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THE TRANSITIONAL JUSTICE IMPERATIVE IN PROTECTING HUMAN RIGHTS IN THE NEW GAMBIA

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1 Introduction

Only recently has the world come to discover just how destructive the 22-year dictatorship of former President Yaya Jammeh was and the debilitating effect it had on The Gambian people, its institutions and the country's economic development.¹ Recently, the Justice Minister of the Gambia was quoted saying,

[t]he damage former President Jammeh has caused to government institutions, public resources and state-owned enterprises is of such serious nature that the

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1 See generally K Sharife & M Anderson 'The great Gambia heist: The inner circle that helped Jammeh steal a billion Dollar' *Organized Crime and Corruption Reporting Project* 27 March 2019 <https://www.occrp.org/en/greatgambiaheist/the-inner-circle-that-helped-jammeh-steal-a-billion-dollars> (accessed 11 June 2019); A John 'Gambia minister to recommend charges' *Associated Press* 13 September 2019 <https://apnews.com/e343810558604f61bf038038763c8abe> (accessed 11 June 2019); 'UN Human Rights Committee examines the state of civil and political rights in the Gambia in absence of report' *UN Press Release* 6 July 2018; 'UN Expert on Transitional Justice to review progress in Gambia' *UN Press Release* 15 November 2019, stating that: 'During Jammeh's rule, the country was plagued by disregard for the rule of law, infringements of human rights and civil liberties, and the existence of a repressive State apparatus accused of committing gross human rights violations against anyone considered to be critical of or threatening to the regime. Arbitrary detentions, torture, enforced disappearances and extrajudicial executions were routine' <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=25301&LangID=E> (accessed 11 June 2019); Human Rights Council 'Report of the UN Working Group on Enforced or Involuntary Disappearances on its mission to the Gambia' A/HRC/39/46/Add.1 (27 August 2018) finding in para 16 that: 'Generally, the period of Mr Jammeh's government was marked by gross human rights violations. Military officers, political opponents, human rights activists and journalists were often reportedly arbitrarily arrested, tortured, killed or disappeared'.

government ought to introduce a motion before the National Assembly for charges to be brought against him for theft, economic crimes and corruption.²

Two decades of Jammeh's reign had effects that ended up crippling the country on multiple levels. For example, the security sector was transformed into a repressive arm of government that failed to protect the citizenry and was instead used as a tool to suppress dissent and stamp out all elements of the opposition.³ The independence and efficiency of the justice sector became seriously compromised, respect for fundamental human rights was systematically overlooked, a culture of secrecy and impunity became firmly entrenched and perpetuated by the State apparatus.⁴ At the international level, the infamous leader contributed to the geopolitical isolation of the country, withdrawing from The Commonwealth in 2013, threatening to withdraw from the Rome Statute, amongst other retrogressive actions that contributed to harming the country's chances at economic development and integration.⁵ One of the consequences of his policies was stunted growth and lack of foreign investment. For example, the Gambia now ranks 174 out of 189 countries on the UN Human Development Index.⁶

All of this changed on 1 December 2016, when Gambians went to the polls to vote for a new President and break with its troubled past.

- 2 'Jammeh Commission recommends criminal charges' *Gambiana* 13 September 2019 <https://gambiana.com/janneh-commission-recommends-criminal-charges-against-jammeh-for-theft-corruption-and-economic-crimes/> (accessed 6 June 2019); A John 'Inquiry into Gambia's ex-President submits report' *Star Tribune* 29 March 2019 <http://www.startribune.com/inquiry-into-gambia-s-ex-president-submits-findings-report/507848472/> (accessed 6 June 2019).
- 3 'UN Human Rights Committee examines the state of civil and political rights in the Gambia in absence of report' (n 1); see also, '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) finding that 'the National Intelligence Agency and the Gambian police consistently practiced torture on detainees, using methods such as severe beatings, electric shocks, asphyxiation, burning, rape, water boarding and simulated burial' paras 25, 32.
- 4 UN Human Rights Council 'UN Working Group on Enforced or Involuntary Disappearances on its Mission to the Gambia' A/HRC/39/46/Add.1 (27 August 2018) paras 16, 18, 19, 21 and 22.
- 5 J Campbell 'Gambia leaves the Commonwealth' *Council on Foreign Relations* 7 October 2013 <https://www.cfr.org/blog/gambia-leaves-commonwealth> (accessed 11 June 2019).
- 6 UNDP 'Human development indices and indicators: 2018 statistical update' http://hdr.undp.org/sites/all/themes/hdr_theme/country-notes/GMB.pdf (accessed 10 June 2019); The Gambia's GDP is estimated at 0.9 per cent according to the Commonwealth statistics, The Commonwealth 'Our member countries: The Gambia' <http://thecommonwealth.org/our-member-countries/gambia> (accessed 10 June 2019).

Since Mr Barrow was chosen as the new leader of a coalition government, the country was thrown full force into a political transition that has been unprecedented in the region. As soon as Mr Barrow was sworn into office, the government vigorously launched a series of actions to expedite the much-anticipated transition to democratic governance and re-establish a culture of human rights. This included measures to address the legacy of past violations and the fast-tracking of long overdue reforms. Despite a crippled economy, the year was characterised by public euphoria and demonstrative steps to reverse the old order.

This chapter highlights the role and relevance of the transitional justice process, which is understood as comprising a

‘full range of processes and mechanisms associated with a society’s attempts to come to terms with a legacy of large-scale past abuses, in order to ensure accountability, serve justice and achieve reconciliation’⁷

to the overall goal of re-establishing a new democratic and constitutional order in The Gambia, one that is grounded in sound rule of law institutions and a well-established human rights culture. The chapter elaborates on the complex journey to pursue truth, justice and reparations for victims of mass violations, and discusses the key considerations that The Gambia should be mindful of as it charts its path towards achieving post-conflict justice. Finally, it discusses lessons learned from other transitional processes with an emphasis on proposing strategies to ensure sustainability and long-term impact beyond the life of the transition period. To this end, the chapter is divided into several subsections, including an elaboration on the transitional justice pillars, an explanation of the historical context leading to the current transition, the key considerations for a comprehensive transitional justice process in The Gambia

2 The Gambian context: Background

One of the first of many initiatives by the new government starting in 2017 was the organisation of a National Stakeholder’s Conference on Justice and Human Rights held in May 2017.⁸ The timing and topic of the conference alone reflects the government’s commitment from the

7 UNSG ‘The rule of law and transitional justice in conflict and post-conflict societies’ S/2004/616 (23 August 2004) <https://www.un.org/ruleoflaw/files/2004%20report.pdf> (accessed 15 June 2019).

8 ‘Gambia: Using guarantees of non-recurrence to prevent past atrocities’ Speech given at National Stakeholder’s Conference on Justice and Human Rights (May 2017) <https://www.hrw.org/news/2017/05/25/gambia-using-guarantees-non-recurrence-prevent-past-atrocities#> (accessed 5 May 2019).

onset to introducing important institutional and legal reforms aimed at addressing past injustices and building stronger, democratic institutions. The key recommendations from the conference have been followed by various government's initiatives ever since. These include the creation of a specialised transitional justice mechanism; the investigation of past human rights violations; and the need for a new constitutional order.⁹ The proposal to develop a National Comprehensive Strategy on Transitional Justice (NCSTJ) was floated and has since taken shape with government in the lead.¹⁰ The NCSTJ, once adopted, is expected to provide a roadmap for navigating the transition, especially with respect to addressing impunity for past crimes, achieving truth seeking and reconciliation, and institutional reforms.¹¹

Following the National Conference, came a string of positive initiatives that have placed The Gambia on a steady path towards a comprehensive transition. This includes the establishment of a Truth Reconciliation and Reparations Commission (TRRC) in December 2017 and the adoption of the Act establishing the National Human Rights Commission.¹² Further, the government established the Commission of Inquiry into the financial activities of public bodies, enterprises and offices as regards their dealings with former President Yaya Jammeh and Connected Matters. This was followed by the establishment of a Constitutional Review Commission to produce a New Draft Constitution; the state's declaration that it would reverse Jammeh's decision to withdraw from the International Criminal Court (ICC),¹³ and the state's ratification of the African Court Protocol and article 34(6) Declaration, allowing individuals to file human rights complaints before the African Court on Human and Peoples' Rights.¹⁴ The government has since demonstrated commitment to spearhead the transitional justice process by launching the TRRC and the elaboration of a national transitional justice policy laying out a strategy for a multi-pronged approach to justice and security sector reform.

9 National Stakeholder's Conference on Justice and Human Rights Banjul, The Gambia, 23-25 May 2017.

10 UN 'The PBF in the Gambia' https://www.un.org/peacebuilding/sites/www.un.org.peacebuilding/files/documents/gambia_two-pager.pdf (accessed 5 May 2019).

11 See National Comprehensive Strategy on Transitional Justice 2020.

12 US State Department 'The Gambia 2017 Human Rights Report' (2017) 2.

13 Amnesty International 'Barrow: Progress in first 100 days of Barrow government requires major reform to break with brutal past' (27 April 2017) <https://www.amnesty.org/en/latest/news/2017/04/gambia-progress-in-first-100-days-of-barrow-government-requires-major-reform-to-break-with-brutal-past/> (accessed 5 May 2019).

14 African Court on Human and Peoples' Rights 'The Gambia becomes the ninth country to allow NGOs and Individuals to access the African Court directly' (23 November 2018) <https://tinyurl.com/2cmryb28> (accessed 5 May 2019).

While many of the initiatives have taken off, with the Draft Constitution already released for public consultation, the establishment of the National Human Rights Commission, and the TRRC having concluded its first year of operations, much still remains to see these measures through and appreciate how they will effectively contribute to the overall transition in The Gambia. After two decades of executive control over the justice sector, there is need for comprehensive legal and institutional reforms including in the justice sector and security sector.¹⁵ Comprehensive transitional justice implies a complex package of mechanisms and measures that require careful planning, sufficient resources and sustained political will to achieve the overall results.¹⁶ There is a sense of urgency amongst victims to see truth, justice and reparations delivered. On this point, the UN affirms that 'peace and justice should be promoted as mutually reinforcing imperatives and the perception that they are at odds should be countered'.¹⁷ Fulfilling this national objective remains a critical element to achieving the new constitutional order.

While the government has prioritised truth-seeking as a primary transitional justice measure, Gambians launched an urgent appeal for justice and accountability for gross human rights violations, crimes against humanity and war crimes dating back to the inauguration of the new government.¹⁸ A national survey on the public's perception and expectations for justice for human rights violations is telling, whereby a reported seven out of ten Gambians (70 per cent) say perpetrators of crimes and human-rights abuses during Jammeh's regime should be tried in court, irrespective of the work of the TRRC.¹⁹ In the aftermath of the violence, victims have begun to mobilise and vocalise their expectations for justice and reparations, which has not been matched by government action as yet.²⁰ A recently launched civil society campaign known as the

15 'Combined Report on the African Charter on Human and Peoples' Rights for the Period 1994 and 2018 and Initial Report under the Protocol to the African Charter on the Rights and Women in Africa, The Gambia State Report to ACHPR' (August 2018) http://www.achpr.org/files/sessions/64th_os/state-reports/2nd-1994-2018/gambia_state_report_1st_eng.pdf (accessed 6 May 2019).

16 UNSG (n 7).

17 UN 'Guidance note of the Secretary General: United Nations approach to transitional justice' (2010) https://www.un.org/ruleoflaw/files/TJ_Guidance_Note_March_2010FINAL.pdf (accessed 6 May 2019).

18 SM Jaw 'Gambians expect the Truth Reconciliation and Reparations Commission to heal the nation but expect human rights violators prosecuted' (2018) 249 *Afrobarometer Dispatch* 6 https://afrobarometer.org/sites/default/files/publications/Dispatches/ab_r7_dispatchno249_gambians_want_national_healing_with_justice.pdf (accessed 7 May 2019).

19 As above.

20 Human Rights Council (n 4) para 24.

Jammeh to Justice (J2J) campaign has been one of the key forces behind the push for justice for Jammeh and his associates; however criminal justice for human rights perpetrators remains elusive for the moment.²¹

At this juncture, the question of how best to achieve these goals, including the identification of effective strategies and mechanisms to achieve them, and how to ensure sustainability of the proposed measures are key issues that need to be addressed in order for the transition in the Gambia to be responsive to the justice needs of the people and to contribute to long-term institution building.²² As Gambia embarks on a process to break from the violence and impunity of the past regime and create new institutions that embrace the rule of law and human rights, it must consider and see how best to apply the key pillars of transitional justice.

3 Transitional justice pillars and principles

Transitional justice is defined as

the full range of processes and mechanisms associated with a society's attempt to come to terms with a legacy of large-scale past abuses, in order to ensure accountability, serve justice and achieve reconciliation.²³

In practice, it may include both judicial and non-judicial processes or mechanisms, which may be of a retributive, restorative and/or reparative nature and may include a combination of criminal prosecutions, truth-seeking initiatives, the administration of reparations, and the adoption of institutional reforms to prevent recurrence of abuse.²⁴ These have become known as the pillars of transitional justice, the foundational elements upon which any comprehensive and holistic process is built.²⁵

The very concept of transitional justice is firmly grounded in principles of international human rights law, notably the right to truth, justice and reparations.²⁶ The right to truth is understood as every person having

21 'UN Human Rights Committee examines the state of civil and political rights in the Gambia in absence of report' (n 1).

22 UNSG Report (n 7).

23 UN (n 17).

24 As above.

25 As above.

26 OHCHR 'Study on the right to truth' E/CN.4/2006/91 (8 February 2006) para 5.

the inalienable right to know the truth about past events concerning the perpetration of heinous crimes and about the circumstances and reasons that led, through massive or systematic violations, to the perpetration of those crimes. Full and effective exercise of the right to the truth provides a vital safeguard against the recurrence of violations.²⁷

According to the UN Principles on Impunity, states have a duty to protect the right defined as,

every people has the inalienable right to know the truth about past events concerning the perpetration of heinous crimes and about the circumstances and reasons that led, through massive or systematic violations, to the perpetration of those crimes. Full and effective exercise of the right to the truth provides a vital safeguard against the recurrence of violations.²⁸

It emerged as a recognised right when addressing impunity for enforced disappearances and has since become a fundamental principle associated with gross violations of human rights due to the fact that family members and next-of-kin are left without information about what happened to their loved ones, yet have a right to know what happened and to locate their whereabouts.²⁹ In such circumstances, the state has an obligation to ensure the pursuit of the full and complete truth as to the events that transpired, their specific circumstances, and who participated in them, including knowing the circumstances in which the violations took place, as well as the reasons for them.³⁰

The right to justice is defined as ‘an ideal of accountability and fairness in the protection and vindication of rights and the prevention and punishment of wrongs’.³¹ Justice encompasses the rights of the accused, the interests of victims and the well-being of society. Further, the right implies a duty of states to undertake prompt, thorough, independent and

27 UN Commission on Human Rights ‘Report of the independent expert to update the set of principles to combat impunity, Diane Orentlicher: Addendum: Updated set of principles for the protection and promotion of human rights through action to combat impunity’ E/CN.4/2005/102/Add.1 (8 February 2005) Principle 2.

28 As above.

29 UN Commission on Human Rights (n 27) Principle 2 (every person has the inalienable right to know the truth about past events concerning the perpetration of heinous crimes and about the circumstances and reasons that led, through massive or systematic violations, to the perpetration of those crimes); Principle 4 (victims and their families have the imprescriptible right to know the truth about the circumstances in which violations took place and, in the event of death or disappearance, the victims’ fate).

30 OHCHR (n 26) paras 3-4.

31 NCSTJ (n 11).

impartial investigations of violations of human rights and international humanitarian law and take appropriate (criminal justice) measures against the perpetrators, by ensuring that those responsible for serious crimes under international law are prosecuted, tried and duly punished.³² According to the UN Principles on Impunity, while the decision to prosecute lies primarily with the state, victims and their families should be able to institute proceedings, particularly as *parties civiles* or as persons conducting private prosecutions in states where these procedures are recognised.³³

Restorative justice is often the most meaningful of the transitional justice pillars to victims because it seeks to restore the dignity to victims and repair the harm suffered, as much as possible.³⁴ The right to a remedy or reparation for the breach of human rights is a fundamental principle of international law recognised in numerous treaty texts and affirmed by a range of international courts.³⁵ Reparation shall render justice by removing or redressing the consequences of the wrongful acts and by preventing and deterring violations. In practice, these obligations translate to specific actions to: take appropriate measures to prevent violations; investigate violations effectively, promptly, thoroughly and impartially and take action against the perpetrators; provide victims of human rights violations with effective access to justice; and provide effective remedies and reparation to victims.³⁶ On this point, the Human Rights Committee stated in its General Comment 31 that ‘without reparation to individuals

32 UN (n 17).

33 Above.

34 D Shelton *Remedies in international human rights law* (1999) 15.

35 See UN General Assembly, International Covenant on Civil and Political Rights, 16 December 1966, United Nations, Treaty Series, vol 999, p 171, art 2(3), 9(5) and 14(6); UN General Assembly, International Convention on the Elimination of All Forms of Racial Discrimination, 21 December 1965, United Nations, Treaty Series, vol 660, p 195, art 6; UN General Assembly, Convention on the Rights of the Child, 20 November 1989, United Nations, Treaty Series, vol 1577, p 3, art 39; UN General Assembly, Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 10 December 1984, United Nations, Treaty Series, vol 1465, p 85, art 14; and UN General Assembly, Rome Statute of the International Criminal Court (last amended 2010), 17 July 1998, art 75. Also, the OAU, African Charter on Human and Peoples’ Rights (Banjul Charter), 27 June 1981, CAB/LEG/67/3 rev. 5, 21 ILM 58 (1982), arts 5(5), 13 and 41; and the Organization of American States (OAS), American Convention on Human Rights, ‘Pact of San Jose’, Costa Rica, 22 November 1969, arts 25, 63(1) and 68; UN Commission on Human Rights, Declaration on the Protection of All Persons from Enforced Disappearance, 28 February 1992, E/CN.4/RES/1992/29, art 19.

36 See Principles 3 and 11 of the UN ‘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’ GA Resolution 60/147 (16 December 2005).

whose Covenant rights have been violated, the obligation to provide effective remedy is not discharged'.³⁷ Reparations for serious and massive violations come in multiple forms to address both the pecuniary and non-pecuniary damages to individuals or groups of victims.³⁸

Finally, guarantees of non-repetition focus on the adoption of preventative measures that have been informed by past practice and injustices. It encompasses the duty of states to ensure that victims do not again have to endure violations of their rights. To achieve this end, 'States must undertake institutional reforms and other measures necessary to ensure respect for the rule of law, foster and sustain a culture of respect for human rights, and restore or establish public trust in government institutions'.³⁹ The measures may include legal, judicial, institutional or policy reforms that reinforce the rule of law and advance the protection of human rights. This can also include the vetting of security and judicial sectors; civilian control of the military/security forces; the repeal of laws that conflict with the state's human rights obligations; measures to ensure an independent and impartial judiciary able to effectively apply international standards of due process; and human rights training of security, justice, and public sector officials.⁴⁰

Over the past 20 years, specialised mechanisms have been developed to implement three of the pillars; for example, truth commissions (right to truth); *ad hoc* war crimes courts or special chambers within national judiciaries (right to justice); and administrative reparations programmes or court-ordered reparations (right to remedy).⁴¹ Finally, guarantees of non-repetition are diverse measures not centralised in their implementation, although the government can designate a follow-up body to implement recommendations from a truth commission, many of which would constitute measures of prevention of future violence.

Integral to transitional justice programming are key principles that ensure a process compliant with international standards, consultative, participatory, and relevant to the local context. The UN refers to them as

37 UN Human Rights Committee (HRC), General Comment 31: The nature of the general legal obligation imposed on States Parties to the Covenant, 26 May 2004, UN Doc CCPR/C/21/Rev.1/Add.13 (2004) 6.

38 UN (n 36).

39 Un (n 17).

40 As above.

41 Transitional justice processes have occurred across the globe and taken on various forms to confront the legacy of past violations: South Africa, Liberia, Sierra Leone, Kenya, Rwanda, Uganda, Guatemala, Peru, Argentina, Chile, Haiti, East Timor, and Cambodia to name a few.

‘Guiding Principles, which relate to the implementation of key concepts’.⁴² Of the ten principles, a few can be highlighted for their particular relevance to The Gambia. First, national consultations at the onset feature as a primary instrument to determine which mechanisms and strategies will be best suited for the post-conflict/authoritarian society.⁴³ National consultations allow for the collection of opinions and appreciation of the interests of the public, victims, and key stakeholders on issues of truth and justice. It also allows for the appreciation of the local context, all of which can inform the selection and design of relevant and responsive transitional justice mechanisms.

Closely linked to this is victim participation or victim centeredness. Involving victims in the design and implementation of transitional justice processes is an especially important element that should be included at every stage of the process, from design phase to implementation phase. While transitional justice processes are often led by government, the absence of victims setting the agenda, priorities and objectives may render the process less meaningful or responsive to those it is meant to serve.

As to the recommended approach, there is an emphasis on ‘comprehensiveness’ of measures, which may include a combination of restorative, retributive or reparative mechanisms.⁴⁴ The biggest challenge faced by every country undergoing a transition is determining the best approach (restorative, retributive) and the specific mechanisms to achieve this. Increasingly, post-conflict societies are encouraged to employ multiple strategies and mechanisms to adopt a holistic approach to tackle past injustices, seek truth and deliver reparations.⁴⁵ It is in the implementation that brings the most challenges as satisfying victims especially after mass atrocities generates a panoply of needs that must be carefully analysed and appreciated.

Finally, the coordination of transitional justice programs with broader rule of law initiatives and existing justice institutions is important to ensure mutually reinforcing measures and sustainability of the transitional justice gains. Especially in the Gambia, with several initiatives taking place simultaneously, it is particularly important to ensure complementarity between the TRRC and the other institutions and processes. In particular, how the TRRC findings and recommendations

42 UN (n 16).

43 UN (n 36) Principle 6.

44 NCSTJ (n 11).

45 Multiple UN statements, reports by special procedures.

will inform the Constitutional review process and the new Constitution is an area for further interrogation.

4 Confronting The Gambia's past – Establishing the what, when and how

In the case of The Gambia, combatting impunity and adopting measures to prevent non-recurrence of violence figure as priorities dating back to the National Stakeholder's Conference in 2017 and were reaffirmed in the Attorney-General's remarks at the beginning of 2020.⁴⁶ Unlike countries such as Sierra Leone and Liberia where atrocities were perpetrated in the context of armed conflict, Jammeh's reign was characterised by state-sponsored violence against civilians, much of which was committed behind closed doors and undocumented. Even where some violations have become well-known, the climate of fear and exclusive control by the President prevented the pursuit of any accountability measures to date.⁴⁷ On this point, a recent survey found that more than 28 per cent of Gambians say they or a family member suffered at least one form of human-rights violation under the regime, including arbitrary arrest or detention without trial (14 per cent); torture, rape, and other brutalities by agents of the state (14 per cent); and, intimidation by state agents (13 per cent).⁴⁸ Notwithstanding, little information is available on the number and types of violations that took place, the structural violence that characterised the two-decade era, or the trends, practices, actors and root causes associated with the violations.⁴⁹

In this context, one of the very first and important steps for The Gambia as it charts a way forward to confront its past is the systematic and comprehensive documentation of violations. Establishing an official record of violations committed and the actors involved is essential for any of the other transitional justice mechanisms to take off and key to a sound transitional justice process. The exercise should strive to identify the number and type of violations that took place, the nature, gravity, and impact of the violations; identification of victims and perpetrators involved; statistics on the number of violations that occurred, as well as figures on the number of women, men and child victims.⁵⁰ Such data can

46 Statement by the Attorney-General at the Legal Year 2020.

47 Human Rights Watch 'World Report 2017: The Gambia' (2017) <https://www.hrw.org/world-report/2017/country-chapters/gambia> (accessed 10 May 2019); Human Rights Council (n 1).

48 Jaw (n 18) 2.

49 Human Rights Council (n 1) para 20.

50 As in the case of Uganda, one of the first steps in the process was to document human

better inform the subsequent development of the mandate and work of a truth commission and provide guidance for the eventual prosecution of perpetrators. Such an exercise, by a state institution, represents the key to official acknowledgment of the wrongdoing by the state and serves as a basis for the government's commitment to pursue justice and reparations for the victims. While documentation is usually part of the mandate of a truth-seeking body, in the absence thereof, other actors such as national human rights institutions, where they exist and where they operate independently, can play an important role in the official documentation of state-sponsored violence.⁵¹

Alternatively, victims themselves and civil society organisations can play a role in the exercise of documenting human rights violations. Indeed, this principle of victim-centeredness was echoed by the UN Special Rapporteur on the Promotion of Truth, Justice, Reparation and Guarantees of Non-Repitition when he called on Gambian authorities to place victims at the centre of the transitional justice process.⁵² In practice, this would require consultation with victims and increasing their involvement in the processes that affect them.

Uganda is a prime example of how multiple documentation efforts, through both formal and informal processes, have been employed over the years, each one reinforcing the other and contributing to a wide, comprehensive coverage of the conflict.⁵³ In the absence of a formal mechanism taking on a documentation exercise, victims and civil society are well placed to take on this role, given their links to victim communities and a sense of trust with victim associations or civil society, allowing them greater access to information about what took place.⁵⁴ Guatemala

rights violations. See 'Government to document human rights abuses from 1987-2007, Uganda' *The Monitor* 4 October 2015.

51 As above.

52 'UN Rights Expert calls for victim centered approach to transitional justice' *UN Press Release* 27 November 2019.

53 Over the years, numerous studies, surveys, and related human rights documentation projects have been conducted by non-governmental organisations and victim associations such as Justice and Reconciliation Project, Refugee Law Project, the Uganda Victims Foundation, HURINET, AYINET as well as by international organisations such as the UN Office of the High Commissioner for Human Rights, UNWomen, *Avocats sans Frontières* and International Centre for Transitional Justice, to name a few.

54 Kathy Ogle 'Guatemala's REMHI Project: Memory Form Below' *Nacla* 25 September 2007 <https://nacla.org/article/guatemala%E2%80%99s-remhi-project-memory-form-below>. The REMHI is an unprecedented effort led by the Catholic Church to document the atrocities committed during Guatemala's 36-year civil war. The Archdiocese launched the project in 1995 in an effort to support the work of any truth

is a good example of this with the Catholic-led REMHI report that unearthed comprehensive information about human rights abuses during the country's civil war.⁵⁵ In the case of Uganda, even before the National Human Rights Commission decided to take on a human rights documentation project in 2012, victims themselves and civil society led numerous initiatives to document violence, victim experiences and expectations for truth, justice and reparations associated with the conflict in Northern Uganda.⁵⁶ Victim associations were mobilised and trained to conduct assessments on the violence and its impact on victim communities, while civil society complemented these efforts and offered important analysis and recommendations on the trends, practices and causes of conflict.⁵⁷ These initiatives naturally led to more active victim participation in the transitional justice process unfolding in the country, as well as to a more robust articulation of their expectations for truth and reparative justice.⁵⁸

Similarly, in The Gambia, opportunities for the same participation of victims in the transitional justice process are emerging. In 2017, the Victims Centre embarked on a human rights documentation exercise, which is designed to inform the transitional justice process going forward and can be instrumental in contributing to the mandate of the TRRC and or identify events and actors that may require additional investigation for criminal justice purposes.⁵⁹ With the recent discovery of sexual violence cases through the TRRC hearings, the need to document violations against women and appreciate the gender element of the state-sponsored

commission that might emerge from the Peace Accords. Church leaders were correct in assuming that an official truth commission would be limited in mandate and time, and they wanted to add to the data bank available to such a commission.

55 As above.

56 Redress 'Uganda victims foundation transitional justice working paper' (2014) <https://redress.org/publication/uganda-victims-foundation-transitional-justice-working-paper-2014/> (accessed 10 May 2019); *Avocats sans Frontières* & Justice and Reconciliation Project 'Report on victims' views on the draft transitional Justice policy for Uganda: Acholi Sub-Region' (5 June 2013) https://www.asf.be/wp-content/uploads/2013/06/ASF_UG_TJPolicy_VictimsConsultation.pdf (accessed 13 July 2022); Refugee Law Project 'Whose Justice: Perceptions of Uganda's Amnesty Act 2000' Refugee Law Project Working Paper 15 (2005) <https://www.refugeelawproject.org/resources/working-papers/80-whose-justice-perceptions-of-uganda-s-amnesty-act-2000-the-potential-for-conflict-resolution-and-long-term-reconciliation> (accessed 5 May 2019).

57 Redress (n 56).

58 'AYINET 'National war victims conference Kampala, Uganda' (2014) <http://africanyouthinitiative.org/national-war-victims-conference/> (accessed 5 May 2019).

59 Interview with Gambia Centre for Victims of Human Rights Violations representative, July 2019.

violence is important to develop specially tailored reparations measures to address the harm suffered by these women, as well as programming to prevent the recurrence of violations. The information can also reveal answers with respect to gross human rights violations such as forced disappearances, extrajudicial killings, torture, arbitrary detention as well as the trends and practices employed by the state.⁶⁰ The exercise also has the potential to explore the impact of the violence on victims, which can inform the need for reparations based on the nature of harm suffered.⁶¹ As part of the documentation process, conflict mapping is also very useful for laying a foundation for the transitional justice process. It allows for the identification of locations where key incidents occurred and provides a clearer picture of where violations were concentrated, and the actors involved.⁶² This is particularly relevant for eventual criminal prosecutions.

While documentation of human rights violations and war crimes is often the first foundational step to launching a transitional justice process, equally important as a preliminary matter, is ensuring popular participation in the process. National consultations constitute a critical step in the planning process. Consultations have taken place in The Gambia and have subsequently informed the establishment of the TRRC and the development of the National Transitional Justice Strategy.⁶³ However, a popular survey conducted in mid-2018 revealed the population's strong interest in criminal accountability of perpetrators. According to an Afrobarometer survey, most citizens say that irrespective of the TRRC's work, perpetrators should be tried in court.⁶⁴ The findings of the study are quite revealing, and they include:⁶⁵

- More than one in four Gambians (28%) say they or a family member suffered at least one form of human-rights abuse under the former regime;

60 Redress (n 56).

61 *Avocats sans Frontières* 'A beggar has no choice: Victim's perspectives on a reparations framework for Uganda' (12 July 2017) https://asf.be/wp-content/uploads/2017/07/ASF_UG_ABeggarhasnoChoice_EN_201704.pdf (accessed 5 May 2019).

62 For more information on conflict mapping see Paul Wehr 'Conflict mapping' *Beyond Intractability* September 2006 https://www.beyondintractability.org/essay/conflict_mapping (accessed 6 May 2019).

63 Human Rights Council (n 1) para 41; Key recommendations from the national consultations in The Gambia included the need for proper public vetting of proposed candidates for the truth, reconciliation and reparations commission; adequate security measures for victims and potential witnesses; adequate reparations for victims, amongst others.

64 As above.

65 As above.

- Two-thirds (68%) of Gambians say perpetrators of crimes and human-rights abuses during the former regime should be tried in court, irrespective of the work of the TRRC;
- Half (51%) of Gambians say the former president should face prosecution for crimes and human-rights abuses.

While consultations have confirmed a strong interest to pursue criminal accountability, steps towards these measures have not yet materialised.⁶⁶ It is expected that once the TRRC concludes its work that it will make recommendations for prosecution. This has still been met with some criticism, especially where known perpetrators having confessed to their involvement in heinous crimes have been released.⁶⁷ Frustration with what some seem to perceive as 'delayed justice' has led to some private individuals filing cases on their own to satisfy their need for justice and accountability. One example of this is when Sarjo Cham, brother of former MP Mahawa Cham, supported by the organisation, ANEKED, filed a complaint before the ECOWAS Court of Justice. The complaint claims that The Gambian Government is responsible for violations against Mahawa Cham as relate to his enforced disappearance and the violations suffered by his family as a consequence of the forced disappearance.⁶⁸ It is important to note that enforced disappearance does not feature as a crime under domestic law as yet, and therefore, one of the areas where the TRRC could play an important role is with respect to its investigations, findings and proclamations on the practice of enforced disappearance including the recommendation of measures to prevent the commission of these violations in the future.

In the case of The Gambia, issue specific consultations can help in framing transitional justice interventions going forward. One example can be borrowed from Uganda whereby national consultations were spearheaded by the government on specific transitional justice issues including criminal justice; amnesties; truth-seeking; traditional justice; and reparations.⁶⁹ The findings of these surveys informed the development of

66 Attorney-General's Chambers & Ministry of Justice 'Statement by Minister of Justice and Attorney General on TRRC Junglers' 8 June 2019 <https://www.moj.gm/news/3fe9f748-c8b1-11e9-b2ca-02e599c15748> (accessed 5 May 2019).

67 'The Gambia: Three former hit men released after admission at reconciliation commission' *DW* <https://www.dw.com/en/the-gambia-three-former-hitmen-released-after-admission-at-reconciliation-commission/a-49920372> (accessed 5 May 2019).

68 'Mahawa Cham's brother takes government to ECOWAS Court' *Standard* 9 December 2019 <https://standard.gm/mahawa-chams-brother-takes-govt-to-ecowas-court/> (accessed 5 May 2019).

69 See The Justice and Law & Order Sector (JLOS) <https://www.jlos.go.ug/index.php/about-jlos/priority-focus-areas/access-to-justice-civil/itemlist/category/20-priority->

an overall Transitional Justice Policy for the country,⁷⁰ but also the design of individual interventions and mechanisms as well as the inclusion of cross-cutting issues such as attention to vulnerable groups, women, children and others affected by the conflict. These consultations were complemented by numerous surveys and studies undertaken by non-governmental organisations working closely with war-affected communities, victims' groups, and international organisations, which related victim perceptions and expectations for truth, justice and reparations.⁷¹ These studies proved to be instrumental in appreciating the lived experience of war affected populations and special groups that the national consultations could not capture or address in detail.

5 Key considerations for the transitional justice process in The Gambia

The Gambia formally launched its transitional justice process with the establishment of the Truth Reconciliation and Reparations Commission in December 2017, just one year after President Barrow was voted into office.⁷² This was preceded by government-led public consultations in the same year and benchmarking visits to South Africa and Sierra Leone to learn from other experiences in the region.⁷³ Alongside this initiative, victims launched a movement to push for justice for former President Jammeh, which is still ongoing.⁷⁴ Meanwhile, efforts to strengthen the justice sector as a whole and achieve fundamental change through a constitutional reform process are also underway.⁷⁵ While the government has demonstrated its commitment to the democratic transition through the adoption of multiple initiatives, the question is what role they play (individually and together) in the larger transitional justice process and in meeting victims' thirst for justice and reparations.

focus-areas#:~:text=Transitional%20Justice%20features%20as%20a,human%20rights%20promotion%20and%20accountability (accessed 10 June 2019).

70 Uganda's National Transitional Justice Policy was adopted on 17 June 2019

71 See *Avocats sans Frontières* (n 61) for examples.

72 Truth, Reconciliation and Reparations Commission Act 2017 <https://www.lawhubgambia.com/truth-reconciliation-reparations-commission> (accessed 5 May 2019).

73 This was supported through the UN Peacebuilding Fund with complimentary funding from UNDP.

74 As building.

75 President Barrow has initiated reforms within the justice sector since 2017; See Human Rights Committee (n 3) where the Committee welcomed information regarding the overhauling of the judiciary system, particularly the abolition of the system of contract judges and the reconstitution of the Judicial Service Commission.

To guide the process, the government, through the Ministry of Justice and with the assistance of the United Nations, initiated a process in 2018 to develop a National Transitional Justice Strategy.⁷⁶ The Strategy is expected to serve as the blueprint for implementing the various transitional justice interventions in a coordinated fashion. The strategy's mission is to

know the truth about past human rights violations, to deliver justice focusing on those bearing the biggest responsibilities for human rights violations, provide reparation to victims and establish measures to ensure that violations will not be repeated, including institutional reforms.⁷⁷

The Strategy is important as it sets out the key principles that will guide the process. It provides for the core pillars of transitional justice, embracing the right to truth, justice and reparations and places emphasis on guarantees of non-repetition. While the strategy provides an overall blueprint, a number of issues still remain to be addressed. In particular, which mechanisms will be employed to implement the strategy and how they will operate or complement each other is still unclear. The following analysis intends to highlight some of these issues for further reflection.

5.1 Truth seeking

The TRRC is unique in its overarching aim to pursue truth-seeking, reconciliation and reparations within one mandate – all significant endeavors that, while related, will require different approaches and interventions. As per the TRRC Act of 2017, the key objectives of the TRRC include:⁷⁸

- to investigate human rights violations and abuses committed during the 22 years of former president Jammeh's authoritarian rule;
- to respond to the needs of victims;
- to address impunity;
- to prevent a repeat of violations by making recommendations for the establishment of appropriate preventative mechanisms;
- to establish and make known the whereabouts of the disappeared;
- to provide victims an opportunity to relate their own accounts of the violations suffered; and

76 Interview with UNDP representative, July 2019.

77 77TRRC Act (n 72).

78 Part III of the TRRC Act of 2017.

- to grant reparations to victims in appropriate cases.

The TRRC is the first institutional mechanism designed with such a specialised mandate to investigate serious and massive violations during the previous regime and to address longstanding impunity.⁷⁹ If it succeeds in meeting all of its objectives within the two-year mandate, it has the potential to be a veritable catalyst for fundamental change in the country by unearthing the dark past, recognising victims and paving the way for a new order. Much of this will depend on the government's sustained commitment to the process, its willingness to endorse the TRRC recommendations as well as its support for implementing the recommendations of the TRRC. Indeed, the value of the Commission's work will ultimately be determined by its ability to achieve the expected results, the accuracy and quality of the data collected, and the qualitative analysis applied to reveal the root causes, trends, and practices as well as the nature and consequences of the structural violence that characterised the period.

The TRRC mandate is very broad and can benefit from further clarity. As to the investigation of human rights violations, while a number of human rights violations are listed in its mandate, there is no mention of violations of social and economic rights or economic crimes. This is relevant for various reasons: The Gambia is one of the most underdeveloped countries on the continent; while it has not been a country in conflict, its GDP and HDI is equivalent to countries that have been mired in armed conflict. Not enough is understood about the effects of the Jammeh regime, including its policies and practices, on the enjoyment of social and economic rights in The Gambia. Historically, the social and economic dimension of a conflict has been overlooked in the literature and by practitioners, with a focus instead on civil and political rights; yet increasingly the United Nations and transitional justice scholars have highlighted the need to more closely interrogate and address accountability for social and economic violations perpetrated during periods of conflict or prolonged dictatorships.⁸⁰ This

79 TRRC has a specialised mandate to 'investigate and establish an impartial record of the nature, causes and extent of violations and abuses of human rights committed during the period of July 1994 and January 2017'.

80 A scan of preeminent authors on transitional justice (Teitel, Kritz, Hayner & Shelton) has focused on civil and political violations perpetrated by state actors, which has been documented by the UN and others. See also OHCHR publication on Transitional Justice and Social Economic and Cultural Rights (2014) and F Haldermann & R Kouassi 'Transitional justice without economic, social and cultural rights?' in E Reidel, G Giacca & C Golay (eds) *Economic, social and cultural rights in international law: Contemporary issues and challenges* (2014); SB 'Making economic social and cultural rights a reality in the 'New Gambia': Lessons from the 1997 Constitution' *Law Hub Gambia* 6 December 2018 <https://www.lawhubgambia.com/lawhub-net/newgambia->

is best captured in the UN Secretary General's Guidance Note on the UN's approach to transitional justice, emphasising the need to 'ensure transitional justice processes and mechanisms take account of the root causes of conflict and repressive rule, and address violations of all rights, including economic, social and cultural rights'.⁸¹ On this same point, the UN has found that, 'the failure to realize economic, social and cultural rights as well as violations of these rights can be – and usually are – part of the root causes of conflict'.

Furthermore, the actions and omissions by states and non-state actors during conflict can also amount to violations of economic, social, and cultural rights, and often have a particular impact on the most vulnerable. On this premise, the TRRC can fill an important gap by investigating the incidence, trends, causes and consequences of Jammeh's regime, policies, and practices on the enjoyment of social and economic rights. Notably, findings from the now concluded Jammeh Commission confirm the misappropriation of funds that should have benefitted the Gambian people; on this point, the government admitted that, 'disproportionate amounts of resources were wasted, misappropriated and diverted during the 22 years of former President Jammeh's government'.⁸² This marks an important opportunity for The Gambia to fully interrogate and address the social and economic violations perpetrated by the Jammeh regime and to identify accountability measures, reparations and long-term reforms needed to prevent the recurrence of these violations. Finally, this process can inform the current constitutional reform agenda in the country highlighting the need for expanded ESC protection in the new Constitution.

Similarly, the lack of reference to economic crimes is potentially a missed opportunity for The Gambia given the amount of egregious violations of a financial and economic nature unearthed by the Commission of Inquiry into financial activities of public bodies, enterprises and offices as regards their dealings with former President Yaya Jammeh and connected matters commonly referred to as the 'Jammeh Commission'.⁸³ While that commission focused on financial and economic crimes perpetrated principally by former President Jammeh, many of these crimes were made possible through the control and manipulation of state institutions,

economic-social-cultural-rights (accessed 5 May 2019).

81 UNSG (n 17).

82 John (n 1).

83 MK Darboe 'Gambian Commission probes ex-President's spending' *Anadolu Agency* 30 August 2017 <https://www.aa.com.tr/en/africa/gambian-commission-probes-ex-presidents-spending/897389> (accessed 15 May 2019).

meaning that the scope of the crimes and their impact was broader than just one person. Given the TRRC mandate, the body would be in a good position to build on the findings of the Jammeh commission and fill gaps by focusing on how state institutions and actors were used to commit and perpetuate economic crimes/violations. It could potentially identify state practices and laws that call for accountability and require reforms outside of what the Jammeh commission has called for, thus ensuring a more comprehensive treatment of the economic crimes dimension of the regime.

On victims, it is important for the TRRC to set out how it practically intends to respond to the needs of victims or how it intends to address impunity. Besides safeguarding their physical security during and after giving testimony, one of the greatest needs for vulnerable victims will be livelihood support and psychosocial support before, during and after appearing before the Commission or even for victim communities observing the hearings, re-exposing them to traumatic events. Provision for psychosocial support would be important to cater for the wellbeing of victims, while measures to diminish re-traumatisation of victims should also be adopted. Further, special protocols should be put in place to respect confidentiality where necessary to protect the dignity and security of those giving statements or testifying. The TRRC has made notable efforts in this regard in its first year, in particular, responding to public criticism against female witnesses and ensuring the public a safe space for giving testimony on sexual and gender-based violence.⁸⁴

Linked to this, an important question is how victim participation has been catered for in the process and how this can be guaranteed in the current context. While victim participation is critical to the integrity of the process, so is their protection. It is widely known that several political figures with notorious backgrounds still hold positions of power in government and adequate vetting has not yet taken place.⁸⁵ This can cause a chilling effect with respect to victims feeling comfortable to come forward to denounce known perpetrators, on the one hand; on the other hand, it can also pose a security risk to those testifying where persons responsible for the violations are free to retaliate or intimidate victims. The situation

84 'TRRC's Message on International Day for The Elimination of All Forms of Discrimination Against Women' *Kerr Fatou* 4 October 2021 <http://www.kerr-fatou.com/trrcs-message-on-international-day-for-the-elimination-of-all-forms-of-discrimination-against-women/> (accessed 10 October 2021).

85 Human Rights Council 'Visit to the Gambia: Report of the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence, Fabian Savioli' A/HRC/45/45/Add.3 (9 July 2020) <https://digitalibrary.un.org/record/3874990?ln=en> (accessed 5 August 2020).

suggests the need for a security assessment to inform on adequate security (witness protection) measures to be put in place to enable Gambians to safely engage with the Commission.

Another important element of its mandate is to establish the whereabouts of the disappeared.⁸⁶ Comprehensive information on exact figures and burial sites do not yet exist,⁸⁷ however it is believed that the number of victims of forced disappearances is high in the country,⁸⁸ as this was one of the tactics used by the government against its opponents.⁸⁹ This involves a complex process of tracing and exhumations that will require its own strategy, specialised personnel, skills, equipment and resources. It is equally worth noting that in 2017 the Ministry of Interior set up a parallel structure, the Panel on Missing Persons, within the national police force to investigate cases of forced disappearances.⁹⁰ Following an official visit by the UN Working Group on Enforced Disappearances to the Gambia in 2017, their 2018 report indicates that the panel lacked accurate information on the places of burial of disappeared persons and that attempts to collect information from suspects for criminal investigations was ongoing. It further indicated that it was following up investigations in the enforced disappearance of 35 people at the time.⁹¹ Despite the outward commitment of the government to address this issue, the 2018 report found that resources and capacity was lacking to enable the unit to make significant progress in the search and preservation of burial sites, identification of the remains of victims and the prosecution of the suspected perpetrators.

Considering the similarities of these bodies, it will be important to clearly define the mandate and role of the Panel on Missing Persons vis-a-vis the TRRC. The TRRC, being a public-facing institution, is well positioned to be a point of entry for recording information on enforced disappearances, burial sites and information regarding the family members wishes for reparations. The TRRC being primarily a restorative justice institution, should maintain its role of documenting violations and promoting healing and reconciliation as well as restoring dignity to victims and their families. Meanwhile, the Panel on Missing Persons is understood to have a mandate focused on criminal accountability. In this

86 TRRC Act.

87 UN (n 4).

88 As above.

89 UN (n 4) paras 20 and 22.

90 As above.

91 UN (n 4) para 21.

regard, information shared between the TRRC and the Missing Persons Panel should be clarified so as not to threaten the integrity of either body.

5.2 Criminal accountability

While efforts to unearth the truth of what took place during the Jammeh regime are ongoing by the TRRC, there is an overwhelming demand by victims for justice and accountability of perpetrators responsible for the egregious human rights violations that characterised the previous regime. A civil society coalition launched a Jammeh to Justice campaign in 2017 that has gained momentum and is continuing to advocate for accountability measures of the former dictator.⁹² Jammeh himself would need to be extradited back to the Gambia to face justice or be pursued for prosecution for international crimes in a third-country exercising universal jurisdiction for crimes against humanity, much like in the case of Hissène Habré of Chad who was prosecuted in Senegal.⁹³ To date, the response from the state on criminal accountability has been mixed.⁹⁴ For example, a first trial for human rights abuses committed during the Jammeh period was launched in 2017.⁹⁵ The case relates to the prosecution of nine National Intelligence Agency officials for the death of opposition activist Solo Sandeng; however, the Minister of Justice has not set out a plan for additional prosecutions, indicating the need to strengthen the justice sector before further trials can take place. The concern here is that the government has not articulated a clear plan for prosecution of human rights perpetrators, nor have adequate measures been taken to preserve documentary and physical evidence of the abuses.⁹⁶

It is yet to be seen therefore if and how the government will pursue perpetrators for human rights abuses committed during the Jammeh era. While the government has so far indicated a political will to prosecute war criminals following recommendations from the TRRC and once it has concluded its work, the recent release of individuals (junglars) who admitted at the TRRC hearings of having committed serious violations on behalf of Jammeh was met with anger and suspicion by family members

92 Human Rights Watch 'World Report 2018: The Gambia' <https://www.hrw.org/world-report/2018/country-chapters/gambia> (accessed 15 May 2019).

93 R Broody 'Reed Brody: Bringing Jammeh to justice' *Human Rights Watch* 30 April 2019 <https://www.hrw.org/news/2019/04/30/reed-brody-bringing-jammeh-justice> (accessed 15 May 2019).

94 Human Rights Watch (n 92).

95 B Asemota 'Gambia: Prosecution tenders report on Solo Sandeng's exhumation' *The Point* 15 November 2018 <https://allafrica.com/stories/201811150879.html> (accessed 10 May 2019).

96 Human Rights Watch (n 92).

to the victims. Nevertheless, it is expected that a prosecution plan will be drawn, in part, from information flowing from the TRRC process, meanwhile steps can and should be taken to prepare for this, including establishment of a database to log information about key events, suspects and to preserve evidence. Further, both the security sector and judicial sector need to be sufficiently resourced and capacitated. In addition, vetting of the public sector is necessary to restore confidence and trust of the population in these institutions.

One important question is whether prosecution of serious crimes and gross violations will take place through national courts or whether there is need for the creation of a specialised mechanism or chamber to prosecute serious crimes (crimes against humanity). An assessment of the judicial sector can help to identify the needs and ensure that adequate structures and frameworks are in place. In the case of The Gambia, if national prosecutions will be pursued, a series of measures would be required to ensure sufficient capacity and resources for this to be achieved. Now is the opportune moment to build up capacity of the Department of Public Prosecutions and Ministry of Justice as a whole so that investigatory skills, expertise and equipment are sought to take on the special task of war crimes prosecutions. In the case of Uganda, a special war crimes chamber was established within the High Court of Uganda in conformity with its international obligations under the Rome Statute.⁹⁷ The International Crimes Division operates with its own panel of specially trained judges and procedural rules specifically tailored to the prosecution of war crimes, as per its mandate and informed by Uganda's Rome Statute obligations.⁹⁸ This allows for the direct application of international standards and principles. The International Crimes Division is holding its first trial against Thomas Kwoyelo accused of committing war crimes in the context of the Northern Uganda conflict.⁹⁹

The process was accompanied by the introduction of guidelines on witness protection,¹⁰⁰ and subsequently, guidelines on the prosecution of sexual violence crimes.¹⁰¹ It was only after several years of preparing the

97 International Crimes Division of the High Court of Uganda, see <http://www.judiciary.go.ug/data/smenu/18/International%20Crimes%20Division.html> (accessed 16 May 2019).

98 As above.

99 Human Rights Watch 'A test case for justice in Uganda' 15 November 2018 <https://www.hrw.org/news/2018/11/15/test-case-justice-uganda> (accessed 20 May 2019).

100 Uganda Law Reform Commission 'Witness protection legislation in Uganda' (n.d) <https://www.ulrc.go.ug/content/witness-protection-legislation-uganda> (accessed 10 May 2019).

101 See generally, DPP 'Publications' <https://dpp.go.ug/index.php/publications> (accessed

national jurisdiction to take on war crimes prosecutions (capacity building of judges, construction of a separate premises for war crimes chamber) that the international crimes division was sufficiently prepared to take on its first case against a former LRA fighter, Thomas Kwoyelo.¹⁰² The Uganda example has been lauded for its ability to apply the ‘complementarity’ clause of the Rome Statute.¹⁰³ It embraces a nationally driven process, one that promotes greater public awareness and participation in the criminal justice process and promotes sustainable international criminal justice efforts. It has also been fraught with several procedural challenges and delays along the way, to the point where a case was filed before the African Commission on Human and Peoples’ Rights for excessive delays and violations of Kwoyelo’s right to a speedy trial.¹⁰⁴ Thus the Uganda experience is an interesting case to learn from as what can be done in terms of satisfying the ‘complementarity’ rule in a national context and what should be avoided in terms of respecting the rule of law and principles of justice. The Gambia could benefit from examining Uganda’s model to enlighten its own process especially with respect to establishing a national mechanism with a special mandate to prosecute war crimes.

Finally, on criminal prosecution, it is important to note that the TRRC mandate speaks of amnesty for an individual who, ‘comes forward to make a full disclosure of his or her involvement in human rights violations’ and shows remorse.¹⁰⁵ It further stipulates that, ‘amnesty will not apply to acts that form part of a crime against humanity’.¹⁰⁶ The true meaning and implications of the last clause need to be elaborated and clarified by the TRRC.¹⁰⁷ Under international law, amnesties are repugnant if they shield perpetrators from accountability for human rights violations or crimes committed, not only crimes against humanity.¹⁰⁸ The fact that this

10 May 2019).

102 Trial International ‘Thomas Kwoyelo’ <https://trialinternational.org/latest-post/thomas-kwoyelo/> (accessed 15 May 2021).

103 International Center for Transitional Justice (ICTJ) ‘A complementarity case study in Uganda: Podcast with Justice Akiiki Kiiza’ 2 February 2012 <https://www.ictj.org/news/complementarity-case-study-uganda-podcast-justice-akiiki-kiiza> (accessed 12 May 2019).

104 *Kwoyelo v Uganda* (Communication 431/12) [2018] ACHPR 129 (17 October 2018) <https://africanlii.org/afu/judgment/african-commission-human-and-peoples-rights/2018/129> (accessed 10 May 2019).

105 Article 19(1) of the TRRC Act.

106 Article 19(3) of the TRRC Act.

107 Definition of crimes against humanity; meanwhile, the TRRC has a mandate to look into a wide array of human rights violations, many of which may not constitute CAH but nevertheless merit being brought to justice.

108 R Slye ‘The Legitimacy of amnesties under international law and general principles of

clause only refers to crimes against humanity for the exclusion of amnesty may suggest that human rights violations that do not reach the threshold of crimes against humanity could be excused by amnesty. If this is the intention, then the amnesty clause is problematic as it can deny victims the ability to pursue justice and reparations against human rights abusers in the courts of law. Moreover, the application of amnesty in this form may threaten the integrity of the TRRC as a justice promoting institution. Accordingly, the provision is likely to require clarification and/or revision to bring the clause into compliance with The Gambia's international human rights obligations.

5.3 Reparations for victims

For those who suffered harm linked to the human rights violations perpetrated during the previous regime, the delivery of reparations is a top priority. It represents a necessary component for healing, recovery, and restoration of dignity for victims. It is also a key element to achieving reconciliation. Given the already precarious socio-economic situation in the country, victims fall within a more vulnerable sector of society with little access to basic services and therefore their need for reparations is even greater and more urgent. For example, victims of torture and other forms of cruel and unusual treatment or punishment, and family members to the disappeared are suffering from trauma or physical injuries and ailments that need to be addressed, primarily through timely medical or psychosocial assistance and rehabilitation.¹⁰⁹

In recognition of this need, the TRRC Act includes a provision on reparations that gives power to the Commission to 'grant reparations to an applicant who is a victim upon consideration of the evidence received or obtained, in order to restore the human and civil dignity of the victim'.¹¹⁰ It also states that the Commission may make its own regulations for granting reparations under the Act. This is a novel inclusion and a welcome innovation as such a provision has not featured as prominently in former truth commission mandates including that of Liberia, Sierra Leone or Kenya. In fact, in the truth commission processes to date, reparations have generally been treated as secondary after a truth commission is concluded. According to the definition in the TRRC Act, reparations include restitution, compensation, rehabilitation, satisfaction and includes collective reparations.¹¹¹ It provides for what are frequently referred to as

Anglo-American Law' (2002) 43 *Virginia Journal of International Law* 173.

109 Interview with Gambia Center for Victims of Human Rights representative, July 2019.

110 Article 20 of the TRRC Act.

111 Part I of the TRRC Act.

'interim measures', that are meant to expeditiously redress the harm while the TRRC process is ongoing, these are particularly necessary for victims with urgent medical needs or other measures that are needed for their physical and psychosocial wellbeing. Given that reparations normally come towards the end of a transitional justice process, the provision reflects the TRRC's recognition of the pressing needs of victims, their present conditions and the timely obligation to repair.

While the intent is admirable, meeting this goal will entail a different process of analysis and determination than a truth-seeking exercise. In particular, assessing the harm, both individual and collective, and the different forms and degrees of damages suffered by victims are an entire exercise that requires specialised consultations with victims. In some cases, victims have suffered severe, direct harm that has caused both immediate consequences and long-term effects. In other cases, loved ones to the deceased or disappeared will be eligible to receive a remedy for their loss, both material and non-material. In still other cases, there will be collective harm suffered by a group, requiring collective measures to adequately repair the harm. Finally, women and girls having suffered sexual violence would need to be consulted on the effects and adequate remedies in such cases.

It is important to note that victims of gross violations of international human rights law are entitled to *adequate* and *effective* reparations that are *appropriate* and *proportional* to the gravity of the violations, taking into account the circumstances of each case.¹¹² Given the time and expertise it requires to establish criteria for the beneficiaries and different groups of beneficiaries; to identify and assess the various categories of harm and their effects on victims; to identify the different forms of reparations that will be provided, and how they will be administered (regulations); as well as securing sufficient resources for their delivery, it will be important that an assessment be done at the end of the TRRC to determine whether this objective has been met. If not, there will be need for a more robust administrative reparations programme to be rolled-out in the follow-up to the TRRC's work.

With the recent contribution of the government of The Gambia to the TRRC for reparations,¹¹³ the TRRC is in a better position to fulfil its

112 See UN Basic Principles (n 36) para 18.

113 'Government of the Gambia commits/donates 50 million dalasis for reparations to be administered by the TRRC' *Freedom Newspaper* 7 October 2019 <https://www.freedomnewspaper.com/2019/10/07/gambia-govt-injects-50-million-dalasis-into-trrc-trust-fund/> (accessed 15 May 2019).

role in delivering interim reparations for urgent cases while at the same time informing a longer-term reparations policy to be rolled out once the TRRC closes its doors. A new mechanism, such as in the case of Sierra Leone (Sierra Leone Reparations Programme) and Peru (Comprehensive Reparations Programme),¹¹⁴ or an existing one can be given this mandate to comprehensively study the issue and administer reparations to a broad category of victims. It will also be important that the government continues to support this process beyond the life of the TRRC as reparations are often a long-term measure that is key to achieving reconciliation after conflict.

Based on consultations with victims and analysis of the different forms of harm suffered, the TRRC will need to determine the types of reparations that it will deliver, its capacity to do so and the resources and modalities required. Given that reparations come in different forms, due consideration should be given to providing a holistic remedy that could include any one or a combination of restitution, compensation, rehabilitation, satisfaction and guarantees of not repetition, depending on the type of violation. Reparations can be administered on an individual or collective basis, and this too should be a part of the analysis. For some events, a massacre for example, a collective group will have suffered in similar ways and may include destruction of a village, schools or health centers. This type of violation may call for a combination of individual and collective remedies, including reconstruction of damaged buildings and homes, compensation to the family members of the deceased, exhumation and re-burial of those who were killed, rehabilitation (medical/psychosocial) to survivors, and memorials to commemorate the deceased.¹¹⁵ With the recent discovery of widespread sexual abuse and exploitation, specially tailored reparations for victims of sexual violence will need to be considered.¹¹⁶

While financial compensation is the most widely recognised of the forms, in the case of serious and massive violations (extrajudicial killing, torture, crimes against humanity), which often imply harm to groups or entire communities, compensation is rarely sufficient.¹¹⁷ These cases pose

114 IOM 'Support to the Implementation of the Sierra Leone Reparations Program' <https://www.iom.int/files/live/sites/iom/files/What-We-Do/docs/Support-to-the-Implementation-of-the-Sierra-Leone-Reparations-Programme-SLRP.pdf>; <https://reparations.qub.ac.uk/countries/peru/> (accessed 16 May 2019).

115 Inter-American Court of Human Rights has decided numerous cases of mass violations in Colombia, Guatemala and Peru amongst others that are highlight the complexity or reparations awards for serious and massive violations, including a combination of individual and collective measures.

116 Statement by the Chairman at the Opening of the 10th Session of the TRRC Public Hearings on 11 November 2019.

117 Serious and Massive violations: The term 'serious violation' has no authoritative

significant challenges for the delivery of reparations: in particular, the sheer number of victims will complicate the assessment of individual harm as well as the identification of all affected persons. Further, mass human rights violations will not only comprise multiple individual violations, but they will also comprise violations against the community; thus, both individual and collective forms of harm will be present. Assessing the harm to place a monetary value on the harm is nearly impossible. The TRRC should decide how it will administer monetary reparations – only to those who suffered direct harm. Will it be a flat amount regardless of the degree of harm suffered or will there be an attempt to quantify the harm into minor, medium, severe as was done in Togo and Morocco? Even when attempting to address the question of settling on an adequate amount, the social consequences of payments on victims and relations with their families and communities should be considered. Payments in a context of precarious socio-economic conditions in society can turn out to be divisive and temporal, used only for the most immediate of needs and failing to fulfil the larger goal of transforming victims' conditions. These challenges raise the question of how best to achieve meaningful or transformative reparation that may require a more holistic response to place the victim in a position to heal and reintegrate into society. In such situations, reparations in the form of symbolic measures such as memorials and guarantees of non-repetition such as legal and institutional reforms are particularly relevant.

5.4 Measures of satisfaction

In the context of massive violations that have taken place over a protracted period such as in the case of The Gambia, measures of satisfaction serve to acknowledge the violation and the harm flowing from it and to end continuing violations and restore the dignity and reputation of the victim. Such awards can incorporate measures such as public apologies, the search for bodily remains and reburials, family reunifications, commemorations, memorials, erection of monuments, tributes, official rulings, institutional reforms, and investigation of the facts and bringing perpetrators to justice. Measures of satisfaction are particularly relevant for collective violations or violations characterised as serious and massive, where making an order for individual reparations is challenging and, in many cases, not sufficient to respond to the collective harm suffered by a group or a community. This measure would be particularly relevant for the Gambian context as the victims are numerous suggesting not only the impracticability of

definition, nor has its content been formally determined. International judicial bodies and other monitoring mechanisms have interchangeably used certain terms notably, 'gross'; 'grave'; 'flagrant'; 'serious' or 'massive' to qualify the gravity of violations.

delivering individual measures, but the inability of individual measures to satisfy group harm at the societal level.

In sum, victims have a lot of expectation to receive reparations from the TRRC.¹¹⁸ While the TRRC may be able to issue ‘interim reparations’ it is unlikely that it will be able to deliver the wider array of long-term measures that would be necessary to redress collective harm. Victims should be consulted and involved in the process of shaping reparations to ensure they are adequately responsive to their needs. Close collaboration and participation of victims in the TRRC process of identifying relevant reparations and advising on their delivery, is important for implementing this objective.

5.5 Guarantees of non-repetition

Lastly, guarantees of non-repetition are sometimes the least emphasised of the transitional justice pillars, yet deserving of significant attention for their relevance to much needed reforms and transformation of the status quo. Guarantees of non-recurrence have to do with the adoption of uniquely tailored measures to address long-standing patterns of abuse, widespread violations, or structural violations that affect large populations, which if not addressed will continue to recur. They do not usually aim to repair individual harm but seek to tackle the underlying conditions that cause violations. In sum, they tend to address the root causes of conflict to stop a practice of abuse and prevent future recurrence of violence. They consist of measures that are long-term in nature, such as legal or institutional reforms. In terms of sequencing, these measures follow a truth commission process and are frequently set out in the recommendations section of a final truth commission report. As to implementation, good practice reveals that a specific body should be set up or designated to coordinate, oversee and report on implementation to the President, even if actual implementation may be taken forward by a variety of institutions across sectors (judicial, legal, security, etc). This is because the variety of follow-up measures can span different sectors and implicate multiple arms of government so a coordinating, oversight mechanism to track progress and coordinate implementation of recommendations is more likely to be effective.

In the case of The Gambia, the government has already begun to adopt measures in this regard; yet the reform process remains a complex and long-term endeavour, which will require sustained government

118 Interview with Gambia Center for Victims of Human Rights Violations representative, July 2019.

commitment together with support through the investment of adequate resources. As mentioned, the new government has clearly demonstrated its commitment to adopt guarantees of non-repetition even as the TRRC is still ongoing. This is apparent from the establishment of the Constitutional Review Commission, reflecting the need for fundamental reforms in the 1997 Constitution; and by the adoption of the Act establishing the National Human Rights Commission, a permanent entity with a mandate to promote and protect human rights, and which was previously non-existent.¹¹⁹ Its 2018 decision to maintain its status as a party to the Rome Statute and its ratification of the Convention against Torture,¹²⁰ as well as the UN Convention of All Persons from Enforced Disappearances¹²¹ are additional examples of how the present government is already taking steps to ensure that past violations and war crimes will be met with legal consequences.¹²² Beyond these measures, the development of a National Transitional Justice Strategy for The Gambia¹²³ is one of the latest initiatives that sets the agenda for the adoption of institutional and legal reforms, namely with respect to the judicial and security sectors.

Some of the measures that are particularly pressing include the need for careful vetting of human rights perpetrators in the public sector and a review of internal practice and procedures to ensure that independence of the judiciary and due process rights are adequately protected. Furthermore, human rights training for all relevant public sector officials will be necessary to establish new practices that adhere to national and international law obligations. The TRRC findings can help to identify legal and institutional weaknesses as well as gaps in legal protection that have yet to be identified. Its recommendations can inform the creation of new justice or security sector institutions, as well as the dissolution or substantial reform of existing ones (National Intelligence Agency – in law, not simply in name). Further, the TRRC findings can highlight the need for new legislation or suggest amendment/abandonment of laws conflicting with The Gambia's international obligations. In light of recent discovery of the extent of sexual violence and exploitation that came out in the TRRC public hearings,¹²⁴ more robust protection and prevention

119 See National Human Rights Commission Act 2017 <https://www.gm-nhrc.org/acts> (accessed 10 May 2019).

120 UNSG (n 16).

121 As above.

122 Amnesty International 'Gambia report 2017/2018' <https://www.amnesty.org/en/countries/africa/gambia/report-gambia/> (accessed 5 May 2019).

123 'The PBF in the Gambia' https://www.un.org/peacebuilding/sites/www.un.org/peacebuilding/files/documents/gambia_two-pager.pdf (accessed 10 May 2019).

124 '#IamToufah: Breaking the silence on sexual Assault in Gambia' *AlJazeera*

measures for women and children's rights should also feature strongly in legal, policy and institutional reforms going forward. The TRRC findings can therefore trigger and provide justification for a larger reform process essential for the establishment of a new democratic order in The Gambia.

Beyond institutional reforms, reconciliation is a major goal of the TRRC, yet achieving reconciliation after a protracted period of violence is a long-term endeavour that tends to happen over time and only after other elements such as truth-seeking, recognition of the violations, remorse and forgiveness have taken place. Further, when multiple victims and perpetrators are involved, achieving reconciliation at the national level cannot overlook the individual reconciliation that needs to take place between the actors involved. All too often, truth commissions include reconciliation in their mandate without sufficient attention to the ingredients necessary to achieve this state of peace and unity. It is sometimes in the interest of the state to declare an 'end' to conflict and 'reconciliation' achieved to fulfill political commitments, yet the individual victims and perpetrators remain key to this process. Reconciliation is a process that needs to be participatory and driven by the main actors involved. This too will require a specially tailored strategy.

In the case of the Gambia, while the TRRC is intended to achieve 'reconciliation', victims are not yet ready to 'talk' reconciliation.¹²⁵ Gambians by far have been the most vocal compared to other post-conflict societies in terms of speaking with one voice about the need for justice and accountability for past violations. While the population has been actively engaged in the TRRC proceedings and while the value placed on truth-telling and reparations remains high, the need to see perpetrators tried and punished for their crimes remains unmet. It is likely that if no prosecutions follow the TRRC, the process of achieving meaningful justice will not be complete. Even where a truth telling process is positive on many levels for a society to confront its past, the degree of harm caused to so many and with multiple, lasting effects will need to be addressed; in part through an effective reparations programme, and in part, by delivering the long-awaited justice and accountability to victims. Gambians are keen to establish a clear line between past practice and charting a new way forward, grounded in principles of justice and human rights for all.

12 November 2019 <https://www.aljazeera.com/indepth/features/iamtoufah-breaking-silence-sexual-assault-gambia-191111184104947.html> (accessed 15 May 2019).

125 Interview with Gambia Centre for Victims of Human Rights Violations, July 2019.

An important element to the success of the TRRC is not only what this body will be able to achieve during its lifetime, but whether and how well the TRRC recommendations are implemented beyond its expiration. For example, its work on forced disappearances (investigations, exhumations, and reburials) and reparations are two complex areas likely to require additional time, resources, and expertise. Even where the TRRC fulfils all its objectives, the nature of the transition process in the Gambia calls for follow-up actions to prevent the recurrence of violence through the adoption of institutional and legislative measures. In particular, this suggests the need for the establishment of an effective follow-up mechanism to the TRRC. In fact, once the TRRC concludes its work and submits its report to the President, he will need to formally accept the report and confirm his government's commitment to implementing the recommendations. Consequently, overall responsibility for the follow-up to the TRRC will largely rest with the government and its ability to set aside resources and ensure institutional capacity to achieve this end. Where the TRRC findings call for criminal accountability of perpetrators, the government will be expected to take the lead through its Ministry of Justice. As to follow-up to the TRRC recommendations more generally, the recently established National Human Rights Commission may be best suited to take up this role as it is a permanent state structure with a mandate to promote and protect human rights. Including this role in the mandate of the National Human Rights Commission promises to ensure sustainability of the measures and maintains national ownership of the process.

6 One process, several mechanisms: The need for coordination and complementarity

While the TRRC is set to conclude its work by late 2020, with the likelihood of an extension, the effective and timely implementation of its findings and recommendations on The Gambia's goal to re-establish the rule of law and build a strong human rights culture is a key consideration that should be planned for from early on to achieve the best results. Integral to achieving this objective is establishing dialogue, exchange, coordination, and complementarity between the TRRC and other concurrent mechanisms and emerging initiatives with similar mandates. While there are multiple on-going initiatives, this final section focuses on three key initiatives that have a bearing on the Gambia's pursuit of a new democratic and constitutional order

6.1 Constitutional Review Commission

The Constitutional Review Commission (CRC), set up in 2017, was created with a mandate to draft a new constitution for the Gambia.¹²⁶ This has entailed consultations country-wide and beyond, a critical review of the existing 1997 Constitution and a reflection on The Gambia's past regime so as to produce a new draft that embraces democratic principles, the rule of law, human rights, and national unity.¹²⁷ Indeed, the new draft released in November 2019 for public comment is a comprehensive instrument grounded in democratic principles and informed by broad national consultations. It incorporates robust protection of the widest array of fundamental rights including social, economic and cultural rights and special group rights.¹²⁸ Under section 33, it sets out the state obligation to 'observe, respect, protect, promote and fulfill the fundamental rights and freedoms' in the instrument, calling on the state to take 'legislative, policy and other measures to achieve the progressive realisation' of rights. The draft provides for strong and independent institutions that reinforce the separation of powers; it introduces presidential term limits; and re-establishes periodic democratic elections.

While the CRC and the TRRC are operating concurrently, their mandates are unique and complementary.¹²⁹ The TRRC will make recommendations for prosecutions to achieve accountability and call for guarantees of non-repetition to ensure that future violations or practices leading to an abuse of power are prevented. The Constitution, being the supreme law of the land, creates the legal backbone for the country. While it establishes a strong human rights regime and measures to protect the independence and integrity of the judiciary, it is clear that the two will be complementary and mutually reinforcing. The Draft Constitution is already extremely encouraging in terms of reinforcing the rule of law, the respect for human rights and the right to justice and a remedy. Further, article 9 refers to the Gambia's international obligations and progressively enables the courts to rely on international human rights treaties in the interpretation or application of a provision in the Constitution with respect to the rights protected therein. In sum, the Draft Constitution creates the necessary framework to enable the implementation of the TRRC

126 Constitutional Review Commission Act 2017.

127 Article 6 (Functions of the Commission) of the Constitutional Review Commission Act.

128 Chap VI of the Draft Constitution, November 2019.

129 It should be noted that since the initial writing of this chapter, the proposed Draft Constitution presented in November 2019 was rejected in 2020 leaving the constitutional reform process in the balance.

recommendations once the body concludes its work. It is important to note that during the time of this writing, the Draft Constitution was presented and rejected by lawmakers in September 2020.¹³⁰ This latest development means that the findings and recommendations of the TRRC will be even more important to reinforce the call for much needed constitutional reform in the country. The TRRC is expected to bring out an array of recommendations requiring legal and constitutional reform.

It is therefore critical that the TRRC concludes its work and its recommendations presented to government to take appropriate action. Without this follow-up measure the TRRC recommendations risk remaining on paper alone. Gambia's pursuit of a new democratic and constitutional order is therefore reliant on the findings of the TRRC and the effective implementation of its recommendations.

6.2 National Human Rights Commission

The establishment of the National Human Rights Commission (NHRC) is a welcome and long-awaited development towards promoting a human rights culture in the Gambia.¹³¹ The NHRC mandate, as the state institution specifically mandated to protect and promote human rights, is the most closely related to the mandate of the TRRC. The two have strong protection mandates which are complementary in nature and scope. The TRRC has a limited temporal mandate and is most concerned with documenting past violations and making recommendations, while the NHRC is a semi-adjudicatory, permanent body that is tasked with making determinations on human rights complaints on current violations. Once the TRRC concludes its mandate, the task of following up on its recommendations becomes critical. It follows that the NHRC, a permanent body, may be the best suited to be assigned the additional role of following-up on the TRRC recommendations once it concludes its work. The Act provides flexibility for adding additional responsibilities and creates thematic committees that take the lead on specific areas, one of which could be created to oversee the implementation of TRRC recommendations specifically.¹³² While a separate entity could be created, the political will and resources required in establishing a new entity will be a challenge. Another option is to create an inter-ministerial committee that is charged with the task of following

130 L. Fadera 'Gambia's draft constitution rejected by lawmakers' *Constitutionnet* 23 September 2020 <https://constitutionnet.org/news/gambias-draft-constitution-rejected-lawmakers> (accessed 10 October 2020).

131 The Barrow government adopted the Act to Establish the National Human Rights Commission in 2017.

132 Article 19 of the National Human Rights Commission Act.

up on implementation of the TRRC recommendations. This would be relevant given that the array of recommendations will touch on different sectors and will be of short and long-term duration. It may also be more practical or effective in that the measures will necessarily be integrated into the national policies and agendas of the relevant ministries or agencies.

Even where the follow-up mechanism is set up outside the NHRC, the NHRC will certainly play a key role in following through on recommendations that are specific to human rights protection and reforms. As such, the timing of these processes is encouraging in that by the time the TRRC is winding up its work, the NHRC would have had time to establish itself, secure resources for its operations and organise itself to take on this additional role. In this regard the two institutions are complementary, and a mechanism of coordination should be established early on so that the work of the TRRC can inform that of the NHRC and potential lessons can be shared to further enrich and enhance the work of the NHRC going forward. This can have procedural and substantive aspects – from the appreciation of the different types of violations that took place in the past and legal measures required to address these such as with respect to addressing forced disappearances, to the opportunity of sharing experiences, skills and capacity on investigating and documenting human rights violations which is central to both of their mandates.

Finally, another opportunity to harness the strengths of these two institutions is their capacity to generate and sustain a dialogue on national reconciliation. Before even embarking on such a venture, the need to openly discuss and acknowledge what transpired during the two-decade regime and come to terms with the heinous acts is critical to a national process of reconciliation and peace. Both the TRRC and NHRC have an important and mutually reinforcing role to play in this regard.

6.3 National Transitional Justice Strategy

The National Transitional Justice Strategy, providing the overall blueprint for the transitional justice process in The Gambia is another welcome initiative.¹³³ Among the several approaches it sets out, the TRRC is the mechanism intended to achieve truth and contribute to national reconciliation. Given the various restorative and retributive justice objectives reflected in the strategy (truth, justice, reparations, guarantees of non-repetition/institutional reform and reconciliation), it will be important that the policy document clearly defines how these objectives will be met through the interventions in the Gambian context.

133 Exchanges with UN representatives supporting the process, 30 June 2019.

While the UN calls for a comprehensive and holistic process, in practice, this is difficult to achieve especially with sometimes conflicting objectives and the consideration of competing interests such as honouring the victims' right to justice, remedy and dignity while striving for accountability of perpetrators. The identification of persons for prosecution for example can be quite controversial and run the risk of affecting one or more of the institutions if not handled delicately. The role of each institution or process will need to be carefully considered and crafted to strive for mutually reinforcing, well-coordinated and complementary interventions. The policy should therefore strive to clarify the linkages between the proposed mechanisms to promote complementarity, while at the same time preserving the integrity of each mechanism. It is also unlikely that the TRRC will be able to handle the delivery of comprehensive reparations in its lifetime, so another follow-up mechanism should be envisioned and set out in the transitional justice policy so that reparations have a place in the policy. One issue that could benefit from clarification is the relationship between the TRRC and the criminal justice process, especially with respect to the sharing of sensitive information regarding the identity of victims and perpetrators.

7 Conclusion

In conclusion, the Gambia has embarked on the challenging journey of transition from a longstanding regime of authoritarian rule towards a new democratic dispensation. The transition process however is fragile and rarely straightforward, but the government has so far demonstrated willingness to take on this task by putting in place the building blocks for constructing a 'New Gambia'. We have yet to see the outcomes of the various transitional justice initiatives being undertaken and the willingness and capacity of the government to implement the recommendations of the TRRC. In contrast, the failure of the government to adopt the new Constitution is a serious setback to the Gambia's transition. This latest development underscores the importance of the TRRC mandate and need to complete its work so as to reinforce a call for constitutional reform much needed in the country. If the Gambia seeks a clean break with its past and strives to build stronger rule of law institutions, the constitution promises to be that cornerstone instrument that will become the backbone of the 'New Gambia'.

One of the key questions that has yet to be addressed is the outstanding impunity for human rights violations, crimes against humanity and war crimes committed during the previous regime. Promises have been made but victims and the Gambian population is anxiously waiting to see demonstrative action on the part of the government to bring perpetrators

to justice. Indeed, addressing the impunity gap constitutes a foundational step towards building a new constitutional order, one that embraces the principles of truth and justice. This will depend, in part, on the government's sustained commitment to the process and its willingness to work with all stakeholders to ensure a comprehensive and participatory approach. As The Gambia approaches a potential change in leadership with the next election, it is hoped that the commitments of the day will carry on into a new administration. In the end, victims remain with high expectations for truth, justice and reparations. After suffering in silence for all these years, they should be placed at the centre of this process, while every effort should be made to honour the objectives set out in the National Transitional Justice Policy for the Gambia.

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