APPRAISAL OF INTERNATIONAL CRIMINAL COURTS: LESSONS FOR THE GAMBIA ON JAMMEH'S ALLEGED CRIMES

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Abstract

This research is determined to present an appraisal of International Criminal Tribunal for Rwanda (hereinafter referred to as ICTR) from an international law perspective in their quest to serve justice after the perpetration of the heinous atrocities of genocide in 1994 in Rwanda and other criminal tribunals and courts. It examines the failure of the international community to intervene, the raison d'être of ICTR as the main tribunal in this research and its fate. It focuses on the national mechanisms and the need for The Gambia to achieve justice for victims of the former President, Yahya Jammeh by reflecting on Rwanda. These findings are used to gauge The Gambia's Truth, Reconciliation and Reparations Commission's (hereinafter referred to as the TRRC) recommendations and The Gambia's white paper on Jammeh's alleged crimes. It examines the violation of human rights, the prospects of this white paper and my perspective on possible mechanisms for social justice, integration and cohesion in The Gambia. This research, therefore, finds out that a hybrid court led by The Gambia and supported by judges in Africa is quite relevant to dealing with these alleged crimes because it is established with the aim of addressing this issue of Jammeh's alleged human rights violations. This is so when The Gambia liaises with the African Union and the Economic Community of West African States to strengthen this hybrid court by providing this court with judges of outstanding legal acumen in hearing cases of such.

Keywords: *Genocide; Human Rights Violations; Hybrid Court; International Crimes; Justice.*

A. Introduction

The Gambia finds itself in a conundrum of human rights violations – although not in the dimension of non-international armed conflicts like in Rwanda – where human rights were violated for 22 years under Jammeh's

regime. Human rights violations of different kinds took place in The Gambia between 1994 and 2016 and they are alleged to be mainly committed by Jammeh as the President of The Gambia during his regime. After Jammeh was ousted from power through a democratic election in December 2016,[1] a phase of hope for democracy and transitional justice begins to emerge in The Gambia.[2] The establishment of Truth, Reconciliation and Reparation Commission with the mandate of investigating these alleged crimes marks the beginning of this new phase. While Rwanda resorted to seeking justice through the Gacaca and ICTR, The Gambia at this moment has completed the truth, reconciliation and reparation processes and now looks forward to another phase of prosecution as recommended by TRRC and approved by the State through the white paper.

The 1994 genocide in Rwanda left the country and its institutions in a shambolic state which resulted in the new government's – and the international community's – timely decision to hold myriads of Rwandans accountable for violence.[3] The ICTR had the jurisdiction to "prosecute persons responsible for serious violations of international humanitarian law committed in the territory of Rwanda and Rwandan citizens responsible for such violations committed in the territory of neighbouring States between 1 January 1994 and 31 December 1994, under the provisions of the present Statute".[4] The following few things stand out in the above-cited provision of the Statute of the ad hoc tribunal which will be

[1] A strategic approach was taken by most political parties in the country as a joint force with a view to ending the Jammeh regime which was characterized with dictatorship and human rights violations.
[2] Amat Jeng, "The Gambia election signals hope for democracy", *https://www.aljazeera.com/opinions/2021/12/11/the-gambia-election-signals-hope-for-democracy-2*, accessed on 11 July 2022.
[3] Hollie Nyseth Brehm, Christi Smith and Evelyn Gerte, "Producing Expertise in a Transitional Justice Setting: Judges at Rwanda's Gacaca Courts", *Law and Social Inquiry*, Vol. 44, Issue 1, 2019, p. 78.
[4] Article 1, Statute of the International Criminal Tribunal for Rwanda.

examined and assessed later in the course of this research: the tribunal has subject-matter jurisdiction, territorial jurisdiction and time limit. These form a significant component of this research.

International humanitarian law applies to armed conflicts within a state and between states. International human rights law, on the other hand, is a set of international principles made by treaty or, based on which people can anticipate and or claim certain rights that must be respected and protected by their States. [5] The 1994 atrocity in Rwanda is a non-international armed conflict that involved Tutsi and Hutu ethnic groups – the former being the minority and predominantly the victim of the conflict. In the case of ICTR and like other international tribunals, there are tendencies of overlap between actual court proceedings which can be challenging to the justice system.[6] But amidst all those gloomy moments and now the rising of Rwanda some people are of the view that the Gacaca court was a witty response to genocide crimes and yet, others are of the considered view that it is a tool of the current government as a mean of controlling the post-genocide sociopolitical atmosphere.[7] Since after World War II, most armed conflicts in the world have been internal rather than international.[8]

Within hundred days, between eight hundred thousand and one million people were killed. Most of the victims belong to the minority Tutsi ethnic group. The UN Special Rapporteur observed in 1994 that; "the Rwandese have indeed been the victims of several massacres in the past, notably in 1959, 1963, 1966, 1973, 1990, 1991, 1992 and 1993. However, those being

[5] United Nations Human Rights Office of the High Commissioner, "Instruments and mechanisms", *https://www.ohchr.org/en/instruments-and-mechanisms/international-human-rights-law*,accessed on 20 July 2022.
[6] Ananda Breed, "Resistant acts in post-genocide Rwanda", *Kritika Kultura*, 21-22, 2013, p. 371.
[7] Theoneste Rutayisire and Annemiek Richters, "Everyday suffering outside prison walls: A legacy of community justice in post-genocide Rwanda", *Social Science & Medicind*, Vol. 120, November 2014, p. 414.
[8] Jakob Hauter, "Delegated Interstate War: Introducing an Addition to Armed Conflict Typologies", *Journal of Strategic Security*, Vol. 12, No. 4, 2019, p. 90.

perpetrated at present are unprecedented in the history of the country and even in that of the entire African continent. They have taken on an extent unequalled in space and in time".[9] This genocide incident started on the evening of 6 April 1994 when Juvenal Habyarimana's[10] jet had just been shut down with him aboard. On 8 November 1994, the United Nations Security Council – to atone for their lethargy and disinterest after staying afar watching the pogrom against the Tutsis – established ICTR[11] whose justice system is slow, retributive, *west-centric*[12] and inimical to the African perspective of dispute settlement. In February 1995, United Nations Security Council Resolution 955, after recalling all resolutions on Rwanda, realized that serious violations of international humanitarian law such as Additional Protocol II[13] to the four Geneva Conventions and Common Article 3 of the four Geneva Conventions which enjoins the High Contracting Parties[14] in conflicts that are not of international existence in the territory of one of the High Contracting Parties to be obliged to ensure that persons participating actively in the hostilities, including members of armed forces who have retreated and those kept *hors de combat*[15] by sickness, wounds,

[9] Report about human rights in Rwanda submitted by Mr. R. Degni-Ségui, Special Rapporteur of the Commission on Human Rights, under para 20 of Commission resolution E/CN.4/S-3/1 of 25 May 1994.

[10] Juvenal Habyarimana, a Hutu, is the second president of Rwanda who ruled from July 5, 1973 till his death on April 6, 1994. He initially won favour among both Hutu and Tutsi groups giving his administration's reluctance s that catered to his primarily Hutu supporters. This restraint did not last and he began to see a government that mirrored the policies of Kayibanda. The Tutsi became disadvantaged. By the start of the invasion from Uganda by the army of the Rwanda Patriotic Front, a rebel army made up mostly a refugee Tutsi who had helped Uganda's Museveni seized controlled of the presidency, Habyarimana's supporters had shrunk to the akuza ("little house" or "President's household"), which was normally composed of an informal group of Hutu extremists from his home region. His assassination ignited ethnic tensions in the region and helped sparked the Rwandan Genocide.

[11] S.C. Res. 955, 1 U.N. Doc. S/RES (Nov. 8, 1994).

[12] My own coined term to mean that it reflects mainly the European perspective of justice which does not align with the African social justice system.

[13] Protocol additional to the Four Geneva Conventions of 12 August 1949 which relates to the protection of victims of internal armed conflicts of 1977 (AP II).

[14] High Contracting Parties in armed conflicts are those that hold on to their international humanitarian law obligations even if the other party to the conflict is not bound by the Geneva Conventions or does not respect them.

[15] *Hors de combat* is anyone who is in the power of control of an adverse party during armed conflicts.

detention, or any other cause, shall without any prejudice be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar condition. The United Nations in Chapter VII of the United Nations Charter establishes ICTR and located the tribunal's seat in Arusha, Tanzania[16] to prosecute the perpetrators of the genocide but the ICTR appeared not to fulfil its mandate.

After the Second World War, the International Community came up with many instruments to control human rights violations. No sooner had these instruments been enacted and recognized by the international community than human rights violations and conflicts of different kinds started gaining tractions in Africa. Rwanda among other African countries became an epitome of armed conflicts zone whose catostrophy called for ICTR whose efficacy and setbacks will be assessed later in this paper.

B. Discussion

1. The Setbacks of The ICTR

Despite its endeavours, the ICTR has registered a lot of setbacks during the period of its mandate. The scope of the Tribunal – indeed, its very reason for establishment – thus went far below the absolute judicial perspective of genocide. These setbacks are articulated in the following lines:

a. The Slow Pace of The ICTR

International tribunals and courts are sometimes criticized for many trials being time-consuming but often, in transitional justce, there are myriads of victim-survivors whose cases the courts ought to

[16] The Security Council considered other options particularly Kigali and Nairobi but couldn't succeed. There was a shortage of premises in Kigali that could serve its purpose by accommodating ICTR. The Security Council also recognized that for justice and fairness to be granted, it required that trial be held in a country that has no interest in the matters involved. In addition, the Secretary General also considered that there were serious security dangers in bringing the leaders of the previous regime to Rwanda. The Kenyan Government also decided that it would not be able to obtain a seat for the tribunal in Nairobi. The Tanzanian Government provided an offer to accommodate the tribunal in the Arusha International Conference Centre [AICC].

handle effectively and efficiently.[17] Besides, these tribunals deal with crimes that are grave and it, therefore, requires that adjudication processes be done diligently, and with justice according to the law whose breach results in that court process. The statute of ICTR[18] provides that the election of permanent judges shall be for a term of four years. These changes in the judicial officers also contributed to the slow pace of the system as some new judges experienced a little delay at Arusha International Conference Centre. This feature of delay was greatly exhibited in the first four years (1995 – 1999). The main challenging part of this phase was to establish a functional judicial institution and commence the first trials when the Arusha International Conference Centre had no courtrooms.

The prescriptions made by the United Nations resolution – national reconciliation, peacekeeping when there was no peace in Rwanda to be kept at the first instance, the fight against impunity and support for the Rwandan courts and judicial systems[19] – appeared to demonstrate the reluctance of international community to respond to this genocide of the twentieth century. The failure of ICTR compelled the Rwandans to the establishment of *Gacaca*[20] because ICTR could not fulfil its mandate because of its slow pace. If one is a puritan in international humanitarian law, one will acknowledge that the establishment of ICTR is a sign of an international guilty conscience.

[17] Lisa J. Laplante, 2013, *The Plural of Justice Aims of Reparations in Transitional Justice Theories,* Taylor and Francis, Abingdon-on-Thames, p. 66.
[18] Article 12 paragraph 3, Statute of International Criminal Tribunal for Rwanda.
[19] Resolution 955 of the UN Security Council.
[20] Gacaca is a community-based judicial system that allows the accused to be confronted by the victim and the community. This system was set up in 1999 to prosecute the extraordinary amount of accused that were in prison for committing genocide and acts associated with the genocide in 1994. The Gacaca is based on a traditional Rwandan court-like system that was in use decades ago.

Having failed to intervene and stop the genocide, the international community wanted to atone for their inactions by punishing the perpetrators of the crime of genocide after it had already been committed. ICTR, with about 800 employees, has a lamentable performance. For example, between July 1999 and October 2000, the only substantial case heard was the trial of a single accused, Ignace Bagilishema, the former mayor of the village of Mabanza. And this slow proccedings are animated by the reality that the foreign judges needed the enlightenment of historians and anthropologists where information revealed in the course of the trials changed. [21] This is unprecedented. The ICTR, unlike the International Criminal Tribunal for former Yugoslavia, had suffered from a lack of international interest. This is true because while the jurisdiction of the International Criminal Tribunal for former Yugoslavia is subject to a longer time limit for prosecuting crimes committed within the territory of the former Yugoslavia from 1991, ICTR is limited to the trial of crimes committed from January 1994 to December of the same year.[22]

b. The ICTR Failed The Rape Victims

Throughout the genocide, widespread sexual violence directed predominantly against Tutsi women occurred in every prefecture. Myriad of women were raped in the streets, at checkpoints, in cultivated plots, in or near government buildings, hospitals, churches, and other places. Some were raped to death. According to the United Nations Security Council,[23] "civilians account for the

[21] Nigel Eltringham, "Illuminating the broader context: Anthropological and historical knowledge at the International Criminal Tribunal for Rwanda", *Journal of the Royal Anthropological Institute,* Vol. 19, Issue 2, 2013, p.338.

[22] Article 1, International Criminal Tribunal for former Yugoslavia and Article 1, International Criminal Tribunal for Rwanda.

[23] S.C. Res. 1820, intro. U.N. Doc. S/RES/1820 (2008).

vast majority of those adversely affected by armed conflict; women and girls are particularly targeted by the use of sexual violence, including as a tactic of war to humiliate, dominate, instill fear in, disperse and, or forcibly relocate civilian members of a community or ethnic group; and that sexual violence perpetrated in this manner may in some instances persist after the cessation of hostilities". Given the evidence and the crimes committed, ICTR is tasked with prosecuting, and virtually every defendant coming before this tribunal should be charged and convicted, where appropriate, for their roles in perpetuating these acts. Yet on the tenth anniversary of the genocide, ICTR had handled down 21 sentences: 18 convictions and three acquittals. An overwhelming 90 per cent of those judgments contained no rape case despite the power given to the tribunal in Article 4 (e) of the Statute of ICTR to prosecute perpetrators of such crimes of violations on Violations of Article 3 Common to the Geneva Conventions and of Additional Protocol II.[24] Until the appointment of women investigators, prosecutors and judges in ICTR, more prosecutions for crimes of sexual violence followed which was not so before their appointments.[25] This was so because as of April 2004, the prosecutor had appealed none of the rape acquittals.[26] Rape was the rule and the exception was its absence.[27] Despite the argument that the Rwandan violation during the conflict did not acquire the dimension of media attention

[24] Article 4 (e), Statute of International Criminal Tribunal for Rwanda.
[25] Teresa Doherty, 2020, "The contribution of women judges and prosecutors to the Development of International Criminal Law" In ed. Freya Baetens *Identity and Diversity on the International Bench: Who is the Judge?*, Oxford University Press, Cambridge, p. 355.
[26] *Ibid.*
[27] Helen Trouille, "How Far Has the International Criminal Tribunal for Rwanda Really Come since Akayesu in the Prosecution and Investigation of Sexual Offences Committed against Women? An Analysis of Ndindiliyimana *et al.*", *International Criminal Law Review*, Vol. 13, No. 4, 2013, p. 747.

projected towards similar crimes committed in former Yugoslavia, the result of the heinous acts of rape during the genocide is the birth of 'unwanted' children who are often stigmatized as children of perpetrators and are often rejected by the family.[28]

c. Unacceptable Bureaucratic Logjam

The trials of accused persons that officially started between September 2000 and April 2001 cannot unfortunately cover all the errors made by ICTR. With only eight people prosecuted after more than four years of trials and nearly seven years since its creation, the ICTR's results are nothing less than shocking. Proceedings at the Arusha tribunal are excessively low. Since 1997, speeding up the trials has been a constant theme in the work of judges during their plenary sessions. So slow were the proceedings at the tribunal that many Rwandans were not aware of its existence.[29] The ad hoc tribunals attempted to unveil the reasons for the logjam and concluded that those recently observed in Arusha were slow.[30]

1) Jurisdictions and Time Limit of The Ad Hoc ICTR

Jurisdictions and time limits are very important 'ingredients' in any litigation – whether criminal or civil. These two 'elements' determine significantly the admissibility or otherwise of a case, and the fairness of trials in cases. Jurisdiction is the power of a court to hear and decide a case or make

[28] Assumpta Muhayisa, *et. al.*, "What is the Fate of Children Born after the Rape of Their Mother Twenty Years of the Rwanda Genocide?", *Therapie Familiale*, Vol. 37, 2016, p. 151.
[29] Philipp Schulz, "Justice seen is Justice done?' - Assessing the Impact of Outreach Activities by the International Criminal Tribunal for Rwanda (ICTR), *CIRR*, Vol. XXI, No. 74, 2015, p. 66.
[30] Expert group report on the effectiveness of the activities and operation of the ad hoc tribunals, November 1999.

certain orders.[31] With regard to jurisdiction, this tribunal was designed with the territorial, subject matter and personal jurisdictions to preside over cases of genocide and other related crimes. Only territorial and subject-matter jurisdictions will be analysed as this research does emphasize personal jurisdiction.

2) Territorial Jurisdiction

Like other criminal tribunals and courts that are established as legal institutions to preside over grave atrocities committed against humanity such as Nuremberg Tribunal[32] and the International Criminal Tribunal for former Yugoslavia,[33] the ICTR has limited territorial jurisdiction. The territorial jurisdiction of the tribunal extended to the land and airspace including the territory of neighbouring States as regards serious violations of international humanitarian law committed by Rwandans. The statute made no provision for crimes committed in territorial waters that are related to the genocide within that period. I am not oblivious of the geography of Rwanda as a landlocked country but what about if a crime was committed in the territorial waters of a neighbouring State in respect of the genocide or a crime related to it by a Rwandan, how would it have been adjudicated when that jurisdiction is not provided for?

3) Subject matter jurisdiction

Subject matter jurisdiction is the power that is conferred on a court to hear certain cases. ICTR

[31] Elizabeth A. Martin, 2001, *Oxford Dictionary of Law*, 5th edition, Oxford University Press, England, p. 272.
[32] Established by the London Agreement of 8 August 1945, signed by the Government of the United Kingdom of Great Britain and Northern, the Government of the United States of America, the Provisional Government of the French Republic (as of then) and the Government of the Union of Soviet Socialist Republics acting in the interest of all the United Nations and their representatives duly authorized there to have concluded this agreement.
[33] The International Criminal Tribunal for former Yugoslavia was established by Resolution 827 (1993) and adopted by the United Nations Security Council at its 3217th meeting on 25 May 1993.

had jurisdiction over genocide [34], crimes against humanity, [35] and violations of Article 3 Common to the Geneva Conventions and of Additional Protocol II. Articles 2, 3 and 4 give a comprehensive list of crimes which could be tried by this tribunal. This will make a reflection on Jammeh's case in the next chapter.

2. The Gambia's Paradigm Shift in The Political Space from 1965 – 2017

To understand the present circumstances of The Gambia and the challenges that are being interrogated and examined by scholars and those curious to see its next phase of development or otherwise it is quite fitting to take a holistic and historical approach to this challenge which portrays enigmatic features of political underdevelopment for the last few decades. These shifts in the political space of the country have four phases after colonialism. These phases are the Pre-republican phase, the Jawara dispensation, the Jammeh era and the Barrow administration. Each of these phases has something unique to offer to the people of The Gambia.

It will be remiss of this research if an overview of the country's political history is left out. The Gambia is the smallest mainland country in Africa with a total area of approximately 11,000 squared kilometres. It is undeniably ranked, for many years, as one of the most fascinating and valuable British colonies with River Gambia as one of the finest and most navigable waterways in Africa. The British location of the island of Bathurst (Banjul) in 1886 is the beginning of Brirtish settlement and the widespread of their control over this Africa's smallest mainland country. In 1888, The Gambia became

[34] Article 2, The Statute of International Criminal Tribunal for Rwanda.

[35] *Ibid*, Article 3.

a colony separated from the administrative control of Sierra Leone. On 18 February 1965, the country regained its independence. [36] At independence, The Gambia was a multi-party democratic state with Sir Dawda K. Jawara as its Prime Minister. In 1970, The Gambia became a Republic with Sir Dawda K. Jawara as its first President. He was illegally ousted from governance through *a coup d' êtat* in 1994 with the suspension of the 1970 Constitution and the emergence of Armed Forces and Provisional Ruling Council (AFPRC) decrees led by Yahya Jammeh (referred to as Jammeh in this research). On January 16, 1997, civilian rule was restored with the 1997 Constitution by the new government of Jammeh. The Jammeh administration was dominated by gross human rights violations meted against opposition figures, journalists and Gambian dissidents living in the diaspora.[37] Aside from the politically dictatorial dispensation of Jammeh's regime, the country also suffered from the most stunted economic growth since independence.[38]

After president Adama Barrow came into power in January 2017, a justice programme was initiated to address some ill-governance practices that were tyrannies in Jammeh's governance. These welcomed approaches include the establishment of the Constitutional Review Commission (CRC), Truth Reconciliation and Reparation Commission (TRRC), the National Human Rights Commission (NHRC), promised security and civil service reforms, and enjoyment of fundamental rights and freedoms. This new phase surges in hope, zeal and zest

[36] Satang Nabaneh, 2017, *The Gambia: Commentary in Constitutions of the Countries of the World*, Oxford University Press, Oxford, p. 1-2.
[37] Essa Njie and Abdoulaye Saine, "Gambia's 'Billion Year' President; the end of the era and the ensuing of political impasse", *Journal of African Elections*, Vol. 18, No. 2, 2019, p. 2.
[38] Abdoulaye Saine, 2019, "The 'new Gambia' and Ghana collaboration" in *The Politics of Economic Reform in Ghana*, Routledge, p. 164.

into most Gambians because Jammeh's regime was animated by undemocratic practices and disregard for the rule of law. This long-awaited phase by citizens came to a halt as some of these initiatives could not become a reality. For example, the Gambia is still battling with the 1997 Constitution which deters good governance and the realization of rights and freedoms amongst the people. In explaining the failure of the 2020 Draft Constitution, Satang Nabaneh, a Gambian law scholar, has it that one way of assessing the reason the draft constitution was rejected is to look at who voted against it. Based on this, it is possible to hypothesize their decision. An analysis of the parliamentary debates points out that great concerns were those of the ruling party as it took issue with the limitations to the scope of executive power. It did not also accept that the presidential term limit would operate retroactively, and this provision would ensure the current term of President Barrow would be counted towards his term limit.[39]

a. Analysis of The Gambia's White Paper on TRRC Recommendations

On 25 May 2022, the government of The Gambia through its Ministry of Justice made a public release of its white paper on the TRRC recommendations on the alleged crimes committed by Jammeh and his accolades from 22 July 1994 to 17 January 2017. This report was released six months after these recommendations were submitted to the President by the Commission. It is quite instructive that of all the commission's recommendations only two are unaccepted by the government and none of these two

[39] Satang Nabaneh, "Attempts at Constitutional Reform in The Gambia: Whither the Draft Constitution?", *https://www.researchgate.net/publication/344526477_Attempts_at_Constitutional_Reform_in_The_Gambia_Whither_the_Draft_Constitution*, accessed on 27 October 2022.

directly involve the alleged principal perpetrator – Yahya Jammeh. [40] These rejected recommendations are associated with the issue of foreign judges, and Sanna Sabally's sought for amnesty.

First, the Commission recommended that:

> Justice Agim, Justice Fagbenle, Justice Wowo, Justice Paul, Justice Nkea, Justice Ikpala, Justice Amadi, Justice Abeke, Justice Kayodeh, Justice Alagbeh as they were then known and all judges who fall under the realms of 'mercenary judges' should be banned from holding any public office in The Gambia.[41]

In response to this, the government rejected it asserting that:

> The characterization of foreign judges as 'mercenary Judges' is unfair, especially without allowing them to be heard regarding the allegations made against them in line with the rule of natural justice. The Government is mindful of the need to maintain existing cordial bilateral relations it has with sister countries, some of which have provided and continue to provide The Gambia with needed technical assistance in critical sectors such as education, health, and the justice sectors".[42]

In my analysis, the government got it right that the principle of natural justice ought to be upheld and The Gambia also has an adversarial system of criminal justice in which the innocence of an accused is presumed until proved or pleaded guilty. The TRRC, tasked with the mandate of, inter alia, investigating human rights abuses committed by Jammeh, cannot in its quest to fulfil its mandate violate the rights of the people. It would be a travesty of justice and a violation of the maxim of equity [43] which upholds that he who comes to equity must come with

[40] Ministry of Justice (The Gambia), "Government White Paper on the Report of the Truth Reconciliation and Reparation Commission", *https://www.moj.gm/download-file/81d650ed-dc36-11ec-8f4f-025103a708b7*, accessed on 10 August 2022.
[41] Truth, Reconciliation and Reparations Commission, "TRRC recommendations on institutional hearing: Justice Sector entities (Vol. 15), paragraph 5", *https://www.justiceinfo.net/wp-content/uploads/Volume-15-Institutional-Hearings-Justice-Sector-Entities.pdf*, accessed on 10 August 2022.
[42] *Ibid*, paragraph 497.
[43] Section 7 (d) of the 1997 Constitution of The Gambia.

clean hands. The commission cannot, *suo moto*, condemn the judicial proceeding of these foreign judges (except Justice Emmanual Nkea, the Cameroonian, who was granted audience through proxy) when it has also failed to grant them an audience to be heard. The commission does not have the *suo moto* power.

Second, the Commission recommended the granting of Amnesty to Sanna Sabally on the basis that he served time in prison for false crimes levied against him. The Commission further noted that he gave full disclosure, showed remorse and initiated and participated in reconciliation with a perpetrator. The Commission finally noted that Sanna's crimes precede the Rome Statute and cannot be applied retroactively. The Commission recommended him for community service. The government, in its reaction to this recommendation, asserts that although Sanna Sabally might have made full disclosure and showed remorse, he is one of the individuals that bear the highest responsibility for gross human rights abuses and violations in the early days of Jammeh regime, particularly the extrajudicial killings of many soldiers on November 11, 1994. According to International law and United Nations Policy on Amnesties, amnesties are impermissible if they prevent the prosecution of individuals who are alleged to be responsible for war crimes, genocide, crimes against humanity or gross human rights violations including gender-specific violations. The bone of contention here is whether Sanna Sabally should be granted amnesty or prosecuted. He is alleged to have committed some of the crimes under which it is impermissible to grant the perpetrator an amnesty under international law. These crimes are crimes against humanity and gross

human rights violations. Crimes against humanity include murder, extermination, enslavement, deportation or forcible transfer of population, imprisonment or severe deprivation of physical liberty in violation of fundamental rules of international law, enforced disappearance of persons and torture. The TRRC hearing revealed that he is acutely aware of the Geneva Convention after discrediting it as a dead-letter law that nobody obeys during armed conflicts. [44] That is admission to his heinous crimes against November 11, 1994, attempted coupists.

b. Yahya Jammeh's Propensity for Extradition or Otherwise Under International Law

Following the ousting of the long-serving president of The Gambia, Yahya Jammeh, speculations start to emerge on whether he should be extradited to face the charges of crimes he is alleged to have committed. Extradition is an international process of a reciprocal agreement by which a State requests a wanted person from another State. [45] The doctrine of extraterritorial jurisdiction [46] in international law applies here and extradition is a key principle in this case.

1) *Sine Qua Non* of Extradition

The concept of extradition under international law is quite a delicate approach in bringing culprits to justice from another territorial jurisdiction. States need order and decorum within their territories, but they cannot realize this without the reciprocal

[44] Truth, Reconciliation, and Reparations Commission, "TRRC Report Volume 3 on November 11, 1994 Attempted Coup", *https://www.justiceinfo.net/wp-content/uploads/Volume-3-November-11th-1994-Coup-Attempt.pdf*, accessed on 27 October 2022.

[45] Conway W. Henderson, 2010, *Understanding International Law*, Blackwell publishing, Hoboken, p. 43.

[46] Extraterritorial jurisdictions are combined principles that grant a state the authority over crimes committed by individuals who are beyond borders of the concerned state.

assistance of other states. The issue of grant of extradition requires that the following conditions be met: (1) the crime for which the accused is to be extradited must be couched in law. In other words, it must be an act that is recognized as illegal; (2) there must be sufficient evidence to affirm that trial will occur speedily; [47] (3) double criminality test must be established to prove that the crime for which extradition is sought is illegal in both the requesting State and a requested State otherwise called the receiving State and sending State respectively; (4) the specialty rule applies demanding that one cannot be extradited for one crime and be prosecuted for another. That means one can only be tried on a crime for which they are extradited and nothing else; (5) the crime for which they are to be extradited must not be politically motivated. [48] Without prejudice to the generality of this principle, an international crime is not categorized under the political offence exceptions, although it may be committed due to politically motivating factors, it is a crime against an international legal authority; [49] (6) finally, an accused can only be extradited if the crime they are alleged to have committed is not punishable by the death penalty in the requesting state. This rule aims to abolish the death penalty in national laws.

Having established the six above litmus tests on extradition, it is quite fitting to dissect each of these principles concerning the case of Jammeh. The first principle

[47] Justice delayed is justice denied. This is a maxim of equity which forms an integral component of the laws of The Gambia (Section 7 (d)).

[48] Sibel Top, "Prosecuting political dissent: Discussing the relevance of the political offence exception in EU extradition law in light of the Catalan independence crisis", *New Journal of European Criminal Law,* Vol. 12, No. 2, 2021, p. 107.

[49] Article 11, International Convention on the Suppression and Punishment of the Crime of Apartheid (adopted 30 November 1973, entered into force 18 July 1976) 1015 UNTS 243.

requires that the crime for which Jammeh can be extradited must be recognized as illegal. As per TRRC recommendation, he is accused of, inter alia, torture, extrajudicial killing and human rights violations. [50] These acts are prohibited in both the laws of The Gambia and international law. The onus of proving the availability and efficacy of these factors lies mainly on the requesting state – in this case, The Gambia. If extradition fails, the principle of *aut dedere aut judicare* applies. The principle of *aut dedere aut judicare* will be examined later in this paper.

2) *Aut Dedere Aut Judicare*

Sovereign equality of all states is the core principle in international law as found in the United Nations Charter. [51] One of the main objectives of international criminal law is to punish offenders and render justice according to law hence the principle of *aut dedere aut judicare* (Latin for 'either extradite or prosecute'). The doctrine of *aut dedere aut punier* (Latin for 'either extradite or convict') was first propounded by Hugo Grotius in 1625. He wrote in his book *De jure belli ac pacis* [52] that kings should either extradite or punish offenders. The scope of this doctrine was limited to crimes which affect human society in some ways. [53] Grotius' submission was that there is a general obligation to extradite or punish as regards all offences by

[50] He is mentioned ad nauseum in the TRRC recommendations on these alleged crimes including the November 11, 1994 torture and killing of attempted coupists (para 61 of the white paper), the murder of Ousman Koro Ceesay, a Finance Minister of The Gambia on 24 June 1995 (para 100 of the white paper), and subverting the course of justice by concealing the cause of his death, the atrocities committed against student demonstrators in 2000 – namely: arbitrary arrests, unlawful detentions, tortures, assails causing harms and killing by reason of the orders and instructions he had given (para 137 of the white paper), the murder of Deyda Hydara and the disappearance of Chief Ebrima Manneh (para 188 of the white paper).

[51] United Nations Charter, Chapter 1, Art. 2.

[52] '*De jure belli ac pacis*' in Latin means the Law of war and peace, and that war is justifiable only if a State is faced with imminent danger and the use of force is both necessary and proportionate to the threat.

[53] Jovana Blešić, "*Aut Dedere Aut Judicare* in International and Domestic", *Paper*, University of Priština, Kosovska Mitrovica, June 2022.

which another state is particularly harmed. Now, with the emergence and realization of the adversarial system of criminal justice[54] which upholds the principle of natural justice, the word 'punish' in Grotius' *aut dedere aut punier* does not fit into the international standards and is, therefore, replaced with the word 'prosecute' hence the formulation of *aut dedere aut judicare.* This principle being an important principle of international law, it is quite sacrosanct to aver that it does not have a free-standing status in international law. That is, the obligation must be animated by certain unacceptable acts called international crimes.[55]

Under the Rome Statute, the subject matter jurisdiction of the court is clearly outlined[56] and it provides that the jurisdiction of the International Criminal Court (ICC) shall be limited to serious crimes that concern the international community. The Court shall have jurisdiction concerning the following crimes: Crime of genocide, War crimes, Crime of aggression, and Crimes against humanity. Genocide is an act committed with the intent to destroy, wholly or partially, a national, ethnical, racial or religious group, as such: killing members of the group, causing serious bodily harm or mental harm to members of a group, deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; imposing measures to prevent births within the group, forcibly transferring children of the group to another group.[57] At no time in

[54] Adversarial criminal justice is a system in which the innocence of a person is presumed until proved or has pleaded guilty. It is a rebuttable presumption.
[55] Stoyan Minkov Panov, 2016, *The Obligation Aut Dedere Aut Judicare ('Extradite or Prosecute'), in International Law: Scope, Content, Sources and Applicability of the Obligation 'Extradite or Prosecute*, PhD thesis, University of Birmingham, Birmingham.
[56] Rome Statute, Article 5.
[57] *Ibid*, Article 6.

Jammeh's regime is an act of genocide committed nor was there a time when the country wallowed in the pool of war therefore, there was never a time that his regime is found wanting for breach of the Geneva Conventions of 1949[58] and, or their Additional Protocols[59]. The Gambia ratified the Rome Statute on 28 June 2002 and got notified on 1 September 2002 [60] but the jurisdiction of the International Criminal Court is *ratione temporis.* [61] This means that this court has jurisdiction over crimes that are committed after the entry into force of the Rome Statute. But the principle of retroactivity is applicable under Article 12 (3) of Rome Statute.[62] Based on this, it is fitting to submit that even if this research later finds some acts committed during Jammeh's regime to be internationally recognized crimes under the Rome Statute, any atrocity committed between 22 July 1994 and 27 June 2002 can be within the purview of the ICC through invocation of Article 12 (3) of Rome Statute. It should also be worth noting that as a court of international law, the ICC cannot assume jurisdiction over every violation of human rights law. This is because while certain acts of human rights violations, however, simultaneously constitute acts of international crimes, a violation of

[58] Geneva Convention for the amelioration of the condition of the wounded and sick in armed forces in the field; Geneva Convention for the amelioration for the condition of wounded, sick and shipwrecked members of armed forces at sea; Geneva Convention relative to the treatment of prisoners of war; and Geneva Convention relative to the protection of civilian persons in time of war.

[59] Protocol Additional to the Geneva Conventions of 12 August 1949 and relating to the protection of victims of international armed conflicts (PROTOCOL I), of 8 June 1977; Protocol Additional to the Geneva Conventions of 12 August 1949 and relating to the protection of victims of non-international armed conflicts (PROTOCOL II), of 8 June 1977; and Protocol Additional to the Geneva Conventions of 12 August 1949 and relating to the adoption of an additional distinctive emblem (PROTOCOL III), of 8 December 2005.

[60] Ex Officio, "Signatory States of the Rome Statute", *https://treaties.un.org/pages/showDetails.aspx?objid=0800000280025774&clang=_en*, accessed on 10 July2022.

[61] Rome Statute, Article 11.

[62] Rome Statute, Article 24 section (1).

human rights as such cannot be the basis for an ICC intervention.[63]

Jammeh's regime is also accused of responsibility for the massacre of West African migrants in July 2005.[64] Also, murder as an element of crimes against humanity is not vague. It is recognized as a human rights violation [65] and an international crime. It is quite fitting to submit that all international crimes are human rights violations but not all human rights violations are tantamount to international crimes. From an international law perspective, murder and torture which are substantive elements of Crime against humanity are alleged to have been committed by Jammeh and his accolades under his responsibilities [66] as the Commander in Chief of The Gambia Armed Forces[67] as of then. These crimes can only be recognized as crimes against humanity 'if they are committed within the context of a widespread or systematic attack directed against a civilian population'[68].

3. The Domestic Legal Mechanism

After Jammeh had been ousted from power a new wave of democratic dispensation sets in with the establishment of, inter alia, the TRRC through the Truth Reconciliation and Reparations Commission Act 2017 by the government of Adama Barrow.

[63] Musa Sarjo, "The Jammeh Alleged Atrocities: Prospects of Prosecution by the International Criminal Court (ICC)", *Superlawgh*, Vol. 1, No. 1, 2021, p. 9.
[64] TRRC Recommendations on the Alleged Killing of the 58 West African Migrants (Vol. 12) 1 – 37, *https://www.justiceinfo.net/wp-content/uploads/Volume-12-The-Killing-of-West-African-Migrants-Enforced-Disappearances.pdf*, accessed on 27 October 2022.
[65] Article 6 of the International Covenant on Civil and Political Rights; Article 4 of African Charter on Human and Peoples' Rights.
[66] Article 28 of the Rome Statute provides that a military commander or person effectively acting as a military commander shall be criminally responsible for crimes within the jurisdiction of the Court committed by forces under his or her effective command and control, or effective authority and control as a result of his or her failure to exercise control properly over such forces.
[67] The President is empowered by section 188 of the Constitution of the Republic of The Gambia, 1997 as the Commander-in-Chief of the Armed Forces.
[68] Musa Sarjo, *Op.Cit.*, p. 15.

The Commission was established with the objective of:

> creating an impartial historical record of violations of human rights from July 1994 to January 2017, in order to promote healing and reconciliation, respond to the needs of the victims, address impunity, and prevent a repeat of the violation and abuses suffered by making recommendations for the establishment of appropriate preventive mechanisms including institutional and legal reforms; establish and make known the fate or whereabouts of disappeared victims; provide victims an opportunity to relate their own accounts of the violations and abuses suffered; and grant reparations to victims in appropriate cases.[69]

Since the conclusion of the TRRC hearings many people – both Gambians and non-Gambians[70] – have speculated on the possibility or otherwise of prosecuting Jammeh by dint of domestic legal mechanism. On his part as the Lead Counsel of the TRRC, Essa M'bye Faal revealed that about 250 murders happened in The Gambia during the Jammeh regime pointing out that justice should be served to the victims.[71] He further submits that Jammeh should be tried for crimes against humanity, murder and human rights abuses he is accused of during his 22-year regime.[72]

Going by alleged crimes committed by Jammeh, two cases stand out. The first case is The State v. Yankuba Touray[73] before the High Court. As per the Constitution of the Republic of The Gambia 1997, the High Court has a subject-matter jurisdiction to determine all civil and criminal proceedings and to interpret and enforce the fundamental rights

[69] Section 13, Truth, Reconciliation and reparations Commission Act 2017.
[70] The Chronicle, "Veteran Nigerian lawyer asks ICC to Open investigation against Jammeh government", *https://www.chronicle.gm/veteran-nigerian-lawyer-asks-icc-to-open-investigation-against-jammeh-government/*, accessed on 17 July 2022.
[71] Pa Modou Cham, "Faal demands Jammeh faces Justice as TRRC records 250 murders", *https://thepoint.gm/africa/gambia/headlines/faal-demands-jammeh-face-justice-as-trrc-records-250-murders*, accessed on 20 July 2022.
[72] Aisha Tamba, "Essa Faal: Jammeh should be tried for crimes against humanity", *https://www.gambia.dk/forums/topic.asp?TOPIC_ID=17617*, accessed on 17 July 2022.
[73] The State v. Yankuba Touray (2019) HC/365/19/CR/067/AO.

and freedoms enshrined in the constitution. [74] The accused was summoned to appear before the TRRC to testify on the alleged murder of one Ousman Koro Ceesay, a Finance Minister of the State at the time of his murder in 1995. The accused claimed that he is under constitutional immunity and therefore, cannot testify before the Commission. He went further to say that he does not recognize the legitimacy of the Commission and he would not proceed further. The Chairman of the Commission had no other option but to sign a warrant of the accused person's immediate arrest and hand him over forthwith to the police station with jurisdiction over the premises of the Commission.[75]

The State filed the case against Yankuba Touray at the High Court. After the learned judge keenly heard the submissions of both parties to the case, he determined, inter alia, whether the court should refer this case to the Supreme Court of The Gambia for interpretation on the issue of constitutional immunity that the accused claimed to have. The Supreme Court of The Gambia under section 127 (1) (a) has the jurisdiction to interpret and enforce any provision of the Constitution save any provisions of sections 18 to 33 or 36 (5) which relate to the bill of rights and freedom in the Constitution. According to this section of the constitution, the Supreme Court in the exercise of its subject-matter jurisdiction determined that the accused, Yankuba Touray, is not entitled to constitutional immunity from prosecution for the alleged murder of the deceased. [76] After the above determination by the Supreme Court, the High Court, under subsection (2) of section 127, continued its proceedings and found

[74] Sec 132 (1), Constitution of the Republic of The Gambia 1997.
[75] Mustapha K. Darboe, "Key junta member Touray puts Gambia's Truth Commission to the test", *https://www.justiceinfo.net/en/41777-key-junta-member-touray-puts-gambia-truth-commission-to-the-test.html*, accessed on 20 July 2022.
[76] *The State v. Yankuba Touray* SC CR/001/2020.

in its judgment the accused guilty as charged.

The second case is the case of The State v. Yankuba Badjie et al [The Nine NIA Case][77] for the murder of Solo Sandeng, a militant of a leading opposition party – the United Democratic Party – during Jammeh's regime who led a civil protest against electoral laws and demanded their reformation. The accused were prosecuted and convicted of murder. The State has up to this moment demonstrated its ability and willingness to prosecute the Jammeh-alleged crimes which are two vital ingredients necessary for domestic prosecution of crimes that are of international nature. The state's wilingness and ability is demonstrated in the prosecutions and convictions in the aboved cited cases of murder and this, therefore, brings to bare the issue of a hybrid court as a national mechanism.

a. A Prospect for a Hybrid Court

Perpetrators of crimes within a state's territory can be prosecuted by the same State if it has the willingness and ability or lethargy to do so genuinely. International Criminal Court is a court of complement.[78] This court does not have primary or concurrent jurisdiction over national issues, and it complements the domestic proceedings on international crimes.[79] The issue of The Gambia's willingness and ability to prosecute Jammeh for the crimes he is alleged to have committed during his regime is the main determinant of the International Criminal Court intervention. Attorney General and Minister for Justice maintains that "the government remains

[77] *The State v. Yankuba Badjie et al.* [The Nine NIA Case] Suit No. HC/068/17/CR/012/AO.
[78] Para. 10 of the Preamble and Art. 1 of the International Criminal Court.
[79] Hamilton, *et.al.*, "The Politicisation of Hybrid Courts: Observations from the Extraordinary Chambers in the Courts of Cambodia", *International Criminal Law Review*, Vol. 14, 2014, p. 115.

committed to serving justice to the past crimes. The evidence of this is revealed in the case of Yankuba Touray for undergoing prosecution and conviction after refusing to recognize the legitimacy of TRRC. The Ministry of Justice hired two consultants who are said to be working on a prosecution strategy that would provide a path to what well fits The Gambia. It will be a Gambian-led court which will likely be a hybrid court by partnering with the Economic Community of West African States.[80] The State has both the ability and willingness to prosecute Jammeh for his alleged crimes by dint of the new strategic approach advanced by the Ministry of Justice.

b. A Nexus Between ICTR and The Gambia's Case

Having elaborated on the ICTR and The Gambia's political experience, it is quite fitting to link The Gambia's case with the ICTR and contextualize it in order to make a logical conclusion. The two cases are not exactly the same in spite of the nexus that exists between them to certain extent. Whilst ICTR had the ability but lacked willingness to prosecute the cases as already stipulated in this research The Gambia has both the ability and willingness to prosecute these alleged crimes as this is revealed in the initiation of the transitional justice processes through TRRC and prosecutions and convictions of Yankuba Touray and Yankuba Badjie on two different cases of murder crimes relative to this study. There are obvious differences in background of the conflicts in these two countries which is the unwillingness of ICTR to prosecute but there is

[80] Mustapha K. Darboe, "Banjul working towards a hybrid Gambia-ECOWAS Court", *https://www.justiceinfo.net/en/102524-banjul-working-towards-hybrid-gambia-ecowas-court.html*, accessed on 5 August 2022.

also a nexus in both countries on the ability to prosecute these crimes and this is germane to this research because both are related to human rights violations. This boils down to jurisdictions and in both national and international law, the subject of jurisdiction is a sine qua non of any litigation.

The establishment of the ICTR is informed principally by the commission of international crimes and The Gambia's case is preoccupied with human rights violations. It is emphasized above that the alleged crimes can be tried in The Gambia, but international crimes are also human rights violations and therefore, the problem faced at ICTR is linked to those in The Gambia not in the context of international crimes but in the context of human rights violations. Both issues of ICTR and The Gambia's case are confined within the purview of Article 17 of Rome Statute. It is quite logical to submit that a tribunal can be compromised when it sits in the same country where the alleged crimes are committed due to the sociocultural settings of the country but unlike Rwanda which had experienced different conflicts, The Gambia is one of the countries in Africa with fewer conflicts and this is as a result of its ability and proclivity to choose a path of social cohesion against tyranny.

C. Conclusion

The applicability of ratione temporis or non-retroactive principle of International Criminal Court can only be possible through the application of Article 12 (3) of the Rome Statute. But since international tribunals do not have concurrent jurisdictions with national courts but are meant to complement national mechanisms, exhaustion of local remedies through national mechanisms – in this case a hybrid court

– is a good step in international litigation of crimes. The analysis avers that strengthening hybrid court with inclusivity of all the alleged crimes as a mean of judicial impartiality for both the victims and the accused will provide justice according to law.

An analysis of this research shows that both ICTR and The Gambia exhibit some differences cognizant of their socio-political differences. But it is also revealed here that both ICTR and The Gambia have the ability to prosecute, and this establishes a nexus between them as ability is quite sacrosanct in jurisdiction of a court or tribunal. While ICTR demonstrated unwillingness The Gambia's approach in the transitional justice process, the prosecution and convictions of perpetrators and its quest to establish a hybrid court to try Jammeh is an affirmation of both its ability and willingness to deal with this matter. Also, the subject matter between the ICTR and The Gambia are similar to certain extent. This is so, because the Jammeh-alleged crimes are mainly human rights violations and those of ICTR are international crimes. International crimes are human rights violations of serious nature and this, therefore, connects ICTR and the Jammeh-alleged crimes as human rights violations.

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