstructing Women's Empowerment and Humanitarianism in Post-Conflict Interventions' in *Rethinking Transitional Gender Justice* (2019) 64.

<sup>1778</sup> Laurence D. Wohlers, Roland Marchal, Ned Dalby, Faouzi Kilembe, Ledio Cakaj, Nathaniel Olin, Enrica Picco, and Stephen W. Smith. *Making Sense of the Central African Republic* (2015) 331.

an emergency/humanitarian mode of aid that has sometimes replaced the Ministry of Health (for example) in their work areas. In the northern town of Batangafo, Doctors Without Borders has almost completely substituted for the state not only in life-saving activities but also in the long-term and routine programmes for which the Ministry of Health receives funding from entities like the United Nations International Children's Emergency Fund (UNICEF) and the Global Fund to Fight AIDS, Tuberculosis, and Malaria. If this organisation were to depart, the number of health workers in the sub-prefecture would drop to ten from 171, and there would be not a single physician.<sup>1779</sup>

Humanitarian assistance has covered almost all social services in the country for at least 20 years.<sup>1780</sup> The duty to assist, discussed above, is, therefore, a duty intended to strengthen the capacity of the state to fulfill its duties rather than rushing to replace a weak social service sector and 'then slowly retreat until the next crisis.'<sup>1781</sup> Conceiving this aid as a duty to help the state can also prevent this aid from depending solely on the money received by donors.<sup>1782</sup>

Recognising the legal duty to assist and the political responsibility of certain beneficiaries/enablers is also a way to prevent these actors from using incentives or conditioning bilateral aid when delivering social services to the CAR. The Special Rapporteur notes that: 'Development aid is not genuine reparation, however, because it perpetuates and reinforces an economic and political system that is based on colonial hierarchies of submission. Reparations, by contrast, imply that the former colonizing Power has a debt to the former colony.'<sup>1783</sup> In that respect, 'in the recent joint declaration by Germany and Namibia, Germany offered 1.1 billion euros, to be disbursed over the next 30 years in the framework of a programme to support development and reconstruction.'<sup>1784</sup> Germany made no mention, however, of reparations and acknowledged only moral responsibility.<sup>1785</sup>

These 'reparations as development' projects raise serious questions about whether such initiatives can violate the essential 'character' of reparations, an act performed and recognised as an atonement for past wrongs.<sup>1786</sup> Reparations must therefore be closely linked to the truth-seeking process.<sup>1787</sup> This process is essential not only to distinguish reparations

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<sup>1779</sup> Ibid at 332.

<sup>1780</sup> Interview recorded on the 31/09/2022.

<sup>1781</sup> Laurence et al. op cit note 1887 at 332.

<sup>1782</sup> Interview recorded on the 5/12/2022.

<sup>1783</sup> UN Doc A/76/180, supra note 1410 at § 60.

<sup>1784</sup> Ibid § 61 referring to Joint Declaration by the Federal Republic of Germany and the Republic of Namibia, available at [www.dngev.de/images/stories/Startseite/joint-declaration\\_2021-05.pdf](http://www.dngev.de/images/stories/Startseite/joint-declaration_2021-05.pdf).

<sup>1785</sup> Ibid § 61 referring to Joint Declaration by the Federal Republic of Germany and the Republic of Namibia, available at [www.dngev.de/images/stories/Startseite/joint-declaration\\_2021-05.pdf](http://www.dngev.de/images/stories/Startseite/joint-declaration_2021-05.pdf).

<sup>1786</sup> Roht-Arriaza & Orlovsky op cit note 1251 at 173.

<sup>1787</sup> Yepes op cit note 1426 at 635.

from humanitarian and development assistance but also to respond, at least in part, to victims' enormous expectations for justice.<sup>1788</sup> This approach also forces a critical examination of what such humanitarian or development assistance provides and of the broader issue of power relations created and maintained by a situation in which certain countries are considered 'donors' and others 'beneficiaries,' without considering the implications of structural factors and global power processes,<sup>1789</sup> which the TJ process can address.<sup>1790</sup> Therefore, for a measure to count as reparation, 'it must be accompanied by recognition of responsibility, be aimed at remedying the harm suffered by the victims and be linked specifically to truth, justice and guarantees of non-recurrence.'<sup>1791</sup>

(i) If TCs diagnose a state's failure to provide core minimum socioeconomic conditions as rights violations, then subsequent development would be perceived (and would be presented) as fulfilling these social justice claims. Thus, the tensions arising from the reparation versus development debate would be alleviated, as the government would seek to redress the full spectrum of rights violations and thus serve the overriding justice component promoted by transitional justice. This approach also would support the UN peace-building agenda by raising the profile of the right to development.<sup>1792</sup>

The CVJRR can also give an exhaustive account of 'the complex interplay of power, history, religion, economics, and politics which has created and sustained the conflict and poverty which (...) is likely beyond the scope of tailoring skills for women,'<sup>1793</sup> and contrasts with '(T)he depoliticisation and dehistoricisation of humanitarian action.'<sup>1794</sup> Reparations become, in a certain sense, an effort of the state and other agents to reconcile themselves with women that were, to some extent, deprived of their citizenship.<sup>1795</sup>

(iii) What transformative reparations could be like in the CAR: Recommendations

The capability approach takes everyone's prerogative seriously to identify and pursue their conception of the good life.<sup>1796</sup> Therefore, it is not the capabilities *per se* that are required, but

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<sup>1788</sup> Picco and Yaliki *supra* note 104 at 65.

<sup>1789</sup> Andrea Cornwall & Althea-Maria Rivas 'From "gender equality and women's empowerment" to global justice: reclaiming a transformative agenda for gender and development' (2015) *Third world quarterly* 36, no. 2: 396-415 at 400.

<sup>1790</sup> Balint, Evans & McMillan *op cit* note 337 at 211.

<sup>1791</sup> UN Doc A/76/180, *supra* note 1410 § 55 referring to UN General Assembly, 69<sup>th</sup> session, Promotion of truth, justice, reparation and guarantees of non-recurrence, 14 October 2014, UN Doc A/69/518, paras. 3 and 11.

<sup>1792</sup> Laplante *op cit* note 305 at 352.

<sup>1793</sup> Shackel & Fiske *op cit* note 1886 at 66.

<sup>1794</sup> *Ibid* 66.

<sup>1795</sup> Yepes *op cit* note 1426 at 635.

<sup>1796</sup> Eric Nelson 'From primary goods to capabilities: distributive justice and the problem of neutrality' (2008) *Political theory* 36, no. 1: 93-122 at 94.

rather the capacity to access them that must be considered a right. Citizens should be free to determine their course once the capabilities are in place.<sup>1797</sup> The question is whether the structures of access to existing rights in the CAR maintain a form of violence and if it is possible to move towards its negation. This can be done by modifying laws that are still discriminatory.

Regarding public policy, reparations can complement actions the state has not yet taken or neglected.<sup>1798</sup> For example, the state budget has recently been reduced and is generally spent on security.<sup>1799</sup> Furthermore, the assessment of SDG 5 ‘Achieve gender equality and empower all women and girls’ remains mixed with regard to the national investment budget through investment programs in priority sectors.<sup>1800</sup> Budget allocation to health was also insufficient in 2021.<sup>1801</sup> Reparations should therefore be directed towards social services, such as access to education and health, among others. Universal social infrastructure, including education, health care, income support, and housing, is also essential for realising human rights.<sup>1802</sup> In the CAR, creating multi-sectoral centers allowing women to access all types of services could be the first step,<sup>1803</sup> as well as make effective the Gender and Poverty Reduction Sector Strategy already adopted by the Ministry of social affairs, national solidarity and the family.<sup>1804</sup> However, this part returns to the analysis initiated in chapter 1 of this thesis, according to which, even if change begins at the institutional level, for a fundamental change in the lives of women to take place, one cannot go under silence the areas of cultural and social norms in CAR.

For example, regarding inclusion, the CEDAW Committee states that:

Measures taken under article 4, paragraph 1, by States parties should aim to accelerate the equal participation of women in the political, economic, social, cultural, civil or any other field. The Committee views the application of these measures not as an exception to the norm of non-discrimination, but rather as an emphasis that temporary special measures are part of a necessary strategy by States parties directed towards the achievement of de facto or substantive equality of women with men in the enjoyment of their human rights and fundamental freedoms.<sup>1805</sup>

Quotas are consistent with international legal standards where state parties have ‘to take specific positive action to promote participative government and the equal participation

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<sup>1797</sup> Ibid at 99-100.

<sup>1798</sup> Roht-Arriaza & Orlovsky op cit note 1251 at 182.

<sup>1799</sup> Interview recorded on the 14/12/2022.

<sup>1800</sup> UN Women supra note 100 at 24.

<sup>1801</sup> Ibid at 49.

<sup>1802</sup> Centre for Women, Peace, Security, LSE supra note 1336.

<sup>1803</sup> OCHA supra note 145.

<sup>1804</sup> Ministère des affaires sociales supra note 464 at 12.

<sup>1805</sup> CEDAW GR 25 supra note 392 §18.

of women in the political life of their countries through affirmative action.<sup>1806</sup> Following a renewed liberal egalitarianism, effective ways to implement reparations in a distributive logic would consist of mobilising the tools provided by positive discrimination policies. Positive discrimination is understood here as all the measures which allocate goods, such as jobs, according to a procedure taking into account candidates who belong to particular population groups.<sup>1807</sup> The objective is to ‘increase the proportion of members of these groups in the institutions concerned, where they find themselves under-represented, at least partly because of past or present stigmatization and discrimination exercised by the public authorities or non-state actors.’<sup>1808</sup> Positive discrimination is essential to compensate for the effects of inequality produced by the structures of distribution and can progressively destroy the current causes of injustice. Equal representation is, therefore, a necessary first step towards forward-looking transformation for women.<sup>1809</sup>

The CAR had its first female Prime minister in 1975-1976, Elisabeth Domitien, and women had already held many positions of responsibility, but more is still needed to create real parity conditions.<sup>1810</sup> Chapter 1 of this thesis shows that a law on electoral parity has recently been adopted, but an implementing decree has yet to be implemented.<sup>1811</sup> Moreover, no political party in the last legislative elections could respect the mandatory 35%.<sup>1812</sup> The Constitutional Court (CC), for fear of preventing political parties from standing for election, allowed parties not to respect this quota if they could justify their inability to reach 35%. All parties, therefore, wrote to the CC to expose their justifications.<sup>1813</sup> In the next the local elections, the CC intends to be intransigent so that no political party list will be accepted if this list does not respect the 35% quota.<sup>1814</sup> An interviewee also noted that it is necessary that women are not only positioned at the bottom of the lists and that there are, therefore, 'zebra' lists in order to be able to obtain, at the level of local elections, 35% of effective participation of women, which the reform of the electoral code will allow.<sup>1815</sup> The political parties' justifications for not respecting the quotas during the last legislative elections were mainly

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<sup>1806</sup> Charlesworth & Chinkin op cit note 1139 at 952.

<sup>1807</sup> Bessone op cit note 865 at 147.

<sup>1808</sup> Ibid 147.

<sup>1809</sup> Ní Aoláin op cit note 274 at 215.

<sup>1810</sup> Interview recorded on the 13/12/2022 (2).

<sup>1811</sup> Interview recorded on the 14/12/2022.

<sup>1812</sup> Ibid.

<sup>1813</sup> Ibid.

<sup>1814</sup> Ibid.

<sup>1815</sup> Ibid

that there were very few women qualified for the post of deputy.<sup>1816</sup> The low participation of women has also been explained by the method of appointing elected officials at the level of political and administrative bodies, the low level of education and commitment of women, and the organisation of elections which often takes place in a context of insecurity generally detrimental to women.<sup>1817</sup>

These facts show the difficulties of including women in forums for norm and decision-making that are sometimes ill-suited for some of them.<sup>1818</sup> For example, Central African women have sometimes had the impression of not being listened to by the government and being excluded from all forums where peace agreements have been discussed, in contrast with local initiatives where they could play an essential role in advocacy, prevention, sensitisation and mediation for peace, at the local and community level.<sup>1819</sup> Moreover, varying worldviews on equality can mean that women will only sometimes want to take on roles that they view as masculine. Mere representation, therefore, does not sufficiently consider the complexity of women's interests and roles, including those shaped by aspects of their identity other than gender.<sup>1820</sup> The level of influence that women can assert on the decision-making and normative process ultimately should be the most important criterium, not just their presence in numbers. For example, while the implementation of resolution 1325 has increased the overall percentage of references to women, further study also finds that this 'may constitute a wily form of gendered window dressing.'<sup>1821</sup> This crucial finding was reiterated in the *Global Study on UN Security Council resolution 1325*, according to which: 'the benefits of women's participation are only fully

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<sup>1816</sup> Ibid/ Also see Harvard University Center for African Studies, African Studies Workshop, Amina Mama, *Feminism and the Challenges of Neocolonialism* (2023), in which she questions 'the efficacy of state feminism (...) to question the neocolonial state's capacity to respond to civil society— in this case movements pursuing women's rights and freedom from male oppression.' She adds: 'How do states respond to socially transformative, feminist visions of empowerment, equity and justice for all? The question is complicated by the globalization of gender discourses through the development industry and the adoption of increasingly technocratic measures and applications of gender. Today a UNDP gender policy template can be given preference over the legitimate and pressing agendas articulated by local feminist movements.' She also notes that including women in public life does little for women when they are integrated into a patriarchal structure, 'effectively perpetuating an existing neocolonial political order that systematically discriminates against women on the basis of gender, and scapegoats sexual minorities to distract from deep and pervasive conditions of crisis and indebtedness.'

<sup>1817</sup> UN Women supra note 100 at 25.

<sup>1818</sup> Ní Aoláin & Hamilton op cit note 462 at 395.

<sup>1819</sup> UN Women supra note 100 at 22.

<sup>1820</sup> UN Women, UNDP supra note 320 at 27.

<sup>1821</sup> Ní Aoláin op cit note 274 at 215.

realized when there is quality participation and the opportunity for influence.<sup>1822</sup> Thus, ‘presence alone may not fundamentally reshape women’s engagement.’<sup>1823</sup>

Ultimately, positive redistribution fails to engage the deep level at which the political economy is gendered, at the risk of being perceived as ‘shallow reallocations’ and making women appear ‘privileged, recipients of special treatment and undeserved largesse’ and to ‘end up feeding backlash into the injustices of recognition.’<sup>1824</sup> Incorporating women into public spheres goes beyond their physical presence and instead requires a complete overhaul of the underlying norms that dictate women's access to these places. Indeed, while several post-conflict countries have seen some of the most spectacular entries of women into politics, particularly in African countries such as South Africa, Rwanda, and Tanzania, it remains to be seen whether the mere presence of women is enough to transform the gender ideologies of a state or the population at large into one where men and women can be equal citizens.<sup>1825</sup> Therefore, even if distributive justice equitably redistributes rights and gender equality, women may be prevented or unwilling to take advantage of it due to other social and customary norms that exist alongside the country's law and sometimes challenge official ideas about women's rights and equality. Young's analysis then suggests, when reflecting on structural injustices, to have a vision of society that does not focus only on a ‘small set of institutions’ but looks at the whole society, by also analysing what she calls ‘patterns in relations’ between persons.<sup>1826</sup> This does not mean neglecting the critical role of political institutions or saying that women should not have access to them. Instead, it suggests that other processes of inequality exist, often at the level of individual relationships, but which are generally largely uncontested and left unexamined.<sup>1827</sup> Therefore, taking into account social and cultural norms, often embedded in customary norms in the CAR, allows one to consider the conditions of structural injustices at the level of individuals' interactions and think about other mechanisms to change these norms, including more informal mechanisms as sites of justice. Indeed, even if linked to the truth-seeking process, the extent of change in women’s lives does not often match the number of initiatives already engaged in the country.

(...) poverty-alleviation programs tend to target women as beneficiaries, but do not tackle women’s subordination, nor do they transform the systems and structures which determine

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<sup>1822</sup> UN Women, UNDP supra note 320 at 22.

<sup>1823</sup> Ní Aoláin op cit note 274 at 215/ Also see UN Women, UNDP supra note 320 at 22.

<sup>1824</sup> Fraser op cit note 2029 at 89.

<sup>1825</sup> Scully op cit note 1742 at 37.

<sup>1826</sup> Nuti op cit note 1627 at 32.

<sup>1827</sup> Ibid at 32.



the distribution of power and resources within and between societies. The issue of women's empowerment is part of the larger process of social transformation (...).<sup>1828</sup>

According to Shackel and Fiske:

The challenge of empowerment must be understood as a process. Empowerment can never be delivered. Tailoring and similar programmes can be delivered. Food can be distributed, and women's domestic violence shelters can be constructed and accessed. However, empowerment requires a fundamentally different approach, not only in the "doing" but also in the "thinking" and understanding.<sup>1829</sup>

They add:

Services may be able to distribute goods or offer training in new, marketable skills, but empowerment is something that can only be built through experiencing one's power. Through having an idea, sharing it with someone else and having it taken seriously, whether modified, rejected or enacted, but treated not as a plea for rescue, but as an opinion.<sup>1830</sup>

This work illuminates the limitations of contemporary women's empowerment interventions that seek to give women greater access to rights. Therefore, if TJ is to be transformative, it cannot be limited to social services: personal and social transformation is also essential. The perceived fairness of the redistribution of rights and the dynamics of power between members of a society significantly impact the effectiveness of distributive justice.<sup>1831</sup> Therefore, the transformation of pre-existing inequalities is rarely crowned with success if it is limited to socio-economic changes, which alone cannot prevent the reappearance of violence.<sup>1832</sup> This analysis leads to the argument that cultural violence should be integrated into the agenda of TJ in the CAR for real change to take place, which brings this thesis to its final chapter and the need for normative justice.

Conclusion

Distributive justice in the CAR would make it possible to consider the structural causes of VAW and the structural violence that affects women. This justice could allow reparations that have been called transformative by some authors and would constitute the overhaul of discriminatory and unequal institutions. However, a radical vision of transitional justice needs to go further regarding change. Sticking to institutional reforms, especially in a plural-

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<sup>1828</sup> Shackel & Fiske op cit note 1886 at 69 citing Zie Gariyo 'NGOs and Development in East Africa: A View from Below' in Michael Edwards and David Hulme (eds) *Non-Governmental Organisations – Performance and Accountability: Beyond the Magic Bullet* (1995) at 131-132.

<sup>1829</sup> Shackel & Fiske op cit note 1886 at 69.

<sup>1830</sup> Ibid at 70.

<sup>1831</sup> Spike Peterson 'New Wars and Gendered Economies' (2008) 88 *Feminist Rev* 7, cited by Miranda Alison *Women and Political Violence: Female Combatants in Ethno-National Conflict* (2009) 9.

<sup>1832</sup> Evans op cit note 953 at 9/ Also see Daly op cit note 1222 at 94.

legal country like the CAR, leaves aside a large part of the problem. Therefore, the literature on transformative justice increasingly includes, within the ambit of guarantees of non-recurrence, social and cultural reforms along with institutional change. This direction wholly anchors transitional justice in the peacebuilding agenda and considers what Galtung described as cultural violence. However, in a context like the CAR, multicultural and post-colonial, the question arises of who is better positioned to change these norms and how to do it. Some answers and avenues will be explored in the last chapter of this thesis.

## V. Normative Justice: Structural justice as fundamental change

In the CAR, the inhumanity of violence no longer comes only from its massive nature, nor from a political upheaval like in Cambodia or Nazi Germany, but from the disappearance of any normative framework.<sup>1833</sup> However, crises and shocks also provide political opportunities for change ‘since the shifts observed will free up space that needs to be used creatively to close the justice gap and promote the implementation of normative standards.’<sup>1834</sup> Therefore, this section deals with cultural violence. Galtung observes that the inclusion of culture greatly expands the agenda of peace studies, and thus here of TJ, however ‘(i)f culture is relevant to violence and peace, and surely it is, then only the dogmatic mind will exclude it from explorations as penetrating and tenacious as the countless studies devoted to the many aspects of direct and structural violence.’<sup>1835</sup> This type of violence is part of the broader concept of structural injustice, as defined by Lu. According to Lu, injustice is the product of inequitable structures and individual actions. Structural injustice is therefore politically, socio-economically, legally, and ideologically localised and rooted in practical social arrangements, institutions, and dominant public discourses.<sup>1836</sup>

Structural injustice, defined as such, is primarily understood to be either institutional or cultural,<sup>1837</sup> occurring at state, community, and family levels<sup>1838</sup> and embedded in different sets of norms: legal, social, and cultural. This violence is therefore ‘normative’<sup>1839</sup> where gender norms constitute gender positions in one society.<sup>1840</sup> Understanding the norm to which the normal should conform helps to understand what creates exclusion and stigma<sup>1841</sup> and can contribute to transform normative acceptance of certain levels of gendered harm.<sup>1842</sup> Norms and practices - social, religious, economic and cultural - discriminatory against women have been recognised as sustaining gender hierarchies detrimental to women and maintain ideologies leading to the acceptance of multiple forms of violence against them.<sup>1843</sup>

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<sup>1833</sup> Antoine Garapon ‘Face à la persistance des violences, comment rendre justice en Centrafrique ?’ (2015) *Institut des Hautes Etudes sur la Justice* at 2.

<sup>1834</sup> UN Doc A/77/162 supra note 1444 § 14.

<sup>1835</sup> Galtung op cit note 263 at 303.

<sup>1836</sup> Balint, Evans & McMillan op cit note 337 at 213.

<sup>1837</sup> Charlesworth & Chinkin op cit note 420 at 220.

<sup>1838</sup> Ibid at 220.

<sup>1839</sup> Walker op cit note 133 at 23.

<sup>1840</sup> Ibid at 25.

<sup>1841</sup> See for example, Michel Foucault *Security, territory, population: lectures at the Collège de France, 1977-78* (2007).

<sup>1842</sup> Swaine op cit note 79 at 276.

<sup>1843</sup> Henn op cit note 136 at 22 referring to UNHRC, *Report of the Special Rapporteur on violence against women, its causes and consequences, Rashida Manjoo*, 02 May 2011, para. 35; UNGA Res. 48/104, *Declaration on the Elimination of Violence against Women*, 20 December 1993; UNSG, *In-Depth-Study on All*

Normative justice is thus conceptualised as a response to cultural violence. Normative justice means, in this thesis, a type of justice that is concerned with the norms that guide the way people practice and think - develop ideas that can lead to ideology, values, stereotypes, rigid gender roles, prejudices - about gender justice, and more specifically, how those norms are assessed, shaped and ultimately transformed. Ultimately, it is about who can participate in the development, evaluation and transformation of these norms.

Building a lasting positive peace indeed requires changing the social relationships and structures that have committed or enabled human rights violations,<sup>1844</sup> and ‘unequal and intersecting power relationships.’<sup>1845</sup> Mackay notes that the concept of gender is therefore crucial in the study of processes of political change, meaning ‘gender relations and gender norms—and their institutionalized forms as “gender regimes”’.<sup>1846</sup> This is so as ‘gender relations and rules and norms of masculinity and femininity’ provide ‘important mechanisms (...) by which wider particular arrangements and power asymmetries are naturalized and institutionalized or resisted and discarded.’<sup>1847</sup> Normative justice is, therefore, essential to achieving what Sandoval calls fundamental change. Sandoval distinguishes between three types of social change: ordinary, a type of change that conforms to dominant social ideologies and structures such as security measures; structural, a type of change that reforms the existing legal system, such as the adoption of a new Constitution; and fundamental change, which occurs ‘when various structural changes provide foundations for new dominant ideologies inspired by radically different values to those evident during the repression or conflict to flourish,’ and that these values are ‘respected, endorsed, adopted, and articulated by different political sectors and ideologies of society and given life through different norms, institutions, education, and culture, so that they can ultimately affect the structures that permit discrimination.’<sup>1848</sup> These types of change can apply to any social context, but the key to distinguishing them is their impact on dominant ideologies and social structures. When political, social, economic, and cultural changes lead to a transformation of the ideologies and structures that have supported gender inequality, they will constitute fundamental social change. If they do not, they constitute an ordinary or structural social

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*Forms of Violence Against Women*, 2006, para 30; The United Nations Special Rapporteur on Violence against Women, *15 Years of the United Nations Special Rapporteur on Violence against Women, its causes and consequences*, 2009, 34.

<sup>1844</sup> McGill op cit note 339 at 87.

<sup>1845</sup> Gready & Robins op cit note 324 at 340.

<sup>1846</sup> Fiona Mackay ‘Nested newness, institutional innovation, and the gendered limits of change’ (2014) *Politics & Gender* 10, no. 4: 549-571 at 553.

<sup>1847</sup> Ibid at 553.

<sup>1848</sup> Sandoval op cit note 42.

change. So the question is: Where does the role of TJ fit into this agenda for fundamental change?

(a) Transitional justice and normative justice

This approach broadens the scope of what is meant by justice. Such an understanding of justice shifts the focus from acts of violence to their root causes embedded in gender norms and ideology; it shifts the focus from the individual and individual rights to taking the collective into account; it goes beyond institutional reform to include social and cultural concerns.<sup>1849</sup> In this sense, for Murphy, TJ differs from criminal justice, corrective justice, or distributive justice because it is also about the just pursuit of social transformation.<sup>1850</sup> This is why one speaks today of transformative justice, because while transition can be seen as ‘a bounded change in state to a known destination’, transformation ‘is a deeper and more uncertain process, often involving cultural and behavioural change.’<sup>1851</sup> Transformation encompasses ‘the fundamental changes in a society’s culture, structures and relationship patterns.’<sup>1852</sup>

In the CAR, the commissioners working for the CVJRR recognise the need to find innovative responses adapted to the expectations of the populations and appropriate to the challenges envisaged. In particular, they plan to reflect on a new political, economic, and social framework conducive to the rapid and harmonious development of the country.<sup>1853</sup> This approach draws legitimacy from extensive reviews of previous peacebuilding processes in the country.<sup>1854</sup> One of the goals of TJ, which it shares with development, is indeed to establish rules and norms, usually through the rule of law, that are conducive to peacebuilding,<sup>1855</sup> along with facilitating institutional reform.<sup>1856</sup> This objective can be linked to an extensive notion of distributive justice, according to which the realisation of the capabilities inherent in every human being also depends on the institutional and cultural environment in which people live.<sup>1857</sup> This is also in line with the broader prevention agenda.

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<sup>1849</sup> Roht-Arriaza op cit note 1639 at 40.

<sup>1850</sup> Murphy op cit note 467 at 119.

<sup>1851</sup> McGill op cit note 339 at 87.

<sup>1852</sup> Ibid at 87.

<sup>1853</sup> Interview recorded on the 29/12/2022.

<sup>1854</sup> Ibid.

<sup>1855</sup> Yvette Selim & Tim Murithi ‘Transitional justice and development: Partners for sustainable peace in Africa?’ (2011) *Journal of Peacebuilding & Development* 6, no. 2: 58-72 at 64.

<sup>1856</sup> Ibid at 66.

<sup>1857</sup> Cobián & Reátegui op cit note 1638 at 144-145.

Ensuring the non-recurrence of atrocities that requires ‘radical societal transformation to ensure the once-prevalent becomes unthinkable.’<sup>1858</sup>

The Secretary-General of the United Nations thus recommended, on March 29, 2022, to Member states, donors and regional and intergovernmental organisations to ‘adopt a survivor-centred approach to preventing and responding to conflict-related sexual violence; to tackle the root causes of conflict-related sexual violence, including structural gender inequality and harmful social norms (...).’<sup>1859</sup> Finally, this approach can also be included into what Jones, Braumgartner and Gabriel, call ‘conflict transformation.’ According to them:

conflict transformation addresses the individual as well as the structural level of society and encompasses all activities that intend to transform attitudes, beliefs, individual and societal values, relationships, interests, institutions and structures that perpetuate violence. Conflict transformation processes are long-term endeavours that can take very different forms depending on local culture, traditions, values, ways of understanding conflict and peace, norms, types of governance and socio-political realities.<sup>1860</sup>

TJ can contribute to changing a country's gender norms through guarantees of non-repetition understood in their broadest sense. Roht-Arriaza argues for a 'stretched' conceptualisation of non-repetition 'moving beyond DDR, vetting, and reforming the security forces and courts,' to reforms that would address underlying causes and champion social and cultural reforms.<sup>1861</sup> She notes that some guarantees of non-repetition are not aimed only at the injured party but, more broadly, at the state/society itself or a collective group of victims and are not explicitly linked to a rights framework.<sup>1862</sup> In a report to the General Assembly on the links between TJ and development, Special Rapporteur Pablo de Greiff wrote that ‘guarantees of non-recurrence, unlike the other “pillars” of the mandate, truth, justice and reparation, is not a category that designates a measure or a set of measures, but a function that can be played by a variety of initiatives.’<sup>1863</sup>

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<sup>1858</sup> McGill op cit note 339 at 87.

<sup>1859</sup> Stop Rape Now supra note 307 at 11.

<sup>1860</sup> SwissPeace op cit note 1612 at 10.

<sup>1861</sup> Roht-Arriaza op cit note 1639 at 16 / Also see *Report of the Special Rapporteur on the Promotion of Truth, Justice, Reparation and Guarantees of Non-Recurrence, Report of the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence, Pablo de Greiff*, GA, 2015, UN Doc. A/HRC/30/42: It is stated that guarantees of non-recurrence must not only be ensured by institutional or legal reforms, but also by interventions in the societal, cultural and personal domains.

<sup>1862</sup> Roht-Arriaza Ibid at 15.

<sup>1863</sup> Ibid at 25 referring to Report of the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence, 23 August 2013, UN Doc. A/68/345 at 17/ Also see International Center for Transitional Justice, Roger Duthie & Paul Seils, *Justice Mosaics: How context shapes transitional justice in fractured societies* (2017) at 31.

Guarantees of non-repetition (GNR), therefore, have significant transformative potential for gender equality.<sup>1864</sup> The Colombian TJ is a good example. It embraced an understanding of GNR as going beyond DDR and changes in security forces and courts to address underlying marginalisation and inequality while acknowledging that victim participation in these expanded efforts is essential.<sup>1865</sup> As such, many scholars have dealt with the role of education, the media and the cultural sector in TJ. Education, formal or non-formal, can influence values and shape how future generations deal with injustice.<sup>1866</sup> At the same time, cultural productions such as theatre, literature, art, performances, dance, and cinema, among others, can open spaces for reflection.<sup>1867</sup> Nevertheless, if the state can shape subjectivities through education, in a post-colonial context such as the CAR, where the state is not always seen as the most legitimate authority to shape and transform cultural norms, this thesis argues instead for women to have an active role in redefining gender norms. This, therefore, raises the question of who is involved and responsible for these reforms and the process by which they are carried out.

(b) The ‘social connection model’

Empowerment is seen in some feminist writing as an opportunity to alienate those familiar social norms that are a source of inequity and powerlessness. Kabeer describes how:

Strategies of “empowerment from within” ... entail reflection, analysis and assessment of what has hitherto been taken for granted so as to uncover the socially constructed and socially shared basis of apparently individual problems. New forms of consciousness arise out of women’s newly acquired access to the intangible resources of analytical skills, social networks, organizational strength, solidarity and sense of not being alone.<sup>1868</sup>

Three critical points stand out. The first is that empowerment enables women to question what they previously considered ‘normal’ and begin to take action to change that reality. The second idea is that empowerment is relational: it concerns the power relations in which people find themselves. Third, empowerment is a process, not an end, let alone a

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<sup>1864</sup> UNDP supra note 186 at 49 referring to Guidance Note supra note 319 at 9.

<sup>1865</sup> Roht-Arriaza op cit note 1639 at 39.

<sup>1866</sup> See Michelle J. Bellino, Julia Paulson & Elizabeth Anderson Worden ‘Working through difficult pasts: Toward thick democracy and transitional justice in education’ (2017) *Comparative Education* 53, no. 3: 313-332 at 327.

<sup>1867</sup> See the 2020 Special issue of the *International Journal of Transitional Justice*.

<sup>1868</sup> Cornwall & Rivas op cit note 1898 at 404.

measurable outcome to which goals can be attached.<sup>1869</sup> Therefore, TJ mechanisms will ideally provide an ‘arena’ for broader social dialogue that allows stakeholders to discuss gender justice and their visions for the future.

(i) Redefining political responsibility beyond reparations

If guilt in criminal law is individual,<sup>1870</sup> since it is based on the philosophy of autonomy and free will,<sup>1871</sup> the political responsibility for social change can be shared. The fact that GBV is often committed in conformity with locally accepted norms rather than in defiance of them necessitates a holistic accountability perspective. As Kirsten Ainley has argued, international criminal law ‘misses much of the significance of the societal nature of the person – the effect of social roles; the non-rational behaviour impelled by human social instincts; the enabling function of groups.’<sup>1872</sup> As Lu understands it, structural injustice indeed results ‘from social structural processes in which many individuals and corporate agents may participate.’<sup>1873</sup> It, therefore, engages the responsibility of the state and, above all, the responsibility of all individuals. No agent, however powerful, can indeed transform unjust structures alone.<sup>1874</sup>

To combat violence against women, the Special Rapporteur on violence against women, its causes and consequences, first suggested in 1999 that states ratify all international human rights instruments, including CEDAW, reform their criminal justice systems, and provide services to women such as shelters as well as take appropriate education and media measures to raise awareness of VAW as a human rights violation.<sup>1875</sup> The meaning of the state's responsibility to act with due diligence was, however, discussed in more detail by the

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<sup>1869</sup> Ibid at 404/ Also see UN Women, UNDP supra note 320 at 60: it acknowledges that ‘real change—in power structures, institutions, social practices and culture, behaviour, relationships and the lived experience of people—takes place over the long-term and even in multigenerational timeframes (...).’

<sup>1870</sup> H. Arendt *Responsibility and Judgment* (2003) at 28–29/ Elies Van Sliedregt ‘The curious case of international criminal liability’ (2012) *Journal of International Criminal Justice* 10, no. 5: 1171-1188 at 1172.

<sup>1871</sup> Van Sliedregt Ibid at 1172.

<sup>1872</sup> K. Ainley ‘Responsibility for Atrocity: Individual Criminal Agency and the International Criminal Court’, in J. Parry (ed.), *Evil, Law and the State: Perspectives on State Power and Violence* (2006) at 15, online at: [http://eprints.lse.ac.uk/24254/1/Responsibility\\_for\\_atrocity\\_%28LSERO%29.pdf](http://eprints.lse.ac.uk/24254/1/Responsibility_for_atrocity_%28LSERO%29.pdf).

<sup>1873</sup> Lu op cit note 283 at 100.

<sup>1874</sup> Nuti op cit note 1627 at 186/ Guidelines on Combatting Sexual Violence and its Consequences in Africa supra note 669 at 17-18: ‘[s]tates must take the necessary measures to prevent all forms of sexual violence and its consequences, particularly by eliminating the root causes of that violence, including sexist and homophobic discrimination, patriarchal preconceptions and stereotypes about women and girls, and/or preconceptions and stereotypes based on gender identity, real or perceived sexual orientation, and/or certain preconceptions of masculinity and virility, irrespective of their source.’

<sup>1875</sup> UN Doc A/HRC/23/49 supra note 1655 § 17 referring to Economic and Social Council, 55<sup>th</sup> session, Integration of the human rights of women and the gender perspective, violence against women in the family, Report of the Special Rapporteur on violence against women, its causes and consequences, Ms. Radhika Coomaraswamy, submitted in accordance with Commission on Human Rights resolution 1995/85, 10 March 1999, UN Doc E/CN.4/1999/68, para. 25.



second Special Rapporteur on violence against women in a 2006 report. One of the main problems she found was that the due diligence standard focused primarily on violence against women as an isolated act and failed to consider the links between violence and the violation of other human rights, including the general principles of gender equality and non-discrimination.<sup>1876</sup> She noted that due diligence had until then ‘tended to be limited to responding to violence against women (...). There has been relatively little work done on the more general obligation of prevention, including the duty to transform patriarchal gender structures and values that perpetuate and entrench violence against women.’<sup>1877</sup>

She also highlighted the lack of state accountability for social structural deficiencies, such as persistent gender discrimination, that create environments conducive to acts of violence against women. This theme was addressed in the 2011 report on multiple and intersecting forms of discrimination that contribute to and exacerbate violence against women. In this report, the Special Rapporteur argues that while laws, policies, and resources are essential to address VAW effectively, efforts must be coupled with renewed will and action to address the structural and systemic challenges that are a cause and a consequence of this violence. Furthermore, to prevent and eliminate violence against women and girls, this violence must be understood as something that affects women throughout their life cycle and is underpinned by a complex interaction of individual, family, community, economic and social factors. This requires recognising that the state's responsibility to act with due diligence is both a systemic level responsibility, that is, the responsibility of states to create effective systems and structures that attack the root causes and consequences of violence against women; and a responsibility at the individual level, that is to say, the responsibility of states to provide each victim with effective measures of prevention, protection, punishment, and reparation.<sup>1878</sup>

Moreover, while the conceptions of moral and legal responsibility seen in Chapters 3 and 4 rely heavily on the notion of liability, those whose acts can be shown to cause or contribute to the harm caused are held accountable; many individuals also contribute to gender inequality in the CAR, but none of these actors necessarily intend or anticipate that their actions will cause gender inequality. Indeed, the actions of those who give rise to gender inequality are sometimes embedded within normative and moral parameters acceptable

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<sup>1876</sup> Ibid § 18.

<sup>1877</sup> Ibid § 19 referring to E/CN.4/1999/68, para. 15.

<sup>1878</sup> Ibid § 20 referring to UN General Assembly, 70<sup>th</sup> session, Report of the Special Rapporteur on violence against women, its causes and consequences, Rashida Manjoo, 2 May 2011, UN Doc A/HRC/17/26.

within the society concerned.<sup>1879</sup> In that respect, Young has developed a model of responsibility that she calls the social connection model as opposed to legal responsibility.<sup>1880</sup> In this model 'all those participating in a social structural process that produces, even indirectly and unintentionally, unjust outcomes bear responsibilities to reform their activities, practices, and institutions to prevent the reproduction of similarly unjust outcomes.'<sup>1881</sup>

This type of responsibility can be linked, in some way, to what Arendt called 'thoughtlessness' and invokes the political responsibility of everyone to exercise their judgment and stimulate their capacity to think, especially from the point of view of someone else.<sup>1882</sup> The concept of thoughtlessness is helpful because it forces one to question what may initially seem normal. It asks to examine where one may not even have identified crimes or inequality so far because they somehow dissolve in one's common sense and can thus become transparent. Such concealment can occur due to the laziness of habitual ways of thinking but also cultural preferences that one can rightly cherish.<sup>1883</sup> Deeply rooted and internalised patterns of domination can also naturalise and reinforce the status quo by making change unthinkable.<sup>1884</sup> Therefore, the responsibility model based on social connections also interrogates the structural 'normal' level as likely to be unjust.<sup>1885</sup> Everyone, even the oppressed, therefore have a responsibility to overcome structural injustice, not in the sense that they are morally blameworthy for their oppression, but in the sense that they must resist injustice and participate in the collective action to transform unjust social structures and processes.<sup>1886</sup> This accountability model is forward-looking; people are responsible for future social conditions. Thus, the accountability model proposed is a model of transformative justice, not compensation or restoration. Agent accountability is, as a result, about transforming the processes and institutions that produce and perpetuate injustices and incentivise agents to seek desirable and more just outcomes.

Therefore, the social connection model goes beyond attributing responsibility to a collective agent, the state.<sup>1887</sup> Instead, it is embedded in social institutions and practices, such as the family, civil society, knowledge-producing institutions, educational and religious

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<sup>1879</sup> Thomason op cit note 1217 at 75.

<sup>1880</sup> See Marion Young *Responsibility for Justice* (2011) 40.

<sup>1881</sup> Lu op cit note 283 at 258.

<sup>1882</sup> Itamar Mann 'Eichmann's Mistake: The Problem of Thoughtlessness in International Criminal Law' (2020) *Canadian Journal of Law & Jurisprudence* 33: 145-181 at 155.

<sup>1883</sup> *Ibid* at 158.

<sup>1884</sup> McGill op cit note 339 at 81.

<sup>1885</sup> Bessone op cit note 865 at 201.

<sup>1886</sup> Lu op cit note 283 at 171.

<sup>1887</sup> Bessone op cit note 865 at 202.

institutions, and other public discourse and practice areas.<sup>1888</sup> Although systemic changes are necessary, an individual approach recognises that they are only relevant, effective, and sustainable if they impact people's daily lives, needs, and relationships. The social connection model examines the extent to which assumptions, myths, stereotypes, and beliefs are held that prevent everyone from being treated with dignity and respect. As such, it provides a tool to identify the norms in which one category of people is treated differently from others and the material, psychological, symbolic, or structural violence that results from such norms.<sup>1889</sup> Normative justice then takes on its meaning in this objective of social, cultural and political transformation. However, some may warn that it is not the role of people working for INGOs or foreign experts taking part in TJ processes to compel structurally disadvantaged people to do more to remedy injustice, because they do not have the 'structural position' to do so.<sup>1890</sup> To be responsible, one also has to be recognised. Therefore, this type of responsibility first calls for women to be recognised as valid political and social actors in redefining gender norms.

(ii) Justice as recognition

The politics of recognition is a politics that demands socially and politically recognising the authentic identities of others.<sup>1891</sup> The ideal of authenticity is often closely linked to the concept of originality.<sup>1892</sup> This concept has two layers: it applies not only to an individual but also to communities.<sup>1893</sup> In the CAR, as analysed in Chapter 1, the individual's identity is likely to also have an ethnic identity as a component of its collective dimension. One could argue that a person's identity is crucially constituted through concepts (and practices) made available to them.<sup>1894</sup> People may wish their life to have a particular narrative unity, so the story must 'cohere in the way appropriate by the standards made available in my culture to a person of my identity. In telling that story, how I fit into the wider story of various collectivities is important for most of us. It is not just gendered identities that give shape (...) to one's life; ethnic and national identities too fit each story into a larger narrative.'<sup>1895</sup>

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<sup>1888</sup> Lu op cit note 283 at 265.

<sup>1889</sup> Cornwall & Rivas op cit note 1898 at 407.

<sup>1890</sup> Nuti op cit note 1627 at 193.

<sup>1891</sup> Kwame Anthony Appiah 'Speaking of civilizations: Race, culture, identity: Misunderstood connections' in Coetzee, P. H., & Roux, A. P. J. (Eds.) *The african philosophy reader* (2003) 446/ Also see Charles Taylor *Multiculturalism: Examining the Politics of Recognition* (1994).

<sup>1892</sup> Kwame Ibid at 447.

<sup>1893</sup> Ibid at 447.

<sup>1894</sup> Ibid at 448.

<sup>1895</sup> Ibid at 449.

Identity politics is however not premised on the notion that ‘all individuals within a group always have the same set of experiences in precisely the same way, but rather that members of certain groups often have different experiences and experience life differently than non-members.’<sup>1896</sup> This approach can be of interest in understanding gender norms in specific social and cultural groups within the CAR and why some women may decide to continue to perpetuate these norms and leave them unchallenged even though they are considered unfair and unequal by outsiders.

Beyond self-realization, Fraser sees recognition as a matter of justice. Therefore, misrecognition is unfair because ‘some individuals and groups are denied the status of full partners in social interaction simply as a consequence of institutionalized patterns of cultural value in whose construction they have not equally participated and which disparage their distinctive characteristics or the distinctive characteristics assigned to them.’<sup>1897</sup> Fraser notes that justice for specific communities today requires, in addition to redistribution, recognition.<sup>1898</sup> In that respect, she calls gender and race ‘paradigmatic bivalent collectivities,’ meaning that people because of their gender or race (and sometimes both) may suffer injustices that are traceable to both political economy (socioeconomic maldistribution) and culture (cultural misrecognition) simultaneously, in ‘forms where neither of these injustices is an indirect effect of the other but where both are primary and co-original.’<sup>1899</sup> In that case, these collectivities need both types of justice,<sup>1900</sup> even though one often presupposes the other.<sup>1901</sup> The kind of injustice linked to the need for recognition is cultural or symbolic and ‘is rooted in social patterns of representation, interpretation, and communication.’<sup>1902</sup> Examples include: ‘cultural domination (being subjected to patterns of interpretation and communication that are associated with another culture and are alien and/or hostile to one’s own); nonrecognition (being rendered invisible via the traditional representational, communicative, and interpretative practices of one’s culture); and disrespect (being routinely maligned or disparaged in stereotypic public cultural representations and/or

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<sup>1896</sup> Gilpin op cit note 375 at 15.

<sup>1897</sup> Nancy Fraser ‘Social justice in the age of identity politics: Redistribution, recognition, and participation’ (1999) at 3, online at: [https://www.ssoar.info/ssoar/bitstream/handle/document/12624/ssoar-1998-fraser-social\\_justice\\_in\\_the\\_age.pdf?sequence=1](https://www.ssoar.info/ssoar/bitstream/handle/document/12624/ssoar-1998-fraser-social_justice_in_the_age.pdf?sequence=1).

<sup>1898</sup> Nancy Fraser ‘From redistribution to recognition?: dilemmas of justice in a ‘postsocialist’ age’ (1995) *NLR I/212* pp. 68-93 at 69.

<sup>1899</sup> Ibid at 78.

<sup>1900</sup> Ibid at 78.

<sup>1901</sup> Ibid at 73.

<sup>1902</sup> Ibid at 71.

in everyday life interactions).<sup>1903</sup> Recognition is therefore needed for women to take an active part in normative justice, by giving them the status of full partners in assessing, shaping and eventually transforming gender norms.

Recognition indeed implies recognising the interpretative or creative competence of groups or individuals hitherto marginalised. It seems therefore ‘essential to avoid a replay of power or domination relations in the determination of skills and the a priori elimination of the ability of certain groups to propose a plausible meaning.’<sup>1904</sup> The expressivist dimension of a law or policy, but also a norm can best be understood as follows: ‘it is the meaning that we would arrive at if we discussed together the question of its interpretation in fair conditions (...) – under conditions in which all are equally able to contribute to the discussion and all are committed to listening and learning from each other's points of view.’<sup>1905</sup> The guarantee of fair conditions requires that ‘minorities who have been historically discriminated against, exploited, marginalized, or despised have the possibility of having their point of view heard and recognized as epistemically valid on the interpretation to be given to this or that law that affects them,’ since ‘political injustices are based primarily on injustices of knowledge or equal participation in the constitution of shared norms.’<sup>1906</sup>

In the CAR, the forms of misrecognitions that could potentially prevent women from participating in the interpretation and definition of norms as full citizens are the following: First, women should be unburdened of excessive ascribed or constructed distinctiveness<sup>1907</sup> with men that could prevent them from being active citizens with them. At the same time, the focus should shift from dominant or advantaged groups’ views to theirs, ‘outing the former’s distinctiveness, which has been falsely parading as universality.’<sup>1908</sup> As seen in Chapter 4, in the CAR, the practice and logic of colonialism often meant that indigenous culture was disrupted in the name of universal norms. Therefore, one must be vigilant of a new global ‘common sense’ used to save women from the dangers of culture, religions, and other practices while producing particular truths that eliminate alternative narratives and approaches and marginalise local knowledge and desires,<sup>1909</sup> while mapping the West as a

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<sup>1903</sup> Ibid at 71.

<sup>1904</sup> Bessone op cit note 865 at 161.

<sup>1905</sup> Ibid at 161-162 referring to Deborah Hellman ‘The expressive dimension of equal protection’ (2000) *Minn. L. Rev.* 85: 1 at 23.

<sup>1906</sup> Ibid 162.

<sup>1907</sup> Fraser op cit note 2028 at 5.

<sup>1908</sup> Ibid at 6.

<sup>1909</sup> Charlotte Mertens & Maree Parry “‘Sexurity’ and its effects in eastern Democratic Republic of Congo’ (2017) *Third World Quarterly* 38, no. 4: 956-979 at 565.

‘zone of feminist freedom and agency, and the rest as a zone of oppression and unfreedom – “ignorant, poor, uneducated, tradition-bound, domestic, family-oriented and victimized.”’<sup>1910</sup>

The duality that still exists today between local norms and human rights norms must therefore be analysed carefully because it may also reflect another vision of the world. In the *ubuntu* philosophy, for example, community or harmony is the combination of solidarity and identity. The following statement illustrates both elements: ‘Every member is expected to consider him/herself an integral part of the whole and to play an appropriate role towards achieving the good of all.’<sup>1911</sup> Hence, one can act by the notion that duty to one’s social group is more important than individual rights.<sup>1912</sup> This can have an impact on how one perceives one’s role as a woman, for example. Sometimes, reproduction being conceived as the supreme symbolic value since it strengthens the human group, ensures the continuity of life, and is assimilated to the vital force itself.<sup>1913</sup> The relationality of the person, encompassed in the concept of *ubuntu*, ‘immediately plunges him/her into a moral universe, making morality an essentially social and transindividual phenomenon focused on the well-being of others,’<sup>1914</sup> in contrast with Kohlberg’s competing account of an ultimate end of the ‘moral point of view’ in strictly impartial terms.<sup>1915</sup> Therefore, justice may be, in part, a conception of morality that ‘will likely include duties to aid others without correlative rights,’<sup>1916</sup> or ‘acting out of sympathy.’<sup>1917</sup> Ultimately, moral or normative matters ‘have their best and unambiguous articulation or translation in the actual way of life of a people - in the way individuals are expected or not expected to respond to one another in times of need, to spontaneously care for one another, and so on.’<sup>1918</sup>

This approach also involves reframing gender relations outside of the box of the oppositional power relationship between ‘men/in/general’ and ‘women/in/general’<sup>1919</sup> and thus avoiding essentialism: ‘the implicit belief that there is some kind of pre-existing essence

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<sup>1910</sup> Engle, Nesiah & Otto op cit note 1412 at 17 referring to Chandra Talpade Mohanty *Feminism without borders: Decolonizing theory, practicing solidarity* (2003).

<sup>1911</sup> Thaddeus Metz & Joseph BR Gaie ‘The African ethic of Ubuntu/Botho: Implications for research on morality’ (2010) *Journal of moral education* 39, no. 3: 273-290 at 276.

<sup>1912</sup> Elza Venter ‘The notion of ubuntu and communalism in African educational discourse’ (2004) *Studies in philosophy and education* 23, no. 2: 149-160 at 151.

<sup>1913</sup> Okome op cit note 378 at 15-16.

<sup>1914</sup> Gyekye op cit note 506 at 310.

<sup>1915</sup> Metz & Gaie op cit note 2042 at 282-283.

<sup>1916</sup> Ibid at 283.

<sup>1917</sup> Ibid at 285/ See S. Harding ‘The curious coincidence of feminine and African moralities’ in: E. C. Eze (Ed.) *African philosophy: an anthology* (1987/1998).

<sup>1918</sup> Gyekye op cit note 506 at 297.

<sup>1919</sup> Cornwall & Rivas op cit note 1898 at 401.

that constitutes “women” and “men” as separate and different.<sup>1920</sup> Going beyond the sex/gender distinction calls for a vision of gender shaped and transformed by its daily performance and not limited to categories defined by women's access to resources and opportunities and their place in the market, among others.<sup>1921</sup> It, therefore, also calls for reconsidering the many possible, locally contingent meanings of 'gender' and 'justice' in different geopolitical regions worldwide<sup>1922</sup> and for paying greater attention to the complexity and diversity of social relations in the CAR. Failure to do so would limit the ability to transform the power relations that sustain social injustice.<sup>1923</sup> This puts back at the heart of the analysis the relational implications of gender difference: the female group does not exist in the abstract but in entanglements of affinity and connection.<sup>1924</sup> Therefore, approaching gender relations in terms of circles rather than hierarchies could allow gender justice to be seen as a more holistic endeavour by also integrating men into its definition and working towards a common definition of gender justice for the whole community<sup>1925</sup> both local and national while avoiding seeing women only as victims without agency. This approach could allow joint work (of every gender) on the social conception of sex and gender.<sup>1926</sup>

Ultimately, recognition involves ‘upwardly revaluing disrespected identities and the cultural products of maligned groups. It could also involve recognizing and positively valorizing cultural diversity. More radically still, it could involve the wholesale transformation of societal patterns of representation, interpretation and communication in ways that would change *everybody's* sense of self,<sup>1927</sup> giving full meaning to Lu's notion of structural reconciliation. Thus understood, reconciliation does not exclude the continuation of the political struggle on the terms of both structural and relational reconciliation. Such a project allows the continuation of moral and political disagreement and does not suppose a homogenising ideal or a form of social unity transcending conflict.<sup>1928</sup> It is instead a question of tending towards the non-alienation of all vis-à-vis the rules, norms, practices, relations,

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<sup>1920</sup> Cornwall & Rivas op cit note 1898 at 401.

<sup>1921</sup> Ibid at 401.

<sup>1922</sup> Schulz op cit note 993 at 692.

<sup>1923</sup> Cornwall & Rivas op cit note 1898 at 401.

<sup>1924</sup> Ibid at 401-402.

<sup>1925</sup> Karen Max ‘Chapter four: anti-colonial research: working as an ally with Aboriginal Peoples’ (2005) *Counterpoints* 252: 79-94 at 82/ also see Dianne Otto ‘International human rights law: Towards rethinking sex/gender dualism’ (2013) *The Ashgate research companion to feminist legal theory*: 197-216.

<sup>1926</sup> Frederic Megret ‘Féminisme et Droit International : Le «Féminisme De Gouvernance» à L’Épreuve Du «Féminisme Critique» (Feminism and International Law: 'Governance Feminism' Put to the Test of 'Critical Feminism')’ (2015) *Available at SSRN 2636364* at 28.

<sup>1927</sup> Fraser op cit note 2029 at 73.

<sup>1928</sup> Lu op cit note 283 at 193.

and conditions of the national and international social/political order.<sup>1929</sup> Under conditions of structural injustice, this type of reconciliation involves 'processes of desalination that aim to establish or recover the subjective freedom of agents, or their capacity to integrate and appropriate the social conditions they inhabit in a nonalienated way.'<sup>1930</sup>

Existential alienation appears when one considers the cultural and psychological damage of unequal relationships. For example, existential alienation arises when women internalise low values due to their gender or the intersection of their gender with other variables such as ethnicity and internalise their inability to express their needs in their language for example.<sup>1931</sup> This is what Bourdieu calls symbolic violence, 'the internalized humiliations and legitimations of inequality and hierarchy ranging from sexism and racism to intimate expressions of class power,' and 'exercised through cognition and misrecognition, knowledge and sentiment, with the unwitting consent of the dominated.'<sup>1932</sup> Therefore, transformative justice, understood as a fundamental change is about reaching structural reconciliation for women by recognising them as equally important as all other members of society – local, national, or global. It is argued in this thesis that TJ can do this not only by recognising them as victims and rights holders through retributive and restorative justice,<sup>1933</sup> as citizens through distributive justice but also as political and social actors through normative justice as it will be discussed in the next section.

### (iii) The standpoint theory

According to Allen the standpoint theory 'contends that an individual's knowledge of the world depends on that person's social location.'<sup>1934</sup> She adds:

Because society tends to recognize and value dominant ways of knowing, mainstream constructions of knowledge about social relations neglect to consider the viewpoints of subordinate groups. However, standpoint theory maintains that members of those marginalized groups have valuable insights. (...) Therefore, standpoint theory argues that attempts to construct knowledge are partial unless they incorporate experiences of nondominant groups.<sup>1935</sup>

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<sup>1929</sup> Ibid at 38.

<sup>1930</sup> Ibid at 38.

<sup>1931</sup> Moga-Kpely & Zewei op cit note 213 at 14.

<sup>1932</sup> Bourgois op cit note 278 at 8.

<sup>1933</sup> De Greiff op cit note 515 at 58.

<sup>1934</sup> Brenda J. Allen 'Standpoint theory' (2017) *The International Encyclopedia of Intercultural Communication*: 1-9 at 1.

<sup>1935</sup> Ibid at 1.



In a feminist perspective, Smith ‘maintained that if sociologists grounded their research about knowledge construction in women’s everyday experiences, they would gain more comprehensive understanding about social institutions such as the family, education, and government.’<sup>1936</sup> Here the standpoint theory will be understood as a tool to honour ‘the main goals of feminism to analyze and disrupt power dynamics to emancipate women and to effect social change. Feminist standpoint theory also aims to identify and challenge established social hierarchies and their consequences.’<sup>1937</sup> Finally,

As a theory of method (methodology), standpoint is invaluable for helping members of marginalized groups both express and create standpoints. Thus, it fulfills goals of some feminist methods to provide opportunities for women and other nondominant groups to share their stories in service of social justice. It also offers space for the consciousness-raising necessary to develop standpoints.<sup>1938</sup>

Therefore, the question of how the transformation of norms takes place and who participates in it is of fundamental importance. The standpoint theory is about socially relocating expertise and knowledge and trusting women's expertise when making decisions affecting their lives. Until now, in transition processes, women's voices have rarely been ‘heard as political subjects, as expert opinion on justice, politics or power relations—these remain the preserve of the expert; the lawyer, aid worker, technocrat or researcher who will interpret and mediate the voices to their respective audiences.’<sup>1939</sup> Although they may not possess ‘legal, human rights or other technical knowledge, women in a society should be valued as experts on that society rather than necessarily needing to be “empowered”, “have their capacities built” and their agency “given” to them.’<sup>1940</sup> This approach assumes that women live and understand the social world in which they live and are best placed to identify and challenge the social, political, economic, and legal structures that impede their full and equal participation.<sup>1941</sup> This also recognises women as repositories of valuable knowledge and ‘grant them epistemological privilege (...).’<sup>1942</sup>

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<sup>1936</sup> Ibid at 2.

<sup>1937</sup> Ibid at 3/ at 4 she also says: ‘To develop standpoints, members of subordinate groups have to recognize and challenge cultural values and power relations that contribute to their oppression.’ In this thesis the standpoint theory rather refers to the capabilities given to subordinate groups to challenge cultural values and power relations if they wish so. This can of course be done by ‘consciousness-raising discussions with other marginalized individuals.’ Moreover, this analysis should, as already mentioned in this thesis, relies on an intersectional approach to gender, taking into account the ‘numerous other cultural, geographical, and historical locations that influence their gendered ways of knowing and being’ (at 5).

<sup>1938</sup> Ibid at 6.

<sup>1939</sup> UN Women, UNDP supra note 320 at 41.

<sup>1940</sup> Ibid at 47.

<sup>1941</sup> Lambourne & Carreon op cit note 1307 at 91/ See Rita Shackel & Lucy Fiske (eds.) *Rethinking Transitional Gender Justice: Transformative Approaches in Post-Conflict Settings* (2018) at 2.

<sup>1942</sup> Satya P. Mohanty ‘The Epistemic Status of Cultural Identity: on “Beloved” and the postcolonial condition’ (1993) *Cultural Critique* 24: 41-80 at 74.

MacKinnon notes:

We know things with our lives, and live that knowledge, beyond anything any theory has yet theorized. Women's practice of confrontation with the realities of male dominance outruns any existing theory of the possibility of consciousness or resistance. To write the theory of this practice is not to work through logical puzzles or entertaining conundra, not to fantasize utopias, not to moralize or tell people what to do. It is not to exercise authority; it does not lead practice. Its task is to engage life through developing mechanisms that identify and criticize rather than reproduce social practices of subordination and to make tools of women's consciousness and resistance that further a practical struggle to end inequality. This kind of theory requires humility and it requires participation.<sup>1943</sup>

It is therefore about re-giving women agency, that is, recognising their capacity to govern their lives, deliberate, and choose modes of action.<sup>1944</sup> Recognising agency means treating individuals as responsible persons by structuring the interaction so that individuals can choose courses of action and, in turn, are held appropriately accountable for their choices.<sup>1945</sup> Women must therefore be key players and take center stage in TJ processes. Given that one of the values of TJ for the goals and targets of the SDGs is 'the rule of law and inclusive institutions, based on its processes and long-term contributions to change rather than short-term impact,'<sup>1946</sup> TJ mechanisms should be able to provide a forum for debate on the meaning of justice.<sup>1947</sup> Ultimately, the standpoint theory argues that 'the process of approximating the truth is part of a dialogical relationship among subjects who are differently situated.'<sup>1948</sup> Instead of seeing women solely as 'victims of sexual and gender-based violence,'<sup>1949</sup> women could also be seen as holding 'the key to the path to change which is central for fulfilling Goal 16.'<sup>1950</sup>

### *(iii.1) Women at the centre stage of defining gender justice*

If the transition framework is designed to help a society deal with the traumas of the past and transform institutions, 'then political and social inequality have to be part of the conversation that enables a future in which all parties are included on an equal basis.'<sup>1951</sup> Truth commissions can facilitate public debate on how to come to terms with the past, affirm

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<sup>1943</sup> Catharine A. MacKinnon 'From practice to theory, or what is a white woman anyway?' in *Feminist Legal Theories* (2013) at 192.

<sup>1944</sup> Murphy op cit note 467 at 121.

<sup>1945</sup> Ibid at 121.

<sup>1946</sup> ICTJ op cit note 53 at 2.

<sup>1947</sup> Gready & Robins op cit note 324 at 356.

<sup>1948</sup> Amy Hinterberger 'Feminism and the politics of representation: Towards a critical and ethical encounter with "others"' (2007) *Journal of International Women's Studies* 8, no. 2: 74-83 at 79.

<sup>1949</sup> UN Women, UNDP supra note 320 at 9.

<sup>1950</sup> UN Doc A/77/162 supra note 1444 § 17.

<sup>1951</sup> Ní Aoláin & Rooney op cit note 465 at 345.

desired values,<sup>1952</sup> and be a place to challenge gender norms.<sup>1953</sup> In that respect, the UN Commission on Human Rights notes that: ‘Institutional reforms aimed at preventing a recurrence of violations should be developed through a process of broad public consultations, including the participation of victims and other sectors of civil society.’<sup>1954</sup> TJ can do so by offering ‘a different perspective – focusing on and giving a voice to persons who experience oppression, who are at risk or who have ideas and a stake in the future, such as young people.’<sup>1955</sup> Change ‘should enable a renewed social contract that includes victims and survivors, and efforts should be made so that this can be sustainable. People-centred approaches to justice need to be at the front and centre of this change.’<sup>1956</sup>

Therefore, one of the roles of the CVJRR can be to allow reflection and the redefinition of standards within the CAR, particularly concerning the place of women in society and to offer a forum in which to reflect on what this may entail in terms of institutional and social reforms. It can serve as an avenue to open dialogue of different viewpoints on the meaning of gender justice. Given their visibility and the urgency of their work, truth commissions are indeed best placed to assume the role of ‘spokesperson’ for the changes desired by the population.<sup>1957</sup> From this angle, the CVJRR should include the whole of public society and not only the actors directly involved in the conflict.<sup>1958</sup> This function of truth commissions, charged with substantial political significance, would not require a large amount of resources or changes in the rights-based logic with which the commissions’ mandates are formulated since it would precisely contribute to the prevention and non-recurrence of the violation of these rights.<sup>1959</sup> Addressing gender norms is also part of the state’s duty of due diligence, as seen above. Therefore, if TJ is understood as a project of profound social change, critical dialogue with prevailing ‘common sense and considering the macro-social context’ becomes decisive.<sup>1960</sup> In summary, the short duration of a truth commission can be exploited to the full when there is a clear understanding of TJ as the ultimate element of a process of historical change.<sup>1961</sup>

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<sup>1952</sup> Musila op cit note 558 at 28.

<sup>1953</sup> All Survivors Project ‘*I don’t know who can help*’, *Men and Boys facing Sexual Violence in Central African Republic* at 26, online at: <https://allsurvivorsproject.org/wp-content/uploads/2018/03/ASP-Central-African-Republic.pdf>.

<sup>1954</sup> Supra note 30 E/CN.4/2005/102/Add.1, Principle 35.

<sup>1955</sup> UN Doc A/77/162 supra note 1444 § 9.

<sup>1956</sup> Ibid § 11.

<sup>1957</sup> Cobián & Reátegui op cit note 1638 at 151.

<sup>1958</sup> Ibid at 151.

<sup>1959</sup> Ibid at 152.

<sup>1960</sup> Ibid at 152.

<sup>1961</sup> Ibid at 154.

In Peru, for example, the CVR public hearings opened up a space of active citizenship for Quechua women.<sup>1962</sup> In Sierra Leone, the TRC has launched a national interdisciplinary project which has enabled citizens to reflect broadly on the country's vision for the future.<sup>1963</sup> In Sri Lanka, a project brought women together in local forums to brainstorm how to change attitudes, resulting in national advocacy. This represents an innovative and effective effort to drive bottom-up TJ that 'permits a natural contextualization of understandings of justice on the basis of gendered and local needs, since agendas and theories of change emerge on the terms of women working within the platform. This very powerfully demonstrates how empowering those traditionally excluded from policy making allows radically different – but radically relevant – approaches to (transitional justice) to emerge.'<sup>1964</sup>

Ideally, non-formal participatory mechanisms could be created, meaning flexible, decentralised, informal, and intimate spaces free from institutional constraints. These spaces are often more adapted to the context, geographically close to the people concerned, and accessible. This decentralisation could also create more inclusive democratic spaces and, therefore, more freedom for women to define and realise demands that meet their specific needs in this context. It would also help to elevate the importance of women's agency who would not only be consulted through 'invited spaces' but within 'claimed spaces.'<sup>1965</sup> In the CAR, this could, ideally, be done through the Peace Committees or the eight branches of the CVJRR. However, the committees are not official yet and have no legal basis.<sup>1966</sup> They are meant to settle disputes but function, for the moment, poorly.<sup>1967</sup> Additionally, some areas of the country are still considered 'low-trust'<sup>1968</sup> environments because armed groups control them. The role of the CVJRR will therefore be essential.

Ultimately, concepts of critical peacebuilding theory, such as 'everyday peace' and 'people's peace,' reminds one to ask oneself what peace, or justice, is continually at stake, according to what priorities, for what purposes, and who decides, and towards what vision is society moving?<sup>1969</sup> This means listening to women's voices as political subjects, as 'expert

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<sup>1962</sup> Macher op cit note 1308 at 240.

<sup>1963</sup> UN Women, UNDP supra note 320 at 60.

<sup>1964</sup> Ibid at 60/ Also see Report of the Secretary-General, *The future of the United Nations peace operations: implementation of the recommendations of the High-level Independent Panel on Peace Operations*, 2 September 2015, A/70/357-S/2015/682, at 2.

<sup>1965</sup> UN Women, UNDP supra note 320 at 51/ Also see Aaron P. Boesenecker & Leslie Vinjamuri 'Charting the path of justice in peacebuilding' in *Restorative Justice, Reconciliation, and Peacebuilding* (2014): 37-76 at 61.

<sup>1966</sup> Interview recorded on the 13/12/2022 (2).

<sup>1967</sup> Ibid.

<sup>1968</sup> UN Women, UNDP supra note 320 at 52.

<sup>1969</sup> Lucy Fiske 'The rise (and fall?) of transitional gender justice: a survey of the field' in *Rethinking Transitional Gender Justice* (2019) 31 referring to Nagy op cit 335 at 217.

opinion on justice, politics or power relations.<sup>1970</sup> Some may warn that local people: 'lack education, training, understanding of gender equality, of how a state should work, and need training in everything from budgeting to writing to organising themselves efficiently in part because many (of them) live in rural areas under concepts of justice and society that do not mesh with the formal state structures of the governance machine.'<sup>1971</sup> However, if women's political goals and preferences are not explored, all avenues for producing new knowledge will be blocked, and the complexity of real-life situations, an essential component of any human situation or condition, will go unrecognised.<sup>1972</sup> Therefore, the work of the CVJRR would imply and require a policy very different from what has been done up to now, a policy which would allow the establishment of a 'sphere in which citizens construct, all together, what their future will have in common.'<sup>1973</sup> Assuming and fulfilling the role of a strong public actor must be understood by truth commissions as a requirement that goes hand in hand with the longer-term TJ project of social change.<sup>1974</sup> This 'transformative participation' – linked to agency and empowerment – can broaden and deepen democratic spaces<sup>1975</sup> and enable a pluralistic approach to gender justice.

*(iii.2) Towards a pluralistic and socio-legal approach to gender justice*

Nussbaum warns: 'Such leaving-up-for-grabs is (...) dangerous when confronting women's issues. (...) many traditional conceptions of social justice and fundamental entitlements have made women second-class citizens, if citizens at all. Women's liberties, opportunities, property rights, and political rights have been construed as unequal to men, and this has been considered a just state of affairs.'<sup>1976</sup> If this is true, however, any international intervention that imposes definitions or overrides crucial contextual differences is problematic, as analysed in Chapter 1 of this thesis. This practice perpetuates a troubling hierarchical paradigm, which understands the local as the static receiver of global norms and knowledge.<sup>1977</sup> Therefore, a 'more accurate and honest starting point is to understand,

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<sup>1970</sup> Shackel & Fiske op cit note 1886 at 2/ Also see Lundy & McGovern op cit note 1568 at 280 / Fiske op cit note 2100 at 31 citing Rees & Chinkin op cit note 89 at 1224.

<sup>1971</sup> Pamela Scully 'Ebola and Post-Conflict Gender Justice: Lessons from Liberia' in *Rethinking Transitional Gender Justice* (2019) 42.

<sup>1972</sup> Okome op cit note 378 at 5.

<sup>1973</sup> Cobián & Reátegui op cit note 1638 at 150.

<sup>1974</sup> Ibid at 151.

<sup>1975</sup> McGill op cit note 339 at 94.

<sup>1976</sup> Martha C. Nussbaum 'Capabilities as fundamental entitlements: Sen and social justice' in *Capabilities Equality: Basic Issues and Problems* (2007) 69.

<sup>1977</sup> UN Women, UNDP supra note 320 at 47 citing Macdonald op cit note 869 at 113.

through a deep contextual, cultural and linguistic engagement with (...) people, local notions of justice related concepts.<sup>1978</sup> It does not necessarily undermine international legal and gender equality standards. However, it contextualises them better when they can be brought into everyday forums where people can evaluate, debate and eventually incorporate the value of liberal equality into their own concepts and values.<sup>1979</sup>

According to Mohanty, many of our most profound evaluative concepts, including ethical concepts, refer not only to the natural properties of human nature but also to the cultures and social contexts in which they were produced.<sup>1980</sup> The actual content of equality as an evaluative notion comes ‘from what is implicit in the metaphysical claim that all of us, across class, gender, or cultural lines of division, are capable of governing our lives and that our welfare consists partly in the exercising of this capacity.’<sup>1981</sup> The notion of inalienable rights is based on a radical egalitarian notion that there is nothing a human being must do to earn their worth.<sup>1982</sup> As Rawls says ‘each person possesses an inviolability founded on justice that even the welfare of society as a whole cannot override.’<sup>1983</sup> However, the notion of equality also refers to ‘(our knowledge of) genuine social and political possibilities.’<sup>1984</sup> The sociality of the person can make ‘him/her naturally oriented to other persons with whom he/she must live in relation.’<sup>1985</sup> Therefore, living with others involves a person in social and moral roles, duties, obligations, and commitments that the person not only must but is sometimes willing to fulfill.<sup>1986</sup>

This means that ‘any single event or norm is part of a larger, complex, organic social environment.’<sup>1987</sup> It also implies that social and political ethos inform the gender roles and identities defined and chosen by women.<sup>1988</sup> Those are the structures that provide ‘rules and resources’ for women to guide their actions in the world.<sup>1989</sup> This double orientation—toward human nature, on the one hand, and toward the social and political conditions of the possibility of knowledge, on the other—allows one to see how values can be historical and

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<sup>1978</sup> Ibid at 113.

<sup>1979</sup> UN Women, UNDP supra note 320 at 47.

<sup>1980</sup> Mohanty op cit note 369 at 814.

<sup>1981</sup> Mohanty op cit note 369 at 818.

<sup>1982</sup> Ibid at 818.

<sup>1983</sup> John Rawls *A Theory of Justice* (1999) 3.

<sup>1984</sup> Mohanty op cit note 369 at 819.

<sup>1985</sup> Gyekye op cit note 506 at 310.

<sup>1986</sup> Ibid at 310.

<sup>1987</sup> Isabelle R. Gunning ‘Arrogant perception, world-travelling and multicultural feminism: The case of female genital surgeries’ (1991) *Colum. Hum. Rts. L. Rev.* 23: 189 at 213.

<sup>1988</sup> Okome op cit note 378 at 6.

<sup>1989</sup> Nuti op cit note 1627 at 34.

objective.<sup>1990</sup> Therefore, rights strategies will likely backfire if they fail to address the power relations, values, and relationships in which women live.<sup>1991</sup> The thrust of the argument is that the recognition of women as political agents 'could involve (...) the wholesale transformation of societal patterns of representation, interpretation, and communication in ways that would change everybody's sense of self.'<sup>1992</sup> Creating political spaces that put women back at the center of norm and decision-making could make it possible to call into question the reproduction process of structures that are sometimes thoughtless because they are internalised.<sup>1993</sup> It is therefore argued that 'pluralistic approaches capture the everyday experiences of citizenship as mediated by factors such as gender, ethnicity, caste, and kinship structures. They enable to see that overlapping identities can function simultaneously as forces of inclusion and exclusion.'<sup>1994</sup> Therefore, adopting a pluralistic and socio-legal approach will allow a better understanding of the possible solutions that international law can offer for gender.

In legal terms, this translates into a refocusing on the relational capacity for creating norms - and, therefore, their transformation - of each legal actor. Law, in this sense, is not a top-down creation and application of legal obligations but is continually remade and renegotiated.<sup>1995</sup> In addition to not reducing anyone to mere legal subjects but conceiving them as complex actors, 'this critical legal-pluralistic approach facilitates human interaction across various actual or perceived boundaries, including those based on gender and between the international and the local. Within this framework, each legal actor can go beyond one particularised facet of her identity, be it related to ethnicity, religion, or gender.'<sup>1996</sup> Critical pluralism 'challenges the stability and predictability usually associated with the law. However, it also bears significant transformative potential, away from prefabricated legalistic responses, to re-evaluate dominant and presumably fixed categories, like gender. (...) (Therefore) international legal norms always need to be filled with content and be further developed by—and in the interaction between—the actors involved.'<sup>1997</sup>

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<sup>1990</sup> Mohanty op cit note 369 at 820.

<sup>1991</sup> Mnisi & Claassens op cit note 475 at 515.

<sup>1992</sup> Fraser op cit note 2029 at 73.

<sup>1993</sup> Nuti op cit note 1627 at 34.

<sup>1994</sup> Mnisi & Claassens op cit note 475 at 497-498.

<sup>1995</sup> Kastner & Roy-Trudel op cit note 476 at 156 referring to Martha-Marie Kleinhans & Roderick A. Macdonald 'What Is a *Critical Legal Pluralism*?' (1997) *Canadian Journal of Law and Society* 12 (2): 25–46 at 38.

<sup>1996</sup> Ibid at 156/ Also see Rachel Sieder & Anna Barrera 'Women and legal pluralism: lessons from indigenous governance systems in the Andes' (2017) *Journal of Latin American Studies* 49, no. 3: 633-658 at 639.

<sup>1997</sup> Kastner & Roy-Trudel op cit note 476 at 157.

This, socio-legal pluralism can inform the construction of a mutually affirming social and political order in the CAR, understood as being composed of objective and subjective components. The objective component of structural reconciliation is about constructing a social and political order with rights and duties, allowing agents to exercise their moral and political agency in a set of background conditions that ensure the social bases of respect and dignity in their institutional relations and structural conditions. Structural reconciliation also has a subjective component: agents' nonalienation from the rules, norms, practices, relations, and conditions of the domestic and/or international social/political order.<sup>1998</sup> This subjective component of structural reconciliation entails existential reconciliation in its broader sense, meaning the resolution of agents' alienation from themselves, through the rebuilding of new social frames that can ground and orientate agents' capacities for self-realisation in the social world they inhabit.<sup>1999</sup> The following section will therefore analyse how the reform of the normative order of the CAR can contribute to defining a legal, social and political order in which gender justice takes on its full meaning.

(c) Towards an 'affirmable and affirmed political and social order' for women in the CAR

In countries emerging from conflict, establishing the rule of Law has generally been accepted as essential for the reconstruction and long-term stability.<sup>2000</sup> However, the rule of Law here should not be equated solely with judicial systems or their reform.<sup>2001</sup> The rule of Law is not just made up of courts and other institutions, Carothers points out; it also includes norms: 'Law is also a normative system that resides in the minds of the citizens of a society. As rule-of-law providers seek to affect the rule of law in a country, it is not clear if they should focus on institution-building or instead try to intervene in ways that would affect how citizens understand, use, and value law.'<sup>2002</sup> Therefore, TJ often translates, in addition to judicial reforms, into normative reforms.<sup>2003</sup> The CEDAW Committee recommends, for example, in cases of sexual violence in conflict or post-conflict settings, that states 'mandate institutional reforms, repeal discriminatory legislation, and enact legislation providing for adequate

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<sup>1998</sup> Lu op cit note 283 at 38 & 39.

<sup>1999</sup> Lu op cit note 283 at 38 & 39.

<sup>2000</sup> Muna B. Ndulo & Roger Duthie 'The Role of Judicial Reform in Development and Transitional Justice' in *Transitional justice and development: Making connections* (2009) at 259.

<sup>2001</sup> Ibid at 259.

<sup>2002</sup> Ibid at 259-260.

<sup>2003</sup> Girelli op cit note 1395 at 234.



sanctions as part of reparations.<sup>2004</sup> Goal 16 focusing on peace and access to justice for all targets at least five goals that directly address issues related to the emergence of the rule of law. Improving the rule of law is, therefore, now part of the overall development framework to which the Central African government adheres and is committed.<sup>2005</sup>

While the law is often seen as ‘one of the most potent cohesive forces in any society,’<sup>2006</sup> the use of national law to attempt to eradicate social practices also reveals ‘that externally imposed laws may lead to serious problems in reducing the incidence of the practice.’<sup>2007</sup> While it is crucial to focus on building a formal system of justice and law that functions effectively and in accordance with international standards, assessing ways to ensure the functioning of complementary and less formal mechanisms seems equally relevant when talking about individual responsibility. This type of responsibility is therefore not about compelling individuals to be moral agents but rather about giving them the space to deliberate on moral, political and legal issues, particularly with regard to gender norms.

The *Politique sectorielle de la justice* notes that alongside actions aimed at restoring the bond of trust between judicial institutions and the population, it is also essential to encourage the development and recognition of ADR (customary justice, conciliation, mediation) and to ensure the complementarity of the various mechanisms for access to the law and justice.<sup>2008</sup> In the long term, this strategy should recognise chiefs as a moral authority capable of regulating tensions in certain communities and promoting the social cohesion and national reconciliation necessary for lasting peace.<sup>2009</sup> In order to ensure the implementation of this policy, a decree was adopted in January 2020. This document, the first of its kind in the CAR, was welcomed as a positive commitment, despite subsequent implementation difficulties.<sup>2010</sup> However, it remains to be seen how this policy can be implemented and its tangible impact on women. Unless reforms in the CAR are engaged from the bottom – meaning the inclusion of women - in a dialogue with international norms, there is a very real

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<sup>2004</sup> Rubio-Marin & Estrada-Tanck op cit note 1447 at 581.

<sup>2005</sup> *Politique sectorielle de la justice : 2020-2024* op cit note 537 at ix.

<sup>2006</sup> See J.M. Iyi ‘Fair hearing without lawyers? The Traditional Courts Bill and the reform of traditional justice system in South Africa’ (2016) *The Journal of Legal Pluralism and Unofficial Law*, 48(1), 127–152.

<sup>2007</sup> Gunning op cit note 2118 at 227.

<sup>2008</sup> *Politique sectorielle de la justice : 2020-2024* op cit note 537 at 33.

<sup>2009</sup> Ibid 537 at 34.

<sup>2010</sup> FIDH, OCDH & Ligue Centrafricaine des Droits de l’Homme supra note 589 at 15/ *Politique sectorielle de la justice : 2020-2024* op cit note 537 Also see CAR, *Arrêté n° 005/MJDH/DIRCAB/CMRJMR.20 portant création du dispositif institutionnel de coordination et de mise en œuvre de la politique sectorielle du ministère de la Justice et des Droits de l’Homme* (Administrative Order No. 005/MJDH/DIRCAB/ CMRJMR.20 on the creation of the institutional mechanism for the coordination and implementation of the sectoral policy of the Ministry of Justice and Human Rights) (16 January 2020).

danger of a conservative interpretation of the African form of communalism as a return to tradition, with women being persuaded to assume traditional subsidiary roles in decision-making and the formation of norms in the name of the preservation of cultural values.<sup>2011</sup> It will then be necessary to pay particular attention to what the 'village chief' means and what the re-framing of norm-making and justice processes implies.

If carefully considered, the process can however allow for state building that constructively engages with local or indigenous social and political structures.<sup>2012</sup> The term 'decentering' is therefore understood as 'a normative and epistemic decolonization that implies repudiating the marginalization of non-European modes of knowledge, discourse, and political practice,' which calls for 'alternative, less alienating, structures of governance compatible with indigenous (...) traditions and practices.'<sup>2013</sup> Therefore, for 'legality' to endure, relying on and invoking commonplace schemas of everyday life, which makes every member of one society an agent of the law, could be an appropriate solution.<sup>2014</sup> This calls for reconceptualising the subject of law through the prism of an African legal philosophy that sees the subject of law as 'a living experience'<sup>2015</sup> while imagining new forms of justice and norm-making processes that would benefit women.

(i) Towards a 'multivalent' understanding of gender justice: 'Legal syncretism'

The two types of political responsibilities mentioned above merge here: the collective and the individual are called upon to work together. If revisions to state laws are part of the solution since laws are of significant importance in building specific 'generalisation and standardisation of people's doing',<sup>2016</sup> these revisions, in the CAR, do not always consider a locally rooted conception of gender justice. It is therefore argued that any changes to be made to gender norms 'must be conducted within the tradition itself, using both its language and its resources',<sup>2017</sup> which will make any social change more likely to be adopted by the

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<sup>2011</sup> Jennifer R. Wilkinson 'Race and Gender' in Coetzee, P. H., & Roux, A. P. J. (Eds.) *The african philosophy reader* (2003) at 420.

<sup>2012</sup> Lu op cit note 283 at 266.

<sup>2013</sup> Ibid at 269.

<sup>2014</sup> Grewal op cit note 494 at 90 referring to Patricia Ewick & Susan S. Silbey *The Common Place of Law: Stories From Everyday Life* (1998) at 17.

<sup>2015</sup> Ramose op cit note 585 at 81.

<sup>2016</sup> Tchoukou op cit note 461 at 2.

<sup>2017</sup> Julie Ynès Ada Tchoukou 'A Conceptual Framework for Regulating Customary Law within Pluralistic African States: Reassessing Justice Sector Reforms for Reconciling Legal Traditions' (2020) *Global Journal of Comparative Law* 9, no. 2: 245-270 at 266.

population,<sup>2018</sup> since it will not be perceived 'as an imposition and an alienation.'<sup>2019</sup> The change would likely occur if it were based on a 'critical refashioning of the best of Indigenous legal and political traditions.'<sup>2020</sup> Tchoukou, referring to Glenn's work, poses the situation in these terms: 'tradition itself justifies opposition,'<sup>2021</sup> since it is not fixed and is in constant evolution. Conversely, the international system for protecting human rights is flexible and can also benefit from the contributions of different societies and groups.<sup>2022</sup> This dialectic enables a dialogue between norms that often seem contradictory.<sup>2023</sup> This dialogue can be called 'inclusive universality,' aimed at finding the minimum requirements for a cross-cultural conception of dignity.<sup>2024</sup> Sousa Santos noticed that 'in contexts marked by the operation of more than one legal order in a given socio-political space these are no longer conceived of as closed or separate entities, but combine in practice generating complex and potentially conflictive configurations of "interlegality,"'<sup>2025</sup> which is the case for women's rights in the CAR, as discussed in Chapter 1.

This 'inclusive universality' goes beyond an attitude of toleration, which applies to norms considered as 'external, different, strange, or even radically wrong or for some evil,'<sup>2026</sup> and 'condemns and excludes customary law as a major legal tradition in African states.'<sup>2027</sup> 'Inclusive universality' rather implies 'multivalent thinking.'<sup>2028</sup> Multivalent thinking is about knowing the 'detailed information found within the conflicting traditions' and building bridges between these traditions to reach a 'middle ground.'<sup>2029</sup> This approach elevates customary norms to the same status as other norms. Negotiating culture with human rights concerns 'inherently questions, delegitimizes, destabilizes, ruptures and, in the long run, destroys oppressive hierarchies. It also contributes to harnessing the positive elements of local culture to advance human rights and gender equality, a process that also revalidates the culture itself.'<sup>2030</sup> This approach is part, among other things, of the fight against violence

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<sup>2018</sup> Ibid at 266.

<sup>2019</sup> Julie Ynès Ada Tchoukou 'Malleus Maleficarum: Scrutinizing Sorcery in Cameroon' (2018) *Journal of African Law* 62, no. 1 at 144.

<sup>2020</sup> Lu op cit note 283 at 279.

<sup>2021</sup> Tchoukou op cit note 2157 at 266.

<sup>2022</sup> Felipe Gómez Isa 'Cultural diversity, legal pluralism, and human rights from an indigenous perspective: the approach by the Colombian Constitutional Court and the Inter-American Court of Human Rights' (2014) *Hum. Rts. Q.* 36: 722 at 734.

<sup>2023</sup> Ibid at 729.

<sup>2024</sup> Ibid at 729.

<sup>2025</sup> Sieder & Barrera op cit note 2127 at 644.

<sup>2026</sup> Tchoukou op cit note 2157 at 267.

<sup>2027</sup> Ibid at 268.

<sup>2028</sup> Ibid at 268.

<sup>2029</sup> Ibid at 268.

<sup>2030</sup> A/HRC/4/34 supra note 478 § 53.

against Indigenous women and girls as: ‘Violations of the right to self-determination of indigenous peoples are historically and currently endemic and have been especially detrimental to the rights of indigenous women and girls. Violations, through both colonization and post-colonial power structures and state practices, have included assaults on the cultural integrity of indigenous communities, non-recognition of customary laws and governance systems, failure to develop frameworks for self-governance, and practices that strip indigenous peoples of autonomy over land and natural resources.’<sup>2031</sup>

Regarding human rights, the lack of universal formula for deciding whether freedom of expression extends to hate speech or whether secularism should prohibit women from wearing the hijab, for example, shows the need for an attempt to harmonise in a unitary ideal, diverse legal and political traditions through the development, at most, of ‘high level principles which can be taken to be applicable across the different legal traditions.’<sup>2032</sup> In that regard, Gebeye gives a definition of constitutionalism that could reconcile these different views. A Constitutionalism that would grant recognition to the existence of customary systems of law and jurisdiction.<sup>2033</sup> This constitutional change would include a ‘more grounded understanding of what the state currently is and what it could be in CAR,’<sup>2034</sup> thereby making any change more effective and permanent in the country.<sup>2035</sup> Gebeye notices that, in Africa, ‘(t)he liberal constitutional system of the postcolonial period is a superstructure built on top of precolonial and colonial structures, laws, rules, discursive practices, and behaviors,’<sup>2036</sup> that, in the CAR, continue to exist alongside the formal legal system. Therefore, finding a middle ground between legal centralism and legal pluralism, he calls for ‘legal syncretism as a theoretical framework for African constitutionalism.’<sup>2037</sup> Legal syncretism is ‘the process and the result of adoption, rejection, invention, and transformation of diverse and seemingly opposite legal rules, principles, and practices into a constitutional state with imperial or colonial legacies.’<sup>2038</sup>

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<sup>2031</sup> *Report of the Special Rapporteur on Violence Against Women, its causes and consequences, Violence against indigenous women and girls*, UHC, 2022, UN Doc A/HRC/50/26, § 25 online at: <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G22/323/90/PDF/G2232390.pdf?OpenElement>.

<sup>2032</sup> Frédéric Mégret ‘International Criminal Justice, Legal Pluralism, and the Margin of Appreciation Lessons from the European Convention on Human Rights’ (2020) *Harv. Hum. Rts. J.*33: 57 at 75.

<sup>2033</sup> Isa op cit note 2162 at 731.

<sup>2034</sup> Lombard op cit note 3 at 246.

<sup>2035</sup> Ibid at 247.

<sup>2036</sup> Gebeye op cit note 390 at 24.

<sup>2037</sup> Ibid at 28.

<sup>2038</sup> Ibid at 33.

Otherwise said, legal syncretism is the working together of distinct systems of law within a holistic legal scheme so that the result is greater than the sum of their individual effects or capabilities. In South Africa, for example, 'a comprehensive system of rights for cultural, linguistic, religious and traditional communities is supported by a constitution that recognizes the harmonization of customary law with human rights principles. While there may be challenges to implementation, these constitutions recognize the diversity of their societies and provide protections that can help to manage diversity constructively.'<sup>2039</sup> Beyond South Africa, many other African countries have followed suit and recognise customary law as a living, active and dynamic organ within the African legal system.<sup>2040</sup> Indeed, a close analysis of the developing jurisprudence since the early 1990s suggests, rather unexpectedly, that customary law is the primary game-changer for shifting and transforming the socio-legal status of women, and gender relations generally, through strategic litigation and judicial activism.<sup>2041</sup>

Therefore, Constitutions can be 'spaces within which the universality and cultural relativity of women's rights are fused,'<sup>2042</sup> and offer 'women unique opportunities to claim their rights and advance their interests within their cultural universes, while also carrying over old problems that challenge these very rights.'<sup>2043</sup> According to Gebeye, 'in such constitutional designs and practices, women's rights are neither a Western export nor an indigenous product: they are the results of legal syncretism, ie, a conscious constitutional craft which aims to channel the seemingly opposite and diverse notions of rights within a constitutional plane.'<sup>2044</sup> By accepting the *de jure* existence of legal pluralism, the state's responsibility for any violations of human rights standards will be clearly engaged, reinforcing the state's duty to protect individuals against interference with their rights by

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<sup>2039</sup> Report of the Secretary-General, *Responsibility to protect: State responsibility and prevention*, 9 July 2013, UN Doc A/67/929 § 36/ Also see Christa Rautenbach 'Deep legal pluralism in South Africa: Judicial accommodation of non-state law' (2010) *The Journal of Legal Pluralism and Unofficial Law* 42, no. 60: 143-177 at 148.

<sup>2040</sup> Tamale op cit note 423 at 108-109.

<sup>2041</sup> Tamale op cit note 423 at 108-109.

<sup>2042</sup> Gebeye op cit note 390 at 177.

<sup>2043</sup> Ibid at 177.

<sup>2044</sup> Ibid at 177.

others.<sup>2045</sup> Recognition in this sense leads to considering custom as a system of effective rules having rational coherence and relying on the relevant legal apparatus of the state.<sup>2046</sup>

In doing so, the content of women's rights in the CAR could be determined by 'the normative, institutional, and practical interactions set out by the Constitution.'<sup>2047</sup> Such an approach reintegrate customary law into a common conception of the Kelsenian normative order<sup>2048</sup> according to which legal norms can be looked at from 'the bottom upwards as deriving their validity from ever more general layers of norms until one reaches some ultimate norm.'<sup>2049</sup> By introducing legal syncretism, normative orders without connection to the state can nonetheless be described as law.<sup>2050</sup> The international legal corpus of human rights says little about the procedure to be followed in the event of legal pluralism. Quane observes that 'there is no general requirement (...) to recognize religious or generally customary law within states' domestic jurisdictions.<sup>2051</sup> She notes that 'instead (...) at the global level (...) a compelling case must be made out in the light of the particular circumstances of the case before the introduction of legal pluralism.'<sup>2052</sup> The specific case of the CAR will therefore be studied below.

(ii) What Legal syncretism could be like in the CAR: Recommendations

To say that women have a voice raises the question of the nature of this voice. To be heard, it is often necessary to master the coloniser's language,<sup>2053</sup> especially if, like in the CAR, the laws are most of the time written in French. However, the Cambridge school, specifically J.G.A. Pocock, states: 'Any stable and articulate society possesses concepts with which to discuss its political affairs.'<sup>2054</sup> The same could be true about its norms and justice. It is not that 'authentic agents' rely only on themselves or on a central or essential idea of themselves

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<sup>2045</sup> Quane op cit note 1673 at 682 / Also see *General Recommendation No. 28* supra note 71. The CEDAW Committee states that: State party have a 'great deal of flexibility for devising a policy that will be appropriate for its particular legal, political, economic, administrative and institutional framework and that can respond to the particular obstacles and resistance to the elimination of discrimination against women existing in that State party. (...) Ultimately, it is for the Committee to determine whether a State party has indeed adopted all necessary measures at the national level aimed at achieving the full realization of the rights recognized in the Convention.

<sup>2046</sup> Tchoukou op cit note 2157 at 251.

<sup>2047</sup> Gebeye op cit note 390 at 183.

<sup>2048</sup> Hans Kelsen *General Theory of Law and State* (1945) 124.

<sup>2049</sup> Ambreena S. Manji 'Imagining women's' legal world': Towards a feminist theory of legal pluralism in Africa' (1999) *Social & Legal Studies* 8, no. 4: 435-455 at 437.

<sup>2050</sup> Ibid at 437.

<sup>2051</sup> Quane op cit note 1673.

<sup>2052</sup> Ibid.

<sup>2053</sup> Bill & Ní Aoláin op cit note 1719 at 330.

<sup>2054</sup> Brett Bowden *The empire of civilization* (2009) at 9.

to define their preferences, decisions, choices or agenda, but that the social norms and the mores they espouse constitute a ‘language of personal resonance.’ Inauthentic lives are therefore the sign of the alienation of peoples whose particular social and moral frameworks have been disrupted, if not rendered inoperative or unintelligible, by colonisation, exploitation, genocide or dispossession, for example.<sup>2055</sup> More fundamentally, it is a problem of losing concepts with which to construct any meaningful narrative.<sup>2056</sup> In exploring the possibility of gender equality, Nzegwu makes a compelling case for the impossibility of dialogue if one uses only Western categories of thought to investigate indigenous societies (here understood in its two meanings). Oyewumi further questions the usefulness of imposing on African societies concepts and categories derived from Western historical experience.<sup>2057</sup>

To overcome the subordination of women in the CAR, social norms, institutions, and practices would therefore benefit from being transformed using concepts rooted in the languages and cultures that exist in the country, replacing the patterns that prevent parity of participation to the creation of the norms and structures of the political community through patterns that reinforce it.<sup>2058</sup> Post-conflict contexts present the possibility of thinking of entirely new systems of governance, offering the possibility of a radical transformation concerning the place of women in political and legal processes in society.<sup>2059</sup> As the previous chapter shows, public spaces and political spheres are only sometimes the preferred places for women to make their voices heard. Other forums, in this regard, might seem better suited and more accessible to women who, for example, live far from the capital or have to assume roles that do not allow them to engage in public policies in the country. The argument is that these spaces for dialogue that are more accessible to women must be recognised as just as necessary as more formal spaces such as parliament or ministerial offices and have a real place in public debate and the formation of norms. It would reconfigure what is meant by the public domain, which would no longer be understood as ‘a masculinized domain that is bounded and clearly separated from the “private” feminized domain of family and household dynamics and the personal lives of citizens.’<sup>2060</sup> One can therefore re-imagine spaces that privilege ‘cooperation consensus-seeking and real discussion of alternatives’ rather than ‘rhetoric, speechifying, posturing, and arcane practice.’<sup>2061</sup> Equality is more than inserting

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<sup>2055</sup> Lu op cit note 283 at 207.

<sup>2056</sup> Ibid at 209.

<sup>2057</sup> Okome op cit note 378 at 3.

<sup>2058</sup> Bessone op cit note 865 at 158.

<sup>2059</sup> Brown & Ní Aoláin op cit note 914 at 134.

<sup>2060</sup> Mackay op cit note 1977 at 558.

<sup>2061</sup> Ibid at 559.

women into spaces created by others, as parliamentary institutions, for example.<sup>2062</sup>

Empowerment requires moving from the ‘invited spaces’ of institutions framed by those who created them to ‘new democratic spaces.’<sup>2063</sup> This section is about creating new spaces in the CAR for women political and legal expression.

(ii.1) *The formation of the norm: Living Customary Law*

In syncretism from below, the local community is the main driver of change and transformation of customary law.<sup>2064</sup> In that respect, the *Goma Declaration on Eradicating Sexual Violence and Ending Impunity in the Great Lakes Region* recommends to member States ‘to support the implementation of a gender equality program aiming to transform the relationship between women and men in a sustainable and equitable manner, involving traditional and religious leaders, as well as women leaders at the grass-root level.’<sup>2065</sup> African feminists are adamant that they are not powerless; they can articulate their needs; they are able to determine the changes needed in their societies and they possess the means to construct these changes.<sup>2066</sup> Living customary law is therefore introduced in this thesis as a conceptual tool to think about how to shape and transform gender norms in a radically democratic way. Moreover, *ubuntu* is a holistic worldview which does not compartmentalise concepts.<sup>2067</sup> Therefore this concept is also a precious academic tool to understand that what, in Western law, is divided between family, personal, criminal, commercial laws can here be merged to think of norms in a holistic way.

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<sup>2062</sup> Cornwall & Rivas op cit note 1898 at 407/ Also see Christine Bell, Colm Campbell & Fionnuala Ní Aoláin ‘Justice discourses in transition’ (2004) *Social & Legal Studies* 13, no. 3: 305-328 at 321.

<sup>2063</sup> Gready & Robins op cit note 324 at 358-359.

<sup>2064</sup> Gebeye op cit note 1778 317.

<sup>2065</sup> International Conference on the Great Lakes Region *The Goma Declaration on Eradicating Sexual Violence and Ending Impunity in the Great Lakes Region* (2008) art. 24/ Also see African Union supra note 65 § 94: ‘Political and institutional reform should ensure respect for the dignity of all members of society based on their inclusion and effective participation in decision-making processes. Particular attention should be paid to the representation, participation and voices of women and youth through law reform and other policy measures that address patterns of discrimination and inequality that make them vulnerable to violations.’ & § 95 (vi) ‘Providing institutional space for integrating into and making use of indigenous values and sociopolitical practices, including through empowering traditional and religious leaders and community-based organizations.’ / Also see Allen & Macdonald op cit note 1377 at 13: ‘There are, however, some interesting ways in which traditional mechanisms are being used to challenge traditional values and social orders. In Afghanistan, the *jirga*, traditionally an ad hoc forum for Pashtun elders to assemble and discuss a particular issue of concern, has been re-designated to describe any gathering aimed at consultation with the general population. In 2010, Afghan Civil Society groups established the *Victims Jirga for Justice* in response to the flawed, non-inclusive government run *Peace Jirga*. (...) By loosely adopting the traditional *jirga* framework for discussion, the meetings provided a familiar and supportive space to recount the abuses that had been endured and to formulate policy proposals to the government.’

<sup>2066</sup> Keevy op cit note 504 at 412.

<sup>2067</sup> Ibid at 387.



It is therefore imperative to distinguish state customary law, which is customary law as codified by the state ‘or subject to analysis of case law (...) fixed in written rules,’<sup>2068</sup> from living customary law, which is unwritten law, made to evolve with changing social circumstances. Tamale precises: customary law is ‘based on horizontal relationships of consultation, participation and reciprocity. Most importantly, they have the unique features of adaptability and ability to change in ways that reflect evolving values in society.’<sup>2069</sup> Sen refers to Mandela when imagining democratic forums to discuss social issues:

In his autobiography, *Long Walk to Freedom*, Nelson Mandela describes how he learned about democracy and individual rights, as a young boy, by seeing the proceedings of the local meetings held in the regent’s house in Mqhekezweni: “Everyone who wanted to speak did so. It was democracy in its purest form. There may have been a hierarchy of importance among the speakers, but everyone was heard, chief and subject, warrior and medicine man, shopkeeper and farmer, landowner and laborer.”<sup>2070</sup>

Living customary law is here meant to be based on horizontal consultation, participation, and reciprocity relationships. More importantly, it is a law that has the unique characteristics of adaptability and the ability to change in ways that reflect changing social values.<sup>2071</sup> Living customary law however may face many criticisms. First, many precepts of distorted custom may have been internalised by both men and women. Thus, customary law can be synonymous with discrimination and distortion in some areas. It is also difficult to prove the content of living law,<sup>2072</sup> as its content will vary from place to place.<sup>2073</sup> Moreover, talking about living customary law is also in tension with the concept of due process, according to which the law must be certain, predictable, and consistent. Therefore, some may say that living customary law is not considered law due to its lack of prospectivity or non-retroactivity, generality, and publicity. These requirements are important for the following reasons:

The generality requirement prevents individuals from being singled out for discriminatory treatment, the constraint on retroactive applicability of laws protects individuals from the whims of power-holders, and the publicity requirement allows individuals to form reasonable expectations about what is permitted and prohibited and introduces requirements for rationality into law-making and accountability into the exercise of power.<sup>2074</sup>

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<sup>2068</sup> Tamale op cit note 423 at 90-91.

<sup>2069</sup> Ibid at 87.

<sup>2070</sup> Sen op cit note 469 at 353 referring to Nelson Mandela *Long Walk to Freedom* (1994) at 21.

<sup>2071</sup> Tamale op cit note 423 at 87.

<sup>2072</sup> Mnisi & Claassens op cit note 475 at 516.

<sup>2073</sup> Ibid at 516.

<sup>2074</sup> A/HRC/37/65 supra note 310 § 29.

However, one of the main purposes of the rule of law is to prevent those in power from abusing it by limiting what they are allowed to do.<sup>2075</sup> Citizens are placed in a position where their choices, not the whim of officials, determine the official response to their conduct.<sup>2076</sup> In that respect, international human rights and constitutional rights are normative frameworks regulating state action. On the other hand, living customary law is by nature democratic and decentred. The *ubuntu* philosophy also shows that:

While “justice as fairness” is anchored on the notion of “the social contract” suffice it to mention that “social contract theory” was also a pervasive feature of traditional African politics and governance. Traditional African chiefs were bound by law to rule with the consent of the people. Acting against the advice of the council would result in the chief’s deposition.<sup>2077</sup>

Codifying customary norms would therefore miss the point of creating new democratic spaces for women in the CAR and could lead ‘to *the ossification and preservation of conservative or inequitable beliefs*,’<sup>2078</sup> which could be detrimental to women's rights. The codification of customary law risks offering statutory protection to those who seek to cling to outdated visions of women's status and rights, as in Lesotho, where Lerothi laws were codified in a very conservative era.<sup>2079</sup> Often, when customary law is codified, an elite can control the codification process, as in Botswana and the writing of the Handbook of Tswana Law and Custom,<sup>2080</sup> depriving the customary justice process of its *raison d’être* and leading to its distortion and ossification.<sup>2081</sup> Ironically, the ascertainment may impede the natural and salutary evolution of customary law toward greater recognition of women's rights and other human rights because the older values and principles are ossified in written form.<sup>2082</sup>

The fluidity of living customary law is, on the contrary, a key point for achieving 'greater gender justice within community-based political and legal institutions.'<sup>2083</sup> The living law approach contains inherently democratic possibilities,<sup>2084</sup> and struggles over the content of custom cannot be separated from struggles over the process of defining custom. By its very nature, as living law, customary law is meant to evolve and grow to meet changing

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<sup>2075</sup> Murphy op cit note 467 at 124.

<sup>2076</sup> Ibid at 125.

<sup>2077</sup> Letseka op cit note 1407 at 545.

<sup>2078</sup> World Bank supra note 447 at 56.

<sup>2079</sup> Ibid at 56.

<sup>2080</sup> Ibid at 57.

<sup>2081</sup> Tamale op cit note 423 at 91 citing Charles Manga Fombad ‘The context of justice in Africa: Emerging trends and prospects’ in *The role of law and justice in Africa’s development* (2013) at 5.

<sup>2082</sup> Pimentel op cit note 523 at 80.

<sup>2083</sup> Sieder & Barrera op cit note 2127 at 645.

<sup>2084</sup> Mnisi & Claassens op cit note 475 at 516.

community needs and responds to various pressures, socioeconomic and political, that push and pull communities in various directions.<sup>2085</sup> Moreover, in countries where ethnic groups coexist within the same borders as in the CAR, the diversity and plurality of norm-forging practices can hardly be translated into a homogenised legal corpus.<sup>2086</sup>

The current problem in the CAR is how these norm-creating and democratic forums are thought out. Prior to colonial conquest, on most of the continent, the authority of traditional chiefs rested on the support of different groups within their communities. They, therefore, had to accommodate the diversity of interests as seen above.<sup>2087</sup> Traditional chiefs now derive their authority mainly from the state, which can enable it to advance and legally entrench its interests without having to take into account disenfranchised groups within the communities, including women,<sup>2088</sup> as it is the case in the CAR where village chiefs derive their power from the 1988 ordinance and more recently the law relating to administrative districts. However, if these forums 'are categorised and institutionalised into semi-formal judicial systems they will inevitably be very different to what they were to start with.'<sup>2089</sup> The point of living customary law being flexible will be lost: 'They will become privileged rites and most likely the preserve of certain figures of male authority recognised by the international community or by the government.'<sup>2090</sup>

Recently, several initiatives have been developed, 'aimed at ensuring improved coordination and complementarity between formal and informal justice mechanisms, building the capacity of traditional leaders, and setting limits to their interventions.'<sup>2091</sup> For an honest dialogue between norms (syncretism), the judges of the two systems must be informed of the statutory and customary norms. Thus, training and sensitisation of judges and community

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<sup>2085</sup> Tamale op cit note 423 at 90 citing Thomas Spear 'Neo-traditionalism and the limits of invention in British colonial Africa' (2003) *The Journal of African History* 44, no. 1: 3-27 at 25.

<sup>2086</sup> World Bank supra note 447 at 57.

<sup>2087</sup> A/HRC/4/34 supra note 478 § 59.

<sup>2088</sup> A/HRC/4/34 supra note 478 § 59.

<sup>2089</sup> Allen & Macdonald op cit note 1377 at 19.

<sup>2090</sup> Ibid at 19.

<sup>2091</sup> FIDH, OCDH & Ligue Centrafricaine des Droits de l'Homme supra note 589 at 33 - See for example MINUSCA 'Préfecture de Mbomou: mise en place d'un cadre de concertation sur les mécanismes informels et formels de la justice' (Prefecture of Mbomou: development of a consultation framework on informal and formal justice mechanisms) (20 December 2021), online at : <https://minusca.unmissions.org/pr%C3%A9fecture-du-mbomou-mise-en-place-d%E2%80%99un-cadre-de-concertation-sur-les-m%C3%A9canismes-informels-et>; MINUSCA 'Rafai: 20 acteurs de la justice informelle, formés et sensibilisés sur l'accès à la justice' (Rafai: 20 informal justice actors trained and made aware of access to justice) (19 March 2022), online at : <https://minusca.unmissions.org/rafai%C2%A0-20-acteurs-de-la-justice-informelle-form%C3%A9s-et-sensibilis%C3%A9s-sur-l%E2%80%99acc%C3%A8s-%C3%A0-la-justice>.

authorities could be organised,<sup>2092</sup> which should be extended to the broader Central African community.<sup>2093</sup> This fits with the capabilities approach as thought by Sen since it fulfils the need for ‘open valuational scrutiny for making social judgments,’<sup>2094</sup> which requires ‘wide informational ability.’<sup>2095</sup> A dialogue between norms can ultimately be a way of undermining internalised discriminatory norms by confronting them to other ones and thus ‘contemporary agents may begin to imagine and create new forms of social relations.’<sup>2096</sup> If one thinks that beliefs and preferences are socially constructed, then confrontation between norms can challenge, in some degree, these social constructs by widening the informational ability of women in the CAR. NGOs and paralegal organisations can lead in organising such awareness campaigns<sup>2097</sup> through 'vernacularization.'<sup>2098</sup> 'Vernacularization' is defined as 'the extraction of ideas and practices from the universal sphere of international organizations, and their translation into ideas and practices that resonate with the values and ways of doing things in local contexts.'<sup>2099</sup> With their knowledge of plural legal systems and their understanding of local socio-political structures, community paralegals can be invaluable in helping women navigate the different systems (formal or informal) to their advantage.<sup>2100</sup> The CEDAW Committee notes:

states must ensure that all justice systems, both indigenous and non-indigenous, act in a timely fashion to offer appropriate and effective remedies for Indigenous Women and Girls who are victims and survivors of discrimination and gender-based violence. This entails having available interpreters, translators, anthropologists, psychologists, healthcare professionals, lawyers, cultural mediators with experience, indigenous spiritual and medicinal authorities, and training with a gender perspective on the realities, cultures, and views of Indigenous Women and Girls.<sup>2101</sup>

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<sup>2092</sup> Food and Agriculture Organization of the United Nations *Legal pluralism, women's land rights and gender equality in Mozambique: Harmonizing statutory and customary law* (2017) at 39-40, online at: <http://www.fao.org/3/i7825e/i7825e.pdf>.

<sup>2093</sup> Ibid at 40.

<sup>2094</sup> Sen op cit note 469 at 333: ‘The capability perspective can also help in bringing out the need for transparent valuational scrutiny of individual advantages and adversities, since the different *functionings* have to be assessed and weighted in relation to each other, and the opportunities of having different *combinations* of functionings also have to be evaluated. The richness of the capability perspective broadly interpreted, thus, includes its insistence on the need for open valuational scrutiny for making social judgments, and in this sense, it fits in well with the importance of public reasoning.’

<sup>2095</sup> Ibid at 349.

<sup>2096</sup> Lu op cit note 283 at 280.

<sup>2097</sup> Food and Agriculture Organization of the United Nations supra note 2260 at 40.

<sup>2098</sup> Sally Engle Merry & Peggy Levitt ‘The vernacularization of women’s human rights’ (2017) *Human rights futures*: 213-236 at 213.

<sup>2099</sup> Ibid at 213.

<sup>2100</sup> UN Women supra note 963 at 122.

<sup>2101</sup> United Nations Rapporteur on Indigenous Peoples, *Report on the Rights of Indigenous Peoples*, A/HRC/42/37, August 2, 2019, para. 25.

These initiatives would benefit, however, from specifying what is meant by ‘traditional justice’, the decentralisation of the normative process being an opportunity to put women’s agency back at the center of any reform. It is also important to re-imagine what the role of the village chief should be, and imagine instead a type of consensual democracy based on the philosophy of *ubuntu*<sup>2102</sup> as an integral part of the norm-creating process and the justice system. It would also require questioning the role of elders in shaping norms and handing them down to younger generations,<sup>2103</sup> and re-imagining what role women could have in this process and in their connection with ancestors. For example, while Khapoya confirms that norms and values are handed down by the ancestors,<sup>2104</sup> Ramose, however, is of the opinion that the living are the legislators who lay down norms and rules,<sup>2105</sup> of which women, of any age, could be an integral part.<sup>2106</sup>

(ii.2) *Interpreting the norm*

Here South Africa can be a good example of placing different legal philosophies on equal ground and of courts promoting African law and legal thinking. Post-apartheid South Africa, for example, can serve as an example of trying to integrate multiculturalism into its constitutional practice. *Ubuntu* can serve as an example of what accommodating multiculturalism within a legal and judicial system could be like, and could be used as another paradigm to interpret the norm. This approach aligns with the Preamble of the Banjul Charter urging member states to take ‘into consideration the virtues of their historical traditions and the values of African civilization which should inspire and characterize their reflection on the concept of human and peoples’ rights.’<sup>2107</sup> Contrary to South Africa, where customary family and personal law are codified, for example, it is rather here question of seeing how living customary law could be subject to constitutional conformity.<sup>2108</sup>

Mbigi argues that for Africa to reconstruct itself, the starting point should be ‘our own roots’, and quotes Cabral to emphasise his point:

A people who free themselves from foreign domination will not be culturally free unless, without underestimating the importance of positive contributions from the oppressor’s culture

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<sup>2102</sup> Keevy op cit note 504 at 334.

<sup>2103</sup> Ibid at 390.

<sup>2104</sup> Ibid at 391 referring to V.B Khapoya *The African Experience: an introduction* (1994) at 49.

<sup>2105</sup> Ibid at 391 referring to Ramose op cit note 585 at 96-97 (These norms and rules must nevertheless be communicated to the ancestors in order to obtain their approval.)

<sup>2106</sup> Ministère des affaires sociales supra note 464 at 17 (ii).

<sup>2107</sup> Organization of African Unity (OAU), *African Charter on Human and Peoples' Rights ("Banjul Charter")*, 27 June 1981, CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), Preamble § 5, available at: <https://www.refworld.org/docid/3ae6b3630.html> [accessed 5 August 2021].

<sup>2108</sup> Gebeye op cit note 1778 at 307.

and other cultures, they return to the upward paths of their own culture ... if Africans are going to undertake the challenge of development, they need to discover their own collective self-identity. This has to be an inward journey, which should lead to a celebration of collective 'personhood', which we have called Ubuntu.<sup>2109</sup>

Mazrui adds:

But in the final analysis the shallowness of the imported institutions is due to that culture gap between the new structures and ancient values, between alien institutions and ancestral traditions. Africa can never go back completely to its pre-colonial starting point but there may be a case for at least a partial retreat, a case for re-establishing contacts with familiar landmarks of yesteryear and restarting the journey of modernization under indigenous impetus<sup>2110</sup>

Indeed some values that at first sight may seem universal, like 'compassion', 'sharing', or 'respect,' in their generic and abstract sense, are however notions that can be interpreted differently under an human rights analysis and one based on the *ubuntu* philosophy once one wants to be more specific and context-sensitive. Respect, for example, in the *ubuntu* philosophy goes beyond respect for elders to also encompass respect for ancestors.<sup>2111</sup> Therefore if concepts can sometimes find a common translation, they still need different methods, approaches, emphasis and attitude to be interpreted.<sup>2112</sup> Mokgoro argues that although the cohesion in traditional African societies has been largely eroded, and 'the social field for an *ubuntu* legal system is not particularly fertile', the values of *ubuntu* can be harnessed and enhanced to create the envisaged value system of the 'new and contemporary (...) African jurisprudence.'<sup>2113</sup>

It is therefore a question of researching about *ubuntu* from a renewed and 'female point of view',<sup>2114</sup> without obscuring the diverse modes of thoughts in the CAR.<sup>2115</sup> This analysis will therefore also require, as seen in Chapter 1, an intersectional analysis,<sup>2116</sup> and the

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<sup>2109</sup> Keevy op cit note 504 at 368 referring to L. Mbigi *Ubuntu. The African Dream in Management* (1997).

<sup>2110</sup> Ibid at 341.

<sup>2111</sup> Ibid at 369.

<sup>2112</sup> Ibid at 364.

<sup>2113</sup> Ibid at 373 referring to Y. Mokgoro 'Ubuntu and the Law in South Africa' (1998) Occasional Papers, Conrad Adenauer Stiftung, Johannesburg. 49-53.

<sup>2114</sup> Ibid at 430 referring to Y. Mokgoro 'Ubuntu and the Law in South Africa' (1998) Buffalo Human Rights Law Review, 4: 15-24 at 17.

<sup>2115</sup> Ibid at 422.

<sup>2116</sup> Ibid at 453.

<sup>2116</sup> See for example, how the Constitutional Court in SA also takes into account the Muslim faith: Rautenbach op cit note 2179 at 149 - 2004 (5) SA 331 (CC) (the *Daniels* case). 'This case dealt with the legal status of a Muslim wife in the context of family law and the question was whether a spouse married according to the tenets of the Muslim faith could be regarded as a spouse in terms of the Intestate Succession Act 81 of 1987 and/or as a survivor in terms of the Maintenance of Surviving Spouses Act 27 of 1990. The answer of the Court to both questions was positive and both Acts were developed to make provision for the surviving spouse of a *de facto* Muslim union. The Court, however, refrained from expressing its viewpoint on the legal status of Muslim wives involved in a *de facto* polygynous Muslim union.'

recruitment and appointment of women justices.<sup>2117</sup> The Constitutional Court's decisions in the *Alexkor* and *Bhe* cases, in South Africa, is a good example of legal syncretism as in *Bhe vs. Magistrate, Khayelitsha*<sup>2118</sup> it is said that:

(...) customary law is inherently flexible with the ability to permit compromise settlements, courts should introduce into the system those constitutional principles that the official system of succession violates. It was suggested that this could be done by using the exceptions in the implementation of the primogeniture rule which do occur in the actual administration of intestate succession as the applicable rule for customary law succession in order to avoid unfair discrimination and the violation of the dignity of the individuals affected by it. Those exceptions would, according to this view, constitute the 'living' customary law which should be implemented instead of official customary law.

Courts, basing their argument on living customary law, are not outrightly rejecting customs using the repugnancy axe anymore. Rather, they are engaging in very complex and nuanced arguments about the living nature of customary law and they are interpreting customary practices through the prism of living customary law.<sup>2119</sup> The South African Court also noted that:

Living' customary law is not always easy to establish and it may sometimes not be possible to determine a new position with clarity. However, where there is a dispute over the law of a community, parties should strive to place evidence of the present practice of that community before the courts, and courts have a duty to examine the law in the context of a community and to acknowledge developments if they have occurred.<sup>2120</sup>

The Court summed up its position in relation to situations where there is a dispute over the content of customary law:

[A] court must consider both the traditions and the present practice of the community. If development happens within the community, the court must strive to recognise and give effect to that development, to the extent consistent with adequately upholding the protection of rights. In addition, the imperative of section 39(2) must be acted on when necessary, and deference should be paid to the development by a customary community of its own laws and customs where this is possible, consistent with the continuing effective operation of the law.<sup>2121</sup>

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<sup>2117</sup> CEDAW GR 39 supra 111 § 27.

<sup>2118</sup> Tamale op cit note 423 at 91 referring to *Bhe and Others v Khayelitsha Magistrate and Others* (CCT 49/03) [2004] ZACC 17; 2005 (1) SA 580 (CC); 2005 (1) BCLR 1 (CC) (15 October 2004) at 65.

<sup>2119</sup> Ibid at 91.

<sup>2120</sup> Mnisi & Claassens op cit note 475 at 505 referring to *Shilubana & Others v Nwamitwa* 2009 (2) SA 66 (CC) para. 46.

<sup>2121</sup> Ibid at 505 referring to *Shilubana & Others v Nwamitwa* 2009 (2) SA 66 (CC) para. 49/ Section 39(2) provides: 'When interpreting any legislation and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights.'

Thus, in ascertaining the living customary law, courts must carefully consider the *context* and *meaning* of cultural practices and mores.<sup>2122</sup> In other words, courts must be alive to the theory of legal pluralism. This means that all laws, including those based on custom, should be subject to the provisions of the constitution.<sup>2123</sup> This could, like Moseneke in *Gumede v. President of the Republic of South Africa and Others* notes, show an ‘effort to remedy the historical humiliation and exclusion meted out to spouses in marriages which were entered into in accordance with culture of indigenous African people.’<sup>2124</sup> This would also mean that customary norms must conform to the Constitution.<sup>2125</sup> Therefore, as Sachs J. stated in the case of *S v Makwanyane*: ‘the secure and progressive development of our legal system demands that it draws the best from all the streams of justice on our country....it means giving long overdue recognition to African law and legal thinking as a source of legal ideas, values and practice.’<sup>2126</sup>

## Conclusion

The customary norms, in the CAR, can offer a tremendous opportunity to rethink how and by whom the norm can be created, evaluated or transformed. It is an ideal opportunity to rethink what local deliberation and political autonomy may mean in the CAR. Reintroducing customary norms, defined as such, to rethink gender justice in its pluralism can allow different voices to be heard on sometimes different conceptions of family, modesty, division of labour and harmony. It can enable a bottom-up process where women will be at the forefront of challenging gender stereotypes in a setting that is familiar to them and by using concepts that can best translate their desires for justice.

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<sup>2122</sup> Tamale op cit note 423 at 107.

<sup>2123</sup> Ibid at 86 referring to Yash Ghai ‘Constitutionalism: African Perspectives’ in *The Gallant Academic* (2017) at 149, and Okoth Ogendo & G. W. Hastings ‘Constitutions Without Constitutionalism: An African Paradox’ (1988).

<sup>2124</sup> Ibid at 106/ Also see Tchoukou op cit note 2157 at 251/ See *Gumede v President of the Republic of South Africa and Others*, 2009 (3) SA 152 (CC) para 16.

<sup>2125</sup> Ibid at 106 referring to *S v Makwanyane and Another* (CCT3/94) [1995] ZACC 3; 1995 (6) BCLR 665; 1995 (3) SA 391; [1996] 2 CHRLD 164; 1995 (2) SACR 1 (6 June 1995).

<sup>2126</sup> Tamale op cit note 423 at 107.



## Conclusion

This thesis is based on the premise that cultural, structural and personal violence are overlapping and mutually reinforcing. But this thesis can be disputed. Some will say that these different types of violence are not linked or far too rarely linked for a certain link of cause-and-effect to be established between them. For example, nothing proves with certainty that more equality between men and women would lead to a reduction in direct violence committed against women. Personal violence, among which sexual violence, of course has multiple causes that go beyond the scope of this thesis. What is certain, however, is that taking into account the violation of socioeconomic and cultural rights in the definition of GBV is an additional reason to be interested in the structural and cultural causes of violations affecting women since the causes of these violations are usually multiple and overlapping.

Lu and Young demonstrate that it is often difficult, when these rights are violated, to identify a single person responsible, a single cause. On the contrary, this violence often turns out to be diffuse and results from multiple causes. This is all the more striking when it comes to a gender study of TJ, as is the case in this thesis. Gender, if understood as a social construction, a starting postulate which is also questioned on several fronts, supposes understanding the norms at the origin of a gendered distribution of the roles attributed to women and men and the inequalities or hierarchies that, very often, result from this distribution. This definition of gender therefore implies studying, understanding and sometimes deconstructing these social constructions.

As a result, a gender analysis of TJ implies that integrating a peace-building agenda in the activities of TJ mechanisms becomes not only desirable but necessary in order to deconstruct and challenge the norms that make relationships between men and women unequal and, potentially, end the personal violence that stems from these inequalities. It then becomes essential to take both structural and cultural violence seriously. The question remains, however, in a particular context, here that of the CAR, how to deconstruct, and sometimes modify, these structures and these norms: what types of responsibilities does this imply and for what types of reparations? Who are the victims of systemic injustice and who can be entitled to reparation? And what kinds of justices must be invoked?

If, as Chapter 3 of this thesis suggests, direct violence against women can be addressed through the usual TJ processes of retributive justice and restorative justice, addressing structural and cultural violence requires extending the paradigm of TJ to the more ambitious one of transformative justice. It is then a question of reflecting on how TJ can best

respond to the challenges of not only distributive but also normative justice. This implies, as seen in Chapters 4 and 5 of this thesis, not to limit TJ to establishing criminal responsibilities but rather to also take into account the political, economic, social and moral responsibilities behind these violations. This also means no longer including women in TJ mechanisms only as victims but also as citizens and agents of political and social change. Finally, this means rethinking the reparations granted to them in terms of radical transformation and not only in terms of reparations limited to individuals or even collective cases when this collective is restricted to the limits of a certain region or a certain group of people. Ultimately, it also means rethinking guarantees of non-repetition as guarantees that can contribute to change the social and interpersonal structures that are at the root of VAW.

Lefranc asked: is TJ a concept?<sup>2127</sup> If it is one, it is still nascent, changing and is increasingly used in various contexts, to deal with different problems. What is certain is that it is a question of bringing more justice where, before, there was little. Trying to understand the term justice through a gender lens in the CAR leads one to define and understand the term justice in its broadest sense. It is then possible to ask whether the term holistic, instead of being defined in terms of institutions, should not instead signify, as Nesiah suggests,<sup>2128</sup> justice understood in its fullest sense, whatever the mechanisms chosen to reach it. A justice that deals with both the problem and its causes in order to ensure that GBV do not occur anymore, or less. In this regard, the AU *Transitional Justice Policy* in its paragraph 19 offers a new definition for TJ: ‘For purposes of this policy, transitional justice refers to the various (formal and traditional or non-formal) policy measures and institutional mechanisms that societies, through an inclusive consultative process, adopt in order to overcome past violations, divisions and inequalities and to create conditions for both security and democratic and socio-economic transformation.’

To overcome past GBV and gender inequalities and create the conditions for security and democratic and socio-economic transformation for women, what remains to be done and what can be done in terms of putting this into practice is a huge undertaking and will require further study. The theory will require political support and the availability of human and economic resources to become a reality, in a context still marked by persistent instability and daily violence. Therefore, the concept of transformative justice developed in this thesis will have to be confronted with the reality of the CAR's capacity to establish, maintain and

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<sup>2127</sup> Sandrine Lefranc ‘La Justice Transitionnelle n'est pas un Concept’ (2008) *Mouvements* at 61-69.

<sup>2128</sup> Nesiah op cit note 26 at 11.

operate such a system. At the time of writing this thesis, the CVJRR has not yet started its hearing activities and is still in a preparatory phase.<sup>2129</sup> Funding for the SCC has also been an important issue. If the SCC has substantial resources compared to ordinary courts, it is still insufficient to fulfill its mandate.<sup>2130</sup> This thesis, nonetheless, argues for a more robust reconstruction of the TJ project to make it effective and meaningful for women in the CAR.

The aim of justice, understood in terms of values and ideals, and the practical goal of creating a stable order may conflict with one another.<sup>2131</sup> This thesis posits that practical considerations ought not to delimit the conception of justice itself. As Rawls put it, ideal theory ‘assumes strict compliance and works out the principles that characterise a well-ordered society under favorable circumstances,’ while nonideal theory ‘is worked out after a conception of [ideal] justice has been chosen,’ and ‘asks how this long-term goal might be achieved, or worked toward, usually in gradual steps.’<sup>2132</sup> It is therefore now time to theoretically, at least, ‘widen the space for “justice” in the widest sense – social, economic, cultural, legal,’<sup>2133</sup> and be open to creative ways to reach those goals.<sup>2134</sup> That is why some scholars and practitioners today are investigating whether TJ should be reconceptualised more generally as allowing a deeper structural and cultural change,<sup>2135</sup> by prompting social, political and economic change that addresses the structural underpinnings of harm and injustice in societies,<sup>2136</sup> and making the concept closer to peacebuilding,<sup>2137</sup> even in societies where negative peace exists. The word ‘transitional’ would therefore not be defined by its temporality but rather as a *justice model*,<sup>2138</sup> in which processes of TJ would be about drawing ‘a line between a past in which rights meant nothing or very little and a future in which rights do matter,’<sup>2139</sup> and thus make the gigantic leap that would allow justice, in its

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<sup>2129</sup> FIDH, OCDH & Ligue Centrafricaine des Droits de l’Homme supra note 589 at 31.

<sup>2130</sup> Ibid at 17.

<sup>2131</sup> Gentile & Foster op cit note 60 at 512.

<sup>2132</sup> Lisa L. Fuller ‘Burdened societies and transitional justice’ (2012) *Ethical theory and moral practice* 15: 369-386 at 369- 370 referring to John Rawls *A Theory of Justice* (1999).

<sup>2133</sup> Rama Mani ‘Dilemmas of expanding transitional justice, or forging the nexus between transitional justice and development’ (2008) *The International Journal of Transitional Justice* 2, no. 3: 253-265 at 265.

<sup>2134</sup> Friederike Mieth ‘Transitional Justice and Social Transformation’ (2018) *Schweizerische Friedensstiftung* at 21.

<sup>2135</sup> Gentile & Foster op cit note 60 at 508/ Balint, Evans & McMillan op cit note 337 at 195 citing Chris Cunneen ‘State Crime, the Colonial Question and Indigenous Peoples’ in Alette Smeulers and Roelof Haveman (ed) *Supranational Criminology: Towards a Criminology of International Crimes* (2008) at 159.

<sup>2136</sup> Balint, Evans & McMillan op cit note 337 at 214.

<sup>2137</sup> Murphy op cit note 467 at 156/ Dustin N. Sharp ‘Interrogating the peripheries: The preoccupations of fourth generation transitional justice’ (2013) *Harv. Hum. Rts. J.* 26: 149 at 178.

<sup>2138</sup> Balint, Evans & McMillan op cit note 337 at 211.

<sup>2139</sup> Murphy op cit note 467 at 153.

full sense.<sup>2140</sup> Transformative justice can therefore be understood as the last step in a continuum of TJ<sup>2141</sup> that would enable radical change<sup>2142</sup> for women in the CAR.

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<sup>2140</sup> Arbour op cit note 55 at 3.

<sup>2141</sup> McGill op cit note 339 at 96.

<sup>2142</sup> Evans op cit note 953 at 6 referring to Daly op cit note 1222 at 74/ Lambourne op cit note 65 at 46.

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