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REPORT TO THE WORKING GROUP ON DEATH PENALTY, EXTRAJUDICIAL, SUMMARY OR ARBITRARY KILLINGS AND ENFORCED DISAPPEARANCES IN AFRICA ON THE PROTECTION OF VICTIMS OF ENFORCED DISAPPEARANCES IN THE GAMBIA

Banjul, October 2020

I. OBJECTIVE OF THE REPORT

Enforced Disappearance refers to the arrest, detention or abduction of a person followed by a refusal to acknowledge the fate of that person. It is a continuous violation of several human rights. It begins at the time of abduction and extends for the whole period of time that the crime is not complete, that is to say, until the State acknowledges the detention or releases information pertaining to the fate or whereabouts of the Individual. Article 2 of the International Convention for the Protection of All Persons from Enforced Disappearance defines enforced disappearance as the “the arrest, detention, abduction, or any other form of deprivation of liberty by agents of the State or by persons or group of persons acting with the authorization, support or acquiescence of the State, followed by a refusal to acknowledge the deprivation of liberty or by concealment of the fate or whereabouts of the disappeared person, which place such a person outside the protection of the law”. This definition has been endorsed by the African Commission (*Communication 348/07 - Collectif des familles de disparu(e)s v. Algeria, para 151*).

In addition to ratifying the International Convention for the Protection of All Persons from Enforced Disappearance, The Gambia has ratified the African Charter on Human and Peoples’ Rights (herein referred to as the charter) which guarantees rights whose violation is consubstantial with enforced disappearances or consequence of it, including the right to life and dignity. The Charter also allows the Commission to draw inspiration from other human rights treaties in accordance with Articles 60 and 61.

Notwithstanding the expansion of the mandate of the Working Group to engage in in-country visits,¹ the Working Group still remains informed of situations relating to extra-judicial, summary or arbitrary killings and Enforced Disappearance. As part of its monitoring mandate, it is also responsible for compiling information on reported instances of extra-judicial, summary, or arbitrary killings and Enforced

¹ Résolution Cadhp/rés. 408 (Ixii) 2018

Disappearances in Africa.² In 2018, The Gambia 2018 Human Rights Report indicated that there were no reports of disappearance cases either by the government or on behalf of the government.³

IHRDA wish to bring to the attention of the Working Group some challenges hindering the rights of victims of enforced disappearances in The Gambia, particularly the challenges hindering the enjoyment of right to truth and justice for victims of enforced disappearance and extra-judicial killings. We will assess the situation based on standards established by the International Convention for the Protection of All Persons from Enforced Disappearance. We will also propose recommendations that the Working Group can put to the Government to address the challenges.

Prior to detailing the challenges and recommendations, this report provides an overview of the context.

II. BACKGROUND AND CONTEXT

In July 1994, former President Yahya Jammeh took over the presidency through a military coup. Between 1994 to when he finally left office in January 2017, many Gambian and non-Gambians alike were either forcibly disappeared or extra-judicially killed. The rights of families to know the whereabouts of persons that were forcibly disappeared and victims of extra-judicial killings such as the right to truth, both individual and collective, are recognized by International Human Rights Law.

In 2012, the Commission expanded the mandate of the Working Group on Death Penalty to include extra-judicial, summary or arbitrary killings in Africa pursuant to Resolutions ACHPR/Res. 227(LII) 2012. Further concerned with the emerging of enforced disappearance in Africa, which have in some cases resulted in deaths, and hence a violation of the right to life, the Commission in 2018, further expanded the mandate of the Working Group to include “Enforced Disappearances” pursuant to ACHPR/Res. 408 (LXIII) 2018.

In many contexts in which enforced disappearances (ED) and extrajudicial killings (EJK) prevailed, effective search procedures and mechanisms will not only save lives but will also contribute to the prevention of further ED/EJK cases. In many countries, especially in the aftermath of a post-authoritarian regime, specific units and commissions are created to search for the disappeared. In other countries, specific mechanisms are set up while crimes amounting to ED have been committed.

The Government of The Gambia has taken an important step in helping victims of Enforced Disappearances and Extra-judicial Killings in The Gambia. Prior to setting up the Truth, Reconciliation and Reparations Commission (TRRC), there was a ten day nationwide national consultation coordinated by the Ministry of Justice of The Gambia in collaboration with United Nations Development Programme (UNDP), the High Commission for Human Rights (OHCHR), UNICEF and some Civil Society Organisations including IHRDA where Gambians were given the opportunity to express their views and opinions on a wide range of issues on the objectives and functions of the TRRC. It was the opinions and ideas shared

² ACommHPR, Resolution 227,

³ The Gambia 2018 human rights reports, page 2. Available here: <https://www.state.gov/wp-content/uploads/2019/03/The-Gambia-2018.pdf>.

at the national consultations that informed the establishment by the Ministry of Justice of a technical committee of governmental and non-governmental institutions to actively work together on shaping the proposed TRRC.⁴ A team led by the Attorney General and Ministry of Justice also embarked on the study tour to Sierra Leone and South Africa with a view to learning how their truth commission experiences could inform Gambia's policy, strategy and implementation of its transitional justice mechanisms.⁵

In December 2017, the TRRC was established by an Act of the National Assembly whose function, inter alia, involves initiating and coordinating investigations into violations and abuses of human rights from July 1994 to January 2017 in order to promote healing and reconciliation, respond to the needs of victims, address impunity, prevent the repetition of violations and abuses suffered by making recommendations for the establishment of appropriate preventive mechanisms including institutional and legal reforms, establish and make known the whereabouts of disappeared victims, provide victims an opportunity to relate to their own accounts of violations and abuses suffered, and grant reparation to victims in appropriate cases.⁶

By 2018, the police was investigating 35 cases of enforced disappearance.⁷ By extension, TRRC has also conducted research and investigations on all 35 cases together with its Research and Investigations Directorate (RID). The Commission has been able to exhume some of the bodies (7) buried in Yundum Barracks after family members of those suspected to be buried there were contacted and their consent obtained. However, the Commission is still unable to conduct a DNA test to be able to identify the bodies exhumed.⁸ The TRRC in this process has involved the Gambia National Army, and the National Disaster Management office. The TRRC has also received testimonies that more bodies are buried at Yundum Barracks, but there is no consensus on where the other remains may be.⁹

III. CHALLENGES HINDERING THE ENJOYMENT OF RIGHT TO TRUTH AND JUSTICE FOR VICTIMS OF ENFORCED DISAPPEARANCE AND EXTRAJUDICIAL KILLINGS

1. Non-codification of the offence of enforced disappearance

Article 4 of the Charter states that "Human beings are inviolable. Every human being shall be entitled to respect for his life and integrity of his person. No one may be arbitrarily deprived of this rights."

⁴ Ibid

⁵ Ibid

⁶ Section 13 Truth, Reconciliation, and Reparation Commission Act, 2017, Republic of The Gambia.

⁷ Human Rights Council 'Report of the Working Group on Enforced or Involuntary Disappearances on its mission to the Gambia (27 August 2018), para 21 (A/HRC/39/46/Add.1).

⁸ Truth, Reconciliation, and Reparation Commission, 2018-2019 Interim Report. Available here: http://www.trrc.gm/wp-content/uploads/2020/04/TRRC-INTERIM-REPORT-Logo-Final.pdf?fbclid=IwAR3aJzg5yiy6AbPbezg_L7wFZqHiQ3_kCI2oJPPggS4WXEWI6B7PAQrwpU. Last accessed 25th September, 2020.

⁹ Ibid at page 23.

Currently, the offence of enforced disappearance does not exist under Gambian law. Notwithstanding, perpetrators of ED can be prosecuted for crimes provided for under the criminal law including murder/manslaughter, kidnapping, and abduction.

The offence of murder is provided for under section 187 of the Criminal Code. It states that a person who of malice aforethought causes death of another person by an unlawful act or omission commits murder. Section 186 highlights that a person who by an unlawful act or omission causes the death of another person commits the felony termed manslaughter. An unlawful omission is an omission amounting to culpable negligence to discharge a duty tending to the preservation of life or health, whether the omission is or is not accompanied by an intention to cause death or bodily harm.

The Constitution in chapter IV recognizes a number of fundamental human rights and freedoms. Specifically, the Constitution ensures personal liberty, including prohibition of torture and inhumane and degrading punishment under sections 19 and 21.

The Criminal Code from section 231 to 239 prohibits the acts of kidnapping or abducting persons. It defines kidnapping from The Gambia as “Any person who conveys another person beyond the limits of The Gambia without the consent of that person, or of some person legally authorized to consent on behalf of that person, is said to kidnap that person from The Gambia.” It further defines kidnapping from unlawful guardianship as “A person who takes or entices another person under the age of eighteen years, or any person of unsound mind, out of the keeping of a lawful guardianship of that person, without the consent of the guardian, is said to kidnap that person from unlawful guardianship.” A person who kidnaps any person from The Gambia or from unlawful guardianship commits felony and liable to imprisonment for seven years.

Abduction on the other hand is defined in section 124 of the Criminal Code as an act where “a person who by force compels, or by any deceitful means induces another person to go from any place.”

The absence of the specific 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.¹⁰ In addition, some if not all these crimes are constitutive elements of enforced disappearance. Furthermore, the prosecution of these crimes does not take into account the continuous nature of enforced disappearance.

2. Non-retroactivity of the criminal law

The Constitution of The Gambia states that “No person shall be charged with or held to be guilty of a criminal offence on account of any act or omission which did not at the time it took place constitute such

¹⁰ Report of the Working Group on Enforced Disappearances or Involuntary Disappearance, UN Human Rights Office of the High Commission for Human Rights (27 July 2016), para 15 (A/HRC/33/51/Add.1).

an offence, and no penalty shall be imposed for any criminal offence which is more severe in degree or description than the maximum penalty which might have been imposed for that offence at the time it was committed.”¹¹ If subsequent to the commission of the offence, provision is made by law for the imposition of the lighter penalty, the offender shall benefit thereby. The non-retroactivity principle may hinder the application of appropriation sanctions to perpetrators of ED/EJK that occurred during Jammeh regime.

3. Gaps in the investigation of enforced disappearance

Article 5 of the Convention for the Protection of All Persons Against Enforced Disappearances provides that “The widespread of systematic practice of enforced disappearance constitutes a crime against humanity as defined in applicable international law and shall attract the consequences provided for under such applicable law.”¹²

Article 20 of the same Convention also provides that “Only where a person is under the protection of the law and the deprivation of liberty is subject to judicial control may the right to information referred to in article 18 be restricted, on an exceptional basis, where strictly necessary and where provided for by law, and if the transmission of the information would adversely affect the privacy or safety of the person, hinder a criminal investigation, or for other equivalent reasons in accordance with the law, and in conformity with applicable international law and with the objectives of this Convention. In no case shall there be restrictions on the right to information referred to in article 18 that could constitute conduct defined in article 2 or be in violation of article 17, paragraph 1.”¹³ In such proceedings, competent national authorities shall have access to all places where persons deprived of their liberty are being held and to each part of those places, as well as to any place in which there are grounds to believe that such persons may be found. Any other competent authority entitled under the law of the State or by any international legal instrument to which the State is a party may also have access to such places”.

Further, Article 12 of the CED establishes that “Each State Party shall ensure that any individual who alleges that a person has been subjected to enforced disappearance has the right to report the facts to the competent authorities, which shall examine the allegation promptly and impartially and, where necessary, undertake without delay a thorough and impartial investigation. Appropriate steps shall be taken, where necessary, to ensure that the complainant, witnesses, relatives of the disappeared person and their defense counsel, as well as persons participating in the investigation, are protected against all ill-treatment or intimidation as a consequence of the complaint or any evidence given. Each State shall ensure that the competent authority has the necessary powers and resources to conduct the investigation effectively, including powers to compel attendance of witnesses and production of relevant documents and to make immediate on-site visits. Steps shall be taken to ensure that all those involved in the investigation, including the complainant, counsel, witnesses and those conducting the

¹¹ Section 24(5), Constitution of The Gambia, 1997.

¹² Article 5, International Convention on the Protection of All Persons from Enforced Disappearance.

¹³ Ibid at Article 20(1)

investigation, are protected against ill-treatment, intimidation or reprisal. The findings of such an investigation shall be made available upon request to all persons concerned, unless doing so would jeopardize an ongoing criminal investigation. Steps shall be taken to ensure that any ill-treatment, intimidation or reprisal or any other form of interference on the occasion of the lodging of a complaint or during the investigation procedure is appropriately punished. An investigation, in accordance with the procedures described above, should be able to be conducted for as long as the fate of the victim of enforced disappearance remains unclarified”.

Pursuant to Article 14 of the 1992 Declaration on the Protection of all Persons from Enforced Disappearance: “any person alleged to have perpetrated an act of enforced disappearance in a particular State shall, when the facts disclosed by an official investigation so warrant, be brought before the competent civil authorities of that State for the purpose of prosecution and trial unless he has been extradited to another State wishing to exercise jurisdiction in accordance with the relevant international agreements in force. All States should take any lawful and appropriate action available to them to bring to justice all persons presumed responsible for an act of enforced disappearance, who are found to be within their jurisdiction or under their control”. Finally, Article 18 of the 1992 Declaration on the Protection of all Persons from Enforced Disappearance reads as follows: “Persons who have or are alleged to have committed offences referred to in article 4, paragraph 1, above, shall not benefit from any special amnesty law or similar measures that might have the effect of exempting them from any criminal proceedings or sanction. In the exercise of the right of pardon, the extreme seriousness of acts of enforced disappearance shall be taken into account”.

With regard to the undertaking of effective judicial measure to prevent, investigate, judge and sanction people responsible for offences that constitute both enforced disappearance and extra-judicial killings, the provisions that currently exist in The Gambia have to do with preventive action of the police. Section 47 of the Criminal Procedure Codes establishes that “Every police officer may interpose for the purpose of preventing, and shall to the best of his ability prevent the commission of any cognizable offence”. Section 48 states that “Every police officer receiving information of a design to commit any cognizable offence shall communicate such information to the police officer to whom he is subordinate, and to any other officer whose duty it is to prevent or take cognizance of the commission of such offence.” The problem with this provision of the Criminal Procedure Code is that apart from the courts having authority to initiate criminal cases, there no independent investigation as it is the police who are responsible for the investigation of possible human rights violations.

The Special Rapporteur on extrajudicial, summary or arbitrary executions established that with regards to police investigations, “currently, the modus operandi is that when the media highlights a case of extrajudicial killing by the police, the suspected perpetrators are suspended, a public announcement is made that that the case will be investigated and no further action is taken on the matter. Only in a few cases will the matter be taken to court for prosecution”.

Regarding the obligation to prosecute, section 69(3) of the Criminal Procedure Code established that “Any person other than a public prosecutor or a police officer, who has reasonable and probable cause to believe that an offence has been committed by any person, may make a complaint thereof to a

Magistrate who has jurisdiction to try or inquire into the alleged offence, or within the local limits of whose jurisdiction the accused person is alleged to reside or be". According to section 85 of the Constitution of The Gambia, 1997, "the Director of Public Prosecution shall have the power in any case in which her or she considers desirable to do so, and subject to the approval of the Attorney General- to initiate and undertake criminal proceedings against any person before any court for an offence against the Law of The Gambia; to take over and continue any criminal proceeding that has been instituted by any person or authority ; to discontinue, at any stage before judgement is delivered, any criminal proceeding instituted or undertaken by himself or herself or any other person or authority. According to the report of the Special Rapporteur on Extrajudicial Summary or Arbitrary Executions on investigations in The Gambia, it was clearly indicated that "A general culture of accountability and the existence of effective institutional channels for redress are essential for protection of the right to life. On several occasions, the Special Rapporteur heard that police or judicial authorities either do not carry out investigations, or, if they do, they are not carried out properly. Other institutions mandated to address misconduct by law enforcement officials appear to be underutilized or ineffective".¹⁴

In 2017, the Government of The Gambia established the TRRC to look into the human rights violations that had occurred in The Gambia from 1994 to 2017. With regards to cases of ED/EJK, the TRRC has so far identified cases and some of the bodies of executed individuals have been identified as well. They have however failed to conduct DNA test to confirm the profile/identity of these bodies. The report of the Special Rapporteur on Extrajudicial Summary or Arbitrary Executions highlighted that "Three alleged plotters were killed during the Government's response to the 2014 attempted coup, as confirmed by the Government. Photographs presented to the Special Rapporteur as being of the dead bodies, if authentic, raise questions about the circumstances that led to their deaths. The apparent pattern of injuries in the photographs does not appear to be consistent with the official version of events. There is no available information on whether official autopsies have been carried out on the bodies of the deceased or on whether appropriate ones have been launched into the circumstances of their deaths. An in-depth forensic analysis should shed light on the causes of death. The Special Rapporteur sent a communication to the Government requesting clarifications and has received no reply yet".¹⁵

The report of the Working Group on Enforced or Involuntary Disappearances on its mission to The Gambia highlighted that "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

¹⁴ Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, Christof Heyns, Addendum, Follow-up country recommendations Kenya, doc. A/HRC/17/28/Add.4, 26 April 2011, hereinafter: "Christof Heyns report", para. 25.

¹⁵ Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, Christof Heyns, Addendum, Follow-up country recommendations Kenya, doc. A/HRC/17/28/Add.4, 26 April 2011, hereinafter: "Christof Heyns report", para. 25.

their investigations in the field. In this regard, they stress the necessity to ensure proper protection during the process of exhumations.

Despite the reports and recommendations by the Human Rights Council, and the Special Rapporteur, the Gambian authorities failed to conduct proper investigation. To date, the perpetrators of such violations remain unpunished. The authorities have still not collected DNA samples to properly identify the bodies exhumed. They also have no capacity to deal with the many cases of ED/EJK. As a result of this, the Ministry of Justice at some point had to contract private prosecutors to handle the NIA 9 case which has been dragging on for almost 4 years and it's still not concluded.

IV. RECOMMENDATIONS

In view of the above, we would request the Working Group to put to the government of The Gambia the following recommendations:

1. Domesticate the Convention for the Protection of All Persons from Enforced Disappearances. Since enforced disappearances is a crime of continuous execution, The Gambia shall ensure that legal definition of the crime of forced disappearance of persons will apply to criminal behaviors committed between July 1994 and January 2017, without this representing a retroactive application.
2. 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.
3. Take all measures to bring those responsible for enforced disappearances to justice, including by initiating investigation *proprio motu* and seeking the extradition of those who are currently abroad
4. Give victims' families full access and capacity to act at all stages of the investigation and search procedures and ensure they receive appropriate reparations.
5. Consider the truth-telling mandate of the TRRC as complementary and not as an alternative to criminal justice, and ensure coordination and information-sharing between the TRRC and the criminal justice system.
6. Include a subject on enforced disappearance in the training curricula of all law enforcement agencies.
7. Provide support services for victims of ED/EJK and their families.

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