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Promoción y protección de todos los derechos humanos, civiles, políticos, económicos, sociales y culturales, incluido el derecho al desarrollo

Informe del Grupo de Trabajo sobre las Desapariciones Forzadas o Involuntarias acerca de su misión a Gambia*

Nota de la Secretaría

La Secretaría tiene el honor de transmitir al Consejo de Derechos Humanos el informe del Grupo de Trabajo sobre las Desapariciones Forzadas o Involuntarias acerca de la misión a Gambia que realizó del 12 al 19 de junio de 2017.

Durante la visita, el Grupo de Trabajo observó que concurrían las condiciones propicias para esclarecer las violaciones de los derechos humanos cometidas en el pasado, incluidas las desapariciones forzadas. Sin embargo, desde entonces se ha avanzado poco en las investigaciones, en particular por lo que respecta a la búsqueda y la preservación de los lugares de enterramiento, la identificación de los restos de las víctimas de desapariciones forzadas y el enjuiciamiento de los presuntos autores. Según se informa, han cesado las exhumaciones. Este estancamiento se debe en parte a la falta de recursos y de capacidad. En la actualidad, el Gobierno de Gambia tiene ante sí un reto y una oportunidad única: adoptar, con el apoyo de la comunidad internacional, un amplio conjunto de medidas para lograr reformas democráticas y constitucionales, que abarquen, entre otros ámbitos, el sector de la seguridad y el poder judicial. Esas medidas deben asegurar el pleno respeto del estado de derecho y los derechos humanos, incluidos los derechos a la verdad, la justicia, la reparación y la memoria, y ofrecer garantías de no repetición a las víctimas de violaciones de los derechos humanos, a sus familias y a la sociedad gambiana en su conjunto.

* Este informe se presenta con retraso para poder incluir en él la información más reciente.

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Report of the Working Group on Enforced or Involuntary Disappearances on its mission to the Gambia**

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** Circulated in the language of submission only.

I. Introduction

1. A delegation of the Working Group on Enforced or Involuntary Disappearances conducted an eight-day official visit to the Gambia from 12 to 19 June 2017. The delegation was composed of the Chair of the Working Group, Houria Es-Slami, and a member of the Working Group, Henrikas Mickevičius.

2. The invitation extended by the Government of the Gambia to the Working Group on 11 April 2017 and the Government's increasing openness to international engagement are very positive and encouraging steps.

3. The Working Group wishes to thank the Government of the Gambia for extending an invitation to visit the country, and for the support received prior to and during the visit, in particular from the Ministry of Foreign Affairs. It welcomes the fact that virtually all meetings requested by the Working Group, at all levels, were accommodated and thanks the Government for its openness.

4. The Working Group also wishes to thank the Office of the United Nations Resident Coordinator in the Gambia and the West Africa Regional Office of the Office of the United Nations High Commissioner for Human Rights for their support.

5. The Working Group met with the President of the Gambia, the Speaker of the National Assembly, the Minister for Foreign Affairs, the Minister of the Interior, the Chief Justice, the Solicitor General, the Chief of the Defence Staff and the Inspector General of Police. It also met the Permanent Secretary of the Ministry of Interior; the Deputy Director for Prosecution; the Special Adviser of the Attorney General; the members of the Defence and Security Committee of the National Assembly; members of the National Assembly from the Foni region; representatives of the Prisons Directorate; the Deputy Director of the State Intelligence Service and other staff; the Panel on Missing Persons within the police; and staff of the Police Human Rights Unit of the Ministry of Interior.

6. The Working Group also met relatives of disappeared persons and held a meeting with representatives of civil society, including non-governmental organizations, human rights defenders and lawyers. It wishes to thank all the stakeholders met, and in particular the relatives of disappeared persons who shared their testimonies with the Working Group.

7. The Working Group has received information from the Government, victims and civil society organizations, and discussed with all stakeholders the measures to prevent and eradicate enforced disappearances, along with issues related to truth, justice and reparation for the victims.

8. The Working Group visited the greater Banjul area and the burial sites in Tanji and in the Tintinba Forest (Foni region). It also visited the Mile 2 Prison and the State Intelligence Service (former National Intelligence Agency) building and attended a National Council for Civic Education dialogue session for the Kanilai community.

9. During the visit, the Working Group noticed a good momentum for shedding light on past human rights violations, including enforced disappearances. Nevertheless, more concrete steps need to be taken to guarantee the rights to truth, justice and reparation for victims of enforced disappearances in the country.

10. Since the visit, little progress has been made in investigations, including the search for and preservation of burial sites, the identification of remains of victims of enforced disappearances and the prosecution of suspected perpetrators. Exhumations have also reportedly ceased.

11. The Working Group appreciates the fact that this standstill is in part due to a lack of resources and capacity of law enforcement and forensic experts, and recognizes that the Gambia needs to be supported in its efforts by the international community.

12. Today, the Government is faced with both a challenge and a unique opportunity: to undertake, with the support of the international community, a comprehensive set of measures towards the achievement of democratic and constitutional reforms, including of

the security sector and the judiciary. Such measures should ensure the full respect of the rule of law and human rights, including the rights to truth, justice, reparation, memory and guarantees of non-repetition for the victims of human rights violations, their families and Gambian society as a whole.

13. The present report also reflects a number of developments between June 2017, when the visit took place, and the time of its submission to the Human Rights Council.

14. The Working Group welcomes the response from the Government on the report, agreeing with the recommendations and indicating its intention to implement them. The Working Group encourages the authorities to continue making progress towards truth and justice for the victims of past human rights violations.

II. General situation of enforced disappearances in the context of a momentous transition in the Gambia

15. The visit to the Gambia took place at a crucial moment in the transitional period following the Presidential elections in December 2016. The Working Group perceived a prevailing sense of hope and relief for what has been defined by many as "the new Gambia".

16. The Gambia became an independent member of the Commonwealth in February 1965. A new Constitution, approved in a referendum in April 1970, transformed the nation into a republic. On 22 July 1994, Lieutenant Yahya Jammeh overthrew Dawda Jawara, who had ruled the country since independence, staying in power until the beginning of 2017. In this period there were at least three attempted coups against Mr. Jammeh: in November 1994, in March 2006 and on 30 December 2014. All these coups failed and were followed by arrests, extrajudicial killings and enforced disappearances of soldiers and civilians suspected of having fomented them. Generally, the period of the 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, disappeared and killed.

17. In power for 22 years, Mr. Jammeh initially accepted his defeat in the presidential elections held on 2 December 2016, but then contested the results. The new President, Adama Barrow, was sworn in at the embassy of the Gambia in Dakar on 19 January 2017. The Economic Community of West African States (ECOWAS) conducted an operation called "Operation Restore Democracy" that allowed the new President to return to the capital, Banjul, and forced Mr. Jammeh to step down and go into exile in Equatorial Guinea.

18. During his rule, President Jammeh relied heavily on the National Intelligence Agency and on a group of men reporting directly to him, known as "the Junglers", to neutralize political dissent and terrorize the population by means of illegal arrests, enforced disappearances, extrajudicial killings and torture.

19. The Junglers often used the premises of the National Intelligence Agency, where specific cells were used to keep opponents in secret detention. The Working Group visited some of the cells where individuals had reportedly been disappeared and subjected to torture. The Junglers also resorted to premises located in other places, such as the National Intelligence Agency complex in Tanji, which was also visited by the Working Group. Other victims were kidnapped, executed and buried in the Tintinba Forest (Foni region) in a shooting range that belonged to the army, a location that was also visited by the Working Group. Information received by the Working Group indicates that 13 other victims were buried in the "Yundum Barracks" and that there was another mass grave in Bonto Forest. Some victims were allegedly buried near Mr. Jammeh's residence in Kanilai, in the Foni region. This location was sealed off by the new Government and the Working Group could not access it. There are also indications that individuals were buried in the Casamance, in neighbouring Senegal. Reportedly, those who died in Mile 2 Prison were buried in unknown locations.

20. There are no exact figures on enforced disappearances in the Gambia, no census or registry and no precise location of burial places. It was only after the fall of President Jammeh's Government in December 2016 that the families of the disappeared and non-governmental organizations began organizing and establishing lists of those who had disappeared and whose fate and whereabouts remained unknown. Gambian civil society actors and political opponents were unable to do so under the previous Government.

21. The Panel on Missing Persons, an interdisciplinary investigation team within the police, was set up in February 2017 to look into serious crimes committed between 1994 and 2016, including disappearances. In the absence of official archives, the Panel lacks accurate information on the places of burial of disappeared persons and attempts to collect information from suspects in ongoing criminal investigations, notably in the case of the nine National Intelligence Agency agents arrested after the fall of the previous regime (known as the "NIA 9 case"). During a meeting with the Working Group, the Panel said that they were investigating criminal cases involving 35 persons who had possibly been subjected to enforced disappearance.

22. Over the years, the Working Group has transmitted 21 cases of enforced disappearances to the Government of the Gambia, of which 13 are still outstanding. The cases relate to disappearances that occurred between 2006 and 2015, with one case, concerning a disappearance alleged to have occurred in 1995, reportedly perpetrated mainly by officers of the former National Intelligence Agency. The eight individuals whose cases were clarified were released from detention. In the Gambia, as in virtually all countries that have experienced enforced disappearances, the number of cases reported to the Working Group is not illustrative of the real dimension of the problem. This is also recognized by the authorities, who have described this practice as widespread in the past. The Working Group received a number of new cases during the visit. Victims of enforced disappearances also reportedly include more than 50 migrants from Ghana, Nigeria and other West African countries who are said to have disappeared after being arrested in July 2005.

23. After the visit of the Working Group, credible investigations carried out by Human Rights Watch and TRIAL International have revealed that a number of migrants who were intending to travel to Europe were suspected of being mercenaries intent on overthrowing the previous Government, and were brutally murdered after having been detained and tortured. Witnesses identified the Junglers as the killers. The 2005 killings quickly became a source of tension between Ghana and the Gambia, particularly after the Gambian authorities refused to cooperate with several attempts by Ghana to investigate the matter. However, in 2009, Ghana reportedly accepted — albeit with scepticism — to bring closure to the families and restore relations between the two countries. The Gambia paid $500,000 in compensation to Ghana, which gave 10,000 Ghanaian cedis (roughly $6,800 at 2009 rates) each to approximately 27 families of victims. Six bodies were returned to Ghana. These findings prompted further calls for Mr. Jammeh and others who bore the greatest responsibility for his Government's crimes to be prosecuted under international law. Reportedly, President Barrow has suggested that he would seek Mr. Jammeh's extradition from Equatorial Guinea if his prosecution was recommended by the Truth, Reconciliation and Reparations Commission, which is expected to begin work in the next few months with an initial two-year mandate.

24. At the end of its visit, the Working Group was left with an impression that the current Government was committed to addressing the problem of enforced disappearances in the Gambia — a message reiterated during several of the meetings held, including by the highest authorities of the country. However, civil society representatives expressed concerns that the official intention of "moving forward" did not necessarily mean efficient investigations and prosecution of all those responsible for human rights violations, including enforced disappearances, during the past regime. By the time of the drafting of the present report these concerns proved to be valid, as no tangible progress has been made in investigations, including identification of gravesites and suspects, or in judicial proceedings.

III. Legislative and institutional framework

25. The Working Group commends the new Government for essential steps recently taken towards setting up an appropriate legal framework to address past gross violations of human rights, including enforced disappearances, as exemplified by its decision to rescind the decision to withdraw from the Rome Statute of the International Criminal Court and to sign the International Convention for the Protection of All Persons from Enforced Disappearance, both of which took place shortly after the Working Group's visit. These efforts should continue to comprehensively cover all matters related to addressing serious violations of human rights, including enforced disappearances, committed in the past and preventing their occurrence in the future. In this context, the Working Group believes that certain areas are of particular importance, as set out below.

26. The Working Group acknowledges that chapter IV of the Constitution of the Gambia protects a number of fundamental rights and freedoms. Several of these protections, if indeed guaranteed in practice, would contribute to preventing enforced disappearances. Specifically, the Constitution ensures personal liberty, including freedom from arbitrary arrest or detention, protects the right to life and prohibits torture and inhuman or degrading treatment or punishment. Although section 36 of the Constitution authorizes the Government to detain Gambian citizens in times of emergency, it also requires the Government to provide such individuals with a prompt statement specifying in detail the grounds upon which they are detained; to notify the spouse, parent, child or other available next of kin of the person detained; and, within 30 days after the detention's commencement, to give notice in the government Gazette stating that such persons have been detained, including "particulars of the provision of law" under which the detention is authorized. In view of the recent history of enforced disappearances, the Working Group would like to encourage the Government to consider, in the process of the planned constitutional reform, the inclusion of an express prohibition of enforced disappearances in the Constitution and an immediate right to habeas corpus upon arrest.

27. The Working Group notes that the Gambia has ratified a number of international human rights treaties, including the International Covenant on Civil and Political Rights and its first Optional Protocol; the International Convention on the Elimination of All Forms of Racial Discrimination; the International Covenant on Economic, Social and Cultural Rights; the Convention on the Elimination of All Forms of Discrimination against Women; the Convention on the Rights of the Child and its Optional Protocol on the sale of children, child prostitution and child pornography; and the Convention on the Rights of Persons with Disabilities. As mentioned, the Gambia remains a State party to the Rome Statute and, in addition to the International Convention for the Protection of All Persons from Enforced Disappearance, it has recently signed the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families and the Second Optional Protocol to the International Covenant on Civil Political Rights, aiming at the abolition of the death penalty. Reportedly, there have been several instances of extended delay between the signature of a treaty and the completion of the ratification process by depositing the required instruments with the United Nations Secretary-General (see A/HRC/28/68/Add.4, annex, para. 7), as exemplified by the process of ratification of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. Reportedly, the Convention was ratified by the National Assembly in 2006 but the instruments were never deposited with the Secretary-General. This final step should be expedited. Consideration should be also given to ratification of the Optional Protocol to the Convention against Torture.

28. The Gambia has also accepted the jurisdiction of several African human rights mechanisms, including the African Commission on Human and Peoples' Rights and the Court of Justice of the Economic Community of West African States. The Gambia issued a declaration under article 34, paragraph 6, of the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights, in which it acknowledged that Court's authority to hear cases from individuals and non-governmental organizations (ibid., para. 9). Nevertheless, in the recent past, the Gambia failed to comply with the decisions rendered by the Court of Justice of ECOWAS.

For example, in 2008, the Court of Justice ordered the Gambia to release Ebrima Manneh, a journalist who had been missing since July 2006.[1] He was not released. Similarly, the Court of Justice held in 2014 that the Gambia had failed to investigate Mr. Manneh's murder properly, thereby ordering the Government to pay damages to his family. The Working Group notes that only recently the Government has announced that the families of Mr. Manneh will receive compensation.[2] The Working Group wishes to remind the Government of the Gambia about its continuous international obligations under international human rights law, including binding decisions of international courts.

29. Furthermore, the rules for domestication of ratified international human rights treaties remain unclear. On the one hand, the Constitution does not refer to the international instruments as being part of the internal legal order, which indicates a dualist system requiring that international treaties need to be transposed into the Gambian legal system to become applicable domestically. On the other hand, the Gambian Constitution's consonance with ratified human rights instruments has been sufficient to invoke provisions of those instruments before the High Court of the Gambia (see A/HRC/28/68/Add.4, annex, para. 10). Although the High Court is not the highest court of the Gambia, this precedent is particularly important for human rights protection because, according to section 132 of the Constitution, the High Court has original jurisdiction to interpret and enforce the fundamental rights and freedoms provided for elsewhere in the Constitution. The Gambia has submitted official statements to regional human rights bodies indicating direct domestic applicability of international human rights treaties when they correspond to its own constitutional provisions. For example, in the 2000 case *Jawara v. The Gambia*, the African Commission on Human and Peoples' Rights cited the assertion of the Government of the Gambia that "most of the rights set out in the Charter have been provided for in [the Bill of Rights] of the 1970 Constitution" which "in fact gave legal effect to some of the provisions of the Charter". The Gambia needs to clarify the relevant legal doctrine and ensure the consistency of its application in practice, especially as the Bill of Rights of the 1997 Constitution, which replaced the Bill of Rights of the 1970 Constitution, is narrower in scope in terms of the protections offered. Specifically, steps should be taken to ensure domestic effect of the International Convention for the Protection of All Persons from Enforced Disappearance after it is ratified. If required under clarified legal doctrine, the provisions of the Convention should be transposed into internal legal order without delay.

30. Both the International Convention for the Protection of All Persons from Enforced Disappearance and the Declaration on the Protection of All Persons from Enforced Disappearance require that States criminalize enforced disappearances. The Gambia does not have a criminal statute that specifically refers to enforced or involuntary disappearances. Instead, it has legislation that generally protects citizens from such offences against liberty as kidnapping, abduction, enslavement, intimidation, compulsory labour and the wrongful concealment of a kidnapped or abducted person.[3] The lack of an autonomous crime of enforced disappearance in the penal legislation creates a situation whereby enforced disappearances are investigated and prosecuted under other crimes (e.g., murder, abduction or arbitrary deprivation of liberty), which is highly problematic in terms of the specific investigation required from the outset in cases of enforced disappearance. This also creates a situation in which suspected perpetrators of enforced disappearances can be acquitted if the standards of proof for the other crimes of which they are accused are not met (see A/HRC/33/51/Add.1, para. 15).

31. The Working Group was informed that the judiciary was not presently considering advising the State to consider enforced disappearance as an autonomous crime. Nevertheless, more targeted legislation would better prevent and punish enforced or involuntary disappearances. Therefore, the Working Group recommends that the Gambia criminalize enforced disappearances as an autonomous crime punishable by appropriate penalties that take into account its extreme seriousness. The introduction of this crime should be independent from the ratification of the Convention.

[1] The case has been under review by the Working Group since 2007 (see A/HRC/7/2, para. 133).

[2] See http://thepoint.gm/africa/gambia/article/deyda-chief-manneh-families-will-be-compensated/.

[3] See Gambian Criminal Code (Act No. 25 of 1933).

32. In order for the criminal law framework for preventing, investigating and punishing enforced disappearances to be complete, the legislation should cover the various modes of criminal liability, including in relation to any person who commits, orders, solicits or induces the commission of, attempts to commit, is an accomplice to or participates in an enforced disappearance. It should also expressly provide for the application of command or superior individual criminal responsibility for such a crime. In addition, it should expressly mention that enforced disappearance is a continuous crime to which amnesties or immunities cannot be applied. Finally, enforced disappearance should be included in the definition of crimes against humanity to which statute of limitations does not apply (see paras. 45 ff. below).

33. During the visit to the Mile 2 Prison, the Working Group found the conditions of detention to be extremely poor. In the short time that the delegation spoke to prisoners, it observed and heard a number of concerns, including regarding prisoners being held on remand for a very long time, foreigners being on remand for several years without their family being informed and the difficulties faced by persons with disabilities in detention. Such practices, especially when combined with a quite outdated and disorderly manual system for registration of prisoners used in the Gambia and the absence of a centralized register, create the conditions for secret detentions.

34. The Working Group noted the lack of regularly updated registries of detainees and of persons transferred from police stations to Janjanbureh and Jeshwang prisons. A handwritten registry was only established very recently for these prisons and detentions in other parts of the country are notified by phone — a practice that is conducive to enforced disappearance. At the moment of the visit, there were 460 prisoners serving sentences and a high number of persons in pretrial detention who had never been brought before a judge or had the assistance of a lawyer. The Working Group recommends that procedures for the deprivation of liberty be documented and recorded in registers kept on a regular basis in all places where individuals may be detained, in such a way as to enable the traceability of any person deprived of their liberty. According to article 10 of the Declaration on the Protection of All Persons from Enforced Disappearance, an official, up-to-date register of all persons deprived of their liberty should be maintained in every place of detention, in addition to maintaining a centralized register. The Government of the Gambia should adopt legislative and regulatory measures to address this systemic problem. As a matter of urgency, efforts should be taken to create a nationwide, digitalized system of registration of all persons deprived of liberty. The Working Group also urges the Government to dismantle the Mile 2 Prison and appreciates that the authorities are aware of the urgency of this issue.

35. In addition, given the problematic history of human rights abuses by law enforcement personnel, special agencies and army personnel in the Gambia, and the lack of independence of its judicial system, appropriate legislative and regulatory measures should be established to lay the groundwork for human rights vetting in these sectors and create an efficient system of parliamentary oversight of law enforcement, security and military officials. In particular, the Working Group wishes to draw the Government's attention to a constitutional provision that potentially weakens the ability of members of the National Assembly to exercise their mandate freely. The National Assembly formally has the power to exercise parliamentary oversight but reportedly it has never been used, mainly because of fear of reprisals using article 91 (d) of the Constitution, which provides that members of the National Assembly have to vacate their seats when they cease to be a member of the political party of which they were a member at the time of their election. In this context, the Working Group encourages the Government to consider measures to strengthen the independence of members of the National Assembly and their ability to exercise their mandate freely. In addition, the Working Group recommends that all security sector institutions, including the military, be subjected to an independent oversight mechanism. Constitutional and legal reform is also needed to ensure that all institutions of the security sector — notably the intelligence services, the army and the police — perform functions that are appropriate for them in democratic countries.

36. The National Assembly was discussing a new law on the intelligence services during the Working Group's visit. The Working Group was informed that several members of the previous leadership of the National Intelligence Agency had been removed from office, and

were either on trial or outside the country. While the Agency has now been replaced by the State Intelligence Service, it is alleged that a number of previous Agency staff are still part of the new Intelligence Service. Also, the State Intelligence Service still reports directly to the President, in accordance with article 191 of the Constitution. As previously this contributed to the strengthening of the authoritarian regime, the Working Group encourages entrusting the National Assembly to oversee this institution (see A/HRC/22/45/Add.2, paras. 76–78).

37. The Working Group believes that the creation of a national human rights institution, in compliance with the principles relating to the status of national institutions for the promotion and protection of human rights (the Paris Principles), would reinforce the promotion and protection of human rights in the Gambia. A National Human Rights Commission Act was signed in December 2017, but the Commission is not yet fully functional.

IV. Truth

38. The Working Group, in its general comment on the right to the truth in relation to enforced disappearance, states that the right to the truth means the right to know about the progress and results of an investigation, the fate or the whereabouts of the disappeared persons, the circumstances of the disappearance and the identity of the perpetrator (see A/HRC/16/48, para. 39). There is also a collective right of the society to know what has happened.

39. The Working Group notes in this respect the establishment of the Truth, Reconciliation and Reparations Commission, announced by the Government as one of the first and main measures to address past violations, including enforced disappearances, within the transitional justice process.

40. From 8 to 12 May 2017, the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence, Pablo de Greiff, conducted a technical advisory visit to the Gambia to make a preliminary assessment of the situation and to provide advice on the transition processes under way in the country (see A/HRC/36/50, para. 4). Soon after, the initial process of consultations started with a stakeholders' conference in Banjul from 23 to 25 May 2017 and nationwide consultations on the design and establishment of a transition process in August 2017.

41. Key recommendations emerging from the nationwide consultations 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, especially since perpetrators and victims were often still living side by side in the same communities; ensuring that mechanisms be put in place to ensure that perpetrators appearing before the commission were also held accountable; and adequate reparations for the victims.

42. In its preliminary observations after the visit,[4] the Working Group underlined that transitional justice measures are broader than a truth, reconciliation and reparations commission, and that the design and implementation of all measures taken in the areas of truth, reconciliation, justice and reparation should be parallel and go hand in hand, encompassing truly inclusive, good faith, consultative and participatory methods, notably with the participation of victims of human rights violations, including victims of enforced disappearances. It also underlined that the commission should be composed of highly professional and independent members, as established by a full and thorough vetting process. In this respect, it is positive that the guidelines for the nomination of commissioners adopted in January 2018 contain reference to the lack of involvement in past human right violations in addition to the absence of criminal records among the criteria for selection. The Executive Secretary of the Commission was sworn into office by the President on 1 March 2018.

[4] Available at www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=21771&LangID=E.

43. After its visit, the Working Group had the opportunity to provide comments on the draft bill establishing the Truth, Reconciliation and Reparations Commission. One of its comments concerned a possible amnesty provision in the bill. In that respect, the Working Group made clear something it had already indicated in its preliminary observations issued after the visit in June 2017: cases of enforced disappearances dealt with by the Commission should not lead to amnesty, in accordance with article 18 (1) of the Declaration on the Protection of All Persons from Enforced Disappearance and other relevant international standards. It is unfortunate that the Truth, Reconciliation and Reparations Commission Act, adopted in December 2017 and signed into law on 13 January 2018 by the President, contains provisions allowing for amnesties under certain circumstances and only excluding from amnesty acts that may qualify as crimes against humanity.

44. In accordance with article 15 (1) (i) of the Truth, Reconciliation and Reparations Commission Act, the Commission has the power to identify and recommend for prosecution persons who bear the greatest responsibility for human rights violations and abuses. In this respect, it is unclear whether and how the Commission will share collected information and evidence with the police, prosecutors and the competent authorities with respect to exhumations, forensic analysis and DNA testing.

45. In relation to the truth regarding past violations, the Government has already taken several steps to search for those who have disappeared and should continue to do so with the assistance and support of the international community. In this respect, the Panel on Missing Persons also informed the Working Group that the number of cases may be higher, as relatives were still continuing to come forward. It is very important that families are duly informed about the investigations and that regular channels of communications are established for that purpose.

46. The investigating team showed good intentions and sincere commitment during its meeting with the Working Group. However, the Panel is faced with several constraints, including changes in the topography of the area to be investigated, a lack of adequate equipment, the absence of a forensic laboratory, the refusal of suspects to share information and the unavailability of transport to facilitate the movement of evidence from crime scenes to either the laboratory or the hospital mortuary, where bodies are kept after exhumation, which could result in the contamination of evidence. The members of the Panel also referred to the hostile environment they faced while doing their investigations in the field. In this regard, they stress the necessity to ensure proper protection during the process of exhumations.

47. As mentioned above, two burial sites have been identified in Tanji and in the Tintinba Forest near Bwiam (Foni region) by persons involved in the alleged abduction of the victims. As a result, the remains of four disappeared persons were exhumed. On 31 March 2017, the remains of Solo Sandeng were exhumed in Tanji. In May 2017, the remains of three persons allegedly belonging to Lamin Sanneh, Njaga Jagne and Jaja Nyass, who were accused of participating in the attempted coup d'état in 2014, were exhumed from the Tintinba Forest. During the Working Group's visit, the DNA analyses of these remains were being carried out in a laboratory in Senegal, as there was no laboratory for DNA testing or national DNA databank in the Gambia. Other persons might have been buried in that location but, as of June 2017, investigators and archaeologists had not been able to locate other gravesites and dig due to the dryness of the soil. The Working Group has visited both sites and believes that the exhumation of these bodies is certainly a positive step. There are, however, some obstacles in the identification of the bodies since adequate technical means and resources are not available in the country. Samples were taken from relatives of the alleged victims, but at the time of drafting the present report official results of the tests were not available.[5]

48. According to the information received by the Working Group, a larger number of disappeared persons are believed to have been thrown in wells or graves in or around the

[5] On 9 July 2018, the Minister of Justice announced during a press conference that preliminary results had positively identified the remains as those of Solo Sandeng, Njaga Jagne, Lamin Sanneh and Jaja Nyass. However, the results are still subject to confirmation.

village of Kanilai, in the Foni region, near the residence of former President Jammeh, and in the Bonto Forest. However, due to the lack of adequate technical materials and the geographical characteristics of the land, the exact places of these burials have not been identified yet. Reports have also been received in relation to a possible mass grave in the army barracks in Yundum, where 13 army officers who allegedly participated in an attempted coup against Jammeh in November 1994 are said to have been buried (see para. 19 above). No progress has been reported in this respect after the visit. As mentioned above, the location of the bodies of the majority of West African migrants killed in 2005 by the Junglers is also unknown and needs to be investigated.[6]

49. It is evident that there is a critical and urgent need to improve the forensic capacity and technical means, especially in relation to DNA testing and forensic anthropology, of all those involved in the exhumation and identification of bodies and in the ensuing criminal investigation. The Government should also be proactive in the identification of new mass graves and provide the necessary equipment to detect their location, as in several areas the identification of mass graves was not possible. The Gambia needs technical assistance in this respect.

50. The Working Group was informed during the visit that the Minister of Interior was in the process of preparing a report, together with the Ministry of Information and Communication Infrastructure, concerning the crimes committed during the former regime. In this regard, the Working Group stresses the importance of access to archives and documents, particularly those of law enforcement and intelligence agencies, and those linked to any operations leading to deprivation of liberty.

V. Justice

51. The Declaration on the Protection of All Persons from Enforced Disappearance requires that the State guarantee to victims of enforced disappearance an effective remedy that includes a thorough and impartial ex officio investigation with a view to identifying those responsible for the disappearance and imposing the appropriate penalties considering the extreme seriousness of the crime, with the exclusion of capital punishment. Mitigating circumstances may be established in national legislation for persons who, having participated in enforced disappearances, are instrumental in bringing the victims forward alive or in providing voluntarily information which would contribute to clarifying cases of enforced disappearance, as established in article 4 (2) of the Declaration. Nevertheless, the Working Group has reiterated on many occasions that impunity for enforced disappearances is a source of future violations, including enforced disappearances.

52. The Working Group thus wishes to emphasize that, while reconciliation is a fundamental element of the transitional justice process, it cannot be achieved at the expense of the rights of the victims. In this respect, it is essential for the national justice systems and transitional justice processes to work closely together. The inclusion of an amnesty provision in the Truth, Reconciliation and Reparations Commission Act goes against this essential condition and the international standards in this area, which do not admit any amnesty for gross human rights violations and international crimes, including enforced disappearances. As mentioned before, article 18 (1) of the Declaration establishes that the alleged perpetrators of enforced disappearances “shall not benefit from any special amnesty law or similar measures”.

53. Only in one case, the enforced disappearance of Solo Sandeng, has the investigation carried out by the Panel on Missing Persons been completed and entered into the adjudication phase. In this case, nine former agents of the National Intelligence Agency (including the former Director) have been arrested and brought before the Banjul Magistrate Court on charges of conspiracy and murder, among other counts. The trial is ongoing and reportedly waiting for the results of the DNA examination to proceed.

[6] A mass grave containing the bodies of 12 West Africans migrants is said to have been discovered near Banjul according to media reports (see www.theguardian.com/global-development/2018/may/16/mass-grave-victims-alleged-massacre-gambia).

54. Investigations are also ongoing in several other cases, although they are being delayed either due to difficulties in the exhumation or identification of the bodies or to the fact that the suspected perpetrators are at large, including abroad (notably in Guinea-Bissau). A number of army officers have been arrested and are detained in connection with the disappearance of the four individuals allegedly involved in a coup attempt against the former President in December 2014 (see para. 47 above). The Working Group received allegations that procedural guarantees and due process might not have been followed in relation to their detention.[7] Those arrested are being detained under the Military Act and will presumably be prosecuted by court martial under military jurisdiction. In this respect the Working Group emphasizes that, according to the Declaration, no role or intervention should be given to the armed forces in the prosecution and trial of enforced disappearances.

55. The Working Group was also informed that most of the suspects are mid- or low-level officers. As they have not disclosed information about the identity of the alleged masterminds of certain crimes, it is difficult to determine any responsibility of higher officials from the previous regime. It is thus important that investigative authorities take steps to identify the superior or commanders of these officers, including by providing incentives for witnesses and suspects.

56. The Working Group encourages the relevant authorities to continue their efforts in investigating all cases of enforced disappearances to guarantee the right of victims to obtain justice and ensure non-repetition of these crimes. It is encouraging that the Panel on Missing Persons has been created. However, as mentioned, this unit needs to be reinforced and provided with the necessary skills, equipment and resources to properly carry out its functions.

57. The functions of the Panel are temporary, although the period of their mandate has not been defined, which makes it difficult to plan investigative strategies and specific steps. The Working Group was informed that once the Panel ends its functions, the information collected will be transferred to the Major Crimes Unit of the Police. No visible progress, however, in relation to investigation on enforced disappearances has been reported since the visit.

58. Impunity for past disappearances may constitute the source for further violations in the future. For this reason, it is imperative that all cases of enforced disappearances are duly investigated and prosecuted and that all possible steps are taken to bring identified perpetrators to justice, including by seeking their extradition if they have escaped abroad.

59. Relatives of disappeared persons have indicated their concern that a number of perpetrators are still at large, some reportedly still holding official positions in State institutions. It is therefore of the utmost importance to take appropriate measures to fully ensure the protection of relatives and witnesses throughout their contact with the criminal justice process, and to foster conditions that encourage more witnesses to provide crucial information. Equally important in this respect is a process of human rights vetting in all security sector institutions, including the army, the judiciary and law enforcement, as those involved in past human rights violations cannot be part of the search, investigation or prosecution of cases of enforced disappearance.

60. Reportedly, relatives of forcibly disappeared persons are afraid to file complaints, and in some instances persons with crucial information have refused to testify. The Working Group was also informed about instances of harassment of witnesses. For judicial efforts to succeed, incentives will have to be provided to witnesses so that they are willing to testify and an adequate witness protection programme needs to be created.

[7] Under the current rules of criminal procedure, a person should not be arrested or detained more than 72 hours without being either prosecuted or released. The Working Group has been informed that this rule is not always observed.

61. It is important to strengthen the impartiality and independence of the judiciary, as there seems to generally be little confidence in judges and prosecutors. There is also a lack of digitalization in the judicial system that hinders productivity in the processing of cases. Clarity is needed on how the information collected by the police and the Truth, Reconciliation and Reparations Commission can be shared for the purposes of their respective mandates.

62. The Working Group was also informed that foreign judges are hired to adjudicate cases. Reportedly, this is due to the shortage of qualified lawyers as there is only one law school in the country. The Working Group encourages the Government to take measures to expand and improve the system of legal education.

63. The Working Group also found a need for legal aid for victims and encourages the State to remedy this situation and provide free legal aid to victims of serious human rights violations, including enforced disappearances.

VI. Reparation and memory

64. All victims of enforced disappearances and their relatives have the right to full reparation, which includes compensation, satisfaction, restitution, rehabilitation and guarantees of non-repetition, as provided for in article 19 of the Declaration on the Protection of All Persons from Enforced Disappearance.

65. The Working Group received testimonies regarding the difficult economic situation that relatives of those who disappeared are experiencing. Particularly, it noted how mothers, wives and children were left in economic hardship with little or no support. There is an urgent need to develop a national reparations policy that takes account of the specific needs of women and children.

66. In its report on enforced disappearances and economic, social and cultural rights, the Working Group highlighted that the right to obtain redress for acts of enforced disappearances includes, among others, medical and psychological care, and guarantees of employment or property (see A/HRC/30/38/Add.5, para. 59). In its general comment on article 19 of the Declaration, the Working Group established a wide interpretation of the right to obtain redress for acts of enforced disappearance, including medical and psychological care and rehabilitation for any form of physical or mental damage and to legal and social rehabilitation, guarantees of non-repetition, restoration of personal liberty, family life, citizenship, employment or property, return to one's place of residence and similar forms of restitution, satisfaction and reparation that might remove the consequences of the enforced disappearance (see E/CN.4/1998/43, para. 75; see also A/HRC/22/45, paras. 46 ff.). If a person is subjected to enforced disappearance, States have an obligation to provide prompt, adequate and effective reparation to victims and their relatives.

67. According to the information received, 25 torture victims have received treatment in Senegal with the support of the United Nations Voluntary Fund for Victims of Torture. No specialized care is available in the Gambia except for limited psychological assistance provided by the Gambian Centre for Victims of Human Rights Violations.

68. In a case of enforced disappearance, the disappeared is not the only victim; the next of kin are also victims. At the time of the visit, psychosocial support programmes for victims were not available. Also, relatives of the disappeared face obstacles in accessing relevant entitlements, in particular owing to a lack of possibility to obtain certificates of absence for their relatives who have been forcibly disappeared.

69. The Working Group noted the lack of State-sponsored memorials around the country and emphasized the importance of State support for civil society remembrance initiatives, including their proper maintenance, for the benefit of the Gambian people and future generations.

VII. Conclusions

70. **The invitation extended by the Government to the Working Group and its increasing openness to international engagement are very positive and encouraging steps.**

71. **During the visit, the Working Group noticed a good momentum for shedding light on past human rights violations, including enforced disappearances. However, more concrete steps need to be taken to guarantee the right to truth, justice and reparation for victims of enforced disappearances in the country.**

72. **Regrettably, following the visit, no tangible progress has been made in advancing investigations, including the search for and preservation of burial sites, the identification of the remains of victims of enforced disappearances and the prosecution of suspected perpetrators. Exhumations have also reportedly ceased.**

73. **The Working Group appreciates the fact that this standstill is in part due to a lack of resources and capacity of law enforcement and forensic experts and recognizes that the Gambia needs to be supported in its efforts by the international community.**

74. **The Working Group welcomes the establishment of the Truth, Reconciliation and Reparations Commission. At the same time, the process of creation of the Commission has created inflated expectations, in particular within the investigative force and prosecutorial authorities. The Working Group wishes to stress that transitional justice mechanisms are not intended to and cannot replace judicial investigations and prosecutions. Rather, transitional and criminal justice mechanisms are complementary, and the best results are achieved when they cooperate in the fulfilment of their respective mandates. It is essential to understand transitional justice measures in a broader way; all measures dealing with truth, justice and reparation should be designed and implemented simultaneously, and should be inclusive, consultative, gender sensitive and participatory.**

75. **The Government should approach envisioned constitutional and institutional reforms with fresh vigour and strengthen the capacity of investigative and prosecutorial authorities to pursue individual cases of enforced disappearance.**

76. **Human rights vetting in the security sector is also necessary, as is strengthening the efficiency and independence of the judiciary. No one involved in past human rights violations can take part in the search, investigation or prosecution of the perpetrators of enforced disappearances. It is to be commended that the guidelines for the appointment of Commissioners of the Truth, Reconciliation and Reparations Commission expressly exclude anyone involved in past human rights violations.**

77. **However, some of the provisions of the Truth, Reconciliation and Reparations Commission Act are disappointing and run contrary to the direction that the Working Group indicated during and after the visit. Notably, the provision in the Act allowing amnesty to be granted in certain circumstances is of concern as amnesty is only expressly excluded for acts committed in the context of crimes against humanity. This is not in line with international standards, including the Declaration on the Protection of All Persons from Enforced Disappearance, and the United Nations position on the granting of amnesty, which should be excluded for gross human rights violations and international crimes, including enforced disappearances. During the visit, the Working Group welcomed the steps already taken to shed light on the disappearances, including the identification of two burial sites and the exhumation of four bodies. However, no further progress in this regard was made between June 2017 and the finalization of the present report.**

78. **The Working Group further reiterates its call for the creation of an adequate legal and institutional framework to prevent future disappearances. In particular, it emphasizes the importance of swiftly finalizing the process of ratification of the International Convention on the Protection of All Persons from Enforced Disappearance, thus materializing the long-announced commitment "at the highest**

levels" thereon. The ratification of the Convention must be accompanied by the adoption of a new law introducing enforced disappearance as an autonomous crime.

79. **The Working Group stresses the importance of national dialogue and the involvement of different ethnic groups, non-governmental organizations and relatives of forcibly disappeared persons in the pursuit of truth, justice, reparation and memory.**

80. **In conclusion, today the Government of the Gambia is faced with both a challenge and a unique opportunity: to undertake, with the support of the international community, a comprehensive set of measures towards the achievement of democratic and constitutional reforms, including of the security sector and the judiciary. Such measures should ensure the full respect of the rule of law and human rights, including the rights to truth, justice, reparations, memory and guarantees of non-repetition for the victims of human rights violations, their families and Gambian society as a whole.**

VIII. Recommendations

81. **In the light of the above, the Working Group formulates the following recommendations.**

A. Legislation and institutional framework

82. **In relation to its legislation and institutional framework, the Working Group recommends that the Government of the Gambia:**

(a) **Expressly introduce a prohibition against enforced disappearance in the Constitution;**

(b) **Introduce a specific crime of enforced disappearance in the Criminal Code punishable by appropriate penalties that take into account its extreme seriousness. The legislation criminalizing enforced disappearance should encompass:**

(i) **The introduction of the various modes of criminal liability, including in relation to any person who commits, orders, solicits or induces the commission of, attempts to commit, is an accomplice to or participates in an enforced disappearance;**

(ii) **The application of command or superior individual criminal responsibility for such crimes;**

(iii) **The express mention that enforced disappearance is a continuous crime to which amnesties or immunities cannot be applied;**

(c) **Complete the ratification process of the International Convention for the Protection of All Persons from Enforced Disappearance as soon as possible by depositing the instruments of ratification with the Secretary-General, and with the express recognition of the competence of the Committee on Enforced Disappearances according to articles 31 and 32 of the Convention;**

(d) **Complete the ratification process of the Convention against Torture and its Optional Protocol;**

(e) **Ensure in legislation and in practice that deprivation of liberty is carried out only by appropriate law enforcement agencies;**

(f) **Create a nationwide digitalized system of registration of all persons deprived of liberty;**

(g) **Dismantle the Mile 2 Prison and build a new prison in compliance with international standards;**

(h) **Complete the reform of the security sector as it is broadly understood, above all the intelligence services, including a thorough human rights vetting;**

(i) **Ensure that the newly created National Human Rights Commission complies with the Paris Principles;**

(j) **Take measures to strengthen the independence of members of the National Assembly and their ability to exercise their mandate freely;**

(k) **Clarify the relevant legal doctrine for domestication of the international human rights treaties in the national legal system and transpose them into the national law.**

B. Truth

83. **Regarding the right of victims to know the truth, the Working Group recommends that the Government of the Gambia:**

(a) **Create a registry for cases of grave human rights violations, including enforced disappearances, committed between 1994 and 2016, taking into account the information gathered by the Truth, Reconciliation and Reparations Commission;**

(b) **Establish a national DNA databank with samples of relatives of disappeared persons for DNA testing and matching;**

(c) **Adopt a comprehensive strategy and plan for the search for and the identification, excavation and proper investigation of existing burial sites and the identification of new ones;**

(d) **Ensure preservation of the sites and the protection of the chain of custody of the samples taken, reinforce the forensic capacity of the investigators, the prosecutors and the judiciary and ensure that they have adequate resources;**

(e) **Ensure access to relevant, including confidential, information, in particular to archives, in order to facilitate the localization of undiscovered gravesites, to speed up the search for missing persons, and to clarify cases of enforced disappearances;**

(f) **Develop a gender-sensitive policy and action plan to provide support and rehabilitation for families of forcibly disappeared persons, including specific measures to support families of disappeared persons whose death is confirmed through the truth-seeking processes.**

84. **The Working Group recommends that the Truth, Reconciliation and Reparations Commission:**

(a) **Be composed of independent and professional commissioners of the highest moral authority and with extensive human rights experience, based on a full and thorough vetting process;**

(b) **Be provided with adequate human and financial resources and sufficiently broad powers, including the power to summon current and former officials;**

(c) **Have the capacity to subpoena information from any source and witness, enter any State institution and have free access to any State archive;**

(d) **Be equipped with the technical capacity, including forensic expertise, to conduct exhumations, working in coordination with the law enforcement and prosecutorial authorities;**

(e) **Adopt a victim-centred approach and be fully accessible to the families of disappeared persons. Victims and the public should be kept informed of the functioning of the Commission and its proceedings;**

(f) **Ensure the protection of witnesses through the establishment of appropriate witness protection programmes;**

(g) **Exclude the possibility of granting amnesty for acts of enforced disappearance.**

C. Justice

85. **Concerning the right to justice, the Working Group recommends that the Government of the Gambia:**

(a) **Carry out all investigations, prosecutions and judicial proceedings in accordance with the principle of due diligence, taking into account the complexity of the enforced disappearances, the context in which they occurred and the patterns that explain why the events occurred, and ensure that there are no omissions in the gathering of evidence or in the development of lines of investigation;**

(b) **Strengthen the independence and impartiality of the judiciary, including enhancing the capacity of Gambian lawyers to adjudicate through appropriate training and education;**

(c) **Consider the truth-telling mandate of the Truth, Reconciliation and Reparations Commission as complementary and not as an alternative to criminal justice, and ensure coordination and information-sharing between the Commission and the criminal justice system;**

(d) **Ensure that persons who have or are alleged to have committed offences of enforced disappearance do not benefit from any special amnesty law or similar measures that might have the effect of exempting them from criminal liability;**

(e) **Take all measures to bring those responsible for enforced disappearances to justice, including by seeking the extradition of those who are currently abroad;**

(f) **Guarantee that criminal investigations of enforced disappearances are conducted, and that prosecutions of identified suspects are carried out by a specialized and appropriately trained team of investigators, prosecutors and forensic experts;**

(g) **Guarantee that the authorities in charge of the investigation have the jurisdictional, logistic and scientific resources necessary to collect and process evidence, and notably the power to access all documents and information relevant to the investigation, including regarding the possible locations of victims' remains;**

(h) **Provide opportunities for victims to participate in and be heard during the investigative and judicial proceedings — both regarding the clarification of enforced disappearances and the punishment of those responsible — and in seeking fair compensation;**

(i) **Digitalize the judicial system and the registry of prisoners. In accordance with article 10 of the Declaration, an official up-to-date register of all persons deprived of their liberty must be maintained in every place of detention.**

D. Reparations and memory

86. **With regard to reparations and memory, the Working Group recommends that the Government of the Gambia:**

(a) **Develop, as a matter of urgency, a reparations policy considering the specific needs of women and children and make adequate provisions for it;**

(b) **Create a system of professional and victim-oriented psychosocial assistance for the relatives of the disappeared in relation to the physical, mental and economic consequences resulting from the absence of the disappeared, in particular in the context of the transitional justice mechanisms;**

(c) **Establish mechanisms that provide for social allowances;**

(d) **Provide support for civil society remembrance initiatives, including for their proper maintenance through public funds;**

(e) **Consider erecting national and local monuments and establish commemoration days aimed specifically at remembering disappeared persons;**

(f) **Promote national dialogue through community workshops in the different regions of the Gambia and in schools;**

(g) **Include human rights in educational institutions at all levels, and in police and military training centres.**

87. **The Working Group recommends that the international community support the Gambia in this transition period, notably through the provision of technical assistance, capacity-building and training in all relevant aspects of the transitional justice process.**

88. **The Working Group invites the Government of the Gambia to submit within 90 days of the date of the presentation of the present report to the Human Rights Council a timetable showing the steps that it will take to implement the present recommendations.**