

GUIDE ON TRANSITIONAL JUSTICE IN THE GAMBIA

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ACRONYMS

CSOs- Civil Society Organisations

NACSA- National Commission for Social Action

OHCHR- Office of the High Commissioner for Human Rights

PBSO- United Nations Peace Building Support Office

TRC-Truth and Reconciliation Commission

TRRC- Truth, Reconciliation and Reparations Commission

UN-United Nations

UNDP- United Nations Development Programme

1. BACKGROUND

It is imperative to reflect on the past so that useful lessons can be drawn for the future. In the case of The Gambia, a primary objective of reflecting upon the past shall be to encourage national reconciliation through accountability and the documentation and establishment of an accurate historical record of events over the past 22 years. There are widespread reports of gross human rights violations that occurred under the former government. Reports of torture, enforced disappearances, unlawful killings, sexual and gender based violence, persecution of real or perceived political opponents and ethnic groups, abductions and/or unlawful arrests, and detention without trial etc., have been published by many individuals and organizations including United Nations agencies. It is against this backdrop that the Government has decided to establish a TRC with support from organisations such as UNDP, OHCHR and PBSO.

2. WHAT IS TRANSITIONAL JUSTICE

The UN defines transitional justice 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. Countries emerging from conflict or authoritarian and repressive rule usually implement a transitional justice program. It is an attempt to address widespread or systematic human rights violations and abuses as they move away from a violent and turbulent past to an era of peace, respect for rule of law and democracy.

3. OBJECTIVES OF TRANSITIONAL JUSTICE

The objectives of a transitional justice program usually are, among other things to:

- Investigate past violations and abuses
- Identify the perpetrators
- Initiate prosecutions
- Provide reparations to victims
- Ensure non-recurrence of rights violations and abuses
- Promote individual and national reconciliation

- Ensure sustainable peace and security

4. COMPONENTS OF TRANSITIONAL JUSTICE

The objectives of transitional justice are usually pursued through judicial and non-judicial measures generally consisting of:

- Truth Commissions
- Prosecutions
- Doctrine of lustration/security sector review
- Institutional reforms

4.1 Truth Commission

Truth Commission is usually a non-judicial body whose mandate includes investigations of past violations of human rights and abuses through:

- Truth telling by perpetrators and victims
- Holding perpetrators accountable
- Providing/Making recommendations for compensation of victims
- Promoting reconciliation
- Making proposals on institutional reforms

4.2 Prosecutions

Prosecution of perpetrators are conducted through domestic courts, international courts or special courts as was in Sierra Leone and Rwanda.

4.3 Doctrine of Lustration/Security Sector Review

This is an attempt at security sector reform and also reform of public service. It involves the removal of corrupt and abusive officials to ensure that such institutions function in accordance with law and democratic principles.

4.4 Institutional Reforms

This involves an overhaul of institutions that were conduits for the perpetration of rights violations and abuses. The consolidation of democracy and rule of law through

institutions such as a Human Rights Commission, an Anti-Corruption body are important. Constitutional reforms are also crucial.

It is important to note that a government may decide to pursue the above components combined or sequence them in accordance with its objectives and policies.

5. WHY ESTABLISH A TRUTH COMMISSION?

The establishment of a Truth Commission have become the most widespread and popular method of dealing with human rights violations and abuses. It must be emphasised that establishing a Truth Commission does not exclude the engagement of the other components of transitional justice.

The Inter-American Commission on Human Rights has stated, “the value of Truth Commission is that they are created not with the presumption that there will be no trials, but to constitute a step towards knowing the truth and ultimately making justice prevail.”

Citizens have a right to the truth, a right to justice and victims a right to reparations. In cases of enforced disappearances, society and families have a right to know the fate and whereabouts of the victims. The State has a duty and responsibility to secure its citizens and to guarantee enjoyment of the fundamental human rights as provided for under the Constitution. Where it fails in its obligations and duty, it should provide an effective remedy.

The International Covenant on Civil and Political Rights to which The Gambia is a signatory guarantees the right to an effective remedy for victims of human rights violations. The right to an effective remedy incorporates the right to the truth, the right to justice and the right to reparations.

6. CHARACTERISTICS OF A TRUTH AND RECONCILIATION COMMISSION

6.1 Mandate

The mandate of the TRC must be very clear, broad and should include not only rights violations and abuses but also violations of civil, political, economic, social and cultural rights. It is also important for the mandate to spell out the timeframe under investigations. Most Commissions operate for a period of two or more years and they are of a temporary nature. The Commissions are dissolved after the presentation of their recommendations.

6.2 Establishment of a Truth and Reconciliation Commission

A TRC is usually established by an Act of Parliament, which clearly articulates its mandate and provisions. This was the case in South Africa, Liberia, Sierra Leone and Ghana just to name a few. The Commissioners are recruited from persons with high moral integrity. It is desirable for the Chairperson to be a religious leader. Out of the seven Commissioners in Sierra Leone, three were foreigners. In South Africa, there was provision for two foreign Commissioners to be appointed.

6.3 Victims

A TRC program must recognize the centrality of victims and their special status in the design and implementation of such mechanism. Their rights and views must be fully respected. Their views are particularly important especially to guarantee lasting peace and reconciliation. It is important that all victims are captured not only those directly affected. The following definitions are illustrative:

- The Declaration of the Basic Principles of Justice for Victims of Crime and Abuse of Power defines victims as: *persons who individually or collectively, have suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights, through acts that are in violation of criminal laws operative within members states, including those laws proscribing criminal abuse of power.*
- The Rome Statute;
 - I. *“Victims” means natural persons who have suffered harm as a result of the commission of any crime within the jurisdiction of the Court;*

- II. *Victims may include organizations or institutions that have sustained direct harm to any of their property, which is dedicated to religion, education, art, or science or charitable purposes, and to their historic monuments, hospitals and other places and objects for humanitarian purposes.*
- The United Nations Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violation of International Human Rights law and Serious Violations of Humanitarian Law:
Persons who individually or collectively suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights, through acts or omissions that constitute gross violations of international human rights law, or serious violations of international humanitarian law. Where appropriate, and in accordance with domestic law, the term “victim” also includes the immediate family or dependants of the direct victim and persons who have suffered harm in intervening to assist victims in distress or to prevent victimisation.

6.4 Witnesses

There should be a witness protection programme in place. Provision for counselling of witnesses especially for children and those sexually abused should also be put in place.

Coding may be introduced as a protective mechanism to protect the identity of witnesses and victims in highly sensitive cases for instance the sexually abused. Consideration should also be given to make adequate preparation for witnesses to be present.

6.5 Stakeholders

CSOs have a very important role to play in the TRC process. They are an important arm in the organisation of the victims and also in conducting widespread sensitisation in the TRC process. Religious and traditional leaders have a critical role in promoting national reconciliation and unity. The media’s role in giving full coverage to the TRC cannot be overemphasised. The support of the donor community and collaboration with the EU, UN agencies such as UNDP, OHCHR and PBSO, and other partners must be underscored.

6.6 Communications Strategy

A very strong and effective communications strategy covering the period before, during and after the TRC must be put in place. The outreach program should be extensive and have nationwide coverage.

6.7 Ownership

Nationals must own the full processes and mechanisms put in place. They must participate fully in the whole scheme. While there are common underlying themes in virtually all TRC, they should nevertheless be conducted within one's own political and specific context based on local needs and realities. It is not a situation of one size fits all. Notwithstanding, important and useful lessons learnt from South Africa and Sierra Leone, our political context is evidently different from theirs. The process we are embarking on is Gambian-driven and not donor imposed.

6.8 Amnesty

Perpetrators who openly and freely testify before the TRC may be granted amnesty for their crimes. This is generally a function of the TRC and it is usually provided for in its enabling legislation. It is worth noting that not all perpetrators will be granted amnesty. It must also be mentioned that it is not possible to prosecute all the perpetrators. Amnesty cannot however be granted for crimes against humanity, gross violations of human rights, torture, rape, enforced disappearances and other forms of international crimes.

6.9 Reparations

Victims of human rights violations and abuses have the right to be provided with full and effective reparations by the State. Reparations are usually provided for in the TRC process and form part of recommendations made at the end of the process, as was the case in Sierra Leone and South Africa. It must be emphasized that reparations both in South Africa and Sierra Leone did not meet the expectations of the victims. Payments were largely delayed and considered inadequate. It is therefore essential for the Government to set aside a fund for reparations to make the TRC process more meaningful.

The UN Basic Principles on the Right to a Remedy require states to ensure that victims of violations of human rights are provided with reparations:

Reparation should be proportional to the gravity of the violations and the harm suffered. In accordance with its domestic laws and international legal obligations, a State shall provide reparation to victims for acts or omissions which can be attributed to the State and constitute gross violations of international human rights law or serious violations of international humanitarian law. In cases where a person, a legal person, or other entity is found liable for reparation to a victim, such party should provide reparation to the victim or compensate the State if the State has already provided reparation to the victim.

Reparations may include compensation, rehabilitation, restitution, satisfaction and guarantees of non- repetition.

6.10 Children and Women in transitional justice

The rights and status of victims particularly women and children must be respected. Apart from our Constitution and other international conventions, we will be guided by international best practices in the design of our entire transitional justice program. The provisions in international conventions and standards relating to children in judicial proceedings will be respected and strictly adhered to. In this regard, reference will be made to the International Covenant on Civil and Political Rights, the Convention on the Rights of the Child, the UN standard minimum Rules for the Administration of juvenile justice and the Guidelines on Justice matters involving child victims and witnesses of crime.

Investigations centred on the violation of children's rights must of necessity be included in the mandate of the TRC. Child sensitive and focused hearings must and will be conducted with the best interest of the child always the prime consideration. The TRC will take into consideration the interests of victims and witnesses when inviting them to give statements, including the security and other concerns of those who may wish to recount their stories in public. The TRC will implement special procedures to address the needs of such particular victims as children or those who have suffered sexual abuses.

The TRC will also as part of its mandate investigate sexual violence and other gender based offences. Closed hearings will be put in place to allow children and victims of sexual abuse to testify in a private setting.

Countries like Sierra Leone have received commendation on their efforts to solicit the views of women's organisation and gender advocacy groups during the proceedings of their TRC. This largely aided the completion of the report with a gender perspective. It is expected that one of the thematic areas on which the TRRC will hold hearings will be dedicated to Women and Children.

6.11 Institutional Reforms

The TRRC is expected to serve as a basis for massive political, legal, social and institutional reforms in The Gambia. Reforms are expected in the security services, the judiciary and other institutions. A constitutional review will certainly be conducted. It is also expected that new institutions will be established to reinforce the rule of law architecture and democracy. In Sierra Leone, for example, the TRC process led to the establishment of the following institutions and legislations:

- Political Parties Registration
- Legal Aid Board
- Human Rights Commission
- NACSA
- Chieftaincy Act
- Gender Act
- Sexual Offences Act
- Constitutional review

7. CONCLUSION

The focus of the TRRC should is not on revenge or 'witch-hunt' but on bringing people together and in this regard religious leaders have an important role to play. The TRRC must investigate the deep-rooted causes of all violations of human rights and abuses.

This must of necessity include violations of civil, political, economic and cultural rights. By addressing the spectrum of violations in a holistic manner, it is expected that the broader objective of non-repetition, peace building and reconciliation will be achieved. Any political group, society or civil society organization desirous of making representation before the TRRC should be accorded the opportunity under its thematic areas, which the TRC process is expected to create.

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