

TRANSITIONAL JUSTICE IN THE GAMBIA – FROM TRUTH SEEKING TO JUSTICE AT THE ANNUAL INTERNATIONAL RULE OF LAW LECTURE ORGANIZED BY THE BAR COUNCIL OF ENGLAND AND WALES

KEY NOTE LECTURE BY SALIEU TAAL, PRESIDENT OF THE GAMBIA BAR ASSOCIATION

Confronting the country's brutal past

Background

1. It is an honour and great pleasure for me and by extension, my country; The Gambia and the Gambia Bar Association to deliver this year's International Rule of Law Key note lecture at the behest of Bar Council on the topic:
Transitional Justice in The Gambia-From Truth Seeking to Justice.
2. I recognize the presence of Her Excellency Fatou Bensouda, Gambian High Commissioner to the United Kingdom. Mrs Bensouda is the former ICC Special Prosecutor and globally recognized leader in the field of International Criminal Law. She recently won the 2022 Magnisky prize for her outstanding work on behalf of women and human rights victims. I am really honoured by your presence Your Excellency together with your counsellor, Mr. Touray. I also recognize the presence of friends and family who have taken time off in this cold winter to listen to a boring lecture on transitional justice.
3. I am grateful to the Bar Council for inviting me to deliver this Lecture on a subject I am very passionate about. I chose the topic of Transitional Justice for the simple reason that my country, the Gambia from 2017 to date, transitioned from a dictatorship to a budding democracy. With humility, I am not an expert in transitional justice neither am I an expert in International Criminal Law but as fate would have or through sheer providence, as a patriotic citizen I initiated and co-founded a social movement called #GambiaHasDecided which played a catalytic role in helping uphold the rule of law and restore our democracy during the country's political impasse in 2016-2017. My fleeting exposure to social movements and activism ignited my interest and passion in being part of the process of restoring democracy, respect for rule of law and ensuring accountability in my country. So distinguished guests, and my learned friends present, that is my locus standi on the subject matter.

4. For purposes of this lecture, I am inclined to use the term Transitional Justice as defined by the United Nations as which broadly speaking “comprises of the full range of processes and mechanisms associated with a society's attempt to come to terms with a legacy of large-scale past abuses, in order to ensure. accountability, serve justice and achieve reconciliation.” The Gambia embarked on its Transitional Justice journey in the aftermath of a democratic change of government from a 22 year dictatorship to a democracy informed by a collective resolve to address the legacy of historic human rights abuses and violations.

5. The Gambia, commonly known as the Smiling Coast of Africa of Africa, is the host country of the African Commission on Human and Peoples’ Rights in recognition of the leading role played by the country under the leadership of our first President Sir Dawda Kairaba Jawara in adopting the African Charter on Human and Peoples’ Rights which is also referred to as the Banjul Charter, named after the capital city of the Gambia. The Gambia also hosts the Africa Centre for Democracy and Human Rights Studies. The Gambia under Sir Dawda was the champion of Human Rights in Africa and I dare say, a leading voice for the rule of law within the Commonwealth. The Gambia under Sir Dawda had an enviable record for the respect for Human Rights and the Rule of Law.

JAMMEH ERA GAMBIA

6. In July 1994, the democratically elected government of Sir Dawda Kairaba Jawara was overthrown by a group of young soldiers who referred to themselves as “Soldiers with a difference” and masqueraded the July 1994 Coup d’état as the “July 22nd Revolution as Gambians came to discover. The Military Junta was led by a young Lieutenant called Yayha Jammeh, suspended the constitution and ruled the country by decree until 1997. In 1997 a new constitution was introduced and the Junta leader Jammeh was elected as President marking a formal return to democratic rule. The Gambia’s trajectory as the beacon of hope for good governance, respect for

the Rule of Law and Human Rights on the continent was, however, reversed dramatically by the 22 year quasi-military democratic regime led by Jammeh.

7. Jammeh era Gambia is undoubtedly, the darkest period in the history of The Gambia to date. Yayha Jammeh simply replaced his military attire with civilian clothing having been elected in 1996 but ruled the country with an iron-fist. He systematically silenced Gambians from all sections of the society by the use of brute force against anyone who dared have a dissenting view or criticise his Government. The freedom of expression was the first casualty, he ensured that no one had a voice within The Gambia, be it the journalists, the citizenry, civil society activists, lawyers, the political class. He didn't stop at just suppressing the media freedom and expression, He brutalised, tortured, killed, prosecuted and arbitrarily detained journalists, outspoken citizens with impunity.
8. Gambia's dictator over time destroyed all the governance institutions of the state and repurposed the state institutions as instruments to perpetuate himself in power. The police, the army, national intelligence agency, the judiciary, the justice ministry, the National Assembly, the local media and even some of the religious leaders were under the absolute control of one person, Yayha Jammeh. He exercised absolute, unfettered power and not even the supreme law of the land, the constitution could restrain him. He ensured that the 1997 Constitution was amended over 52 times to consolidate his power and self perpetuate. He was on record that he could rule Gambia for 1000 years. At some point the idea of crowning as King was mooted and this was supported by some chiefs and National Assembly members. Believe it or not a march was organised by his loyalists calling for the abolition of elections and for his coronation as King.
9. Under his watch, his rubber stamp National Assembly promulgated draconian laws and amended existing laws at his whim, laws which he used to repress

and violate the rights of the citizenry through his apparatus, the Ministry of Justice, the Police and the national intelligence agency.

10. Just as King Louis XVI declared “L’etat c’est moi” Yahya Jammeh was also the State during his regime and indeed made the pronouncement publicly that he owned the country and that anyone who failed to follow his rules or directives will be sent to prison which he called his “Five Star Hotel” .

11. His presidential directives were implemented and given the force of law. Gambia became a pariah state and was isolated from the international community. He even declared Gambia an Islamic state contrary to express provisions of the constitution. Every Gambian who lived in the Gambia during that era lived under the climate of fear and terror. No one was safe in the Gambia and as State security forces were used as weapon and instrument of violence at the behest of the former President. Jammeh controlled the narrative and operated a parallel state machinery shrouded in secrecy. Many Gambians and the world got to know or confirm the gruesome human violations of the Jammeh regime after the democratic change of Government which led to the establishment of a Truth, Reconciliation and Reparations Commission. This was the nightmare we lived under in the Gambia between 1994 to 2017.

The New Democratic Dispensation

12. In December 2016, a coalition of political parties under the leadership of H.E President Adama Barrow defeated former President Yahya Jammeh which ushered in a new government on the promise of restoring good governance and respect for the rule of law. The Gambia decided to turn to a new chapter aptly captured by journalist Saikou Jammeh “ **The sun is smiling on Gambia not because Jammeh has left and Barrow is coming, but because Gambia has decided Never Again** ”.

13. In line with the legitimate expectation of the Gambian people, there was a consensus on the need to embark on a transition for the country to come to terms with the violations that took place under the previous regime. In 2017, The Gambia resolved to formulate a National Transitional Justice Programme to help restore democratic governance in the country.

14. In this regard the government through the Ministry of Justice and partners organised a National Stakeholders Conference to create a forum for consultation and dialogue as a prelude to Transitional Justice programme that would strengthen Rule of Law and protection of human rights in The Gambia; ensure full democratic participation in national affairs; provide a solid foundation for good governance; and establish strong governance institutions including a Human Rights Commission.

15. A key outcome/recommendation of the conference was the resolve to set up a Truth, Reconciliation and Reparations Commission (TRRC) and a mechanism for prosecution after the truth-seeking process. In 2017, a TRRC Act was established by an Act of Parliament to ***“investigate and establish an impartial historical record of the nature, causes and extent of violations and abuses of human rights committed during the period July 1994 to January 2017 and to consider the granting of reparations to victims and for connected matters.”***¹

16. In addition, the TRRC was mandated by the Act to: 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. Thus, the mandate of the TRRC extended beyond the documentation of atrocities and charged the Commission with the responsibility of identifying and recommending for prosecution of persons who bear the greatest responsibility for human rights violations and abuses. A unique feature of Gambia’s Truth Commission was

¹ See Long title of the Truth Reconciliation and Reparations Act, 2017.

that its mandate included the power to grant reparations to victims in appropriate cases.

17. The TRRC was launched October 2018 and commenced hearings on the 7th of January 2019. The Commission's mandate was to examine the alleged human rights violations that occurred during the 22 year rule of former President Yahya Jammeh. The proceedings were divided into 17 different thematic areas and a total of 393 witnesses testified including former government insiders such as ministers, police and intelligence chiefs, and members of the "Junglars," a notorious military hit squad that took its orders directly from Jammeh, in addition to experts and numerous victims. The TRRC also received over 2600 statements from January 2019 to May 2021. The TRRC in line with its governing act submitted a report to the President in November 25th 2021 and the President through the Minister of Justice published the 17-volume report on the 24th of December.

18. The Gambia's TRRC has been hailed as a great success and model in terms of its transparent, participatory and inclusive approach. The TRRC Commission was built on political and national consensus following a nationwide consultation. From the onset, the composition of the commission reflected the country's ethnic, regional, gender and religious diversity. The commission was conferred independent status by its enabling statute and discharged its functions with autonomy from the executive. The Commission was vested with quasi-judicial power with expansive powers to issue witnesses summons and subpoenas. Failure to comply with the commission's witness summons or subpoena amongst others was considered a contempt of court actionable at the High Court. These powers to a large extent, though unconventional for Truth Commissions enhanced their ability to elicit truthful testimonies from witnesses.

19. The Gambia's truth seeking process is indeed a milestone in the country's transitional justice journey. The public broadcast of the commission hearings in all local languages with victims and perpetrators giving live testimonies kept Gambians clued on their TV's, radios or telephones. Many Gambians were

not aware of the extent of the atrocities by the former regime due to their clandestine modus operandi and control of the local media. The compelling story telling of victims and perpetrators was very powerful and shocking to many Gambians who could never imagine that such evil could be committed by their fellow Gambians some of whom were neighbours, friends and even family. The Truth Commission gave victims/survivors of Jammeh era violations the opportunity and platform to share their painful ordeals in the public space without any fear of reprisal after 22 years. This was aptly captured by words of the Chair of the TRRC, the venerable Dr. Lamin Cisse I quote “ **In the faces of these witnesses, as in the dilemma of all Gambians, lies the agony of a bewildered people who failed for 22 years to confront evil. NEVER AGAIN**”

20. The slogan Never Again encapsulates the collective voice and resolve of Gambians to never again allow the country to slide into such an unprecedented level of abuse of power, violence and culture of impunity endured under the rule of Yayha Jammeh.

21. The TRRC final report made a series of recommendations ranging from constitutional and legislative changes, institutional reforms, security sector reform, reparation for victims, memorialisation and prosecution the persons who bear the greatest responsibility for the human rights violations and abuses that occurred in the 22 year period.

22. I shall now focus on the recommendations for prosecution and the next steps towards attaining justice and accountability.

FROM TRUTH SEEKING TO JUSTICE

23. Whilst the TRRC act focused on the truth seeking process and reparations as a means of fostering reconciliation, the underlying demand for justice and accountability was a constant clamour of the victims who organised themselves together with NGO allies into a coalition called Jammeh to Justice, calling for prosecution of perpetrators starting with the former

President. Indeed, one of the primary objectives of the TRRC was to address the impunity and avoid its recurrence [Never Again]. ***It goes without saying that there cannot be a meaningful truth seeking process ,reconciliation or healing in the absence of addressing impunity and the question of justice and accountability.***

This was eloquently articulated by the late Kofi Annan former United Nations Secretary General, in his statement following a conviction by the Rwanda war crimes tribunal which reads “***For there can be no healing without peace, there can be no peace without justice and there can be no justice without respect for human rights and respect for the rule of law***”². It followed that the trajectory following the truth seeking process would naturally flow towards ensuring accountability and justice through prosecutions of perpetrators. ***How else can we speak of Never Again or speak of impunity if those responsible for serious human violations are not held accountable?***

24. The Commission in its report identified torture, enforced disappearances extra-judicial killings, sexual violence, rape, arbitrary detention, and other forms of inhumane treatments crimes were perpetrated by Jammeh, former members of his Junta and his specialized paramilitary killing squad known as the “Junglars”, as well as some members of the notorious National Intelligence Agency (NIA) and other security personnel under his direction and control. In total, seventy (70) individuals including the Jammeh were recommended for prosecution by the TRRC. Jammeh and his co-perpetrators are said to be responsible for the deaths of over 250 people. The real toll is yet to confirmed and may well exceed this number.

25. The commission revealed the prevalence and routine use of torture by security personal sanctioned by the former president. We heard testimonies of torture squads visiting the prisons in the middle of the night to torture

² Delivered by Kofi Annan on 2nd of September 1998 following the ICTR judgment on the crime of Genocide being the first ever judgment on Genocide. OHCHR L/2896

prisoners at the behest of the former President. The culture of TORTURE was institutionalised under the Jammeh regime, TORTURE was normalised and TORTURE was the order of the day. Many Gambians and non-Gambians held under the custody of the National Intelligence or prison were severely & routinely tortured and subject to degrading inhumane treatment.

26. The Commission found the former President and his enablers responsible for the abduction, enforced disappearance of many Gambians and non-Gambians without explanation and some ended up being executed on the instructions of the former President. A sergeant gave testimony about two Gambian born Americans on a business trip to The Gambia who mysteriously disappeared without trace but were actually abducted by security operatives under the control of Jammeh. Not only were they killed but he ordered them to be cut in pieces like meat.

27. Jammeh didn't even spare his own family. His own uncle, Harouna Jammeh was arrested and kept in custody for a number of months at the National intelligence Agency then executed and dumped in a well. Several of his close relatives also suffered the same fate.

28. The Commission revealed the systemic and widespread perpetration of sexual violence during the 22 year rule of the former President. The Commission heard heart breaking testimonies of young helpless girls who were raped and sexually violated by the former president and some senior security officers and Government with impunity. Sexual violence was used to systematically repress, punish and humiliate both men and women at the highest level and by Jammeh's security apparatus. [Toufa Jallow testimony and two other unarmed victims testified]

29. One of the most gruesome crimes committed was the massacre of over 59 economic migrants from different West African States from Ghana, Togo, Senegal, Ivory Coast and Nigeria who were bound for Europe after their boat landed in the Gambia. They were rounded up, detained over a period 10 days

and executed by the “Junglars” and other security personnel on the orders of the former President then dumped in wells around the border with Senegal. One of the migrants from Ghana, named Martin Kyere miraculously escaped and survived ; and lived to tell narrate this gruesome incident at the truth commission. Several soldiers who participated in the massacre, confessed to the gruesome killing of the migrants on the pretext they were told by their superiors that the migrants were mercenaries. A sergeant in his public testimony at the TRRC recounted that the the alleged leader of the operation, told the men that “the order from ... Jammeh is that they[referring to the migrants] are all to be executed.” **Over 59 people extra judicially executed in the middle of night and dumped in wells.**

30. The list goes on and on, Victims and doctors described how Jammeh personally ran a sham treatment program that forced HIV-positive Gambians to give up their medicine and put themselves under Jammeh’s care. Witnesses spoke of “witch hunts” in which hundreds of people were arbitrarily detained, humiliated, and ostracized.
31. Jammeh and other members of his Government were also implicated in the killing of 14 demonstrators and a red cross volunteer in the The April 10 – 11 Student demonstrations. The commission heard testimony that Jammeh gave the order for the killing of April 10-11 demonstrators and found him [together with some senior members of his Government including the former Vice President, Armed Forces Chief of Staff and Minister of Interior] primarily responsible for the deaths of the students and other violations.
32. The Commission concluded that the crimes committed by the former President and some of his co-perpetrators amount to crimes against humanity defined under the Rome Statute.³
33. The findings of the Commission to prosecute perpetrators of human rights violations is in line with the expectations of the majority of Gambians who

³ See Vol 1. Part B Compendium Recommendations for Prosecution Article 3 and 4

watched the Truth Commission proceedings. According to a poll by AfroBarometer, a reputable pollster, 73% of Gambians wanted perpetrators of human rights violations under the Jammeh regime prosecuted.

34. The recommendations to prosecute the former leader and 69 other perpetrators was accepted by the Government of the Gambia in its White Paper six months after the publication of the report. The Government accepted that **‘Yayha Jammeh and some his “junglars can be tried for crimes against humanity under a “Special Judicial Framework to be set up for the prosecution of offences emanating from the Commission’s report”**.⁴

35. The Government in its White Paper also expressed its intention to set up a Special Prosecution Office with a mandate to carry out investigations and prosecutions as laid out in the White Paper.

36. We are happy to note that the Government has declared that the special judicial framework envisaged to try the perpetrators whose crimes amount to international crimes is a hybrid court mechanism which is in line with the recommendations of the Gambia Bar Association.

WHY HYBRID COURT, Challenges and Opportunities

37. Even before the TRRC published its report, The Gambia Bar Association began convening a series of stakeholder meetings which included victims , Ministry of Justice, the Judiciary, Local and International Experts and Civil Society to examine the most appropriate accountability mechanism in anticipation of the TRRC report.

⁴ Para 380 and pg 104 of White Paper.

38. Our stakeholder engagement and review of the Gambia's legal framework highlighted the inadequacy of the domestic laws and courts to prosecute international crimes in line with the TRRC report. The Gambia does not have domestic legislation to prosecute International Crimes such as Torture, Enforced Disappearances, Crimes Against Humanity. These crimes are not specifically provided for under Gambian law although one can argue that they form part of international customary law which is part of Gambian law settled by decision of the Supreme Court of The Gambia in **State vs Yankuba Touray**. However, it would be challenging to use international customary law as a basis of prosecuting these crimes effectively.
39. In addition, our domestic laws and court system does not have a role for or recognize victims as parties. The role of victims is seen as central to the prosecution of international crimes and victim participation is a very important element in the transitional justice process. So our domestic courts are clearly not suitable to try perpetrators who committed international crimes therefore ruling out a purely domestic option.
40. The Government of the Gambia has announced its decision to establish a hybrid court within the Gambian judicial system vested with the jurisdiction to prosecute international crimes such as torture and the option of holding sittings outside the Gambia based on the exigency of the case. This option is informed by government's desire to have as much local ownership as possible and at the same time benefit from internationalisation of the process to allow for the application international law, procedures and standards. The Government to achieve this objective has opted to partner with the ECONOMIC COMMUNITY OF WEST AFRICAN STATES (ECOWAS). In fact , our Minister of Justice, Hon Dawda Jallow has met with the ECOWAS President in Abuja at the beginning of November and to formally kick start the engagement of ECOWAS as Gambia's hybrid partner.
41. The proposed hybrid court would be similar to the Extraordinary African Chambers that was established in Senegal backed by the African Union

which successfully tried and convicted Hissene Habre, former President of Chad.

42. The hybrid model is certainly the logical way to go as it offers the possibility of conferring **Personal, Temporal** and **Subject matter jurisdiction** required to try international crimes through an adhoc mechanism tailored to suit our local peculiarities and internationalised to the extent required. The partnership with ECOWAS will be a historic instance of the regional body taking a lead role in the prosecution of international crimes in West Africa. It will also bring the court closer to the victims. The option will allow for the possibility of having sittings outside The Gambia if there is a palpable security risk i.e the prosecution of Jammeh who is currently in exile in Equatorial Guinea. The opportunity to address impunity by an internationalised domestic mechanism with the regional backing of ECOWAS will enjoy more legitimacy and will send a strong signal that the subregion is serious about fighting against impunity and ensuring accountability & justice in the subregion.

43. The hybrid court model proposed will address the potential challenges posed by the intersection of domestic and international law. How do you address the potential conflict between self-serving domestic laws enacted to shield the leaders from responsibility? How do you address the question of retroactivity or legality? The Gambia's Constitution bars the enactment of retroactive constitutional laws and also purports to grant immunity to the former President & the Junta Members making no exception for international crimes.

44. A full discourse of the above question is not possible within the time allocated but it suffice to say at the juncture, that the hybrid court mechanism is precisely designed to address such challenges as the court for all intents and purposes would have an International Character juridically and governed by international law. The Constitutive Treaty and enabling local legislation establishing the court should clearly spell out the applicable law and procedure of the court. It is equally important to ensure there is clarity in the relationship between the hybrid court and the domestic system. It may be necessary to make constitutional/legislative amendments to create a synergy

between the Hybrid and domestic system. This will help avert potential collateral and protracted legal challenges of the process. There is jurisprudence under international and domestic law which support the view that hybrid court mechanism once conferred international law jurisdiction will not be subject to the limits of domestic law. Sierra Leone and Senegal are examples.

45. As always it is always important to bear in mind the impact of political processes on the successful implementation of the recommendations for prosecutions. The role of the local legislature is very critical as there would be a need to ratify the Treaty between Gambia and ECOWAS. Enabling legislation would need to be enacted to establish/embed the hybrid court within the domestic legal system as envisaged.

46. We have learnt from the experience of many Transitional Justice initiatives that the hardest and most challenging part is the implementation of recommendations to prosecute perpetrators which is usually within the purview of the state [Executive & National Assembly] and inevitably the subject of political considerations.

47. In The Gambia we are fortunate, so far to enjoy the political will of the Executive to implement the recommendation to prosecute demonstrated by the Minister of Justice's unequivocal pronouncements and actions/steps taken in this regard. The Gambia Bar Association continues to work closely and support the Ministry of Justice as it takes a lead in the process.

48. Notwithstanding the current dispensation and efforts towards prosecuting Yayha Jammeh and his enablers, there will be resistance from his loyalists and political challenges. However, it is my ardent belief that all these challenges and political challenges are surmountable if the current political will and commitment does not dissipate over time. Political will at the highest level must be demonstrated publicly. For this reason, It is important that the

President of the Republic, His Excellency Adama Barrow champions the implementation of the TRRC recommendation for justice and accountability as an integral part of the country's commitment to the restoration of the rule of law and respect for the human rights.

49. As Gambians, we have learnt from the failed attempt to introduce a new constitution which enjoyed massive public support but did not get the required votes in Parliament to go beyond the first reading. The lesson learnt amongst other things is that the support and buy in of domestic legislature (politicians) is critical for the success or failure for any major reform in the country. For this reason, The Gambia Bar Association proposes a constructive engagement of the National Assembly [Parliament] to apprise them of the importance of implementing the TRRC recommendations as part of the country's commitment to consolidate our democracy and come to terms with our brutal past. The discourse on the TRRC should be elevated beyond and above partisan interests and politics.

50. The Victims [Survivors] have been waiting for Justice for a long time and Justice must happen, sooner than later. Whilst the process for establishing a hybrid court is ongoing we are happy to learn of Government's intention to establish a special division within the high court under the judiciary with enhanced capacity to try perpetrators whose offences have not reached the higher threshold of international crimes.

51. For this purpose the establishment of the Special Prosecutor's office envisaged is a critical step to start the process of identifying the perpetrators to be prosecuted and for what crimes based after thorough assessment and further investigations as may be required. Bearing in mind that the evidential threshold required for prosecution in a court to establish criminal liability is higher than in truth commission or tribunal of fact.

Conclusion

52. As country we have come far in terms of peacefully removing a dictator through the ballot box and embarking on a truth seeking journey which exposed the horrendous crimes committed by the former President and his co-perpetrators.

53. In 2013, Gambia withdrew from the Commonwealth. In 2016, Gambia announced its withdrawal from the ICC. Jammeh was a pariah even within ECOWAS, the sub-regional bloc. His distaste for human rights, democratic values, international human rights organisations and the UN was conspicuous. Today Gambia is at cusp of establishing a model hybrid court that will set a precedent in International Criminal Justice and the fight against impunity in Africa. The Gambia a small country is regaining its name as a champion of human rights. Who would have imagined The Gambia bringing a case at the ICJ against Myanmar to protect the minority Rohingya from genocide and setting a precedent in International Law ?

54. The Gambia is consolidating its democratic gains anchored on the respect for the rule of law. I am honoured to stand here to represent many unsung Gambian heroes who have contributed to our journey to justice. Never Again is not or should not be mere hollow words but rather a commitment and collective resolve to prevent recurrence of the brutality and systematic wrongs that were inflicted on the people for 22 years. I dedicate this lecture to my compatriots who on December 1, 2016 voted for change rejected impunity. **#GambiaHasDecided #NeverAgain**

