



**THE ROLE OF THE HYBRID COURT IN THE GAMBIA IN ENSURING
ACCOUNTABILITY FOR HUMAN RIGHTS VIOLATIONS DURING YAHYA
JAMMEH'S REGIME**

Submitted in partial fulfillment of the requirements of the Master of Laws (LLM) in
Human Rights
and Democratisation in Africa

by

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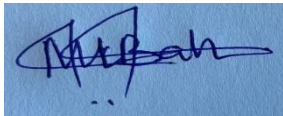
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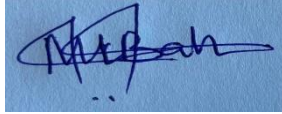
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Dedication

This dissertation is dedicated to my beloved mother, Jamilatou Bah and my beloved father, Alh. Muhamadou Lamin Bah. Additionally, I extend this dedication to my beloved brother, Omar Bah and beloved sister, Fatoumatta Bah. Your support throughout my education journey has been incredibly immense.

List of acronyms

APRC	Alliance for Patriotic Reorientation and Construction
AFPRC	Armed Forces Provisional Ruling Council
ECOWAS	Economic Community of West African States
ECOMIG	ECOWAS Military Intervention in The Gambia
EAC	Extraordinary African Chambers
ECCC	Extraordinary Chambers in the Courts of Cambodia
EULEX	European Union Rule of Law Mission in Kosovo
GNA	Gambia National Army
ICC	International Criminal Court
ICTY	International Tribunal for the Former Yugoslavia
ICTR	International Criminal Tribunal for Rwanda
NIA	National Intelligence Agency
NHRC	National Human Rights Commission
PPP	People's Progressive Party
SAM	Special Accountability Mechanism
SCSL	Special Court for Sierra Leone
SPO	Special Prosecutor's Office
SPSC	Special Panels for Serious Crimes (East Timor)
TRRC	Truth Reconciliation and Reparations Commission
UDP	United Democratic Party
UN	United Nations
UNMIK	United Nations Mission in Kosovo

1. Introduction

1.1 Background

On 22 July 1994, a group of soldiers led by Yahya Jammeh orchestrated a coup d'état which ended Sir Dawda Kairaba Jawara's three decade presidency in The Gambia.¹ Jawara's government was renowned for being one of the longest standing democracies in Africa, with a strong reputation for the respect for human rights and rule of law.² Following the military takeover, the soldiers led by Jammeh presided over a crackdown of the media, civil and political rights, fundamental rights and freedoms.³ They introduced draconian laws to restrict the enjoyment of human rights such as freedom of the press and expression.⁴ The administration operated by decrees, ensuring that the laws passed by the military superseded all other laws.⁵ As a result, the military succeeded in controlling power and ensured that the decrees formed part of the laws of The Gambia.⁶

From July 1994 to September 1996, accused persons were routinely denied bail by both the police and the National Intelligence Agency (NIA), even after a court order. Moreover, the decrees passed by the military regime prevailed over court orders resulting in prisoners, particularly political prisoners, being held in prisons and detention facilities at the mercy of the ruling regime.⁷

The regime, the Armed Forces Provisional Ruling Council (AFPRC) established itself as political body after the military takeover, and presided over a constitutional referendum which took place in August 1996 and a presidential election in September of the same year.⁸ The AFPRC transitioned to the Alliance for Patriotic Reorientation and Construction (APRC) to rally behind Jammeh and supported his

¹ Report of the Truth Reconciliation and Reparations Commission (TRRC) of The Gambia (hereinafter TRRC Report) volume 1 (Part A) 'Compendium on the findings and recommendations' available at <https://www.moj.gm/downloads> (accessed 5 July 2024).

² TRRC Report volume 1 (Part A) (n 1) 3.

³ TRRC Report volume 1 (Part A) (n 1) 3-4.

⁴ TRRC Report volume 1 (Part A) (n 1) 3.

⁵ As above.

⁶ The 1997 Constitution of The Gambia, sec 7.

⁷ TRRC Report volume 1 (Part A) (n 1) 5

⁸ S, Nabaneh & others *The Gambia in transition: Towards a new constitutional order* (2022) 2.

campaign for presidency.⁹ Jammeh won the 1996 presidential election, ushering in a civilian rule and became the country's second president.¹⁰ The 1997 Constitution officially came into force on 16 January 1997.¹¹

Jammeh ruled The Gambia for 22 years with an iron fist. His rule crippled the country on multiple fronts.¹² For instance, the security sector was used against the citizenry to suppress all forms of dissent and opposition against the government.¹³ The justice sector was conspicuously compromised, and there was no respect for rule of law and fundamental human rights. The State machinery entrenched the culture of impunity against the citizenry.¹⁴ The UN Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, JE Méndez, during a mission to The Gambia (3-7 November 2014) reported that the police and National Intelligence Agency (NIA) tortured detainees using inhumane methods such as electric shocks, burning, rape and other forms of inhumane and degrading treatments.¹⁵

In December 2016, Jammeh lost the presidential election to a coalition of opposition parties led by Adama Barrow. Following a dispute over the election results, and an intervention from Economic Community of West African States (ECOWAS), the new president assumed office on 17 January 2017. The country has since embarked on a transition from an authoritarian regime to a democratic dispensation.

In 2018, the government established the Truth Reconciliation and Reparations Commission (TRRC) with the objective to 'investigate and establish an impartial historical record of the nature, causes and extent of violations and abuses of human

⁹ As above.

¹⁰ As above.

¹¹ As above.

¹² S, Nabaneh & others (n 8) 255.

¹³ See 'Preliminary Observations from the Official Visit to The Gambia by the Special Rapporteur on the Promotion of Truth, Justice, Reparation and Guarantees of Non-Recurrence Fabián Salvioli from 20 to 27 November 2019' available at <https://www.ohchr.org/en/press-releases/2019/11/preliminary-observations-official-visit-gambia-special-rapporteur-promotion> (accessed 11 May 2024).

¹⁴ Nabaneh & others (n 8) 255.

¹⁵ See paragraphs 25 and 32 of the 'Report of the UN Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, JE Méndez: Mission to the Gambia (3-7 November 2014)' A/HRC/28/68/Add.4 (16 March 2015).

rights committed during the period from July 1994 to January 2017'.¹⁶ The TRRC concluded its hearings in 2021, and recommended the prosecution of those who bear the greatest responsibility in the perpetuation of heinous human rights violations during the Jammeh regime.¹⁷ At the end of its operations in May 2021, the TRRC had recorded 2600 statements, covered 17 thematic areas and heard testimonies from 392 witnesses.¹⁸

The Commission submitted its final report to the President in November 2021 and the government, on 25 May 2022 released its White Paper on the report. The White Paper outlined the position of the government on the recommendations of the TRRC. Out of 265 recommendations, the government accepted 263 in varying degrees.¹⁹ Notably, the government rejected the recommendation of the Commission to ban 10 judges who served as justices of the superior courts during the Jammeh era from holding public office in The Gambia.²⁰ The government noted that the judges were not given the opportunity to be heard by the Commission.²¹

Equally, the Commission recommended the granting of amnesty to one Sanna Sabally,²² on the basis that he was a victim of Jammeh's misrule because he was tortured and wrongly tried and imprisoned.²³ However, the government rejected the Commission's recommendation and noted that Sanna Sabally participated in gross human rights violations during the early days of the Jammeh government especially in the killings of soldiers on 11 November 1994.²⁴

¹⁶ Truth, Reconciliation and Reparations Commission Act 2018, sec 13(a).

¹⁷ TRRC Report volume 1 'Compendium Part (B) Recommendations for Prosecution' 3.

¹⁸ National Human Rights Commission 'Status Report-Implementation of the Government White Paper on the TRRC Recommendations submitted to the National Assembly 25 May 2022- May 25 2023' 5 available <https://www.gm-nhrc.org/download-file/5bb1503c-afb1-11ee-965f-02a8a26af761> (accessed 10 October 2024).

¹⁹ As above.

²⁰ Government White Paper (hereinafter White Paper) on the Report of the TRRC, 140 available at <https://www.moj.gm/downloads> (accessed 5 July 2024).

²¹ As above.

²² He was the Vice Chairman of the AFPRC during the early days of the Jammeh regime and Jammeh was the Chairman.

²³ White Paper (n 20) 171.

²⁴ White Paper (n 20) 172.

Since then, the government has fully implemented six recommendations, 165 are ongoing, while 92 recommendations remain unimplemented.²⁵ The TRRC recommended the establishment of a specialized court to prosecute perpetrators of human rights violations.²⁶ The Commission noted that the crimes committed by Jammeh and his co-perpetrators amount to crimes against humanity and any charges against them other than crimes against humanity would diminish the seriousness or the grave nature of the crimes they allegedly committed.²⁷

The government accepted the recommendations of the TRRC and has the ambition to create a special judicial framework within the national legal system for the prosecution of those responsible for human rights abuses and violations during the Jammeh era.²⁸ Even though the court will be situated in The Gambia, depending on the exigencies of each case, the court will have the option of sitting in other countries.²⁹

Consequently, the government passed the Special Accountability Mechanism (TRRC) Act 2024 which serves as a legal basis for the establishment of a Special Accountability Mechanism for the investigation and prosecution of the crimes described in the TRRC report.³⁰ On 23 April 2024, the National Assembly passed the Special Prosecutor's Office Bill which seeks to establish the office of the Special Prosecutor. The office's mandate is to investigate and prosecute cases involving serious human rights violations contained in the report of the TRRC.³¹ In pursuit of justice for victims, The Gambia has opted for the establishment of a hybrid court to adjudicate cases involving individuals with significant responsibility for gross human rights violations perpetrated between July 1994 and January 2017 under Jammeh's

²⁵ National Human Rights Commission Status Report (n 18).

²⁶ P Saine & E McAllister 'Gambia's truth commission recommends prosecutions for Jammeh-era crimes' *Reuters* (Banjul) 25 November 2021.

²⁷ TRRC Report volume 1 'Compendium (Part B)' (n 17) 17.

²⁸ White Paper (n 20) 8.

²⁹ As above.

³⁰ Special Accountability Mechanism Act 2024, sec 3.

³¹ Special Prosecutor's Office Act, 2024, sec 2.

rule. The aim of the internationalized court is to deliver justice to the victims and The Gambia.³²

There is no standard definition of a hybrid or internationalized court.³³ However, it can be described as a type of judicial institution that uses both domestic and international law in its proceedings and operation.³⁴ The presence of international judges who sit alongside with municipal/domestic judges of the affected State and the application of both municipal and international law are some of the factors that make a hybrid or internationalized court distinct.³⁵

1.2 Problem statement

The TRRC rejected the domestic prosecution of the crimes committed in the Jammeh regime because of the inadequacy of the country's legal system, infrastructure and financial capacity. As a result it recommended the constitution of an internationalized tribunal to be established to hear and determine the alleged crimes.³⁶ The TRRC also noted that the domestic prosecution in The Gambia has the likelihood of engendering conflict and polarization which the Commission noted must be avoided in order to foster unity in The Gambia.³⁷ The international crimes that the TRRC found to have been committed by Jammeh and co-perpetrators such as enforced disappearances, cruel, inhumane and degrading treatments and crimes against humanity have not been domesticated in The Gambia and prosecution of these crimes under solely national legal processes will lack the procedural legal basis or will present legal obstacles at the very least.³⁸

In addition, the country's present legal and political realities will affect domestic accountability because in the 2021 elections President Barrow's party formed a

³² D Gbery 'The Gambia Opts for a Hybrid Court | International Center for Transitional Justice' 4 January 2024 available at <https://www.ictj.org/latest-news/gambia-opts-hybrid-court> (accessed 5 May 2024).

³³ S Williams 'Hybrid and Internationalised Criminal Tribunals: Selected Jurisdictional Issues' (2012) *Australian International Law Journal* 284.

³⁴ B Ferencz 'Hybrid Courts' available at <https://www.asser.nl/nexus/international-criminal-law/the-history-of-icl/hybrid-courts/> (accessed 6 July 2024).

³⁵ Williams (n 33) 284.

³⁶ Report of the TRRC volume 1 'Compendium (Part B)' (n 17) 18, para 9.

³⁷ Report of the TRRC, volume 1 'Compendium (Part B)' (n 17) 18, para 10.

³⁸ O Owiso & S Nakandha 'International Criminal Accountability for Yahya Jammeh's administration: The Gambia- ECOWAS Court' 9 August 2023 available <https://www.justsecurity.org/87511/international-criminal-accountability-for-yahya-jammehs-administration-the-gambia-ecowas-court/> (accessed 24 June 2024).

coalition with Jammeh's political party.³⁹ The alliance is likely going to affect the criminal accountability for Jammeh. Further, prosecuting high ranking officials of the previous government could be challenging and at the very least will require political commitment, financial and human resources.⁴⁰

1.3 Research objectives

- a. To determine the impact of the proposed hybrid court in The Gambia and whether it is equipped with jurisdiction to apply both domestic and international law to deliver justice and accountability for victims of human rights violations during Jammeh's rule.
- b. Determine that Jammeh and his co-perpetrators can be tried under universal jurisdiction for the human rights violations they allegedly committed in The Gambia.
- c. Determine that Jammeh and his co-perpetrators can be tried at the ICC for the human rights violations they allegedly committed in The Gambia.
- d. Consider the roles of former hybrid courts such as Regulation "64" Panels in the Courts of Kosovo, the Special Panels for Serious Crimes (SPSC) in East Timor, the Special Court for Sierra Leone (SCSL), the Extraordinary Chamber in the Courts of Cambodia (ECCC) and the Extraordinary African Chambers (EAC) in the courts of Senegal in ensuring criminal accountability for human rights abuses.
- e. Anticipate the potential challenges that will hinder the hybrid court in the administration of justice in The Gambia and make recommendations.
- f. Consider the challenges of prosecuting Jammeh and his co-perpetrators under universal jurisdiction and at the ICC.

1.4 Research question

The leading question this research seeks to interrogate is what is the role of the hybrid court in ensuring accountability for people adversely mentioned in the reports of the TRRC of The Gambia including Yahya Jammeh?

In answering this question, the following sub-questions were considered:

³⁹ As above.

⁴⁰ As above.

- (i) Is a hybrid court, equipped with jurisdiction to apply both domestic and international law a viable option to deliver justice and accountability for victims of human rights violations during Jammeh's rule?
- (ii) Can the people that the TRRC recommended for prosecution and accepted by the government of The Gambia be prosecuted under universal jurisdiction for crimes committed in The Gambia during the Jammeh era?
- (iii) Can the people that the TRRC recommended for prosecution and accepted by the government of The Gambia be prosecuted at the International Criminal Court (ICC) for crimes committed in The Gambia during the Jammeh era?
- (iv) Consider the roles of former hybrid courts such as Regulation "64" Panels in the Courts of Kosovo, the Special Panels for Serious Crimes (SPSC) in East Timor, the Special Court for Sierra Leone (SCSL), the Extraordinary Chamber in the Courts of Cambodia (ECCC) and the Extraordinary African Chambers (EAC) in the courts of Senegal, is a hybrid court an adequate transitional justice accountability mechanism for grave human rights violations? What potential challenges might hinder the hybrid court in the administration of justice in The Gambia?
- (v) What the potential challenges will be in prosecuting Jammeh and his co-perpetrators under universal jurisdiction and at the ICC?
- (vi) What recommendations should be made for the court to function effectively and efficiently?

1.5 Literature review

The hybrid domestic-international court emerged as a form of accountability mechanisms. The hybrid system uses both international and domestic law. International and domestic judges hear and determine cases brought by prosecutors and defended by team of domestic and international lawyers. Judges in a hybrid court apply domestic law that has been refined to make room for the application of international standards. Dickinson noted that this type of court is prevalently used in

post-conflict situations like in Sierra Leone or East Timor or in Kosovo where an international tribunal existed but it was overwhelmed by the large volume of cases.⁴¹

Nouwen noted that in post-conflict situation national courts may be affected by not being impartial and independent or may not be seen as impartial.⁴² Trial wholly on international courts or tribunals are considered to lack the legitimacy as there is often the lack of ownership of the process of accountability by those mostly affected by the crimes allegedly committed.⁴³ The proceedings take place in distant courtrooms, where the prime participants are attorneys who lack knowledge of the conflict and customs in which the crimes have been perpetrated.⁴⁴ As a result, the beneficial outcomes that trials could bring to the affected community are not realized.⁴⁵

Some of the challenges faced by the SCSL were the imposition of a three-year mandate to complete its work and that created high and unrealistic expectations as the Court could not accomplish its initial mandate within the three years.⁴⁶ The trials started slowly because of funding issues which caused longer trials and the tribunal had to scale down its operations because of inadequate funding.⁴⁷ There was also the challenge of limited support for the Office of Defense and there was inequality of arms between the prosecution and the defense because the defense lacked the autonomy to make decisions in their pursuit of justice.⁴⁸

My research fits in with the existing research as I seek to explore the impact of the proposed hybrid court and how it will ensure justice and accountability by making reference to the Regulation “64” Panels, the SPSC, SCSL, ECCC and EAC in the courts of Senegal and how they succeeded in achieving accountability for gross human rights violations and, the potential challenges that may hinder the Hybrid Court in The Gambia.

⁴¹ LA Dickinson ‘the Promise of Hybrid Court’ (2003) 97 *The American Journal of International Law* 299.

⁴² SMH Nouwen ‘Hybrid Courts. The Hybrid Category of a New Type of International Crimes Courts’ (2006) 2 *Utrecht Law Review* 191.

⁴³ As above.

⁴⁴ As above.

⁴⁵ As above.

⁴⁶ CC Jalloh ‘Special Court for Sierra Leone: Achieving Justice?’ (2011) 32 *Michigan Journal of International Law* (2011) 435.

⁴⁷ Jalloh (n 46) 436.

⁴⁸ Jalloh (n 46) 442.

1.6 Methodology

This study employed a doctrinal research approach, relying on desktop research. The desktop based research analyses existing literature and jurisprudence concerning hybrid courts, and the prosecution of international crimes through universal jurisdiction and at the International Criminal Court. The primary sources that were consulted were the 1997 Constitution of The Gambia, domestic statutes particularly the Special Accountability Mechanism (TRRC) Act 2024 and the Special Prosecutor's Office Act, 2024 and the Reports of the TRRC. The secondary sources that were consulted were case law, journal articles, books, normative frameworks by human rights institutions and the internet.

1.7 Limitations of study

The scope of the study was to explore the role of the Hybrid Court in ensuring accountability for human rights violations in Jammeh's 22 year misrule in The Gambia. The research aimed to analyse the key role the court will play in helping to ensure accountability.

The Court is not yet setup but plans are rife for the setting up the court and the establishment of the Special Prosecutor's Office. Because the court is still not in existence, the scope of the study was limited to only the potential role the court will play in ensuring accountability when it is set up.

1.8 Structure

This dissertation is divided into five chapters. The Introduction consists of the background, problem statement, research objectives, research questions, literature review, methodology, limitations of study and the structure. Chapter two discusses the political climate and human rights situation in The Gambia during the reign of Jammeh. It also considers key events and instances of human rights abuses orchestrated by the Jammeh regime, the transitional justice process and the implementation plan.

Chapter three considers the legal basis for prosecution of the Jammeh era crimes under universal jurisdiction and briefly discusses the trials and convictions of Bai

Lowe and Ousman Sonko for crimes against humanity by the courts in Switzerland and Germany respectively. The chapter also examines the challenges of prosecuting Jammeh and his co-perpetrators under universal jurisdiction. The legal basis for prosecution of the Jammeh era crimes at the ICC and the challenges that may be encountered are also discussed.

Chapter four discusses former hybrid courts and the potential advantages and disadvantages of hybrid courts, and it gives a background for the establishment of the hybrid court in The Gambia. In addition, the chapter analyses the legislation passed by the National Assembly that could see Jammeh and his co-perpetrators prosecuted in The Gambia. Further, the chapter discusses the role of victims in the proceedings and the importance of reparations for victims of human rights abuses. Finally, the chapter considers the potential challenges that could face the hybrid court in ensuring accountability. Chapter five comprises the conclusion and recommendations.

Chapter 2: Historical context

2.1 Introduction

This chapter discusses the political climate and human rights situations in The Gambia during the Jammeh era in order to paint a clear picture of the country in relation to its political climate and human rights situations at the time. The chapter also discusses the transitional justice process and the implementation plan embarked on by The Gambia.

2.2 Political climate in The Gambia during Jammeh era

Yahya Jammeh once described members of the oppositions as evil vermin and he would bury them nine-feet deep if they attempted to destabilize the nation.⁴⁹ Opposition leaders and members of their political parties were occasionally arbitrarily arrested and imprisoned.⁵⁰ Intimidation and obstruction of activities of opposition figures by state security agents were also common during the Jammeh's era.⁵¹ Opposition groups faced administrative hurdles whenever they wanted to hold political activities requiring the use of public address systems as they were required to obtain a permit from the police who were always reluctant to issue them with one because of fear of reprisals from Jammeh.⁵² Government officials who were perceived to support the oppositions' political parties were arbitrarily arrested and dismissed.⁵³

⁴⁹ Amnesty International 'Gambia: Opposition in Gambia- The Danger of Dissent' 14 September, 2016, 5 available at <https://www.amnesty.org/en/documents/afr27/4705/2016/en/> (accessed 1 August 2024).

⁵⁰ T Felicity and D Corinne 'State of Fear: Arbitrary Arrests, Torture, and Killings' Human Rights Watch 15 September 2015 available at <https://www.hrw.org/report/2015/09/17/state-fear/arbitrary-arrests-torture-and-killings> (accessed 20 September 2024).

⁵¹ As above.

⁵² J Butty 'Gambia opposition leader cannot use PA system to address supporters' *Voice of America* (Washington, DC) 17 April 2015.

⁵³ Felicity and Corinne (n 50).

During his 22-year rule, the elections presided over by Jammeh were widely criticized and mostly characterized by violence and intimidation.⁵⁴ During the 1996 election for instance, main opposition political parties such as former President Jawara's People's Progressive Party (PPP) were banned.⁵⁵ The 2001 and 2006 elections were described by the United Nations (UN) as 'relatively free and fair'.⁵⁶ However, in 2011 elections, due to intimidation of voters by Jammeh's ruling party, ECOWAS denounced the election as being neither free nor fair.⁵⁷

In 2015, there was one opposition and four independent National Assembly members out of 53 in The Gambia's National Assembly.⁵⁸ In June 2015, the government of Yahya Jammeh wanted to amend the Elections Act to increase the fee required to register a political party to one million dalasi (24,527 US dollars).⁵⁹ However, the National Assembly reduced the fee to D500,000 (12,262 US dollars).⁶⁰ The move of the government was criticized by opposition leaders who argued that the law affected the healthy growth of multi-party democracy in the country.⁶¹ In light of the unfavourable political climate for opposition parties, some discontent opposition parties protested against the Jammeh regime and demanded legal reforms to ensure more favourable electoral laws. This protest was however met with force that led to the detention and subsequent death of Solo Sandeng, an executive member of the United Democratic Party (UDP) and others were seriously injured.⁶² The political climate in the country was by all indications unfavorable to opposition leaders and members of their political parties.

2.3 Human rights situation in The Gambia during Jammeh's era

Because of highly restrictive administrative and legal frameworks, human rights and pro-democracy groups struggled to promote human rights and good governance in

⁵⁴ Felicity and Corinne (n 50) 11.

⁵⁵ As above.

⁵⁶ UN Secretary-General 'Secretary-General calls for free, fair and peaceful election in Gambia; sends Special Envoy to reaffirm UN commitment' Press Release available at <https://press.un.org/en/2001/sgsm8002.doc.htm> (accessed 20 September 2024).

⁵⁷ U Fofana 'Gambian polls close in election denounced by ECOWAS' *BBC News* (London) 24 November 2011.

⁵⁸ As above.

⁵⁹ As above.

⁶⁰ As above.

⁶¹ As above.

⁶² Human Rights Watch 'Beaten to death: family of murdered opposition leader speaks out' 2 November, 2016 available at <https://www.hrw.org/news/2016/11/02/witness-beaten-death-gambia> (accessed 27 September 2024).

The Gambia during Jammeh's rule.⁶³ Few Non-Governmental Organisations (NGOs) operated freely in the country at the time but they avoided reporting on human rights abuses and focused on less controversial issues such as health and education.⁶⁴

In addition, people were accused of being witches and forced to drink Jammeh's concoctions that led to the death of some victims while survivors still grapple with severe medical conditions.⁶⁵ Also, Jammeh's AIDS treatment initiative resulted in numerous deaths and serious health conditions for survivors.⁶⁶ Many of the victims as well as their families have endured mental, emotional and physical harms for many years.⁶⁷

The Gambia's truth commission recorded 122 cases of torture, over 230 individuals murdered and numerous cases of sexual violence perpetrated by Jammeh himself and his agents with majority of these cases were executed under Jammeh's directive.⁶⁸ The state security forces extrajudicially executed numerous people and many others forcefully disappeared and believed to be dead.⁶⁹

2.4 Key events and instances of human rights abuses orchestrated by the Jammeh regime

There are several critical events and instances of human rights abuses orchestrated during the Jammeh regime such as the killings of the West African migrants in 2005, the students protest in 2000 which resulted to the killings and maiming of many students, the 1994 November attempted coup on Jammeh and his military junta by soldiers of the Gambia Armed Forces which resulted to the summary execution of the alleged coup plotters and the alleged rape of Toufah Jallow by Jammeh. However, under this sub-heading, because of space constraint, I only briefly discuss the killings of the West African migrants and the execution of November 1994 coup plotters.

⁶³ Felicity and Corinne (n 50) 12.

⁶⁴ As above.

⁶⁵ Preliminary Observations from the Official Visit to The Gambia by the Special Rapporteur on the Promotion of Truth, Justice, Reparation and Guarantees of Non-Recurrence (n 13).

⁶⁶ As above.

⁶⁷ As above.

⁶⁸ TRRC Report volume 1 'Compendium Part (B) (n 17). See also S Jammeh and R Maclean, 'Gambia Says It Will Prosecute Former President for Murder' *The New York Times* (New York) 25 August 2022.

⁶⁹ Felicity and Corinne (n 50) 12.

2.4.1 Killings of West African migrants

On 22 July 2005, around 67 economic migrants from West Africa, comprising mostly of Ghanaians started their journey to Europe via the Mediterranean Sea.⁷⁰ The migrants were informed by their agent, Lamin Tunkara to travel to The Gambia to catch a boat to Europe.⁷¹ Shortly upon their arrival ashore in The Gambia, they were arrested, accused of being mercenaries, detained and tortured by state security agents.⁷² They were driven to the bush by state agents in the Senegalese region of Casamance where they were executed on the order of Jammeh.⁷³ However, one Martin Nyere who was one of the migrants luckily escaped death and returned to Ghana where he reported about the killings of the migrants.⁷⁴

Soon after the incident in 2005, in an effort to refute Martin's allegation, The Gambian authorities established a taskforce to cover up the crimes.⁷⁵ The panel refuted the allegation of Martin.⁷⁶ In August 2008, Ghana and Gambia requested a joint investigative panel to be set up to probe into the alleged killings of the migrants.⁷⁷ As a result, a joint investigative team was established by UN and ECOWAS to investigate the alleged killings of the migrants.⁷⁸ The TRRC found that shortly before the UN/ECOWAS fact-finding mission arrived in The Gambia, top-ranking government officials instructed members of the taskforce that was established to facilitate the investigation not to reveal anything that had the potential to incriminate the Jammeh regime.⁷⁹ Acting on the instruction, the members of the taskforce covered up the killings, misled and manipulated the UN/ECOWAS fact-finding mission.⁸⁰

During the public hearings of the TRRC, state security agents admitted that the killings of the migrants were sanctioned by Jammeh.⁸¹ The TRRC as a result found

⁷⁰ TRRC Report volume 12, 'The killings of the West African Migrants. Enforced Disappearances' 1

⁷¹ As above

⁷² Report of the TRRC volume 12 (n 70) 7.

⁷³ As above.

⁷⁴ As above.

⁷⁵ Report of the TRRC volume 12 (n 70) 34.

⁷⁶ As above

⁷⁷ As above.

⁷⁸ As above.

⁷⁹ As above.

⁸⁰ As above.

⁸¹ Report of the TRRC volume 12 (n 70) 34.

Jammeh liable for the killings, torture and enforced disappearances of more than 60 West African migrants by ordering the security agents to execute them in July 2005.⁸²

2.4.2 The execution of November 1994 coup plotters

In November 1994, barely three months after the successful coup led by Jammeh, the leadership of the military junta reported that a counter-coup was planned and led by one Basiru Barrow.⁸³ The soldiers wanted to overthrow the military junta because they were not happy with the situation as they felt betrayed by their colleagues who they assisted to oust the Jawara regime.⁸⁴

In response to the planned coup, the junta met and agreed to crush the ringleaders of the planned coup d'état and Jammeh as the Chairman of the AFPRC ordered his colleagues to take no prisoners.⁸⁵ On 10 November 1994, the AFPRC junta members and their loyal soldiers in The Gambia National Army (GNA) attacked Fajara and Yundum Barracks with the intent to kill the soldiers who attempted to plot a counter coup d'etat.⁸⁶ During the invasion, they captured, abused, tortured, arbitrarily arrested, unlawfully detained and inhumanly treated, and extrajudicially executed the alleged ringleaders of the countercoup.⁸⁷ The captured soldiers were executed in Yundum and Fajara Barracks while some of them were driven to a forest in Brikama where they got lined up and shot.⁸⁸ The incident resulted in the execution of at least 20 soldiers.⁸⁹

2.5 The transitional justice process

In order to restore good governance and public confidence in government institutions and to restore human rights and strengthen access to justice, transitional justice

⁸² As above.

⁸³ MK Darboe 'Gambia: Uncomfortable Truths on the 1994 Executions' 29 January 2019 available at <https://www.justiceinfo.net/en/40079-gambia-uncomfortable-truths-on-the-1994-executions.html> (accessed 21 September 2024).

⁸⁴ TRRC Report volume 3 'November 11th, 1994 attempted coup' 1.

⁸⁵ Report of the TRRC volume 3 (n 84) 7.

⁸⁶ Report of the TRRC volume 3 (n 84) 1.

⁸⁷ Report of the TRRC volume 3 (n 84) 34.

⁸⁸ Report of the TRRC volume 3 (n 84) 29-30.

⁸⁹ Darboe (n 83).

became an urgent priority to the government.⁹⁰ The transitional justice process in The Gambia has different approaches including truth telling, prosecution, compensations and institutional reforms.⁹¹ The TRRC was at the forefront in helping to address human rights abuses committed during the Jammeh regime.⁹² Established in 2017, the TRRC had been crucial in uncovering the truth about past crimes, giving victims the chance to narrate their stories in order to ensure that those responsible are held to account.⁹³ Through the conduct of public hearings and testimonies of witnesses, the TRRC unearthed extensive rights violations.⁹⁴

To ensure accountability, the government started to prosecute persons implicated in human rights abuses. For instance, the National Intelligence Agency (NIA) officials who tortured and killed Solo Sandeng, a youth opposition activist, have been prosecuted and sentenced to death.⁹⁵ Also, Yankuba Touray, a former member of the military junta who participated in the killing of former Finance Minister, Koro Ceesay was sentenced to death.⁹⁶

Further, the government set up a reparations fund and implementation support programs that are aimed at providing reparations and support to victims of past atrocities.⁹⁷ Importantly, the capacity and infrastructure of the judiciary are being enhanced to enable the institution to hear and determine cases of international crimes.⁹⁸

Continuing on the transitional justice process, the government also passed two laws that could see the prosecution of Jammeh and his co-perpetrators in The Gambia.⁹⁹

⁹⁰ The Gambia National Development Plan 2018-2021.

⁹¹ D Dettman 'Navigating the Path of Transitional Justice: The Gambian Experience' 22 April 2024 *American Bar Association* available at <https://www.americanbar.org/advocacy/global-programs/news/2024/navigating-the-path-of-transitional-justice/> (accessed 21 September 2024).

⁹² As above.

⁹³ As above.

⁹⁴ As above.

⁹⁵ B Asemota 'EX-NIA DG, 4 others sentenced to death' *The Standard Newspaper* (Bakau) 14 July 2022.

⁹⁶ MK Darboe 'Yankuba Touray Sentenced to Death in Gambia' 16 July 2021 available at <https://www.justiceinfo.net/en/79933-yankuba-touray-sentenced-to-death-in-gambia.html> (accessed 21 September 2024).

⁹⁷ Dettman (n 91).

⁹⁸ As above.

⁹⁹ MK Darboe 'Gambia Passes Law That Could See Former Dictator Jammeh Tried Locally' *Front Page Africa* (Monrovia) 7 May 2024).

In 2017, the government also passed the National Human Rights Commission (NHRC) Act, 2017 which established the National Human Rights Commission.¹⁰⁰ In 2018, the National Assembly also passed the Constitutional Review Commission Act, 2017 which saw the establishment of the Constitutional Review Commission (CRC).¹⁰¹ The function of the Commission was to draft a new constitution for The Gambia.¹⁰² The Commission drafted a new constitution but the National Assembly rejected the draft in September 2020 because sympathizers of President Adama Barrow in the National Assembly did not support the draft as it gave the president one term to serve in office.¹⁰³

2.6 Implementation plan

The government of The Gambia said it is committed to implementing the recommendations of the TRRC and as a result, it developed an implementation plan 2023-2027.¹⁰⁴ The implementation plan seeks to ensure that the TRRC recommendations are implemented effectively in a way that is transparent, inclusive and in a responsible way.¹⁰⁵ The overarching priorities of the implementation plan encompass truth, justice and accountability, reparations for victims, peace and reconciliation, and guarantees of non-repetition.¹⁰⁶

2.7 Conclusion

Serious human rights abuses and violations happened in The Gambia during Jammeh's 22 year rule. Through the TRRC process, several serious crimes committed during Jammeh's time were revealed. The government of The Gambia has committed itself to implementing the recommendations of the TRRC. This was followed by the development of an implementation plan.

¹⁰⁰ National Human Rights Commission Act 2017, art 3.

¹⁰¹ Constitutional Review Commission Act 2017, sec 3.

¹⁰² Constitutional Review Commission Act 2017, sec 6.

¹⁰³ MK Darboe '7 Years of Stalemate: Gambia's Long Journey to a New Supreme Law | FactCheck Gambia' 11 September 2024 available at <https://factcheckgambia.org/7-years-of-stalemate-gambias-long-journey-to-a-new-supreme-law/> (accessed 12 October 2024).

¹⁰⁴ Implementation plan to the Government White Paper on the Recommendations of the TRRC (hereinafter Implementation plan) 8 available at <https://www.moj.gm/downloads> (accessed 5 July 2024).

¹⁰⁵ As above

¹⁰⁶ Implementation plan (n 104) 18.

Chapter 3: Litigation under universal jurisdiction and at the ICC

3.1 Introduction

In our present world, we witness people being prosecuted in a state where the crimes they are accused to have committed were neither committed on the nationals of the prosecuting state nor were the crimes committed on their territory. This chapter considers the legal basis of litigation of Jammeh era crimes under universal jurisdiction and at the International Criminal Court (ICC). The chapter briefly discusses the trials and convictions of Ousman Sonko and Bai Lowe for crimes against humanity in Switzerland and Germany respectively. The chapter also highlights the challenges of litigating Jammeh era crimes under universal jurisdiction and at the ICC. The chapter answers the questions as to whether the crimes recommended for prosecution by the TRRC and accepted by the government can be tried under universal jurisdiction and at the ICC and the potential challenges that might be encountered.

3.2 Legal basis for prosecution under universal jurisdiction

Universal jurisdiction means that a country can prosecute a person solely on the type of crime regardless of where the crime occurred, the nationality of the accused, the nationality of the victim or any other link to the country exercising such kind of jurisdiction.¹⁰⁷ The principle of universal jurisdiction is based on the belief that some crimes are so severe to global interests that states have the right and in fact the duty to initiate legal proceedings against the perpetrators without regards to where the crimes happened or the people involved.¹⁰⁸

¹⁰⁷ S Macedo & others 'The Princeton Principles of Universal Jurisdiction: Princeton Project on Universal Jurisdiction' (2001) *Princeton University Press* 11.

¹⁰⁸ M Robinson 'Foreword' 'The Princeton Principles on Universal Jurisdiction' (2001) *Princeton University Press* 16.

The principle derogates from the usual rules of criminal jurisdiction which requires territorial or personal connection with the person who committed the crime or the victims.¹⁰⁹ Universal jurisdiction allows for the prosecution of international crimes regardless of where the crimes were committed in the world.¹¹⁰ The justifications for the derogation are thus: first, there are certain crimes that are so severe that they affect the international community as a whole and second, those who committed grave international crimes must have no safe havens available to them.¹¹¹ The international community which comprises of states and international organisations must step up to prosecute and punish those responsible for the commission of grave crimes.¹¹²

One of the most famous universal jurisdiction cases is *Regina v Bartle, Bow Street Stipendiary Magistrate & Commissioner of Police, Ex Parte Pinochet*.¹¹³ Pinochet was a former head of state of Chile. He was accused of conspiring and taking hostage, torture and killing of people including citizens of Spain. He was arrested in England but he argued that he was immune from arrest and could not be extradited. The House of Lords held that Pinochet was not entitled to immunity in relation to torture that had been made universal offence by the International Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment of 1984. The Convention was incorporated into the Criminal Justice Act of 1988 of England and it was effective in 29 September 1988 and it provided an exception to the immunity from criminal process of present and former head of states.¹¹⁴

The concept of universal jurisdiction was codified in the 1949 Geneva Conventions which mandates States parties to either prosecute or extradite those accused of serious violations of the Conventions.¹¹⁵ The 1949 Geneva Conventions, the 1973 Convention against Apartheid, the 1984 Convention against Torture and the 2006 Convention against Enforced Disappearance are the international treaties that

¹⁰⁹ X Philippe 'The principles of universal jurisdiction and complementarity: how do the two principles intermesh?' (2006) 88 *International Review of the Red Cross* 377.

¹¹⁰ As above.

¹¹¹ Philippe (n 109) 377-378.

¹¹² As above.

¹¹³ United Kingdom House of Lords, 1999 2 W.L.R. 827, 38 I.L.M. 581.

¹¹⁴ LF Damrosch & SD Murphy *International Law Cases and Materials* (2019) 780.

¹¹⁵ 1949 Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field of 12 August 1949, arts 49 and 50.

obligate State parties to exercise universal jurisdiction especially when extradition is not possible.¹¹⁶

There are three paramount steps to take in order to get universal jurisdiction to function: first, there must be specific reason for universal jurisdiction; second, the crime and its constitutive elements must be well-defined; and third, the state must have domestic enforcement frameworks so that its courts can exercise jurisdiction over these offences.¹¹⁷ When any of these steps are missing, the principle remains a wish.¹¹⁸

The TRRC in Volume 1 Compendium- Part B at pages 17 and 18 outlined different options for the prosecution of Yahya Jammeh and his co-perpetrators. The first option which was obviously not the favorite option of the Commission was purely domestic prosecution of the crimes in The Gambia. The second option being prosecution using internationalized tribunal in The Gambia and the third option being prosecution of the crimes in one of The Gambia's neighboring countries. The fourth option is prosecution at the International Criminal Court (ICC).¹¹⁹ The government of The Gambia as stated in the introduction accepted the second option put forward by the TRRC.¹²⁰

Because the whereabouts of the perpetrators are relevant under universal jurisdiction, it is important to ask the question, where are Yahya Jammeh and his co-perpetrators? Briefly, since Jammeh got forced out of power following an unexpected defeat in The Gambia's national elections in 2016, he is being residing in Equatorial Guinea. Even though some of the perpetrators of human rights abuses live outside The Gambia such as Sanna Manjang and Peter Signateh there are a number of perpetrators that the government accepted to prosecute presently living freely in The Gambia like Alhagie Kanyi, Omar Amadou Jallow, Alagie Martin just to name a few.

¹¹⁶ Geneva Conventions for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field of 12 August 1949, arts 49 and 50, International Convention on the Suppression and Punishment of the Crime of Apartheid, art 5, Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, art 7, and International Convention for the Protection of All Persons from Enforced Disappearance, art 3.

¹¹⁷ Philippe (n 109) 379.

¹¹⁸ As above.

¹¹⁹ TRRC Report volume 1 Compendium Part B (n 17) 17.

¹²⁰ White Paper (n 20) 8.

Ousman Sonko and Bai Lowe have been successfully tried and convicted for crimes against humanity in Germany and Switzerland respectively and I will discuss their cases below as they are relevant as far as prosecution under universal jurisdiction is concerned. Michael Sang Correa is detained and charged with six counts of torture and a count on conspiracy to commit torture in the United States.¹²¹ It is alleged in Correa's indictments that he and other junglers beat their victims with pipes; sticks and used plastic bags to suffocate them, thus causing them serious pains and sufferings.¹²²

Some of the crimes Jammeh is accused of committing include torture, murder, rape, sexual violence and generally, every nation that ratified and incorporates the UN Convention against Torture in their domestic law has the universal jurisdiction to try him.¹²³ Equatorial Guinea ratified the Convention in 1984 and article 7 of the Convention, requires the State parties to either prosecute or extradite people who are accused of committing the crime of torture.¹²⁴ In Equatorial Guinea however, international treaties become part of the national legal system only when incorporated into their domestic law as the country does not give treaties supra-legal place.¹²⁵ Therefore, ratification of the Torture Convention is not sufficient to give it direct effect unless when it is domesticated.

Equatorial Guinea in 2006 passed a law forbidding torture.¹²⁶ However, the law does not provide for extraterritorial jurisdiction and the UN Convention against Torture is not incorporated into their laws, making it not directly applicable. Therefore, Equatorial Guinea lacks domestic enforcement frameworks that could assist the courts to exercise jurisdiction over serious crimes committed in another jurisdiction. Since this essential step is missing, it is right to conclude that the principle of

¹²¹ The Centre for Justice and Accountability 'U.S. Criminal Prosecution of Michael Sang Correa' available at <https://cja.org/what-we-do/litigation/u-s-criminal-prosecution-of-michael-sang-correa/> (accessed 7 September 2024).

¹²² As above.

¹²³ Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, art 7.

¹²⁴ As above.

¹²⁵ M Jacqueline 'The conflict between international and domestic law in the constitutions of the Economic and Monetary Community of Central Africa' (2022) 7 *Academic Journal of Legal Studies and Research* 5.

¹²⁶ Ley num 6/2006, de fecha 2 de Novembere, Sobre La Prevencion y sanction de la tortura (Act No.6/2006 of 2 November 2006 on the Prevention and Punishment of Torture).

universal jurisdiction is a mere wish in Equatorial Guinea. Arguably, if the Convention was domesticated in Equatorial Guinea, or international treaties apply directly in Equatorial Guinea, the case of *Belgium v Senegal*,¹²⁷ at the International Court of Justice (ICJ) would have been relevant. Nevertheless, brief facts of the case will assist in understanding the principle of universal jurisdiction.

Belgium initiated proceedings against Senegal in relation to a dispute about Senegal's compliance with its obligation under international law to prosecute Hissène Habré (former president of Chad) or extradite him to Belgium to face criminal proceedings. Belgium anchored its claim on the UN Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment and customary international law.¹²⁸

Belgium sought the court to adjudge and make declaration that Senegal was under an obligation to try Habré for acts he committed such as torture, crimes against humanity, and failing to prosecute him, Senegal was under an obligation to extradite him to Belgium so that he could be prosecuted for the crimes before the Belgium courts.¹²⁹

The ICJ ruled that since the crimes were committed after Senegal ratified the Torture Convention, it was under an obligation pursuant to article 7 of the Convention to prosecute Habré for the crimes. The court held that Senegal violated article 7 for failing to prosecute some offences allegedly perpetrated by Habré after June 1987, which is when the Convention entered into force for Senegal.¹³⁰

After the ICJ's ruling, the Extraordinary African Chambers (EAC) was established as a result of an agreement between Senegal and the African Union (AU). Habré was tried and convicted in 2016 for crimes against humanity, genocide, war crimes and torture, and sentenced to life imprisonment. His conviction was upheld in 2017.¹³¹

¹²⁷ International Court of Justice, 2012 I.C.J 422.

¹²⁸ As above.

¹²⁹ As above.

¹³⁰ As above.

¹³¹ Damrosch & Murphy (114) 104.

3.3 The trials and convictions of Bai Lowe and Ousman Sonko for crimes against humanity by the Switzerland and Germany Courts respectively

3.3.1 Bai Lowe

Bai Lowe was residing in Germany at the time of his trial. German law allows German courts to have territorial jurisdiction and under specific circumstances, extraterritorial jurisdiction founded on the principles of active personality, passive personality, protective jurisdiction and universal jurisdiction.¹³² Germany has a special legislation called the Code of Crimes against International Law (*Völkerstrafgesetzbuch* – VStGB) which came into force in June 2002.¹³³ The legislation gives German courts universal jurisdiction over genocide, crimes against humanity and war crimes regardless of the lack of connection between the perpetrator(s) or the victim(s) with Germany.¹³⁴

Bai Lowe was a member of Jammeh’s death squad known as the “junglers”.¹³⁵ He was accused of involvement in the attempted murder of lawyer Ousman Sillah in 2003, and the attempted murder of Ida Jagne and Nian Sarang Jobe and the murders of Deyda Hydara in 2004 and Dawda Nyassi in 2006.¹³⁶ He was tried by the Higher Regional Court of Celle in Germany under the principle of universal jurisdiction because he was residing in Germany and German authorities were under an obligation under universal jurisdiction to prosecute him even though the crimes

¹³² M Langer ‘The Diplomacy of Universal Jurisdiction: The Political Branches and the Transnational Prosecution of International Crimes’ (2011) 105 *The American Journal of International Law* 11.

¹³³ Code of Crimes against International Law (*Völkerstrafgesetzbuch* – VStGB), English translations by the German Ministry of Justice available at http://www.gesetze-im-internet.de/Teilliste_translations.html (accessed 7 September 2024).

¹³⁴ Code of Crimes against International Law (*Völkerstrafgesetzbuch* – VStGB), secs, 6, 7, 8, 9, 10, 11 and 12

¹³⁵ TRRC Report volume 1 ‘Compendium Part B’ (n 17) 63.

¹³⁶ Human Rights Watch ‘Questions and Answers on First German Trial for Serious Crimes Committed in The Gambia’ 28 November 2023 available at <https://www.hrw.org/news/2023/11/28/questions-and-answers-first-german-trial-serious-crimes-committed-gambia> (accessed 7 September 2024).

were not committed in Germany and the victims were not Germans.¹³⁷ He was convicted of murder and attempted murder constituting crimes against humanity and sentenced to life imprisonment.¹³⁸

3.3.2 Ousman Sonko

Ousman Sonko was a former Minister of Interior under the autocratic presidency of Jammeh. He was indicted by the Swiss Federal Criminal Court on charges of crimes against humanity. He was accused of murder of political opponents and sexual violence against one Ms Jamba and acts of torture including the one meted on Solo Sandeng which resulted to his demise.¹³⁹

He was convicted for the torture and execution of civilians and sentenced to 20 years in prison.¹⁴⁰ Sonko just like Lowe was tried in Switzerland under the principle of universal jurisdiction.¹⁴¹ However, Sonko was exonerated of the offence of rape because the court considered the charge outside its jurisdiction as it was an individual crime.¹⁴²

3.4 Challenges of prosecuting Jammeh and his co-perpetrators under universal jurisdiction

This section highlights some of the challenges of prosecuting Jammeh and his co-perpetrators under universal jurisdiction. To begin, political interference is a challenge for the exercise of universal jurisdiction as potential defendants always include current or former officials from other states.¹⁴³ This means that states bringing cases might face sanctions from nations such as China, Russia and United States.¹⁴⁴ The sanctions could hinder the situation of human rights and the economy

¹³⁷ Trial International 'Historic conviction in Germany of a former member of a Gambian death squad for crimes against humanity' 30 November, 2023 available at <https://trialinternational.org/latest-post/historic-conviction-in-germany-of-a-former-member-of-a-gambian-death-squad-for-crimes-against-humanity/> (accessed 7 September 2024).

¹³⁸ DN Kupemba 'Deyda Hydara murder: Gambian sentenced in Germany for crimes against humanity' *BBC* (London) 30 November 2023.

¹³⁹ Human Rights Watch (n 136) above.

¹⁴⁰ N Cumming-Bruce and R Maclean 'An Enforcer for a Strongman President Goes on Trial in Milestone Swiss Case' *The New York Times* (New York) 15 May 2024.

¹⁴¹ Swiss Criminal Code of 21 December 1937, arts 6(1), 7(1) & (2) and 264m

¹⁴² Cumming-Bruce and Maclean (n 140).

¹⁴³ Langer (n 132) 6-7.

¹⁴⁴ As above.

of the prosecuting state which could result to the prosecuting state's political leaders to desist from pursuing the prosecution of the cases under universal jurisdiction.¹⁴⁵

Belgium for instance was forced to amend its statute providing for universal jurisdiction over international crimes because complainants filed cases against world leaders such as Ariel Sharon for human rights abuses in Lebanon and former president George W. Bush for alleged crimes in Iraq during the Gulf war and as a result, Donald Rumsfeld, former Defense Secretary threatened to remove the headquarters of NATO from Brussels if Belgium fails to amend its law.¹⁴⁶ Belgium had to amend its law to give its courts' jurisdiction only where the victim or accused is Belgian, thus the law stops short of giving the courts universal jurisdiction.¹⁴⁷

In Germany, the authority to determine whether to initiate formal proceedings or to terminate them once they have commenced rests with the German Federal prosecutor who is subject to the guidance of the Federal Minister of Justice.¹⁴⁸ The prosecutor has the power to terminate a case even after proceedings have begun, should continuation pose a fundamental harm to Germany or to other critical public interests.¹⁴⁹ The Swiss Criminal Code gives the prosecutor discretion to initiate or terminate proceedings if the crime was committed outside their territory and the victims or the perpetrators are non-Swiss nationals.¹⁵⁰

It is important I mention that so far no state has been threatened for undertaking prosecutions of accused persons in relation to their involvement in human rights abuses in The Gambia from July 1994 to January 2017. This may be attributed to the perpetrators lack of global influence that could warrant powerful nations such as China, Russian or United States to threaten sanctions against states that prosecute perpetrators adversely mentioned by the TRRC.

In addition, witness protection may be a challenge as some witnesses may feel unsafe to testify in open court especially if measures to ensure their protection are inadequate. For instance, in the trial of Al-Khatib (a former Syrian State officer who

¹⁴⁵ As above.

¹⁴⁶ P Chevigny 'The Limitations of Universal Jurisdiction' March 2006 *Global Policy Forum* available at <https://archive.globalpolicy.org/opinion/2006/03universal.htm> (accessed 14 September 2024).

¹⁴⁷ As above.

¹⁴⁸ Langer (n 132) 12.

¹⁴⁹ German Code of Criminal Procedure (Strafprozeßordnung – StPO), sec 153c(3).

¹⁵⁰ Swiss Criminal Code, art 264m (2).

was tried in Germany for crimes against humanity), a number of the Syrian survivors and victims of human rights abuses who were witnesses in the trial expressed worries about their safety and that of their families because they felt unsafe to testify in open court claiming that the mechanisms in place to ensure their protection were insufficient.¹⁵¹ It is pertinent for any state that prosecutes accused under universal jurisdiction must ensure to have adequate witness protection in place to enable them to confidently participate in the trials.

Another challenge is the potential lack of accessibility to interpretation of the proceedings. Interpretation of the proceedings should not be restricted to the accused persons only, there should be a mechanism to enable victims and their families to get the entire proceedings translated to them in a language that they understand. With these, the victims will feel involved in the entire accountability process. In the Al-Khatib trial, there was difficulty of access to interpretation from German to Arabic and vice-versa because interpreters translated the whole trial into Arabic for the accused but families and journalists in the public hall could not have access to the service.¹⁵²

3.5 Legal basis for prosecution at the ICC

The TRRC also considered the prosecution of the Jammeh era crimes at the ICC because The Gambia is a State party to the Rome Statute that established the ICC and that give the court complementarity jurisdiction over crimes against humanity committed in The Gambia during the Jammeh regime.¹⁵³

The ICC was founded in 2002.¹⁵⁴ The Gambia ratified the Rome Statute that established the ICC on 7 December 1998.¹⁵⁵ The goal of the ICC is to stop impunity for those who commit severe crimes that worry the international community and to

¹⁵¹ M Masadeh 'One Court at a Time: Challenges of Universal Jurisdiction and Enhancing International Justice: Lessons Learned Through Al-Khatib Trial' 24 January 2022 available at <https://voelkerrechtsblog.org/one-court-at-a-time-challenges-of-universal-jurisdiction-and-enhancing-international-justice/> (accessed 14 September 2024).

¹⁵² As above.

¹⁵³ TRRC Report volume 1 Compendium Part B (n 17).

¹⁵⁴ C Gegout 'The International Criminal Court: limits, potential and conditions for the promotion of justice and peace' (2013) 34 *Third World Quarterly* 800.

¹⁵⁵ International Criminal Court 'The States Parties to the Rome Statute' available at <https://asp.icc-cpi.int/states-parties> (accessed 28 September 2024).

assist in the prevention of those crimes from happening.¹⁵⁶ The ICC has the jurisdiction to prosecute crimes such as genocide,¹⁵⁷ crimes against humanity,¹⁵⁸ war crimes,¹⁵⁹ and aggression.¹⁶⁰

The ICC does not substitute itself for national courts because it is not a supranational court.¹⁶¹ It only takes cases where the national systems fail to investigate or prosecute the cases or where the State the crimes were allegedly committed is unwilling to bring the perpetrators to justice.¹⁶² It is noteworthy to mention that an accused or a state regardless of whether they are parties to the Rome Statute or not can challenge the admissibility of a case where these criteria are not fulfilled.¹⁶³

To determine a State's unwillingness, the court first considers whether national prosecutions were done or the decision of the court was made to shield the perpetrator from criminal accountability.¹⁶⁴ Secondly, the court considers whether there has been unreasonable delay which is contrary to the intent to bring the perpetrator to justice.¹⁶⁵ Lastly, the court determines whether the proceedings were not carried out independently or in a way contrary to the intent to bring the perpetrator to justice.¹⁶⁶

The standard required is high and the ICC prosecutor must prove that there was indeed intent to protect the perpetrator from facing justice.¹⁶⁷ The prosecutor has a high burden of proof to satisfy which is always difficult having regards to the fact that it is the State's authorities that have the relevant information regarding the steps taken at the level of the State and the reason for any action or lack thereof.¹⁶⁸

¹⁵⁶ Gegout (n 154) above.

¹⁵⁷ Rome Statute of the International Criminal Court, art 6.

¹⁵⁸ Rome Statute of the International Criminal Court, art 7

¹⁵⁹ Rome Statute of the International Criminal Court, art 8

¹⁶⁰ Rome Statute of the International Criminal Court, art 8 bis.

¹⁶¹ R Dicker and H Duffy 'National Courts and the ICC' (1999) 6 *The Brown Journal of World Affairs* 58.

¹⁶² Rome Statute of the International Criminal Court, art 17(1).

¹⁶³ Dicker and Duffy (n 161) 59.

¹⁶⁴ Rome Statute of the International Criminal Court, art 17(2)(a).

¹⁶⁵ Rome Statute of the International Criminal Court, art 17(2)(b).

¹⁶⁶ Rome Statute of the International Criminal Court, art 17(2)(c).

¹⁶⁷ Dicker and Duffy (n 161) 59.

¹⁶⁸ As above.

Clearly, the ICC could only step in to prosecute the perpetrators of the Jammeh era crimes when it is able to establish that the crimes committed fall within the jurisdiction of the court, that The Gambia is unwilling to investigate and prosecute those responsible for human rights violations and abuses and whether the seriousness of the crimes committed warrant the intervention of the ICC.

According to the TRRC, over 250 people were unlawfully killed, hundreds of people tortured and many detained or imprisoned unlawfully.¹⁶⁹ The Commission is of the view that the atrocities committed have reached the gravity threshold of crimes against humanity under the Rome Statute.¹⁷⁰

3.6 Challenges of prosecuting Jammeh and his co-perpetrators at the ICC

Moving on to the ICC, the ICC encounters language and cultural challenges when trying to engage local audiences and it has to depend on organizations that are more effective in connecting with the people.¹⁷¹ Even though the court's seat is at the Hague, in certain circumstances, the Rome Statute allows the court to seat in another country- probably where the atrocities were committed.¹⁷² Regardless, many people in countries that experienced atrocities may find the ICC mysterious. The court is made up of foreign staff, it operates far away from home and it applies laws that the victims are not familiar with.¹⁷³ Also, despite the ICC's statute's adequate provision for victims' participation and the promise of the former prosecutor at the court, Luis Moreno Ocampo to engage with affected populations,¹⁷⁴ the ICC is less connected with local realities.¹⁷⁵

¹⁶⁹ TRRC Report volume 1 Compendium Part B (n 17) 20.

¹⁷⁰ As above.

¹⁷¹ ER Higonnet 'Restructuring hybrid courts: Local empowerment and National Criminal Justice Reform' (2006) 23 *Arizona Journal of International & Comparative Law* 433.

¹⁷² Rome Statute of the International Criminal Court, art. 3.

¹⁷³ Higonnet (n 171) 433.

¹⁷⁴ As above.

¹⁷⁵ I Nizich 'International Law Weekend Proceedings: International Tribunals and Their Ability to Provide Adequate Justice: Lessons from the Yugoslav Tribunal' (2001) 7 *ILSA Journal of International & Comparative Law* 364.

Crucially, the ICC has serious capacity constraints and the objectives of the court are to prosecute the most serious crimes committed by those most responsible.¹⁷⁶ This runs the risk of excluding perpetrators from criminal responsibility if in the view of the prosecutor that their acts or omissions are not the most serious and that they are not the most responsible for the commission of the crimes.

3.7 Conclusion

From the foregoing, it is indeed clear that the Jammeh era crimes can be prosecuted using the principle of universal jurisdiction as seen in the cases of Ousman Sonko and Bai Lowe. Therefore, a state that has adequate domestic enforcement frameworks to exercise universal jurisdiction has the right to prosecute any of the alleged perpetrators. A state that has the enforcement frameworks have the right to ask the state where the perpetrator or perpetrators are to either prosecute or extradite them to a state that has the enforcement frameworks to prosecute the alleged perpetrator(s) under the principle of universal jurisdiction as seen the case of *Belgium supra*.

With regards to prosecution at the ICC, in my view, even though the accountability process is slow in The Gambia, at least The Gambia is making some efforts towards the establishment of a mechanism to prosecute people who caused the severe human rights violations between July 1994 and January 2017. Therefore, there are no sufficient grounds warranting the intervention of the ICC under the present circumstance. However, considering the number of people who were unlawfully killed, tortured, imprisoned and detained, the gravity threshold of crimes against humanity under the Rome Statute of the ICC is satisfied if the Gambia fails or becomes unwilling to prosecute the crimes.

Glaringly, there is no safe haven for perpetrators of human rights abuses anywhere, however the prosecution of perpetrators of human rights abuses far away from the place where the crimes were committed have the potential of shielding the process of accountability from the communities where the crimes were perpetrated. That is why and I strongly believe so that the government of The Gambia chooses the option

¹⁷⁶ K Ambos & I Stegmiller 'Prosecuting international crimes at the International Criminal Court: Is there a coherent and comprehensive prosecution strategy?' (2013) 59 *Crime, Law and Social Change* 416.

to prosecute the people who committed the Jammeh era crimes in the theatre of crimes- The Gambia.

There is no doubt that the conviction and sentence of Ousman Sonko and Bai Lowe are giant strides from the international community particularly Germany and Switzerland in helping to bring justice to the victims of heinous human rights abuses in The Gambia.

Chapter 4: Hybrid courts

4.1 Introduction

Hybrid courts are defined as courts that blend national and international legal frameworks, usually operating in the country where the crimes took place.¹⁷⁷ Hybrid courts are often structured in a manner to ensure that only a small fraction of defendants accused of grave crimes including war crimes, crimes against humanity or other severe crimes are brought before them.¹⁷⁸

Hybrid courts are the third wave of international criminal tribunals following the first generation tribunals such as the Nuremberg and Tokyo Tribunals, and the second generation, which includes the International Criminal Tribunal for the former Yugoslavia (ICTY), the International Criminal Tribunal for Rwanda (ICTR), and the International Criminal Court (ICC).¹⁷⁹ Hybrid courts emerged as a significant policy development in transitional justice, being implemented in diverse variety of situations to address a range of different needs.¹⁸⁰

This chapter discusses some hybrid courts that were established to hear and determine war crimes, crimes against humanity, genocide, and other atrocities cases. In addition, it discusses the advantages and disadvantages of hybrid courts, and a brief background on the establishment of the court. The chapter also discusses the Special Accountability (TRRC) Act 2024 and the Special Prosecutor's Office Act 2024- two law passed by the National Assembly of The Gambia to establish a special court and a criminal division to try human rights violations

¹⁷⁷ A Bayefsky *The UN Human Rights Treaty System in the 21 Century* (2000) 1.

¹⁷⁸ As above.

¹⁷⁹ H Andersen 'Hybrid Courts and Multilevel Rules of Law: Some Overall Considerations, Challenges and Opportunities' (2017) 6 *International Journal of Criminology and Sociology* 117.

¹⁸⁰ Bayefsky (n 177).

committed during the Jammeh era. Further, the role of victims during the proceedings and the importance of reparations for victims of human rights abuses are also discussed. Lastly, it provides a not exhaustive potential challenges that the proposed hybrid court may likely encounter.

To start, there have been a number of hybrid courts established over the past decades. However, the most pertinent of them being: the Kosovo Regulation “64” Panels, the East Timor Special Panels for Serious Crimes (SPSC), the Special Court for Sierra Leone (SCSL), the Extraordinary Chambers in the Courts of Cambodia (ECCC), the Bosnian War Crimes Chamber, the Special Tribunal for Lebanon (STL), the Iraqi High Tribunal, the Serbian War Crimes Chamber and the Extraordinary African Chamber (EAC).

The Kosovo Regulation “64” Panels, the East Timor SPSC, SCSL and the ECCC being some of the first hybrid tribunals are seen as models for hybrid courts. The EAC, established by the African Union and being closer to home is also relevant to discuss. Therefore a brief study of their formations, structures and accomplishments are critical for comprehending the contents in this chapter.

4.2 Former hybrid courts

4.2.1 Regulation “64” Panels in the Courts of Kosovo

In Kosovo, the conflict was predominantly committed by Serbian forces against the Kosovars which caused the expulsion of over 800,000 Kosovars and the internal displacement of roughly 500,000 of the people whose estimated population was 1.7 million.¹⁸¹ Kosovar towns were virtually emptied because of the conflict.¹⁸² Consequently, the United Nations Mission in Kosovo (UNMIK) was established in June 1999 to apprehend, try and punish those who committed crimes following the establishment of the UNMIK.¹⁸³

¹⁸¹ ‘Report of the Secretary-General on the United Nations Interim Administration Mission in Kosovo’ available at [s-1999-779_1.pdf \(unmissions.org\)](https://www.unmissions.org/s-1999-779_1.pdf) (accessed 25 July 2024).

¹⁸² As above.

¹⁸³ WS Betts & others ‘The Post-Conflict Transitional Administration of Kosovo and the Lessons Learned in Efforts to Establish a Judiciary and the Rule of Law’ (2001) 22 *Michigan Journal of International Law* 371.

The task of the UNMIK was difficult to execute,¹⁸⁴ as the judicial physical infrastructure such as court buildings, tools and legal texts were destroyed because of the conflict.¹⁸⁵ Local attorneys and judges were scarce while some of them lacked the requisite experience because Kosovars were barred from working for the judiciary and Serbian lawyers and judges ran away or refused to serve in the UNMIK.¹⁸⁶ Detention facilities were overcrowded with detainees suspected of committing serious crimes.¹⁸⁷ The judiciary did not have the capacity or lacked the independence to prosecute the crimes because of the conflict and years of discrimination against minority Kosovars.¹⁸⁸

The stain of the previous authoritarian government eroded public confidence and trust in the legal system which had systematically marginalized Kosovars and had been controlled by Serbians who were seen as the oppressors.¹⁸⁹ The decision by the UNMIK authorities to declare that the law applicable in Kosovo to be Federal Republic of Yugoslavia (FRY)/Serbian law though with modification to align with international global norms was met with resentment by Kosovars who perceived the FRY/Serbian law as the legal framework of the repressive Serbian administration.¹⁹⁰ As a result, the Kosovars judges chose not to implement the law leading to legal uncertainty.¹⁹¹ Some decisions delivered by Kosovars judges were considered harsh against the Serbians who appeared before the court and such decisions were later set-aside by a combined panel of foreign and local judges.¹⁹²

To address the accountability crisis, the UN allowed international judges to sit alongside domestic judges and international lawyers were allowed to work with domestic lawyers to try and defend cases before the Kosovo domestic courts.¹⁹³ International law and domestic law were blended but the domestic laws were

¹⁸⁴ Dickinson (n 41) 296-297.

¹⁸⁵ Betts (n 183) 376-377.

¹⁸⁶ Dickinson (n 41) 297.

¹⁸⁷ H Strohmeyer 'Making Multilateral Interventions Work: The U.N. and the Creation of Transitional Justice Systems in Kosovo and East Timor (2001) 25 *Fletcher Forum of World Affairs* 114.

¹⁸⁸ Dickinson (n 41) 297.

¹⁸⁹ Higonnet (n 171) 380.

¹⁹⁰ As above.

¹⁹¹ Dickinson (n 41) 297.

¹⁹² Higonnet (n 171) 380.

¹⁹³ Dickinson (n 41) 297.

modified to comply with global human rights norms.¹⁹⁴ The integration of foreign and local judges and foreign and local lawyers in Kosovo's judicial system gave rise to the formation of "Regulation 64 Panels" which applied a hybrid approach of international and domestic law.¹⁹⁵

In the beginning, foreign judges had little impact as they formed the minority on the panels for trials.¹⁹⁶ To correct the problem, UNMIK passed a resolution in December 2000 which saw international judges form the majority in all war crimes cases before the court and prosecutions were mostly carried out by foreign prosecutors.¹⁹⁷ The involvement of UNMIK in Kosovo concluded in November 2008 and the mandate of prosecuting war crimes and other serious crimes under the law of Kosovo was officially handed over to the European Union Rule of Law Mission in Kosovo 'EULEX'.¹⁹⁸ The present mandate of the EULEX is set to expire on 14 June 2025.¹⁹⁹

4.2.2 The Special Panels for Serious Crimes in East Timor (SPSC)

Following the armed conflict that transpired after the fall of the Suharto regime in Indonesia in 1998, the circumstances in East Timor were akin to those of Kosovo, as the local judicial system in East Timor faced challenges in conducting trials for the many detainees in custody, because of the significant infrastructure damage and shortage of qualified personnel.²⁰⁰ As a result, the SPSC was set up in June 2000 by the UN Transitional Justice Administration for East Timor (UNTAET) and it was integrated into the District Court of Dili to prosecute cases that arose as a consequent of the conflict.²⁰¹

¹⁹⁴ UNMIK Resolution available at https://unmik.unmissions.org/sites/default/files/regulations/02english/E1999regs/RE1999_01.htm, (accessed 26 July 2024).

¹⁹⁵ Higonnet (n 171) 381.

¹⁹⁶ 'Organization for Security and Co-operation in Europe (OSCE), Department of Human Rights and Rule of Law, Legal Systems Monitoring Section, Kosovo's War Crimes Trials: A Review, September 2002' available at <http://www.osce.org/kosovo/documents/reports/justice/> (accessed 25 July 2025).

¹⁹⁷ As above.

¹⁹⁸ 'International Criminal Justice: The institutions' available at https://www.icrc.org/sites/default/file_list/dp_consult_32_international_criminal_justice_institutions.pdf (accessed 11 October 2024).

¹⁹⁹ 'What Is EULEX? - EULEX - European Union Rule of Law Mission in Kosovo' available at <https://www.eulex-kosovo.eu/?page=2,16> (accessed 11 October 2024).

²⁰⁰ Dickinson (n 41) 298.

²⁰¹ UNTAET Regulation No 2000/15 of 6 June 2000 on the 'Establishment of Panels with Exclusive Jurisdiction over Serious Criminal Offences' available at <https://ihl-databases.icrc.org/en/national-practice/untaet-regulation-no-200015-6-june-2000-establishment-panels-exclusive> (accessed 26 July 2024).

The SPSC was vested with exclusive jurisdiction over matters involving genocide, crimes against humanity and war crimes as well as grave criminal offences committed as per the laws of East Timor between 1 January and 25 October 1999.²⁰² The SPSC had universal jurisdiction and its chambers were predominantly composed of international judges.²⁰³ The SPSC finished its work on 20 May 2005.²⁰⁴

4.2.3 Special Court for Sierra Leone (SCSL)

The SCSL was established in January 2002 following a plea for international support by Sierra Leone.²⁰⁵ The establishment of the SCSL was necessitated because of severe accountability crises that rocked the nation following the civil war.²⁰⁶ The domestic judicial system was seriously tainted and ill-equipped to prosecute serious atrocity cases committed during the civil war especially the trial of the leader of the Revolutionary United Front (RUF), Foday Sankoh, who was in custody.²⁰⁷

The trial of Foday Sankoh was a serious problem for the Sierra Leonean government just as his long detention without trial.²⁰⁸ As a result, the government of Sierra Leone engaged the UN to assist them to set up a special tribunal to try those who were most accountable for the perpetration of crimes against humanity, war crimes and severe violations of international humanitarian law, as well as offences under applicable Sierra Leone law within the territory of Sierra Leone since 30 November 1996.²⁰⁹

²⁰² UNTAET Regulation 2000/15, sec 2.

²⁰³ UNTAET Regulation 2000/15, sec 22.1.

²⁰⁴ UN Security Council Resolution 1543 (2004) available at <https://digitallibrary.un.org/record/521476> (accessed 11 October 2024).

²⁰⁵ Agreement between the United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone, appending the Statute of the Special Court for Sierra Leone (SCSL Statute) available at <https://www.rscsl.org/Documents/RSCSL%20Agreement%20Statute.pdf> (accessed 27 July 2024).

²⁰⁶ AD Haines 'Accountability in Sierra Leone: A Role of the Special Court' in JE Stromseth (ed) *Accountability for Atrocities: National and International Responses* (2003) 173.

²⁰⁷ B Crossette 'U.N. to Establish a War Crimes Panel to Hear Sierra Leone Atrocity Cases' *New York Times* (New York) 15 August 2000.

²⁰⁸ Dickinson (n 41) 299.

²⁰⁹ Crossette (n 207).

The UN responded positively to the request and the SCSL operated outside the domestic courts of Sierra Leone and bore the features of a hybrid institution.²¹⁰ The personnel of the court comprised of both foreign and Sierra Leonean nationals and international and domestic laws were blended as the court considered cases under international humanitarian law and under the national law of Sierra Leone.²¹¹ The court was guided by the decisions of the ICTY and the ICTR in respect of the interpretation of international humanitarian law and the decisions of the Supreme Court of Sierra Leone regarding the interpretation of the law of Sierra Leone.²¹²

The SCSL established an advanced and comprehensive witness protection and support initiative, providing security, medical aid, physiological counseling, threat investigation and relocation when needed.²¹³ One of the most groundbreaking and significant programs is the court extensive outreach efforts to raise awareness of the court's work among Sierra Leoneans, such as training local media, creating audio and video material, organizing countrywide events and conducting community meetings.²¹⁴

4.2.4 Extraordinary Chambers in the Courts of Cambodia (ECCC)

Between April 1975 and January 1978, the Khmer Rouge held power in Cambodia resulting in the death of approximately 1.7 million Cambodians through execution, starvation and disease; the number constituting roughly one fourth of the population.²¹⁵

In June of 1997, the former Co-Prime Ministers of Cambodia, Hun Sen and Norodom Ranariddh, requested for the support of the UN in holding accountable those responsible for the commission of crimes against humanity and genocide.²¹⁶ Lengthy and challenging negotiations continued for a period of six years between the UN and

²¹⁰ UN Secretary-General 'Report of the Secretary-General on the Establishment of a Special Court for Sierra Leone' available at <https://digitallibrary.un.org/record/424039> (accessed 27 July 2024).

²¹¹ Statute of the Special Court for Sierra Leone, art 1.

²¹² Statute of the Special Court for Sierra Leone, art 20.

²¹³ Higonnet (n 171) 387.

²¹⁴ As above.

²¹⁵ Higonnet (n 171) 390.

²¹⁶ H Jarvis 'Trials and Tribulations: The Latest Twists in the Long Quest for Justice for the Cambodian Genocide' (2002) 34 *Critical Asian Studies* 607-610.

the Cambodian government as well as within the Cambodian government itself.²¹⁷ For a year, opposition political parties in the country such as the Royalist Funcinpec and Sam Rainsy Party boycotted Parliament in a move to ensure that neither treaties nor legislation were passed.²¹⁸

The ECCC was consequently established.²¹⁹ The court was based in Phnom Penh in the High Command Headquarters of the Royal Cambodian Armed Forces,²²⁰ with Khmer designated as the official working language and translations into English and French were to be provided.²²¹ Even though the ECCC was predominantly composed of domestic judges, every decision had to receive the vote of at least a foreign judge.²²² The UN, Japan and the government of Cambodia were among the major funders of the ECCC.²²³ The ECCC completed its judicial caseload on 1 January 2023 and it has now commenced its initial three year period residual functions.²²⁴

4.2.5 Extraordinary African Chambers (EAC)

One of the most recent examples of a hybrid court is the EAC in the courts of Senegal. It was established in February 2013 to try crimes perpetrated in Chad between 1982 to 1990 under the leadership of Hissène Habré.²²⁵ The EAC was established under the authority of the African Union (AU) and Senegal with support from Chad to try Habré under universal jurisdiction on allegation of commission of international crimes.²²⁶ The tribunal was integrated within the Senegalese judicial framework and headquartered in Dakar.²²⁷

²¹⁷ Higonnet (n 171) 392-393, see footnote 157 of the article.

²¹⁸ Higonnet (n 171) 393.

²¹⁹ Law on the establishment of Extraordinary Chambers in the Courts of Cambodia for the prosecution of crimes committed during the period of Democratic Kampuchea available at [NS/RKM/0801/12 \(eccc.gov.kh\)](https://www.eccc.gov.kh) (accessed 27 July 2024).

²²⁰ Statute on the Establishment of the Extraordinary Chambers in the Courts of Cambodia, art 43.

²²¹ Statute on the Establishment of the Extraordinary Chambers in the Courts of Cambodia, art 45.

²²² Statute on the Establishment of the Extraordinary Chambers in the Courts of Cambodia, art 14(1).

²²³ Higonnet (n 171) 394.

²²⁴ 'Extraordinary Chambers in the Courts of Cambodia (ECCC)' available at <https://www.eccc.gov.kh/en> (accessed 11 October 2024).

²²⁵ Statute of the Extraordinary African Chambers available at <https://www.hrw.org/news/2013/09/02/statute-extraordinary-african-chambers> (accessed 18 July 2024).

²²⁶ S Yang 'Can Hybrid Courts Overcome Legitimacy Challenges?: Analyzing the Extraordinary African Chambers in Senegal' (2020) 11 *George Mason International Law Journal* 61.

²²⁷ Statute of the Extraordinary African Chambers, art 2.

The EAC had the authority to try cases involving genocide, crimes against humanity, war crimes, and torture that transpired in Chad between 1982 and 1990.²²⁸ In addition to the Trial Chamber and the Appeals Chamber, the EAC had an Investigating and an Indicting Chamber.²²⁹ The presidents of the Trial Chamber and the Appeals Chamber had to come from an AU nation other than Senegal, whereas all other judges were to be solely from Senegal.²³⁰ The EAC was financially supported by voluntary contributions from various countries and organizations, with notable donors being Chad and the European Union.²³¹ Habré was sentenced to life imprisonment in 2016 by the Trial Chamber.²³² On 27 April 2017, his sentence was affirmed by the Appeals Chamber and he was ordered to pay 123 million euros through victims trust fund as compensation.²³³

4.3 Potential advantages of hybrid courts

Hybrid courts have a number of advantages which are discussed in detailed below.

4.3.1 Legitimacy

The inclusion of international judges and prosecutors in cases involving serious violations of human rights may increase the perception of the legitimacy of the process of accountability to some extent.²³⁴ The appointment of international judges to sit alongside with local judges in domestic courts, as well as the appointment of foreign prosecutors to work with domestic prosecutors help establish a frame of collaboration that may help to improve the overall legitimacy of the institutions.²³⁵ Through cooperation and responsibilities sharing, international and local officials are able to participate in fruitful conversations.²³⁶ Dickinson argues, rightly so, that in Kosovo and East Timor, the involvement of international judges and prosecutors in

²²⁸ Statute of the Extraordinary African Chambers, art 3.

²²⁹ Statute of the Extraordinary African Chambers, art 11.

²³⁰ Statute of the Extraordinary African Chambers, art 11.

²³¹ HJB Marcos 'The Effectivity of Hybrid International Courts: A Study of the Extraordinary African Chambers in the Hissène Habré Case' 1 November 2018) available at <https://papers.ssrn.com/abstract=3684027> (accessed 11 May 2024).

²³² Marcos (n 231) 16.

²³³ *The General Prosecutor v Hissen Habré*, Appeal Judgment (27 April 2017).

²³⁴ Dickinson (n 41) 306.

²³⁵ As above.

²³⁶ As above.

cases involving severe human rights violations and abuses enhanced the legitimacy of the accountability processes.²³⁷

4.3.2 Independence

The appointment of foreign judges to domestic courts to adjudicate over sensitive cases bolsters the perception of independence and legitimacy of the judiciary across a diverse segment of the local populace.²³⁸ This was evident in Kosovo where previous attempts to administer justice failed to be embraced by the Serbian population.²³⁹ Serbian jurists refused to participate in the accountability process, leading to the Serbian community to doubt the impartiality of the judgments delivered by Kosovars.²⁴⁰ Conversely, the decisions delivered by the hybrid tribunals were supported widely even by the Serbian community.²⁴¹

4.3.3 Capacity building

The hybrid process is critical in capacity building. The working arrangement promotes on the job training which is more invaluable than theoretical conversation of rules and principles in a class-like setting.²⁴² The team work experiences that are gained as a result of hybridity facilitate the exchange of knowledge and experience which are beneficial to both national and international actors.²⁴³ The arrangement assists international actors gain sensitivity to local issues and culture and approaches to justice while domestic actors learn from the expertise of international actors.²⁴⁴

4.3.4 Internalisation of international norms

Hybrid courts have the potential to promote the implementation of international humanitarian standards because the institutions employ international and domestic judges which provides a greater opportunity for the exchange of global and local

²³⁷ As above.

²³⁸ Report of the Organisation for Security and Co-operation in Europe (OSCE) Mission in Kosovo, Department of Human Rights and the Rule of Law, Legal Systems Monitoring Section, March 2002, 6 [hereinafter OSCE Report March 2002] available at http://www.osce.org/documents/mik/2002/03/863_en.pdf.

²³⁹ As above.

²⁴⁰ OSCE Report March 2002 (n 238) 5-6.

²⁴¹ As above.

²⁴² Dickinson (n 171) 307.

²⁴³ As above.

²⁴⁴ As above.

standards in relation to accountability for mass atrocities.²⁴⁵ Crucially, the establishments of hybrid courts help international and domestic legal experts to network, thereby creating an environment where they engage in the exchange of knowledge and deliberate on important human rights and humanitarian law issues both within and outside the courtroom.²⁴⁶

4.3.5 Fosters local ownership

Holding trials in countries where atrocities happened removes financial and logistical burdens on reporters and makes it simple for them to cover and relate the happenings in the accountability process to the locals all that transpire in the proceedings.²⁴⁷ This help informs the people everything about the process and the people feel that they are involved in the entire accountability endeavors.

4.4 Disadvantages of hybrid courts

Despite the advantages stated above, hybrid courts have disadvantages. Some of the disadvantages are discussed below.

4.4.1 The likelihood of trials to be influenced through political manipulations

The participations of locals in a hybrid court can result to sham trials by people implicated in the adjudication of the crimes committed.²⁴⁸ Also, the participation of locals can open the door for political trials by the succeeding administration that may be bent on retaliation at the expense of justice and rule of law, and such trials neither advance rule of rule at the national nor at the international levels.²⁴⁹ In a country where people are divided along tribal and political lines, a hybrid court can lead to local strife and biased perception or favoritism especially where the hybrid tribunal is dominated by one group over the others.²⁵⁰

4.4.2 Logistical and training challenges

²⁴⁵ As above.

²⁴⁶ AM Slaughter 'Judicial Globalization' (2000) 40 *Virginia Journal of International Law* 1122.

²⁴⁷ Higonnet (n 171) 361.

²⁴⁸ JÉ Alvarez 'Crimes of States/Crimes of Hate: Lessons from Rwanda' (1999) 24 *Yale Journal of International Law* 370.

²⁴⁹ As above.

²⁵⁰ Higonnet (n 171) 413.

Similar to local trials, hybrid courts face multiple logistical and training challenges. By employing local personnel and using local infrastructure, their operations may be hampered by the worsening state of infrastructure or the shortage of experienced legal professionals, judges, investigators and analysts in the nation.²⁵¹ These challenges appear overwhelming; yet they are strongly linked to the need for hybrids.²⁵²

4.4.3 Legitimacy

Finding a balance of responsibilities in a hybrid court is a challenge.²⁵³ In Sierra Leone for instance, even though a number of Sierra Leoneans were employed in the SCSL, the locals perceived a significant distance from the court because senior positions of the court were held by foreign staff.²⁵⁴ The court's failure to recognize the disconnect between the local populace and itself affected the population's acceptance of the significance of the court in their culture, consequently impacting the court's overall legitimacy.²⁵⁵

4.5 Brief background for the establishment of a hybrid court to try Jammeh era crimes

The basis for the establishment of a hybrid court is discussed in more detail in the introduction. However, let me reiterate that throughout the 22 year rule of Yahya Jammeh, Gambia experienced systemic human rights abuses, as recorded by Amnesty International.²⁵⁶ The abuses include extrajudicial killings, enforced disappearances, torture, and limitations on freedom of expression, and arbitrary arrests and detentions.²⁵⁷ Prior to the 2006 presidential elections, three supporters of the United Democratic Party (UDP) were arrested and forcibly disappeared.²⁵⁸

²⁵¹ Higonnet (n 171) 413.

²⁵² As above.

²⁵³ BM Leyh 'National and Hybrid Tribunals. Benefits and Challenges' (2017) *Cambridge University Press* 134.

²⁵⁴ As above.

²⁵⁵ As above.

²⁵⁶ Amnesty International (n 49) 5.

²⁵⁷ Felicity and Corinne (n 50).

²⁵⁸ Amnesty International (n 49) 4.

Crucially, there are concerns over lack of progress in relation to accountability for past human rights violations and abuses.²⁵⁹ However, the reasons behind the lack of progress in the area of accountability remain unclear because it is uncertain whether it could stem from lack of political commitment.²⁶⁰ A number of stakeholders noted even in the National Strategy Document for Transitional Justice in The Gambia that the judiciary is perceived to lack independence and has insufficient human and material resources.²⁶¹ The lack of progress could also be attributed to ineffective judicial system that is ill-equipped to address the challenges it confronts.²⁶² Members of the judiciary are scarce and inadequately trained and it lacks basic infrastructure and its independence is questioned.²⁶³ These shortcomings affect the capacity of the judiciary to do criminal prosecutions as they have the risks of jeopardizing the attainment of justice for past human rights abuses.²⁶⁴

4.6 Legal framework and analysis

This section analyses the Special Accountability Mechanism (TRRC) Act 2024 and the Special Prosecutor's Office Act 2024- two legal instruments passed by the National Assembly of The Gambia seeking to establish the Special Court, the Special Criminal Division of the High Court and the Office of the Special Prosecutor to try Jammeh era crimes.

4.6.1 Special Accountability Mechanism (TRRC) Act, 2024

The establishment of the SAM (TRRC) Act 2024 is intended for the 'investigation, prosecution and adjudication of cases' involving grave human right violations and abuses which happened in The Gambia between July 1994 and January 2017 and detailed in the TRRC report.²⁶⁵

It is important to highlight that neither the SAM (TRRC) Act 2024 nor the Special Prosecutor's Office Act 2024 specifically provided for the crimes that will be

²⁵⁹ Preliminary Observations from the Official Visit to The Gambia by the Special Rapporteur on the Promotion of Truth, Justice, Reparation and Guarantees of Non-Recurrence (n 13).

²⁶⁰ As above.

²⁶¹ As above.

²⁶² As above.

²⁶³ As above.

²⁶⁴ As above.

²⁶⁵ Special Accountability Mechanism (TRRC) Act, 2024, sec 3(1).

prosecuted in the Special Tribunal or the Special Criminal Division of the High Court. However, the crimes identified in the TRRC report are proscribed under article 7 of the Rome Statute which includes ‘murder, rape and sexual violence, torture, inhumane and degrading treatment, enforced disappearances and persecution.’²⁶⁶ This is unlike the Statute of the SCSL which specifically provided for the crimes that the court had jurisdiction to prosecute such as crimes against humanity,²⁶⁷ violation of article 3 of the Geneva Conventions and of Additional Protocol II,²⁶⁸ other serious crimes of international humanitarian law,²⁶⁹ and crimes under Sierra Leonean law.²⁷⁰

In term of composition, the Special Accountability Mechanism (SAM) consists of the Office of the Special Prosecutor, the Special Tribunal and the Special Criminal Division of the High Court.²⁷¹ The SCSL on the other hand comprised of the Trial and Appellate Chambers, the Prosecutor and the Registry; it did not have a Special Criminal Division of the High Court which distinguished it with the Gambian model in this regards.²⁷²

The employees of the SAM must be both Gambians, foreign judges, prosecutors and experts; however, the SAM must prioritise the appointment of qualified Gambians but on a competitive basis and merit based.²⁷³ The SAM is different from the SCSL in this regard because the SCSL did not prioritise the appointment of qualified Sierra Leoneans as the prosecutor was appointed by the UN Secretary General and assisted by a Sierra Leonean Deputy Prosecutor.²⁷⁴

There are obviously advantages of having a limited number of international staff in The Gambia’s SAM. On the one hand, it is convenient to include more local staff such as judges and prosecutors and defence counsel on the court and that will help reduce the financial burden in the operations of the court, and local staff especially

²⁶⁶ Rome Statute, art 7.

²⁶⁷ Statute of the Special Court for Sierra Leone, art 2.

²⁶⁸ Statute of the Special Court for Sierra Leone, art 3.

²⁶⁹ Statute of the Special Court for Sierra Leone, art 4.

²⁷⁰ Statute of the Special Court for Sierra Leone, art 5.

²⁷¹ Special Accountability Mechanism (TRRC) Act, 2024, sec 3(2).

²⁷² Statute of the Special Court for Sierra Leone, art 11.

²⁷³ Special Accountability Mechanism (TRRC) Act, 2024, sec 3(3).

²⁷⁴ Statute of the Special Court for Sierra Leone, art 15.

domestic judges and prosecutors have mastery of The Gambia's criminal law and procedure.²⁷⁵

The Chief Justice assigned two judges- Justice Ebrima Jaiteh and Justice Sidi K Jobarteh to the Special Criminal Division of the High Court which will have jurisdiction over domestic hearings of cases originating from the implementation of the recommendations of the TRRC and of the Government White Paper.²⁷⁶ Justice Jaiteh was arrested and detained by the Jammeh regime when he was a magistrate after he acquitted and discharged Sheikh Muhideen Hydera and Alkalo Buyeh Touray.²⁷⁷ Jaiteh appeared before the TRRC and gave testimony in relation to his arrest and detention. Undoubtedly, he is a victim of the Jammeh regime but appointing him to serve as a judge on cases arising from the implementation of the recommendations of the TRRC will likely see critics raise concern about his impartiality in the hearing and determination of human rights violations that occurred during the Jammeh regime.

The SAM applies international law such as international customary law and international criminal law and the laws of The Gambia for the investigation and prosecution of crimes detailed in section 3(1) of the SAM (TRRC) Act 2024.²⁷⁸ In order to ensure fair, transparent and effective legal proceedings, the SAM must be guided by relevant international jurisprudence and procedure.²⁷⁹ The SCSL was guided by the decisions of the Appeal Chambers of the ICTR and the ICTY,²⁸⁰ while in proceedings before the SCSL, the Rules of Procedure and Evidence of the ICTR *mutatis mutandis* applied.²⁸¹ Evidently, the SAM is short of specifically stating which previous *ad hoc* tribunals' decisions and Rules of Procedure and Evidence that should be followed by judges of the Special Tribunal. The SAM is also short of stating that judges of the tribunal may follow the Rules of Procedure and Evidence of the ICC.

²⁷⁵ Yang (n 226) 68.

²⁷⁶ B Asemota '2 Judges assigned to Special Criminal Division' *The Standard Newspaper* (Fajara) 6 February 2024.

²⁷⁷ K Jeffang 'Magistrate Jaiteh joins the list' *Kairo News* (Brikama) 9 November 2015.

²⁷⁸ Special Accountability Mechanism (TRRC) Act, 2024, sec 4.

²⁷⁹ As above.

²⁸⁰ Statute of the Special Court for Sierra Leone, art 20(3).

²⁸¹ Statute of the Special Court for Sierra Leone, art 14(2).

Every component of the SAM holds primary jurisdiction over other ‘investigative, prosecutorial, or adjudicative’ entities within The Gambia concerning the crimes and persons that fall under their specific jurisdiction.²⁸² This is akin to article 8(2) of the Statute of the SCSL which gave it primary jurisdiction over national courts.²⁸³

The Special Tribunal is to be setup through a treaty between The Gambia and ECOWAS or other regional or international organisations.²⁸⁴ The Special Tribunal comprises of the Office of the Special Prosecutor, a Trial and an Appeal Chambers, Office of the Defence and the Registry.²⁸⁵ The SAM has the mandate to hear and determine international and domestic crimes and the authority to establish its own regulations for conducting proceedings and presenting evidence while drawing inspiration from international standards.²⁸⁶ Essentially, the SAM has the authority to ensure the safety of witnesses and their involvement in the proceedings.²⁸⁷

The Special Tribunal shall be headquartered in The Gambia but where the interest of justice requires, it may hold proceedings outside The Gambia.²⁸⁸ The statute of the ECCC specifically stated that the court had to be located in Cambodia,²⁸⁹ without going further to say that when interest of justice arises, the court may hold proceedings outside the country.

The Office of the Special Prosecutor has the power to determine the cases that could be prosecuted before the Special Criminal Division of The High Court.²⁹⁰ Until the establishment of the Special Tribunal, the Special Criminal Division of The High Court is empowered to adjudicate applications for interim measures that are fundamental for safeguarding the integrity of continuing investigations or prosecutions.²⁹¹

²⁸² Special Accountability Mechanism (TRRC) Act, 2024, sec 5.

²⁸³ Statute of the Special Court for Sierra Leone, art 8(2).

²⁸⁴ Special Accountability Mechanism (TRRC) Act, 2024, sec 7(1).

²⁸⁵ Special Accountability Mechanism (TRRC) Act, 2024, sec 7(2).

²⁸⁶ Special Accountability Mechanism (TRRC) Act, 2024, sec 7(3).

²⁸⁷ As above.

²⁸⁸ Special Accountability Mechanism (TRRC) Act, 2024, sec 7(4).

²⁸⁹ Statute of the Extraordinary Chambers in the Courts of Cambodia, art 43.

²⁹⁰ Special Accountability Mechanism (TRRC) Act, 2024, sec 8(1).

²⁹¹ Special Accountability Mechanism (TRRC) Act, 2024, sec 8(2).

The Special Prosecutor upon the establishment of the Special Tribunal can apply to modify, change, halt or remove a temporal measure formerly ordered by the Special Criminal Division of the High Court.²⁹² Crucially, the Special Tribunal can also *suo moto* modify, change, halt or remove a temporal measure previously ordered by the Special Criminal Division of the High Court.²⁹³

It is worthy to note that an accused is entitled to a counsel and sufficient time and resources to adequately prepare their defence and same is extended to a suspect who is being interrogated.²⁹⁴ This is in accordance with section 24 of the Constitution of The Gambia.²⁹⁵ Similar to this are articles 17 of the statute of the SCSL and 21 of the statute of the EAC which provide for the rights of the accused to presumption of innocence, right to adequate time and facilities to prepare defence and the right to be tried within a reasonable time.²⁹⁶

The Special Tribunal and the Office of the Special Prosecutor are required to put in place mechanisms for the safeguard and assistance of witnesses.²⁹⁷ The Special Tribunal and the Office of the Special Prosecutor must ensure the creation of victims and witness protection support units that adhere to international standards and best practices.²⁹⁸ The inspiration of this provision seemly stems from article 16(4) of the statute of the SCSL which gave the Registrar of the court the duty to establish Victims and Witnesses Unit within the Court's Registry.²⁹⁹

Where the Special Tribunal and the Special Criminal Division of the High Court recognise a person as a victim in a judgment, the victim is entitled to reparation.³⁰⁰ A victim who did not participate in the proceeding before the Special Tribunal and the Special Criminal Division of High Court is not precluded from seeking compensation

²⁹² Special Accountability Mechanism (TRRC) Act, 2024, sec 8(3).

²⁹³ As above.

²⁹⁴ Special Accountability Mechanism (TRRC) Act, 2024, sec 9.

²⁹⁵ Constitution of The Gambia 1994, sec 24.

²⁹⁶ Statute of the Special Court for Sierra Leone, art 17 & Statute of the Extraordinary African Chambers, art 21.

²⁹⁷ Special Accountability Mechanism (TRRC) Act, 2024, sec 10(1).

²⁹⁸ Special Accountability Mechanism (TRRC) Act, 2024, sec 10(2).

²⁹⁹ Statute of the Special Court for Sierra Leone, art 16(4).

³⁰⁰ Special Accountability Mechanism (TRRC) Act, 2024, sec 10(4).

through other means as long as he or she suffered serious human rights abuses between July 1994 and January 2017.³⁰¹

It is important to observe that neither the SAM (TRRC) Act 2024 nor the Special Office of the Prosecutor's Act 2024 specifies the working language of the SAM. I assume that the omission may be deliberate because the Courts Act of the Gambia stated that the language of the courts is English.³⁰²

I also note keenly the SAM unlike the SCSL, ECCC and the EAC which all provided the sources of funding for the tribunals; the SAM did not provide the source of its funding. This in my view is unique even though it is best to state clearly the source of funding for the SAM in the SAM (TRRC) Act 2024. However, the United States Government's Agency for International Development (USAID) launched a 10-month Rapid Response initiative to accelerate the prosecution of Jammeh era crimes.³⁰³ Also, considering the efforts of The Gambia to involve ECOWAS in the accountability process, it is likely the tribunal will be funded by the government of The Gambia, ECOWAS, UN, donors such as the US government and other governments.

4.6.2 The Special Prosecutor's Office (SPO)

The Special Prosecutor's Office is to be set up to investigate and prosecute cases of grave human rights violations that were orchestrated in The Gambia between July 1994 and January 2017.³⁰⁴ The office is headed by the Special Prosecutor,³⁰⁵ who conducts investigations and prosecutions on behalf of the State.³⁰⁶ The office is independent and autonomous.³⁰⁷

The Special Prosecutor is appointed by the President following the advice of a Selection Panel established in accordance with section 23 of the Special

³⁰¹ Special Accountability Mechanism (TRRC) Act, 2024, sec 10(5).

³⁰² Courts Act of The Gambia, sec 46.

³⁰³ Press Release 6 July 2024 'USAID: \$365,000 to Accelerate Prosecution of Jammeh-Era Crimes ' *U.S. Agency for International Development*) available at <https://www.usaid.gov/the-gambia/press-release/jun-07-2023usaid-365000-accelerate-prosecution-jammeh-era-crimes> (accessed 17 August 2024).

³⁰⁴ Special Prosecutor's Office Act, 2024, sec 3(1).

³⁰⁵ Special Prosecutor's Office Act, 2024, sec 3(2).

³⁰⁶ Special Prosecutor's Office Act, 2024, sec 3(4).

³⁰⁷ Special Prosecutor's Office Act, 2024, sect 4(1).

Prosecutor's Act.³⁰⁸ The Deputy Special Prosecutor assists the Special Prosecutor in the exercise of his/her functions.³⁰⁹ The Selection Panel recommends for the appointment of the Special Prosecutor, the Deputy Special Prosecutor, Division Heads and the Chair of the Special Prosecutions Funds.³¹⁰ Fundamentally, it is required for the Special Panel to consult the Special Prosecutor in the selection of Deputy Special Prosecutor and the Division Heads.³¹¹ The Special Prosecutor's tenure in office is for four years but he/she is eligible for renewal for one additional term.³¹²

The Special Prosecutor determines the cases that should be prosecuted in the Special Tribunal and the ones which should be prosecuted before the Special Criminal Division of the High Court.³¹³ Therefore, the Special Prosecutor can initiate proceedings before the Special Criminal Division of the High Court, the Special Tribunal, and additionally, he/she has the power to refer cases for prosecution before an international court or tribunal provided the Attorney General grants approval.³¹⁴

The functions and powers of the Special Prosecutor includes: the initiation, conduct and the supervision of investigations; providing annual updates to the Attorney General and Minister of Justice, ECOWAS and the Oversight Committee on the progress of investigations and prosecutions; refers cases for prosecution before the Special Criminal Division of the High Court and when circumstances arise, takeover prosecution before the Special Criminal Division of the High Court; gives the public regular updates on the progress of investigations and prosecutions; ensures victims and witnesses protections and support; the protection of evidence; makes guidelines for the handlings of sensitive testimonies of witnesses and vulnerable persons; and design outreach activities.³¹⁵ The powers of the Special Prosecutor include investigative, prosecutorial, victims and witness protections, ancillary powers and the power to apply for interim measures.³¹⁶

³⁰⁸ Special Prosecutor's Office Act, 2024, sect 5(1).

³⁰⁹ Special Prosecutor's Office Act, 2024, sec 6.

³¹⁰ Special Prosecutor's Office Act, 2024, sec 7(1).

³¹¹ Special Prosecutor's Office Act, 2024, sec 7(2).

³¹² Special Prosecutor's Office Act, 2024, sec 8.

³¹³ Special Prosecutor's Office Act, 2024, sec 11(1).

³¹⁴ Special Prosecutor's Office Act, 2024, sec 11(2).

³¹⁵ Special Prosecutor's Office Act, 2024, sec 14(1).

³¹⁶ Special Prosecutor's Office Act, 2024, secs 16-20.

The Special Court for Sierra Leone in *Prosecutor v Brima* observed that the responsibility and authority to determine who should be prosecuted based on the findings of investigation rest squarely on the prosecutor.³¹⁷ The Special prosecutor had the discretion to prosecute and he was not bound to explain how he/she exercised his discretion but transparency during the investigation process yields legitimacy, as it is the practice of the International Criminal Court's prosecutor.³¹⁸

The office of the Special Prosecutor comprises of the Management and Coordination Unit, Victims and Witness Support Unit, Legal and Policy Unit, Outreach and Communication Unit, Investigation Division, the Prosecution Division, the Finance and Administration Division.³¹⁹ The offices of the Special Prosecutor and the deputy constitute the Senior Management Team.³²⁰ The Independent Selection Panel is constituted by a member appointed by ECOWAS, the government of The Gambia, The Gambia Bar Association, a representative of the Public Service Commission and two international criminal law experts to be appointed by ECOWAS and The Gambia government either jointly or separately.³²¹

The Independent Fund for Special Prosecutions finances the Special Prosecutor's office operations in order to assist it in the execution of its functions.³²² The sources of funding for the Special Prosecutor's Office include National Assembly appropriation, donations from nationals or international organisations and fines imposed by the courts.³²³ The funds are used to support the operations of the Special Prosecutor's office.³²⁴

The Special Prosecutor's Office Oversight Committee comprises of a representative from the government of The Gambia, ECOWAS, civil society organisations and two international experts.³²⁵ The Oversight Committee essentially supervises and

³¹⁷ *Prosecutor v. Brima* Appeals Judgment, Case No. SCSL-04-16-A, 281.

³¹⁸ Jalloh (n 46) 419.

³¹⁹ Special Prosecutor's Office Act, 2024, Sec 21.

³²⁰ Special Prosecutor's Office Act, 2024, sec 22.

³²¹ Special Prosecutor's Office Act, 2024, sec 23.

³²² Special Prosecutor's Office Act, 2024, sec 27.

³²³ Special Prosecutor's Office Act, 2024, sec 28.

³²⁴ Special Prosecutor's Office Act, 2024, sec 29.

³²⁵ Special Prosecutor's Office Act, 2024, section 37(1).

reviews the performance of the office of the Special Prosecutor, ensures it submits periodic reports and provides regular updates to the general populace on its progress and activities.³²⁶

4.7 Role of victims in the proceedings

A victim in this context means a person or an entity who suffered harm because of the commission of a crime under the jurisdiction of the SAM.³²⁷ A family member who suffered harm as a result of their kinship to the victim of human rights violations under the Public Law is considered a victim.³²⁸ Also considered a victim is a person who was harmed while intervening to assist a victim or to prevent a violation from happening.³²⁹

A significant number of scholars and advocates support a victim-centered approach in the realm of international criminal justice.³³⁰ Findlay and Henham are prominent advocates for championing the cause of placing victims at the forefront of international criminal justice.³³¹

In The Gambia, victims of human rights violations appeared before the TRRC to give their testimonies but in order to ensure that those accountable are brought to book; they have another venue to appear and present their stories before judges, lawyers and prosecutors. Therefore, they should not relent and relax; they should be ready to come forward to present their stories in order to help in ensuring that they get the justice that they await for years.

Over the years, the roles of victims in proceedings before hybrid courts had evolved as international law traditionally did not recognize victims' right but provided for their protection.³³² That is why earlier statutes of international and hybrid courts did not

³²⁶ Special Prosecutor's Office Act, 2024, section 38(1).

³²⁷ Special Accountability Mechanism (TRRC) Act 2044, sec 2.

³²⁸ Organic Law on Establishing and Organizing Transitional Justice art, 10 available at <http://www.ohchr.org/Documents/Countries/TN/TransitionalJusticeTunisia.pdf> (accessed 31 August 2024).

³²⁹ As above.

³³⁰ M Pena and G Carayon 'Is the ICC Making the Most of Victim Participation?' (2013) 7 *International Journal of Transitional Justice* 518.

³³¹ M Findlay & R Henham *Exploring the Boundaries of International Criminal Justice* (2011) 17.

³³² H Varney & others, 'The Role of Victims in Criminal Proceedings' (December 2017) 2 available at [ICTJ-Victims_in_Criminal_Proceedings-Final-EN.pdf](https://www.ictj.org/sites/default/files/2017/12/ICTJ-Victims_in_Criminal_Proceedings-Final-EN.pdf) (accessed 18 October 2024).

make provision for the participation of victims in international criminal proceedings.³³³ However, the SAM (TRRC) Act 2024 provides for victims participation.³³⁴

Now, the Rome Statute of the International Criminal Court (ICC) developed victims' role in the proceedings which promotes their interest.³³⁵ Statutes of the ECCC and the EAC followed the ICC example.³³⁶ Presently, the international criminal justice process recognizes the participation of victims because they contribute meaningfully in the accountability process by ensuring that they express their voices and safeguard their interest.³³⁷ Essentially, it acknowledged that the criminal justice system can play a critical restorative function for victims by facilitating the provision of reparations.³³⁸

The participation of victims helps in ensuring successful prosecutions because victims are the most credible source of information about their own experiences of human rights abuses.³³⁹ They can serve as an oversight mechanism in situations where prosecutors fail/neglect to seek the truth or show lack of diligence.³⁴⁰

Essentially, the participation of victims helps in the granting of reparations because they help bring out crucial information before the court that could help in the determination of the awards for reparations.³⁴¹ The role victims play in this regards help to afford the affected communities a remedy and enhances restorative justice.³⁴²

The importance of victims' participation in the proceedings cannot be overemphasized. The success of Gambia's effort to ensure justice cannot be realized in the absence of meaningful participation of the victims. Victims' failure to fully participate only gives the perpetrators the opportunity to freely roam the streets despite their alleged involvement in the commission of gross violations of human

³³³ As above.

³³⁴ Special Accountability Mechanism (TRRC) Act, 2024, sec 10.

³³⁵ K Tibori-Szabó & M Hirst *Victim Participation in International Criminal Justice: Practitioners' Guide* (2017) 2. See also the following articles in the ICC Statute: articles 15(3), 19(3), 43(6), 53(1), 57(3), 64(2) and (6), 68, 75, 79, 82(4), 85(1), and article 87(4) of the Rome Statute of the ICC 1998.

³³⁶ H Varney & others (n 332) 2.

³³⁷ As above.

³³⁸ As above.

³³⁹ H Varney & others (n 332) 3.

³⁴⁰ As above.

³⁴¹ CP Trumbull IV 'The Victims of Victim Participation in International Criminal Proceedings' (2008) 29 *Michigan Journal of International Law* 777.

³⁴² As above.

rights. To ensure perpetrators are denied the opportunity to continue to freely roam the streets, victims need to fully participate in the accountability process.

4.8 Importance of reparations for victims of human rights abuses

Where the Special Tribunal and the Special Criminal Division of the High Court recognize a person as a victim, he/she is entitled to reparations.³⁴³ Those who did not participate in the proceedings but suffered as a result of the commission of serious human rights violations between July 1994 and January 2017 have the right to seek compensation through other mechanisms.³⁴⁴

The right to reparation is ingrained in international law and encapsulates a wide array of remedies which transcends beyond the pursuit of criminal justice and accountability.³⁴⁵ Persons who suffered as victims have inherent right to reparation.³⁴⁶ The concept of reparation refers to various measures aimed at addressing violations of human rights through the provision of benefits (material and symbolic) to victims, their families and the communities affected.³⁴⁷ Reparation measures encompass restitution, compensation, rehabilitation and satisfaction.³⁴⁸ It also includes measures to guarantee non-repetition of the violations of human rights.³⁴⁹

The Rome Statute provides victims with the right to reparation.³⁵⁰ The ICC is the premier court to introduce the system of reparation under which victims of atrocity crimes claim and get reparations from those convicted for human rights violations and now hybrid courts emulate the ICC's framework on reparations.³⁵¹ Now, numerous international treaties and legal instruments have established the rights to reparations for victims of human rights abuses and the right to reparations has now

³⁴³ Special Accountability Mechanism (TRRC) Act, 2024, sec 10(4).

³⁴⁴ Special Accountability Mechanism (TRRC) Act, 2024, sec 10(5).

³⁴⁵ Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, art 14.

³⁴⁶ Office of the High Commissioner for Human Rights (OHCHR) 'Reparations' available at <https://www.ohchr.org/en/transitional-justice/reparations> (accessed 18 August 2024).

³⁴⁷ As above.

³⁴⁸ As above.

³⁴⁹ *Kambole v Tanzania* (Judgment) (2020) 4 AfCLR 460.

³⁵⁰ Rome Statute, art 75(1).

³⁵¹ E Salmon & JP Perez-Leon-Acevedo 'Reparation for Victims of Serious Violations of International Humanitarian Law: New Developments' (2022) 104 *International Review of the Red Cross* 1337.

been recognised as a customary international norms.³⁵² Van Boven/Bissiouni Principles, argue that victims are entitled to sufficient, timely and effective reparation for harm endured.³⁵³

Failure to provide reparations for victims of human rights abuses does not only contravene international law but also lead to further victimization for victims.³⁵⁴ In some instances, access to established crime victims' funds is the most effective and a times the only means for victims to realize their rights to reparation and obtain compensation for wrongful harm they have endured.³⁵⁵

4.9 Potential challenges that could face the hybrid court in ensuring accountability

This section provides for the potential challenges that the proposed hybrid court in The Gambia will likely encounter. This section is considered in light of the challenges that previous hybrid courts face in their efforts to bringing those responsible for human rights abuses to book. It will make reference to exact challenges that the hybrid courts discussed above faced and highlight how the challenges will likely surface in The Gambia's hybrid court.

First, is funding. Adequate funding was a challenge in East Timor. The Public Defender's Unit was so underfunded and inexperienced that it did not manage to call any witness in its first 14 trials.³⁵⁶ The Prosecution Unit was adequately funded, staffed with competent and experienced personnel; however, the Tribunal and the Public Defender's Unit were in a dismal situation.³⁵⁷ Regulation "64" Panels in the Courts of Kosovo was also confronted with the challenge of underfunding. The court

³⁵² International Covenant on Civil and Political Rights (ICCPR) articles 2(3), 9(5), and 14(6), International Convention for the Elimination of Racial Discrimination, art 6, International Convention for the Protection of all Persons from Enforced Disappearance, art 24, Protocol to the African Charter on Human and Peoples' Rights, art 27(1).

³⁵³ 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, Principle 10 available at <https://documents-dds-ny.un.org/doc/UNDOC/GEN/N05/496/42/PDF/N0549642.pdf?OpenElement> (accessed 31 August 2024).

³⁵⁴ M Naseer, 'Realizing the Right to Reparation by Reforming Domestic Crime Victims' Funds' (2024) *Harvard Human Rights Journal*, 37.

³⁵⁵ As above.

³⁵⁶ D Cohen, 'Seeking Justice on the Cheap: Is the East Timor Tribunal Really a Model for the Future?' (2002) 61 *East-West Center, Asia Pacific Issues* 1.

³⁵⁷ Cohen (n 356) 3.

was faced with multiple challenges especially in getting funding to hire qualified international personnel.³⁵⁸ Similarly, shoestring funding of the SCSL led to inadequate support for the Office of the Defense which consequently resulted to inequality of arms between the defense and the prosecution.³⁵⁹

Funding has always been a major challenge for hybrid courts. The process of justice and accountability require a lot of funding to succeed. It is obvious that funding will be one of the major challenges of the court that is to be established in The Gambia. Already, the government in its implementation plan identified limited funding as a challenge that will likely affect the implementation of the plan.³⁶⁰

Second, witness protection could be a challenge. According to experience from the ICTR and ICTY that witnesses constituting victims and non-victims encounter severe security, physiological and physical difficulties in relation to their appearance in court.³⁶¹ Victims of gender based violence require special treatment because of the trauma that they might have encountered.³⁶² The SCSL was located in Sierra Leone as a result, the court staff reported that witnesses expressed concerns that their families were at risk because of their testimonies in court.³⁶³ This was not experienced at the ICTR and ICTY because the tribunals were not located where the crimes occurred.³⁶⁴

In the context of The Gambia, because the court is to be located in The Gambia, witness protection particularly witnesses who experienced gender based violence might have concerns about their security and that of their families and dependents. The Witness Protection Unit might not have sufficient resources to ensure that witnesses receive relevant support such as counseling, medical assistance and rehabilitation particularly in rape and sexual assault cases.

³⁵⁸ Higonnet (n 171) 382.

³⁵⁹ Jalloh (n 46) 413.

³⁶⁰ Implementation plan (104) 33.

³⁶¹ Human Rights Watch 'Bringing Justice: The Special Court for Sierra Leone: Accomplishments, Shortcomings, and Needed Support' September 2004 available at <https://www.hrw.org/report/2004/09/08/bringing-justice-special-court-sierra-leone/accomplishments-shortcomings-and> (accessed 6 August 2024).

³⁶² As above.

³⁶³ As above.

³⁶⁴ As above.

Third, extradition of perpetrators had been a challenge for hybrid criminal tribunals. In East Timor for instance, people expressed disappointment about the shortcomings of the tribunal three years after it was established because it could not prosecute a number of accused persons who were indicted for the crimes in 1999.³⁶⁵ Indonesia's refusal to comply with extradition requests or help the Serious Crimes Unit (SCU) with its investigations was considered as a fundamental reason for the failures of the tribunal.³⁶⁶

Presently, a number of people who are recommended for prosecution live outside The Gambia. Jammeh for instance lives in Equatorial Guinea and has a good relationship with President Teodoro Obiang.³⁶⁷ Obiang even pledged to protect Jammeh.³⁶⁸ Clearly, extraditing Jammeh to face justice whether in The Gambia or elsewhere will be a challenge.³⁶⁹ Aside the good relationship between Obiang and Jammeh, extradition of Jammeh to The Gambia will be difficult because there is no extradition agreement between The Gambia and Equatorial Guinea.³⁷⁰ Additionally, Equatorial Guinea is not a member of ECOWAS.³⁷¹ Therefore a court established by The Gambia and ECOWAS will make it difficult for the West African body to mandate an obligation for adherence by Equatorial Guinea.³⁷²

Finally, security will be a challenge because the court is to be located in the scene of the crimes which is akin to the SCSL and the ECCC as discussed above. In Sierra Leone, Human Rights Watch noted that because of the sensitive nature of the proceedings, it was important to ensure sufficient security for both the court's facilities, staff especially judges and prosecutors at the court.³⁷³ This concern was underscored because of the court's proximity to the people who had a close link to

³⁶⁵ S Katzenstein 'Hybrid Tribunals: Searching for Justice in East Timor' (2003) 16 *Harvard Human Rights Law Journal* 251- 252.

³⁶⁶ Katzenstein (n 365) 252.

³⁶⁷ C Hartmann 'ECOWAS and the Restoration of Democracy in The Gambia' (2017) 52 *Africa Spectrum* 90.

³⁶⁸ R Maclean 'Equatorial Guinea says it will protect former Gambia leader' *The Guardian* (Dakar) 27 July 2018.

³⁶⁹ Owiso & Nakandha (n 38).

³⁷⁰ As above.

³⁷¹ As above.

³⁷² As above.

³⁷³ Human Rights Watch (n 361) 31.

the work of the court.³⁷⁴ It is also essential to mention that Sierra Leone at the time had inadequacies in the security sector and sustained engagement with international forces to provide security for the court was fundamental.³⁷⁵

Similarly in The Gambia, Jammeh still has strong loyalists in the security sector.³⁷⁶ The sensitive nature of the proceedings that would see former powerful men face justice underscores the importance to have adequate security for the facilities of the court, staff particularly judges and prosecutors. Because of the location of the court, its proximity to the people closely tied to the court's work will equally pose challenges that were not present at the ICTR, ICTY and EAC because these courts were located far away from the scenes of crimes. The challenges that the hybrid court may face are by no means exhaustive. The recommendations on how to overcome or minimize the challenges are discussed in chapter 5.

4.10 Conclusion

Hybrid tribunals have been used as a strategy to prosecute serious crimes committed in places such as Kosovo, East Timor, Sierra Leone and Cambodia. The strategy is not without challenges as already discussed. Despite the challenges, these tribunals immensely contributed to bringing to justice those who committed human rights abuses in the most extensive scale. Therefore, I have a strong conviction that the hybrid court will apply both domestic and international law to deliver justice for victims of human rights violations during Jammeh's rule.

We expect The Gambia to make significant improvement from previous hybrid criminal courts because we already had numerous courts established before and the challenges they faced. The Gambia is expected to work hard in order to lessen the challenges that hindered the smooth operationalization of previous hybrid courts and do significant work to improve the efficacy and efficiency of the court.

³⁷⁴ As above.

³⁷⁵ As above.

³⁷⁶ T Naadi, 'Gambia after Yahya Jammeh: I'll never get justice' *BBC News*, (London) 13 July 2022.

Chapter 5: Conclusion and recommendations

5.1 Conclusion

The Jammeh era crimes can be prosecuted by a state that has domestic enforcement frameworks that could be a basis for the courts to exercise universal jurisdiction over the crimes allegedly committed by Jammeh and his co-perpetrators.

With regards to prosecution at the ICC, because The Gambia is making efforts to establish a mechanism to prosecute Jammeh and his co-perpetrators, the ICC presently might have insufficient grounds to prosecute the alleged perpetrators. However, when The Gambia ceases its efforts to prosecute the perpetrators, the ICC has jurisdiction to prosecute the perpetrators because the crimes committed by Jammeh and his co-perpetrators meet the gravity threshold of crimes against humanity under the Rome Statute of the ICC.

Having regards to section 4 of the SAM (TRRC) Act, 2024, the hybrid is equipped with jurisdiction to apply both domestic and international law to deliver justice and accountability for victims of rights violations during the Jammeh regime. In addition, despite the challenges faced by former hybrid courts discussed above, it is obvious that a hybrid court is an adequate transitional justice accountability mechanism for grave human rights violations.

There is no doubt that to seek justice for the crimes perpetrated during the administration of Jammeh is not merely a legal obligation but it is a moral duty that has fundamental implications for the future of the country. This paper referred to widespread human rights violations that took place in The Gambia and the challenges associated with ensuring that perpetrators are held to account.

Even though there are significant challenges such as resource constraints and lack of technical expertise and capacity, the success of the TRRC and the release of the government White paper and the implementation plan and the successful trials and convictions of some of the perpetrators, show giant strides forward. It is fundamental

that the government, civil society and the international community to come together in the vigorous pursuit of justice, which is not only for the victims but also for maintaining the nation's integrity.

The pursuit of justice is a collaborative effort that can foster healing and restore the dignity of victims, laying a solid foundation for a Gambia that is more just and peaceful. We believe strongly to bring to justice those recommended for prosecution by the TRRC will not only demonstrate the strength and resilience of The Gambian people but it will serve as an example for other states that face with similar challenges.

5.2 Recommendations

This section proffers some inexhaustive recommendations for the prosecution of Jammeh era crimes whether the prosecution is based on universal jurisdiction, at the ICC or the prosecution is carried out at the hybrid court. Relevantly, this section refers to some of the experiences of previous hybrid or internationalized courts where necessary to lay a foundation for some of the recommendations that have relevance to the courts or tribunals. Some of the recommendations are as follows:

5.2.1 Female judges

To begin, at the EAC, all the judges were males.³⁷⁷ In appointing judges to sit as umpires in the prosecution of crimes committed during the Jammeh era, it is pertinent for the government of the prosecuting state to ensure that female judges participate in the adjudication process especially when it is a rape or sexual assault case. Female judges bring feminist/womanly perspective to achieve justice.³⁷⁸ For instance, rape being an international crime is sometime ignored,³⁷⁹ as we saw in the trial of Ousman Sonko where the court declined to make pronouncement on the charge of rape because it considered the charge outside its jurisdiction.³⁸⁰ Female

³⁷⁷ AU Press Release N.089\2015, 6 April 2015 available at [http://www.chambresafricaines.org/pdf/PR%20089-Appointment%20JudgesTrial%20Chamber-AEC-final%20\(2\).pdf](http://www.chambresafricaines.org/pdf/PR%20089-Appointment%20JudgesTrial%20Chamber-AEC-final%20(2).pdf) (accessed 4 October 2024).

³⁷⁸ N Grossman 'Sex on the Bench: Do Women Judges Matter to the Legitimacy of International Courts?' (2012) 12 *Chicago Journal of International Law* 658.

³⁷⁹ M Ellis 'Breaking the Silence: Rape as an International Crime' (2007) 38 *Case Western Reserve Journal of International Law* 228.

³⁸⁰ Cumming-Bruce and Maclean (n 140).

legal experts bring experience and wisdom and make enormous contribution to a court's work.³⁸¹ The representation of female enhances the legitimacy of a court.³⁸²

5.2.2 Funding

In the case of the hybrid court, it is pertinent that it aims to have unconditional funding in order to avoid selling the court to donors to obtain funding.³⁸³ Having adequate funding will save the time and energy of the court and that helps it to devote more of its time to the work of the court.³⁸⁴ Unfortunately, even though the government of The Gambia expressed commitment to fund the court through its national budget, the implementation plan maintains to seek funding from international organisations.³⁸⁵

Essentially, to reduce costs associated with the pursuit of justice, The Gambia should consider employing equal number of nationals just like the number of international personnel in the court. To have more international personnel in the court might result to incurring more costs and lessens the participation of locals in the accountability process. To have equal number of nationals will help build the capacity of Gambians to help them to acquire the required knowledge and skills to execute their functions effectively. This helps to realise the successful implementation of the recommendations of the TRRC.³⁸⁶

5.2.3 Witness protection and victims participation

Whether the prosecutions of the perpetrators are held in The Gambia or in another country, witness protections and victims participations are critical. The Witness and Victims Support Unit should implement measures to ensure witness protection. The Protection Unit must have adequate resources and skilled staff to assist victims and witnesses to receive the necessary support and counseling and any other assistance as required under section 18 of the Special Prosecutor's Act, 2024. The role victims play in legal proceedings is discussed in Chapter 4.

³⁸¹ Yang (n 226) 68.

³⁸² Yang (n 226) 69.

³⁸³ K Ainley & M Kersten *Dakar Guidelines on the Establishment of Hybrid Courts* (2019) 34.

³⁸⁴ As above.

³⁸⁵ Implementation plan (n 104) 32.

³⁸⁶ Implementation plan (n 104) 12.

5.2.4 Extradition

There are some alleged perpetrators who presently live outside The Gambia including Jammeh. In order to ensure the prosecution of these people in The Gambia or in any other country, they need to be extradited to the prosecuting country except when the country they stay in decide to exercise universal jurisdiction to prosecute them.

Having regards to the good relationship between Jammeh and President Teodoro Obiang Nguema Mbasogo, and lack of extradition agreement between Gambia and Equatorial Guinea, it will be difficult for Equatorial Guinea to get Jammeh extradited to The Gambia or to another country to face justice. Equally difficult is to imagine Obiang agrees for Jammeh to face justice in Equatorial Guinea. Considering Equatorial Guinea is not a member of ECOWAS, it will be complicated for the regional body to force Equatorial Guinea to handover Jammeh for prosecution. However, both Gambia and Equatorial Guinea are members of the AU. Therefore, collaboration with the AU in the establishment of the hybrid court, the AU's threats of coercive sanctions under article 23 of the Constitutive Act will likely motivate Equatorial Guinea to adhere to any decisions of the AU mandating collaboration with the court.³⁸⁷

5.2.5 Security

In Sierra Leone for instance, the forces of the United Nations Mission in Sierra Leone (UNMSIL) provided security for the facilities of the court.³⁸⁸ Presently, the ECOWAS Military Intervention in The Gambia (ECOMIG) forces is in The Gambia. Their presence in the country throughout the period of the court's operations is critical to the maintenance of law and order. Specifically, their presence could be instrumental in providing security for the court's facilities, judges, staff and other personnel of the court.

³⁸⁷ Owiso & Nakandha (n 38).

³⁸⁸ Human Rights Watch (n 361).

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