DCAF Geneva Centre for Security Sector Governance

The Complementarity of Transitional Justice & SSR in Addressing and Preventing Human Rights Violations

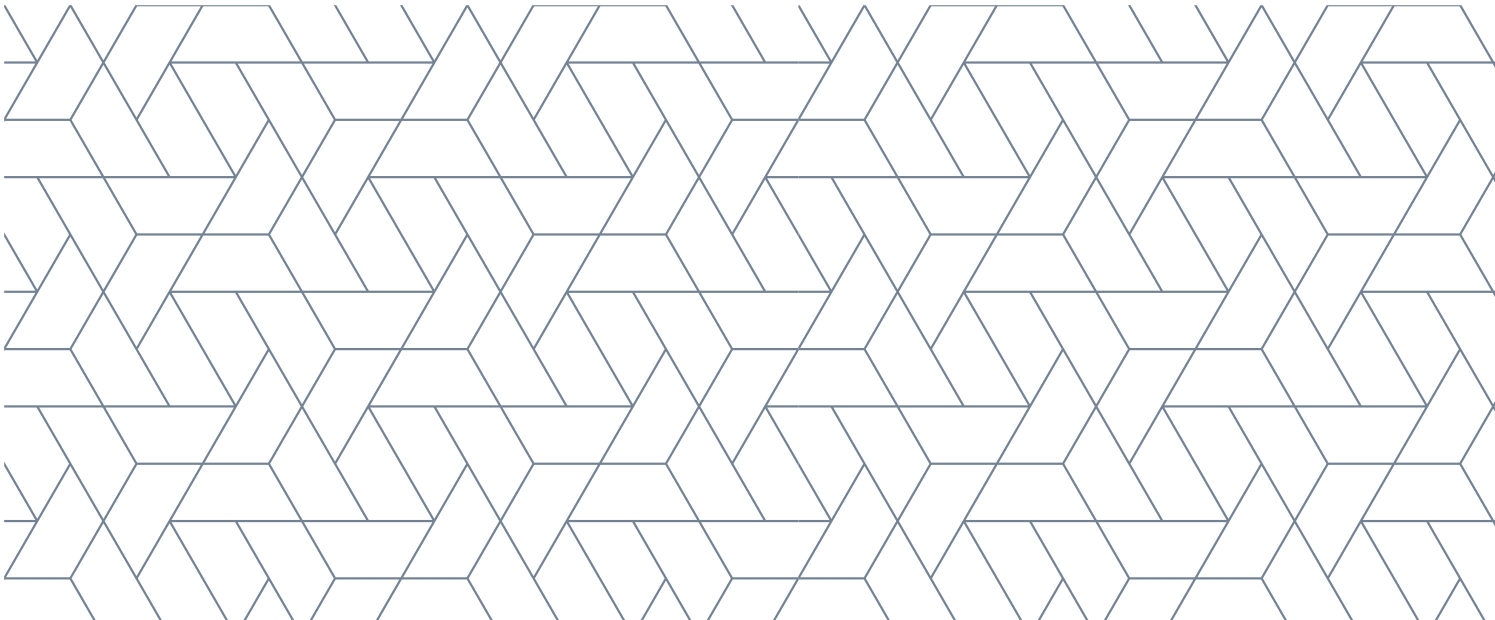
Focus on The Gambia

Policy Paper - July 2021, by Dr Sophie Frediani

Front cover image: © Jason Florio Fondation Hirondelle

Back cover image: © Mustapha K. Darboe for JusticeInfo.net

Contents



The Complementarity of Transitional Justice & SSR in Addressing and Preventing Human Rights Violations

Focus on The Gambia

Policy Paper - July 2021

By Dr Sophie Frediani

Executive summary

The election of Adama Barrow in late 2016 put an end of 22 years of dictatorship under Yahya Jammeh, whose rule was characterized by a pervasive and entrenched disregard for the rule of law and systematic human rights violations, most of which were perpetrated by members of state security institutions or paramilitary groups. Upon taking office, the Barrow administration initiated three critical processes: transitional justice, security sector reform (SSR), and constitutional reform. The success of these processes hinges on their ability to address the legacy of abuses under the Jammeh regime while establishing the parameters of separation of power, the rule of law and good governance. This policy paper specifically focuses on the interlinkage of the SSR and transitional justice processes as complementary tools to provide a platform for reconciliation, reforming abusive institutions and ensuring oversight and accountability of the justice and security sector.

While different in nature, SSR and transitional justice processes are closely interlinked and are considered as two mutually dependent processes. SSR should be considered as an integral component to transitional justice, under the pillar of the guarantee of non-recurrence. The guarantee of non-recurrence constitutes an obligation of states under human rights instruments to take all necessary measures to prevent recurrence of violations, including an obligation to undertake the necessary reforms to shape its security sector in such a way that fully enshrines respect for human rights. As such, the justice and security-related initiatives undertaken by the state – whether or not officially branded as or part of an SSR process – constitute the means by which the state complies with its international legal obligation of guaranteeing non-recurrence. In the context of a post-authoritarian regime, such as The Gambia, the objectives or nature of SSR are twofold. First, "prospective" SSR, which commonly aims at laying the foundations for a future improved governance of the security sector. In this sense, SSR deals with how institutions (and their personnel) will and/or should operate and behave in the future. Second, "retrospective" SSR, which implies shaping the SSR agenda with due regard to the structures, policies and practices that facilitated or allowed human rights violations, and aims at disabling the organizational, operational, if not the legal capacity, to commit these violations.

In The Gambia, the transitional justice process through the Truth, Reconciliation and Reparations Commission (TRRC) provided a detailed account of the operations of security institutions, including the chain of command, internal policies and practices and demonstrated the extent to which de jure and de facto abusive powers of security institutions, coupled with absolute absence of internal or external oversight mechanisms, facilitated systematic human rights violations. These accounts represent fundamental

elements to shape the SSR process, provided that the relevant tools and mechanisms are adopted to ensure mutual integration. So far, however, such an integrated approach or even a dialogue between the two processes has been somehow lacking. Various complementary strategies may be adopted to ensure continuous interlinkage between the two processes. These include effective coordination and communication between the two processes so that SSR is continuously fed by and mindful of the TRRC proceedings. Informal coordination (through the Office of National Security) or formal coordination (joint coordination mechanism envisioned in the SSR Strategy but never established) together with a genuine participatory and inclusive SSR process are instrumental in ensuring that the information gathered in the framework of the TRRC regularly infuses and guides SSR and its priorities. In addition, an integrated approach of the two processes implies considering the need to "deal with the past" as a core objective of SSR. In The Gambia, while good governance of the security sector was highlighted as a priority to address past abuses, most of the efforts have so far concentrated on the rightsizing component of the process.

In the context of institutional and legal reforms, a "retrospective" approach to SSR should notably entail a focus on a human-centred and service-oriented approach of security institutions, guided by fundamental human rights principles; addressing political interference into the operations and appointments/staffing of security institutions; ensuring that all security institutions (including the intelligence agency or the State House guard) are overseen by a line ministry; or that complaints mechanisms for alleged offences by security personnel are accessible and effective.

In parallel, efforts to address the past abuses from a security sector perspective would be in vain if the issue of accountability for these abuses is not openly dealt with or discussed. Overarching SSR policies stress the need to set up a mechanism for dealing with members of the past regime allegedly involved in abuses and acknowledge the fact that alleged perpetrators still operate in the security sector. Yet, the vetting mechanism that has been initiated merely consists of "security vetting", aimed at assessing the vulnerability and associated risks of an individual to ensure that he/she can be trusted with sensitive information or assets. This is to be differentiated from "transitional/integrity building vetting" which assesses whether past behaviour of personnel, including non-adherence to human rights, calls for their exclusion from the justice and security sectors. As of today, there is nothing to suggest that such a vetting process will complement or be subsumed in the "security vetting" process.

In addition, while the TRRC process and vetting mechanism should both contribute to acknowledgment of past abuses, they are not alternatives to criminal prosecution. The TRRC's recommendations for prosecution of persons "who bear the greatest responsibility" for human rights violations and abuses shall eventually serve as guidelines for developing a prosecutorial strategy. The transitional justice process constitutes an opportunity for the Government to launch and implement the required legal and judicial reforms, so as to enable an effective prosecution of crimes. These include criminalization under domestic law of international crimes including crimes against humanity, torture, enforced disappearance or ensuring that law enforcement authorities have the capacity to handle complex criminal investigations and proceedings.

While this policy paper argues more could have been done to interlink SSR and transitional justice, the release of the TRRC report – expected in summer or autumn 2021 – should be seen as a unique opportunity to effectively integrate transitional justice into the SSR agenda. It will be critical to ensure that the findings and recommendations of the TRRC are a matter of public interest and that the proper mechanisms and strategies are established to provide for a transparent and thorough review of the recommendations as they pertain to the security sector and the development of strategies (or revision of the existing strategic framework) to guarantee that these recommendations are effectively acted upon. The fact that the release of the report will precede or coincide with the presidential election campaign may constitute an opportunity to foster dialogue around the implementation of the recommendations and therefore advance the SSR process through the specific lens of promotion and protection of fundamental human rights principles and norms.

Introduction

In December 2016, Adama Barrow was elected President of the Republic of The Gambia, succeeding Yahya Jammeh who had seized power in a coup d'état in 1994. For 22 years, Jammeh's rule was characterized by a pervasive and entrenched disregard for the rule of law and systematic human rights violations. This included enforced disappearances, arbitrary arrests and detentions, torture and other forms of ill-treatment, unlawful killings and intimidation.[1] These human rights abuses targeted journalists, human rights defenders, civil society organizations (CSOs), student and religious leaders, political dissidents, members of the LGBTQ community, and dissenting members of the state's justice and security institutions. For the most part, these serious human rights violations were committed by members of state security institutions or paramilitary groups, which served as the Jammeh regime's tool of repression. The state apparatus was further characterized by highly politicized security institutions, the lack of independent judicial authorities and the absence of genuine parliamentary oversight.

Upon taking office, the new Government committed to creating the required architecture that would guide Gambian society in reflecting and upholding overarching principles or democratic principles, human rights and the rule of law. Under this broader framework, the Government identified three critical processes: transitional justice, security sector reform (SSR) and constitutional reform. The success of these three processes hinges on their ability to address the legacy of abuses under the Jammeh regime while establishing the parameters of separation of power, the rule of law and good governance. This policy paper specifically focuses on the interlinkage of the SSR and the transitional justice processes as complementary tools to provide a platform for reconciliation, reforming abusive institutions and ensuring oversight and accountability of the justice and security sector.

The SSR process and the transitional justice process in The Gambia were both initiated in 2017 and have since run in parallel. To date, each process can claim some important achievements. The SSR process has led to the Government adopting an ambitious SSR transformation agenda by adopting a series of overarching policy and strategic documents. This includes the National Security Policy (June 2019) and its subsidiary strategies – i.e. the National Security Strategy (2020-2035) and the SSR Strategy (2020-2024), both launched at the end of November 2020. Similarly, the Truth, Reconciliation and Reparations Commission (TRRC) was established by its constitutive Act of 2017, with the mandate to establish an impartial historical record of human right abuses from July 1994 to January 2017 and to make recommendations to prevent the recurrence of abuse. Since its establishment, the TRRC has conducted and completed a large number of public hearings, gathered written statements, and conducted on-site visits and exhumations. In so doing, it has documented the involvement of the executive, security institutions and paramilitary groups in the commission of serious human rights violations during the Jammeh era. The TRRC published an interim report in March 2020 and is expected to produce a final report in July 2021.[2]

While the TRRC and SSR processes both focus on security sector institutions and their personnel, and share underlying aims, the two processes have been approached in isolation and as distinct from each other. Both SSR and transitional justice were seen as vital by the Government in supporting wider efforts at ensuring sustainable peace, reconciliation and security. Indeed, the "never again" guiding principle of the Gambian transitional justice process has been an important consideration in many of the core reforms outlined in the SSR process. The conceptualization of the SSR process has indeed had a dual approach: the more common "prospective" approach, which aims at laying the foundations for improved governance and effectiveness of the security sector, and the "retrospective" approach which aims at dismantling the system – from an individual, institutional and legal standpoint – that enabled or facilitated security agencies and the state to commit human rights violations. Ignoring the legacy of past abuses in the framework of the SSR process would undermine key public demands regarding transformational change and governance deficits within the security sector, and sustainability of the process itself but also its overall objectives of peace and security.

This policy paper examines the interlinkage between SSR and transitional justice from two perspectives. Part one of the paper identifies the international standards and legal instruments that support an understanding of SSR in the framework of transitional justice. Part two proposes areas where the transitional justice and SSR processes in The Gambia could be mutually integrated, thereby enhancing their respective contribution towards a just, safe and democratic society.

I. Understanding SSR in the framework of transitional justice

1) The guarantee of non-recurrence under transitional justice

Transitional justice commonly refers to "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."[3] Through a set of complementary mechanisms, transitional justice encompasses and gives effect to four international fundamental rights and obligations:[4] 1) the right to truth; 2) the right to reparation; 3) the right to justice and; 4) the guarantee of non-recurrence of violations. These four fundamental rights and associated obligations of states to respond to mass violations of human rights are enshrined in the Updated UN Set of Principles to Combat Impunity[5] - as reflected in the four pillars of the mandate of the Special Rapporteur on transitional justice.[6]

Because the four pillars of transitional justice consist of fundamental rights of people and related state obligations under international law, these pillars are cumulative and not alternative. This implies that compliance with the obligation to guarantee the right to truth through the establishment of a truth commission does not absolve the state from its obligation to prosecute gross violations of human rights. Likewise, complying with the obligation to prosecute violations does not relieve a state from its obligation to undertake the required measures and reforms to prevent the recurrence of violations. As a result, all pillars are closely interlinked and mutually reinforcing and as such ought to be considered through a holistic approach.[7]

The guarantee of non-recurrence was initially considered in a landmark UN report on the right to reparation for victims of gross violations of human rights,[8] whereby reparation shall include restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition.[9] The guarantee of non-recurrence of human rights violations was thereafter affirmed by human rights bodies,[10] either as a standalone legal obligation of states responsible for human rights violations or as part of the obligation to provide reparation.[11]

As stated by the UN Special Rapporteur, an obligation to respect and ensure human rights entails an obligation to take measures to prevent a recurrence of their violation.[12] The obligation of states includes a need "to organize the governmental apparatus, and in general, all the structures through which public power is exercised, so that they are capable of juridically ensuring the free and full enjoyment of human rights."[13]

The legal obligation to take all the required measures to prevent the recurrence of human rights violations is incumbent on successor governments which are bound by wrongful acts committed by their predecessor.[14]

2) SSR and the guarantee of non-recurrence

i. SSR as an international legal obligation?

SSR is generally referred to as a process of transforming the security sector to strengthen accountability, effectiveness, and respect for human rights and the rule of law.[15] The security sector is a broad term used to describe the structures, institutions and personnel responsible for the management, provision and oversight of security in a country.[16]

Since the emergence of the concept in the 1990s, SSR has been conceived as a process to promote and strengthen good governance, and especially accountability, of the justice and security sector. More rarely, however, has SSR been understood in light of international legal obligations.[17] Yet, as detailed above, in the context of past gross violations of human rights, the guarantee of non-recurrence obliges the state to undertake the necessary reforms to, inter alia, shape its security sector in such a way that fully ensures respect for human rights. As such, it can be argued that **the justice and security-related initiatives undertaken by the state – whether or not officially branded as or part of an SSR process – constitute the means by which the state complies with its international legal obligation to guarantee non-recurrence.**

Clearly, implementing adequate measures and reforms in compliance with this legal obligation will not "guarantee" the non-repetition of human rights violations. As such, "the term 'guarantee of non-recurrence' is somewhat misleading",[18] as the state does not have an "obligation of result" but of "means".[19] This obligation suggests a need to "take all appropriate measures" and "to do all that can be reasonably expected"[20] to prevent the recurrence of violations.

ii. SSR-related measures and compliance with the guarantee of non-recurrence

There is no specific approach for complying with the guarantee of non-recurrence, as this guarantee is a function that can be satisfied through a broad variety of measures.[21] Human rights treaty bodies have identified a series of **measures that can be undertaken by states under the guarantee of non-recurrence, all of which fall within the parameters of an SSR process.**

The measures identified in the 1993 Van Boven Report include: ensuring effective civilian control of military and security forces; restricting the jurisdiction of military tribunals; strengthening the independence of the judiciary; protecting human rights workers, and; providing human rights training to all sectors of society, in particular to military and law enforcement officials.[22] Measures listed in the Updated Set of Principles to Combat Impunity[23] include: 1) reform of state institutions, through legislative and administrative reforms; 2) disbandment of unofficial armed groups; 3) legal reform, notably repealing of legislation and regulations that contribute to or legitimize human rights violations; ratification of human rights treaties; domestication of international crimes; judicial reforms and constitutional reform.[24] According to the Updated Set of Principles, measures toward reforming state institutions ought to include civilian oversight of military and security forces and of intelligence agencies, including by legislative oversight bodies; civil complaint procedures and "at a minimum", the removal of "public officials and employees personally responsible for gross human rights violations, in particular those involved in military, security, police, intelligence and judicial sectors".[25]

While the guarantee of non-recurrence constitutes a state obligation under international law, the preventive measures enumerated by human rights bodies are not mandatory.[26]

iii. Retrospective & prospective SSR

Research examining which states are more vulnerable to gross human rights violations has identified a series of "risk factors".[27] Two of these risk factors are particularly relevant in the context of SSR. The *first key risk factor* relates to *contexts in which there are weak state structures*. In such cases "the weakness of State structures will not necessarily be a cause of atrocity crimes, but it undoubtedly decreases the level of protection and, when analysed in conjunction with other risk factors, increases the probability of atrocity crimes."[28] The *second risk factor* relates to *contexts where there are cases of serious violations* of international human rights along with a policy or practice of impunity. In such cases "the legacies of past atrocity crimes have not been adequately addressed through individual criminal accountability, reparation, truth-seeking and reconciliation processes, as well as comprehensive reform measures in the security and judicial sectors." This factor increases the risk that state security institutions will "resort again to violence as a form of addressing problems."[29]

These two scenarios mirror the two complementary objectives of SSR in the framework of past human rights violations. The first scenario calls for **"prospective"** SSR, which commonly aims at improving security sector governance (SSG). SSR processes aim to identify and pursue reforms that influence how institutions and their personnel will and/or should operate and behave in the future. SSR focuses on strengthening the accountability, effectiveness and efficiency of justice and security sector institutions. This includes promoting ethics, integrity and professionalism, addressing structural or management deficits, establishing internal control mechanisms and ensuring effective external oversight of the security sector by state and non-state actors (i.e. parliament, CSOs, media, ombuds institutions, national human rights commissions).

In the second case – records of unaddressed human rights violation– "prospective" SSR alone would not adequately prevent a recurrence of violations. The SSR process should be **"retrospective"** in nature as well. This implies shaping the SSR agenda in light of the underlying root causes of past violations, whether cultural or structural, and aims at disbanding the system (both at the institutional and individual level) that enabled or facilitated previous human rights violations. The SSR agenda must thus be crafted with due regard to the structures, policies and practices that facilitated or allowed the violations, and to disable the organizational, operational, if not the legal capacity, to commit the violations.[30] In the same vein, in designing the justice and security reform process, one must consider the extent to which the past human rights violations, by act or omission, directly or indirectly targeted specific groups of the population on the basis of their ethnicity, religion or gender.

II. Interlinking SSR and transitional justice processes in The Gambia

As discussed above, the obligation of the state to comply with its international obligations under the guarantee of non-recurrence requires it to undertake the necessary legal, institutional and administrative reforms. The SSR process is central to the Government's efforts in this regard and accordingly needs to be shaped and implemented having due regard to the underlying factors that facilitated the commission of past abuses. Following a brief overview of the involvement of the security sector in human rights violations during the past regime, section one of this part of the paper examines *how* transitional justice and SSR could effectively be implemented through an integrated approach. Next, the paper identifies *what*, in substance, transitional justice should entail for SSR, through institution-specific (section two), vetting (section three) and prosecution/legal reform (section four)

Overview of past abuses in light of the TRRC proceedings

The TRRC collects information on past human rights abuses through public hearings, statements, on-site visits and exhumations. The public hearings are conducted following predefined "themes" that relate to specific events (e.g. the 1994 coup;), to the type of human rights violations (sexual and gender-based violence [SGBV], violation of freedom of press or assembly; enforced disappearance etc.), to Jammeh's paramilitary hit squad known as the "Junglers" or to justice and security institutions. Beyond the impact that the information collected will have on the victims in terms of their right to truth, the evidence gathered by the TRRC is key to laying bare the systemic, legal, and cultural factors that facilitated human rights violations.

The TRRC's public hearings confirmed the extent to which security institutions were involved in systematic human rights abuse and that they were used as the past regime's tool of oppression and power. Notably, the hearing corroborated allegations pertaining to the central role of the National Intelligence Agency (NIA; Jammeh's personal secret police) in the commission of human rights violations; a role that can be summarized by the following witness statement: "It was a tolerated practice that NIA would bring prisoners in without proper documentation or paperwork. Some came in a bad shape, after torture."[31] The TRRC conducted an on-site visit to the NIA, including the infamous "Bambadinka" (crocodile hole), where victims, particularly alleged dissidents, were tortured. In addition to torture, illegal arrest and detention and other human rights violations, NIA members were allegedly implicated in drug trafficking, along with members of the Drug Law Enforcement Agency of The Gambia (DLEAG).[32] The public hearings, coupled with on-site visits by the TRRC to prisons (Mile 2, Old Jeshwang, and Janjanbureh prisons), also showed the extent to which systematic torture or other inhumane treatments were committed in detention centres. Testimonies referred to widespread torture in Mile 2 Security Wing committed by the Director of Operations.[33] The process further exposed the implication of the Gambian Armed Forces (GAF) in extrajudicial killings, notably those carried out on 11 November 1994.[34] Likewise, a number of witnesses gave accounts of Jammeh's witch hunt campaign in 2009, which had been facilitated by the Gambian Police Force (GPF) and resulted in a number of victims.[35] The TRRC proceedings further exposed the killing of some 50 West African migrants which was instigated, committed and covered up by high ranking official of security institutions, specifically the NIA, GPF and GAF.[36]

The TRRC process further provided insight into cultural and social factors which contributed to abuses by security agencies, especially against women. Testimonies and statements demonstrated the extent to which SGBV was committed by Jammeh and his inner circle. Evidence points to a "system" whereby Jammeh's entourage regularly pressured women to visit or work for Jammeh, who then sexually abused many of them.[37] A report submitted to the TRRC[38] gives an account of women being subjected to widespread human rights violations, in particular sexual violence (including rape committed by soldiers in the course of the 2009 witch hunt campaign), arbitrary arrest, torture and other forms of ill-treatment as well as forced labour (e.g. women were forced to work on Jammeh's farms) by members of security institutions and the Government.

The evidence gathered by the truth commission are key to understanding the system through which the state apparatus, and specifically security institutions, were de facto and de jure able to curb the fundamental rights of the population. These constitute fundamental elements to shape the SSR process, provided that the relevant tools and mechanisms are adopted to ensure an integrated approach of the two processes.

1) Promoting an integrated approach of the two processes

The Gambian SSR and transitional justice processes were launched simultaneously in 2017 and have since run in parallel. In spite of their complementary objectives, it is argued that efforts to ensure an integrated approach or even a dialogue between the two processes, have been somehow lacking.

Various complementary steps may be adopted to shape and implement the SSR process in light of the transitional justice framework. These include (i) coordination; (ii) inclusivity; and (iii) enshrining the principle of "dealing with the past" as a key SSR priority. Undoubtedly, the final stage pertains to the Government's responsibility to effectively act upon the TRRC's recommendations (IV).

i) The fact that transitional justice and SSR were launched and are running in parallel constitutes a genuine opportunity – if not a necessity – to ensure **effective coordination** and communication between the two processes so that SSR is continuously fed by and mindful of the TRRC proceedings. The role of the Government, in particular the Office of the President, the Office of National Security and the Minister of Justice, are instrumental in ensuring that the information provided by victims and witnesses in the framework of the TRRC regularly infuses and guides SSR and its priorities. The Minister of Justice, who leads the transitional justice process and also chairs the SSR Steering Committee, has a pivotal role to play to ensure that the voices of the victims and witnesses are equally heard and addressed in both the SSR and transitional justice processes. In parallel, a good practice may consist in establishing a dedicated framework or mechanism to foster coordination between SSR and transitional justice. It is notable that the 2020 SSR Strategy foresees the establishment of a "joint coordinating committee to synergize transitional justice and SSR."[39] This body was, however, never established. Its creation and operationalization at the outset of the SSR process could have been instrumental in influencing the SSR agenda. It is hoped that such a body will ultimately be created to serve as an effective tool for the purpose of analysing and acting upon the TRRC's recommendations, following the release of its report.

ii) In parallel, due consideration of transitional justice in the SSR process should imply that it is fully **inclusive and participatory** in such a way that it is designed and implemented having due regard to the experiences, concerns, fears and expectations of the victims of past violations, including vulnerable groups or minorities. As Mayer-Rieckh stated, "in the aftermath of serious abuses, particular efforts should be made to reverse the process of excluding victims of abuse and other marginalized groups and reaccept them in the political community."[40] Likewise, it entails adequate representation of victims and marginalized groups in security sector institutions, considering that "dealing with the past in SSR should aim not only to reform the security providers but also to empower directly victims and other marginalized groups."[41] Notably, this requires that victims and witnesses of past abuses are represented and participate in the development of key strategic SSR documents. Yet, in The Gambia, concerns have been raised about the lack of genuine participation of CSOs in the SSR process, and specifically in the development of strategic SSR documents.

An inclusive SSR process also implies awareness raising and access to information at the community level. This is particularly vital in the context of past abuses involving security personnel with a view to presenting the objectives and achievements of the reform process from the lens of past human rights violations: what has been and will be done in the framework of SSR to prevent repetition of human rights violations? In The Gambia, while the TRRC process has benefitted from a wide communication and outreach campaign (and receives a relatively high level of trust from the population),[42] public information and awareness-raising efforts of the SSR process has been deficient, as demonstrated by a 2019 DCAF survey indicating that 80 per cent of the respondents had no knowledge of the SSR process in the country.

iii) An integrated approach of the two processes would also imply considering the need to "deal with the past" as a **core objective of SSR**. Admittedly, the SSR strategic framework (National Security Policy and the two subsidiary strategies) expressly acknowledge that past human rights abuses were committed by members of security forces.[43] While the SSR Strategy does set its first SSR priority area as "Addressing Post-Authoritarian Legacies to Enhance Reforms", the specific objectives or interventions foreseen under this pillar do not respond to the stated priority area. As a way of example, the revision of laws and policies is aimed at "reflecting the *current* realities." Other objectives stated in the strategy are also so broad that they hardly commit the Government to implementation. For instance, it refers to the need to "impose sanctions on those responsible for human rights violations." Not only is the language here problematic (the aim should be to ensure accountability of persons involved in past abuses

rather than "imposing sanctions"), but the document fails to clearly identify the required measures (in terms of legal reforms and justice reforms) that would allow effective and efficient prosecution of violations. In view of the above, while some of the overarching framework of the SSR process explicitly states the overall objective to frame the agenda for the purpose of addressing the past abuses, the process (both in policy and in practice) fails to consider the full extent of what this really implies in term of reforms, and specifically in term of governance. While good governance of the security sector was stated as a priority to address past abuses, most of the efforts have so far concentrated on the rightsizing component of the process. It is significant in this respect that the vast majority of international donor support has focused on strengthening operational capacity of security institutions ("train and equip")[44] rather than enhancing good governance and accountability.

iv) **The final report of the TRRC** is expected to be released in summer or autumn 2021. In compliance with Article 14(4)(b)ii) of the TRRC Act, the report should contain the body's activities, findings, along with "recommendations to the President with regard to the creation of institutions conducive to the development of a stable and democratic society as well as the institutional, administrative and legislative measures which should be taken in order to prevent the commission of violations and abuses of human rights." Article 30 refers to the obligation of the Government to submit the report to the National Assembly, and within six months after submitting it to "issue a white paper containing its proposed plan on the implementation of the recommendations in the gazette."

The security sector itself will likely not only be a key subject of the report but will have to commit itself to considering the wide-ranging implications and findings of the TRRC report and recommendations. Arguably, the security sector will need to launch a dedicated process to review existing reform priorities and policies (e.g. National Security Policy or SSR Strategy) in light of the TRRC's findings, including amending such foundational documents if there is a disconnect between stated SSR priorities and the priority recommendations made by the TRRC specific to the security sector. The joint SSR-transitional justice mechanism foreseen in the SSR Strategy, together with the Office of National Security, will be best placed to coordinate this review process and develop a roadmap on the implementation of the recommendations.

It is essential that the implication of the TRRC's recommendations be a matter of public interest. This means that upon submission of the report by the Government to the National Assembly, dedicated public hearings on the report should be held. In parallel, the report should receive wide dissemination among the population, including in a user-friendly format to enhance its understanding and accessibility. The "white paper" produced by the Government in compliance with Article 30 of the TRRC Act, presenting the implementation plan of the recommendations, should likewise be widely disseminated and easily accessible, and not exclusively through the Official Gazette. This will enable the population, including CSOs, media and institutional oversight mechanisms (Ombudsman, National Human Rights Commission), to closely monitor, report on and advocate for the implementation of the recommendations from the lens of the SSR process.

2) Undertaking security sector institutional and legal reforms

The TRRC's proceedings point to a security system in which political interference, an inadequate or lack of legal and regulatory framework governing security institutions, and absence of effective oversight mechanisms allowed or enabled the commission of systematic human rights violations by security agencies.

One of the underlying factors of the involvement of security services in past abuses arises from the very core concept of security and security service provision. The Jammeh regime was characterized by a security system primarily aimed at and used for serving and protecting the state and, above all, the interest of its head of state. In this state-centric approach to security, not only does the security system not serve the security needs and concerns of the population but, on the contrary, it is conceived as a tool of repression to prevent the Gambian population from exercising their naturally endowed rights. In this respect, SSR is critical to ensuring an effective transition to a human-centric security approach which is enshrined in the overall constitutional, policy and legal framework and formally adhered to by individual security institutions. It is notable that, while the 1997 Constitution of The Gambia was drafted and repeatedly amended so as to serve and protect the interests of the state apparatus, the yet to be adopted 2020 final draft Constitution includes a new provision formally endorsing the concept of human security.[45] Likewise, individual security institutions ought to be governed,

through the process of SSR, by a human security and service-oriented approach and be expressly guided by fundamental principles related to prevention and protection of human rights and respect to rule of law into their respective legal and regulatory framework. Initiatives in this regard have been made, for example in the draft Act governing the GAF, also yet to be finalized. In addition, security institutions' governing acts and subordinated policies and doctrines should not only clearly identify their respective mandates and responsibilities but also define their missions, visions and overarching core principles, including values and standards that should guide their operations. In relation to mandates and responsibilities, this implies defining the mandate of the GAF in internal security (whether, when and how it can intervene in internal security matters and how this function fits with those of other agencies such as the GPF). Likewise, defining the core functions of the intelligence agency also implies delineating its powers which, together with an effective oversight mechanism, should prevent the abuse of power. This is an essential requirement for the reform of the NIA – renamed as the State Intelligence Service (SIS) – considering the scope of its powers under the previous regime (including powers of arrest and detention without judicial control) and the extent of NIA's involvement in past abuses. Hence, the need to ensure that the mandate of the agency is clearly and exhaustively legally defined and limited and to ensure that its powers do not include that of arrest. While the draft SIS bill – yet to be tabled in the National Assembly – includes significant improvements over previous legislation governing the intelligence sector, a number of provisions raise concerns linked to governance and deficits in checks and balances, including with regard to the powers of the agency (e.g. in relation to arrest and warrants), implying a risk of abuse of power. It is further noted that, while the final draft Constitution provides dedicated sections related to the GAF and GPF, outlining their respective mandates, no similar section is included for the SIS.

The TRRC proceedings demonstrated the extent to which security institutions constituted the armed wing of the executive and the pervasive political interference in both the operations and organization of these institutions. SSG/R initiatives are key to establishing the proper framework and processes to formally prohibit the head of state from making operational decisions, and in parallel, can ensure that security institutions are apolitical. In this regard, it is vital that each security institution has a responsible line ministry to which it reports. It is worth noting with concern that the intelligence agency (NIA/SIS) does not have a responsible line ministry and is to report directly to the President; neither the final draft Constitution nor the draft SIS bill have modified this reporting line. In the same vein, the State House guard (presidential guards)[46] created under the Barrow administration seems to operate in a vacuum, as a parallel security institution. They are under the direct purview of the executive, without a line ministry and operate without any legal framework as this body is neither referred to in the draft Constitution nor is it governed by dedicated legislation setting out its mandate, responsibilities and oversight mechanisms. This situation is even more worrisome considering the extent to which the Presidential guard unit under Jammeh – Jammeh's hit squad, the "Junglers" – were used and involved in the commission of human rights violations. The lack of legal safeguards around the State House guard constitutes an inevitable risk of misuse against the population. In addition to political interference into the operations of security institutions, the former regime was characterized by interference into the organization (chain of command) and staffing of these institutions. Here again, such a situation hampers the establishment of an autonomous and non-politicized security sector. Hence, the need for the SSR process to include a focus on human resource management of individual security institutions, ensuring thereby a merit-based standard throughout the recruitment and promotion of security staff at all ranks.

The extent and nature of the human rights violations orchestrated and committed by the state apparatus and security institutions were further illustrative of the absence of any proper oversight mechanisms, be they external or internal, state or non-state. In a nutshell, external oversight actors were at best ineffective, dormant and powerless (e.g. the National Assembly, and specifically the Standing Committee on Defence and Security [SCDS]) and at worst, oppressed and muzzled by the state (e.g. CSOs, media). In parallel, none of the security institutions were provided with proper internal control mechanisms to deal with conduct and discipline. While SSR is commonly seen as a key instrument in enhancing oversight of the security sector, a "retrospective" approach to SSR aims at placing oversight and accountability of the security sector at the very heart of the reform process.

Since the political transition, some notable initiatives have been undertaken in this respect. These have included the establishment in 2017 of the National Human Rights Commission, which is empowered to, inter alia, investigate *proprio motu* or based on complaints, alleged violations of human rights, including those allegedly committed by members of

security forces. Notably, the National Human Rights Commission conducted two investigations into a deadly case of torture allegedly committed by GPF personnel.[47] Progress has also been achieved with regard to parliamentary oversight of the security sector. In particular, the oversight role of the National Assembly has been strengthened through provisions requiring security actors in some cases to seek approval from or to report to the National Assembly. For instance, the draft GAF Act provides that the operational use of the GAF is subject to the National Assembly's approval; the final draft Constitution requires the GAF to report to the National Assembly when deployed for assisting other authorities in situations of emergency or disaster.[48] Such a reporting requirement is however absent both in the draft Constitution and the draft GAF Act in cases of deployment of the GAF for internal security purposes.[49] In parallel, the function of the National Assembly and specifically that of the SCDS in holding to account the Government and security institutions is expressly enshrined in the 2020 National Security Strategy and recalled in the 2020 National Assembly Standing Orders.[50] There is concrete evidence of enhanced engagement of the SCDS in security sector oversight, including the recent scrutiny of a bilateral security agreement with Turkey, holding meetings with heads of security institutions during the 2019 budget discussions, or conducting on-site visits of institutions.[51] While there are signs of parliamentarians' willingness and commitment to perform meaningful security sector oversight, it remains to be seen if they will be provided with effective opportunities and leverage to exercise such a mandate. As it currently stands, it is likely that the SCDS will have little opportunity to supervise intelligence-related matters given the absence of any statutory reporting requirement of the SIS to the National Assembly coupled with the lack of legislation or policies governing access to classified information. Further, given the insufficient means of the SCDS to properly perform its functions (e.g. support staff, legal staff, technical expertise, resources/material), one may regret the lack of a specific objective in the SSR Strategy to strengthen SCDS capacity.

Notable progress on institutional oversight of the security sector was made through the establishment of the National Security Service Commission (NSSC) in the final draft Constitution.[52] In addition to its function related to the appointment and promotion of staff within some security institutions,[53] the NSSC is to "observ[e] due process, exercise disciplinary control over and remove persons holding or acting in offices within its jurisdiction".[54] While members of the NSSC are to be appointed by the President, its composition explicitly excludes members of the security services, ensuring thereby statutory autonomy and independence from the institutions under its purview. The scope of the functions of the NSSC and applicable procedures are yet to be expressly defined. It will be interesting to assess the extent of the role and powers of the organ in terms of disciplinary control of security personnel. It seems unlikely that the NSSC will be vested with the power to receive complaints of alleged misconduct (breach of disciplinary-related rules and regulations including codes of conduct) by security personnel. Furthermore, it is clear, and perhaps a missed opportunity, that the NSSC will not have the authority to serve as a public complaints mechanism for criminal offences allegedly committed by members of the security institutions. In this regard, it is argued that a "retrospective" approach to SSR aimed at preventing and addressing abuses by security personnel should prioritize the existence of effective complaints mechanisms, known and accessible to the public, in its reform agenda. Yet, four years after the initiation of the SSR process, none of the key security institutions are endowed with fully operational and accessible complaints mechanisms. Admittedly, the police has a Human Rights and Professional Standards Unit, but it is still neither fully operational nor well known to the public. The Gambian Immigration Department does not have a dedicated structure or mechanism for dealing with public complaints, while the draft GAF Act does not foresee such a mechanism for the GAF. While the SIS draft legislation does provide the establishment of a "complaint tribunal", some of the legal provisions related to its jurisdiction and procedures are likely to undermine its accessibility, independence and legitimacy.

The institutional and legal reforms undertaken as part of the SSR process to dismantle a security system that contributed to the commission of past abuses would be critically undermined if, in parallel, the SSR process ignores the still sensitive and political issue of accountability for these abuses allowing security actors involved in abuses to remain in function.

3) Vetting at the core of the intersection of SSR and transitional justice

The 2019 National Security Policy states:

> "Further delays to set up a mechanism for dealing with members of the past regime accused of committing atrocities has resulted in deep-seated grievances amongst sections of the civilian population. Importantly, alleged perpetrators still actively involved in the security sector must be brought to account for alleged crimes in a strengthened Transitional Justice Process to ensure accountability and justice."[55]

Following his visit to The Gambia in 2019, the Special Rapporteur on Transitional Justice stated: "Individuals accused of perpetrating or enabling human rights abuses continue to work within civil or security services and well-known high-level enablers or perpetrators of the former regime were appointed as ministerial upper ranks, advisors, ambassadors and in other government positions."[56] This situation has likewise been singled out by victims, witnesses or representatives from CSOs. While some security personnel who were subject to the TRRC's hearings have been dismissed or put on administrative leave, many senior commanders of security institutions under Jammeh (in the NIA, DLEAG, GAF, GPF) have remained in function.

A vetting process of the security sector has been either called for or referred to in both the transitional justice and the SSR processes. It appears, however, that **the two processes have taken a different approach as to the scope and purpose of vetting**. On the one hand, the transitional justice strategy states that "vetting and ejecting the individuals responsible for abuses from public office is an integral part of the process of restoring the trust of the victims and the society in state institutions."[57] On the other hand, under the SSR strategic framework, the vetting envisaged is to "screen and vet personnel of all national security institutions before enrollment and as may be deemed necessary."[58] The National Security Strategy and the SSR Strategy foresee the enactment of a "Vetting Act" and the establishment of an independent and multi-sectoral vetting capability responsible for all vetting.[59] This mechanism moreover is to be under the purview of the SIS.[60]

It appears that the Gambian Government plans solely for **"security vetting," as opposed to "transitional/ integrity building vetting."** "Security vetting" aims to ensure that the character, personal circumstances of an individual, including his/her vulnerabilities and associated risks, are such that he/she can be trusted with sensitive Government information or assets. "Security vetting" therefore consists of a screening process for criteria that do not include human rights considerations but focuses instead on issues related to the security of the state. It seems that the "security vetting" process planned in The Gambia will mirror that undertaken in Kosovo.[61] "Security vetting" is to be differentiated from the common concept of vetting in transitional settings which generally refers to "a formal process for the identification and removal of individuals responsible for abuses, especially from police, prison services, the army and the judiciary."[62]

While "security vetting" should be part of a comprehensive SSR framework, it could be argued that priority should have been given to a "transitional/ integrity building vetting" process.

Vetting is generally seen as an "enabling condition" of other transitional justice measures or a "mechanism to manage spoilers in transition".[63] A process of truth telling, criminal prosecution or institutional reforms – especially of security institutions – cannot be effectively implemented without affecting the fundamental interests of those responsible for the violations. As a result, should those involved in the violations remain in office, they may - by their acts or omission - hamper the process. This may take the form of obstructing or slowing down institutional reforms, including restructuring or downsizing security institutions, or concealing or destroying incriminating evidence. In The Gambia, various sources[64] indicate that some pieces of evidence of human rights violations committed on the premises of the GPF and the NIA have been either "accidentally"[65] destroyed, or deliberately removed. The hearings of the current head of the SIS – who served in the NIA for 14 years, including as head of operations in 2004 – confirmed the destruction of evidence in the "torture chamber" of the NIA , including the "torture machine"; likewise, NIA registration files submitted to the TRRC are incomplete, with notably the absence of records from 2004.[66]

An additional argument for vetting is that the absence of "integrity building vetting" diminishes any efforts made towards preventing the recurrence of human rights violations. As stressed by the UN Special Rapporteur on Transitional Justice: "The continuation in power of an abusive regime makes it impossible to guarantee that violations will not be repeated."[67] Those security personnel who bear the greatest responsibility in past abuses are likely to reproduce their previous behavior in a given or similar context, including during a political or security crisis.

Finally, vetting can fill what is generally called the "impunity gap",[68] given that all perpetrators of human rights abuses cannot be held accountable through criminal prosecution and/or truth telling. Through its punitive aspect, the removal from office of perpetrators will constitute a sanction, both economic and social; in turn, from the victim's perspective, it represents a formal recognition of the crimes he/she suffered and may somehow serve as a reparation. By contrast, if the victims and the population observe that alleged perpetrators still serve in the security services, this not only constitutes a "re-victimization", but also critically and automatically undermines the trust in and legitimacy of these institutions. In The Gambia, while the level of trust in security institutions of the population remains generally good,[69] concerns were raised during DCAF's interactions with communities regarding the SSR process and the fact that former abusers had thus far remained in office. Ignoring the legacy of past abuses by retaining in office those responsible for such abuses, including in key command positions, will undermine efforts to build civic trust and greater legitimacy of the security sector.

Against this background, while a "security vetting" may be relevant, a "retrospective" approach to SSR would have called for an "integrity building/human rights vetting". Such a vetting may be seen at the core of the intersection of SSR and transitional justice: if SSR is considered as the means to address the system that enabled the commission of the human rights abuses, it should consider the apparatus that contributed to it. Admittedly, the decision by national authorities and the donor community to opt for "security vetting" was largely due to affordability. Yet, "transitional vetting" does not necessarily imply a large-scale or costly programme, provided that both the screening criteria and the subjects of the vetting are narrowly defined.[70]

4) Ensuring accountability for past abuses

While the truth commission and vetting mechanisms both contribute to acknowledgment of and accountability for past abuses, they are not alternatives to criminal prosecution. CSO representatives in The Gambia have stressed the importance that criminal prosecution will have in the healing and reconciliation process for Gambians.[71] Surveys indicate that 68 per cent of Gambians believe that "perpetrators of crimes and human rights abuses during Jammeh's regime should be tried in court".[72] During the so-called "reconciliation hearings", which are critical for healing, citizens still express concerns that there must be criminal justice.[73] It is worth stressing that the Supreme Court of The Gambia ruled that members of the previous regime do not enjoy constitutional immunity from prosecution.[74]

The TRRC Act provides the basis for the Commission for the "**identification and recommendation for prosecution of persons who bear the greatest responsibility** for human rights violations and abuses".[75] As the then Minister of Justice stressed, this is the first truth commission in the world with such a mandate.[76] The phrase "who bear the greatest responsibility" has been used to establish the primacy of ad hoc international or hybrid criminal tribunals over national courts, leaving to the latter the responsibility to prosecute lower-ranking individuals.[77] The recommendations of the TRRC as regards to "those who bear the greatest responsibility" may serve as a guideline for developing a prosecutorial strategy and shall not constitute legal findings as to the individual criminal responsibility of the individuals mentioned.[78]

The TRRC is further empowered to make **recommendations for amnesty,** provided that the individuals make a full disclosure of their involvement in human rights violations,[79] a prerogative common to most truth commissions. The TRRC Act expressly excludes from amnesty acts that may qualify as crimes against humanity but leaves unresolved the question of amnesty for other gross violations of human rights. International human rights treaties, bodies and courts have ruled that states may not grant amnesty that would prevent prosecution for gross violations of human rights, which include torture and enforced disappearance; amnesties for gross violations of human rights may also violate states' obligations under customary law,[80] as recalled by the Special Rapporteur on Transitional Justice during his visit to the Gambian capital of Banjul.[81] That said, in the framework of transitional justice processes, amnesties constitute an incentive for alleged perpetrators to testify, thereby facilitating the realization of the right to truth. While these so-called conditional amnesties shall not bar prosecution of those who consented to provide full disclosure of their acts, they may constitute a mitigating circumstance and justify a reduction of their sentence, provided it remains proportionate with the gravity of the crime.[82] The implications that full confessions of crimes before the TRRC would have on criminal prosecutions has however already been raised, in view of the release from jail of some "Junglers" who had appeared before the TRRC.[83]

The TRRC process will constitute the first layer of accountability and will complement and support (through the collected evidence) criminal prosecutions. In this regard, it is to be expected that the TRRC will eventually share collected information and evidence (exhumation, forensic analysis and DNA testing) with the prosecutorial authorities.

So far, initiatives aimed at prosecuting individuals involved in past human rights violations have been limited. Only at the international level has there been some progress, with the prosecution of two individuals in Switzerland[84] and in the U.S.[85]. At the national level, the slow pace of the "NIA 9" case,[86] coupled with the release of the "Junglers" following their testimonies before the TRRC[87] raised questions about the Government's willingness or capacity to undertake effective prosecutions.[88]

The slow pace of national prosecution has been justified by a sequencing strategy, consisting of first asserting the factual findings of the TRRC and thereafter using these for prosecutorial purposes.[89] This sequencing may also be due to the inadequacy of the judicial system to handle the cases,[90] preventing the country to "achieve all forms of justice at once".[91] This constitutes both a challenge and **an opportunity to launch and implement the required legal and judicial reforms, in the framework of the justice and security sector reforms**. Institutional and legal reform may indeed "be a precondition for providing domestic criminal accountability for the abuses of (..) the authoritarian past."[92] As regards the legal framework, priority needs to be given to ratification and implementation of international human rights treaties. Under the Barrow administration, The Gambia has notably ratified the Convention Against Torture and the Convention Against Enforced and Involuntary Disappearance.[93] The Government further needs to ensure that crimes committed during the past regime, including crimes against humanity, torture, and enforced disappearance, are criminalized under national law (the criminal code or specific national legislation); if not, acts that may qualify as crimes against humanity would be prosecuted as "ordinary/common crimes", which not only fails to acknowledge the gravity of the offence but may further lead to a prescription regime. The decision of the Barrow administration to "rejoin" the Rome Statute of the International Criminal Court coupled with its commitment to uphold human rights represents a good opportunity to criminalize all crimes enshrined in the Rome Statute under national law. Initiatives have been taken by the Ministry of Justice with the development of a bill criminalizing acts of torture and "an international crimes bill to cover mass atrocity crimes like genocide, war crimes and crimes against humanity".[94] Debate may then arise as to the applicability of this legislation in the prosecution of crimes committed under Jammeh's rule, in view of the principle of legality and non-retroactivity of domestic legislation. Should this legislation or a national act implementing the Rome Statute fail to expressly include a retroactive clause, prosecution of acts of torture or crimes against humanity committed under Jammeh's rule may rely on customary international law.[95]

Other legal reforms underway include the revision of the criminal code and the criminal procedure code. In this regard, special attention should be given to ensure that general principles of criminal liability under international criminal law (as enshrined in the Rome Statute) are duly covered; this includes provisions con¬cern¬ing self-defense or act-ing in ac¬cord¬ance with or¬ders of su¬per¬i¬ors, failures in the chain of command, or provisions pertaining to im¬munit¬ies or stat¬utory limit¬a¬tion.

Further justice-related reforms underway or planned should aim at strengthening the capacity of law enforcement authorities, the police and the judiciary, to handle complex criminal investigations and proceedings related to the transitional justice process. This requires that the police have adequate forensic expertise,[96] an objective which is foreseen in the SSR Strategy.[97] Other measures aim at providing judges, prosecutors and defence lawyers with the required skills and expertise to handle complex cases involving crimes of an international nature. In addition, proceedings of high-profile and sensitive cases require that victims and witnesses are provided with the necessary protection (a mechanism already set up by the TRRC). The establishment of witness protection programmes and the development of victim support services in conformity with international best practices is foreseen under the SSR Strategy.[98]

Overall, the transitional justice process represents a genuine opportunity to ensure that criminal justice reforms constitute an integral part of SSR while providing the relevant framework, tools and mechanism to prevent and prosecute serious human rights violations.

Conclusion and way forward

More than four years into the political transition, significant progress has been achieved in the framework of transitional justice and SSR. While the former process will lead to the drafting of a final report in the near future, the latter process led to the collection of data and the establishment of a framework to inform and implement reforms. For the most part, however, these two processes have been developed and implemented in silos, with little dialogue, let alone integration. One could refer to the sequencing of the two processes to explain this gap. There are indeed some benefits when SSR processes are initiated after the completion of a truth commission's mandate, allowing SSR policymakers to review the commission's recommendations and design the reform agenda accordingly; as such, this sequencing is likely to leverage the impact of transitional justice. On the other hand, the launching of the two processes in parallel constitutes an opportunity of mutual integration and dialogue from the outset. This is particularly true in The Gambia where the transitional justice process has benefitted from a wide and effective communication campaign, which could have simultaneously advanced dialogue on and inclusiveness of the SSR agenda. This limited dialogue among TRRC and SSR practitioners may be seen as a missed opportunity to better understand the systemic or structural issues that have contributed to the misbehavior of the security sector, thereby enhancing the relevance of the SSR process to the needs, views, and fears of citizens and vulnerable groups impacted by the atrocities committed by the security sector under the previous regime.

The development of transitional justice and SSR in parallel constitutes a unique opportunity for both national stakeholders and the international community to influence the reform agenda in such a way that the focus in the SSR process is not predominantly on capacity and effectiveness of the security sector but rather on the wider SSG. The release of the TRRC report will be critical in this regard. It may constitute an important milestone for Gambian society, its architecture and (safe) environment only in so far as there exists a genuine political will allowing for the findings and recommendations to be fully endorsed and acted upon. While the TRRC's recommendations are not binding, the Government may be held accountable for failure to coherently respond to them.[99] Given the forthcoming presidential election – scheduled for December 2021 – and the fact that the release of the TRRC report may shortly precede or coincide with the electoral campaign, the commitment towards implementation of the recommendations of the report may well be used as a campaign argument. This may contribute to advancing core principles of SSG/R and, beyond that, the values and principles that should guide a safe and democratic society, including the fight against impunity and the prevention of human rights abuses.

References

1. These abuses were documented in detail in Human Rights Watch, *State of Fear: Arbitrary Arrests, Torture, and Killings*, September 2015, (https://www.hrw.org/sites/default/files/report_pdf/gambia0915_4up_0.pdf)
2. Due to the COVID-19 crisis, the work of the TRRC has suffered substantial delays which prompted it to request an extension of its two-year mandate in late November 2020, which was endorsed by the President. The public hearings were completed on 28 May 2021.
3. *The rule of law and transitional justice in conflict and post-conflict societies*, (S/2004/616), para. 8. The African Union defines transitional justice as "the various (formal and traditional or non-formal) policy measures and institutional mechanisms that societies, through an inclusive consultative process, adopt in order to overcome past violations, divisions and inequalities and to create conditions for both security and democratic and socio-economic transformation". *African Union Transitional Justice Policy*, February 2019.
4. See the related international treaties and conventions referenced in *Guidance Note of the Secretary-General: United Nations Approach to transitional justice*, March 2010, fn 2-5.
5. *Updated Set of principles for the protection and promotion of human rights through action to combat impunity*, E/CN.4/2005/102/Add.1, 8 February 2005.
6. A/HRC/RES/18/7, 13 October 2011.
7. As stated by the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence: *"the core function of guarantees of non-recurrence is preventive in nature. It is one to which truth, justice and reparation are themselves supposed to contribute: criminal justice mainly through deterrence and affirmation of norms; truth commissions through disclosure, clarification and the formulation of recommendations with a preventive intent; and reparations by strengthening the hand of victims to claim redress for past and future violations and to enforce their rights more assertively."*, A/HCR/30/42, para. 24.
8. *Study concerning the right to restitution, compensation and rehabilitation for victims of gross violations of human rights and fundamental freedoms*, E/CN.4/Sub.2/1993/8, 2 July 1993, (hereafter "*Van Boven Report*").
9. *Van Boven Report*, para. 47 and 137.
10. See A. Mayer-Rieckh, "Guarantee of Non-Recurrence: An Appropriation", *Human Right Quarterly*, 39 (2017), pp. 416-448.
11. Updated *Set of principles for the protection and promotion of human rights through action to combat impunity*, E/CN.4/2005/102/Add.1.
12. A/HCR/30/42, 7 September 2015, para. 18; see also A/70/438.
13. *Velásquez Rodríguez v. Honduras*, OAS/Ser.L/V/III 19, doc. 13, app. VI (1988), para. 166.
14. *Van Boven Report*, op. cit, para. 41.
15. DCAF, "Security Sector Governance and Reform", DCAF Backgrounder Series, Geneva, 2009.
16. Ibid.
17. See D. Sharp, "Security Sector Reform for Human Security: The Role of International Law and Transitional Justice in Shaping More Effective Policy and Practice", M. Saul and J.A. Sweeney, eds., *International Law and Post-conflict Reconstruction Policy*, London, 2015.
18. A. Mayer-Rieckh, "Guarantee of Non-Recurrence: An Appropriation", op. cit., p. 432.
19. Ibid.
20. See case law cited in K.L.H. Samuel, "The Legal Character of Due Diligence: Standards, Obligations or Both?", *1 Central Asian Yearbook of International Law (2018/2019)*, fn 100-101.
21. A/HCR/30/42, op. cit., para. 23.
22. *Van Boven Report*, para. 137.
23. *Updated Set of principles for the protection and promotion of human rights through action to combat impunity*, E/CN.4/2005/102/Add.1, 8 February 2005.
24. A/HCR/30/42, op. cit., paras. 42-76.
25. Ibid. A dedicated report of the Special Rapporteur focuses on vetting of security institutions for the purpose of the guarantee of non-recurrence, A/70/438, 21 October 2015.
26. Mayer-Rieckh, "Guarantee of Non-Recurrence: An Appropriation", op. cit., p. 429.
27. United Nations, *Framework of Analysis for Atrocity Crimes: A tool for Prevention*, 2014.
28. Ibid, p. 12.
29. Ibid, p. 11.
30. Mayer-Rieckh, "Guarantee of Non-Recurrence: An Appropriation", op. cit., p. 435.
31. Justice Info, "The truth behind the walls of Mile 2 prison, Jammeh's 'five-star hotel'", 22 June 2020, (https://www.justiceinfo.net/en/truth-commissions/44653-the-truth-behind-the-walls-of-mile-2-prison-jammeh-s-five-star-hotel.html).
32. Justice Info, "Gambia: finger pointing in the security forces", 22 February 2020, (https://www.justiceinfo.net/en/truth-commissions/43890-gambia-finger-pointing-in-the-security-forces.html).
33. *Ibid.*
34. See testimony of Sanna Sabally, the then vice-chair of the Armed Forces Provisional Ruling Council. The TRRC conducted exhumations at the Yundum Barracks of the Gambian Armed Forces, where the remains of six soldiers were found.
35. The former chief of the GPF confessed to helping facilitate the work of the witch doctors at the police headquarters, (https://www.justiceinfo.net/en/truth-commissions/43205-gambia-trail-deadly-witch-doctors-jammeh-region.html).
36. Justice Info, "Gambia: the story of a government-sanctioned massacre and its cover-up", 11 March 2021, (https://www.justiceinfo.net/en/74778-gambia-story-government-sanctioned-massacre-cover-up.html).

37. Human Rights Watch, "Gambia: Women Accuse Ex-President of Sexual Violence", 26 June 2019, (https://www.hrw.org/news/2019/06/26/gambia-women-accuse-ex-president-sexual-violence); Human Rights Watch, "Gambia: Commission Uncovers Ex-Dictator's Alleged Crimes", 4 December 2019, (https://www.hrw.org/news/2019/12/04/gambia-commission-uncovers-ex-dictators-alleged-crimes)
38. International Center for Transitional Justice, *Women's Experiences of Dictatorship in the Gambia: A Submission by Women from Sintet, Janjanbureh, and Basse to the Truth, Reconciliation and Reparations Commission*, December 2019.
39. SSR Strategy, 2020, p. 6.
40. A. Mayer-Rieckh, "Dealing with the Past in Security Sector Reform", DCAF SSR Paper Series, Geneva, 2013, p. 22.
41. Ibid., p. 26.
42. In June 2021, 46 per cent of Afrobarometer respondents said they trust the TRRC "a lot" or "somewhat", (https://afrobarometer.org/countries/gambia-1).
43. The National Security Policy, in particular, refers to "widespread human rights abuses and a culture of impunity by elements of security forces."
44. In 2021, about 75 per cent of international donor support went towards operational training, equipment and infrastructure.
45. The final draft Constitution expressly provides that national security aims at, among others, protecting The Gambia and its peoples' rights and freedom, peace and stability; is pursued with the utmost respect for the rule of law, democracy, and respect for fundamental rights and freedoms and is to be people-centred. Final draft Constitution, 2020, Section 283, (https://crc220.org/wp-content/uploads/2015/12/CRC-FINAL-DRAFT-CONSTITUTION.pdf).
46. The State House guard mixed command structure consists of over 300 personnel from the army, police and intelligence service.
47. National Human Right Commission, *Annual Report*, 2019, (https://www.gm-nhrc.org/annual-reports).
48. Final draft Constitution, 2020, Section 286(6)(a).
49. Ibid., Section 286(6)(b).
50. National Security Strategy, 2020, Chapter IX, para. 78; National Assembly Standing Orders, 25 June 2020, Sections 117 (1), 46, 36.
51. External evaluation report of DCAF's EU-funded project in The Gambia (internal document).
52. Final draft Constitution, Sections 292-295.
53. GPF, DLEAG, Fire & Rescue Service, Prison Service, Immigration Department, with the exclusion of GAF and SIS.
54. Final draft Constitution, 2020, Section 293(b).
55. National Security Policy of The Gambia, publicly launched on 18 June 2019, para. 22.1.
56. *Preliminary Observations from the Official Visit to The Gambia by the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence, Fabián Salvioli from 20 to 27 November 2019.* (hereafter "*Report of the Special Rapporteur on Transitional Justice on The Gambia*"), (https://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=25349&LangID=E).
57. National Strategy Document for Transitional Justice, cited in *Report of the Special Rapporteur on Transitional Justice on The Gambia*, op. cit. p. 8.
58. Ibid., para. 33.3.2.9.
59. Paras. 46.2.11 and 46.2.12. of the National Security Strategy; para. 9.2.4.2.1.1 of the SSR Strategy.
60. Yet, the intelligence agency, together with the prison services, has been the most implicated institution during the TRRC proceedings, and its personnel has mostly remained unchanged since the previous regime.
61. In late 2019, a team of Gambian stakeholders undertook a study trip to learn from their counterparts. The security vetting process undertaken in Kosovo was understood as "the investigation process of personnel in state institutions, business and any other positions which have access to confidential data [with the purpose] to confirm whether an individual is of integrity to execute a sensitive activity."
62. UN Doc. S/2004/616; see also A/70/438, para. 18; S/2004/616, para. 52.
63. A/70/438, op. cit., p. 8.
64. *Report of the Special Rapporteur on Transitional Justice on The Gambia*, op. cit.
65. In 2018, prior to the TRRC having the opportunity to visit the NIA/SIS premises, the SIS initiated some renovation, during which an "accidental fire" occurred, destroying its records.
66. Justice Info, "Gambia: the spy chief who knew too much or not enough", 11 January 2021, (https://www.justiceinfo.net/en/46425-gambia-spy-chief-who-knew-too-much-or-not-enough.html).
67. A/HRC/30/42, para. 36.
68. A/70/438, op. cit., p. 7.
69. DCAF, *Access and Trust: A population based study of security and justice in The Gambia*, Geneva, 2019. The relatively high level of trust in the security institutions is confirmed by updated data indicating 59 per cent and 67 per cent of the population trust the police and the army respectively, (https://afrobarometer.org/sites/default/files/press-release/The%20Gambia/news_release-gambians_feel_less_safe_but_want_ecomig_to_leave-afrobarometer-v2-28may21f.pdf).
70. See UNDP, *Vetting Public Employees in Post-conflict Settings: Operational guidelines*, 2006.
71. *Report of the Special Rapporteur on Transitional Justice on The Gambia*, op. cit.
72. Afrobarometer dispatch n. 249, 2018.

73. Justice Info, "Gambia: when it is time for reconciliation", 1 June 2021, (https://www.justiceinfo.net/en/77910-gambia-time-reconciliation.html).

74. Supreme Court of The Gambia, *State v. Yankuba Touray*, 19 March 2021, (https://www.hrw.org/sites/default/files/media_2021/03/YANKUBA%20TOURAY%20JUDGMENT.pdf).

75. TRRC Act, 2017, Article 15.

76. VOA, "A Voice for Justice for Rohingyas, Rwandans and Gambians", 27 May 2020, (https://www.voanews.com/africa/voice-justice-rohingyas-rwandans-and-gambians).

77. See Article 15 of the Statute of the Special Court for Sierra Leone. Unlike ad hoc international criminal tribunals, the ICC jurisdiction is governed by the principle of complementarity whereby the Court may only exercise jurisdiction when national courts are unable or unwilling to prosecute (Art. 17 of the Rome Statute).

78. On a related issue, the Special Court for Sierra Leone ruled at the "greatest responsibility" clause does not constitute a jurisdictional requirement but serves as a guideline for the exercise of prosecutorial discretion.

79. Article 19 of the TRRC Act.

80. OHCHR, *Rule-Of-Law Tools For Post-Conflict States: Amnesties,* 2009.

81. Stating that "international human rights law impedes the use of amnesties not only for crimes against humanity but for all gross human rights violations such as torture, summary executions and enforced disappearance, among others.", *Report of the Special Rapporteur on Transitional Justice on The Gambia.*

82. *Rule-Of-Law Tools For Post-Conflict States: Amnesties,* op. cit., p. 34.

83. In August 2019, the Ministry of Justice decided to release the "Junglers" from jail. They were released on conditions and put on administrative leave from the Gambian Armed Forces. The "Junglers" have agreed to testify in any future case that may be of interest to the state. "Two of the conditions are to be given psychosocial support by the TRRC and to accept being prosecution witnesses in the future", (https://www.justiceinfo.net/en/truth-commissions/42234-anger-flares-release-gambia-confessed-killers.html).

84. O. Sonko was the Minister of Interior under Jammeh from 2006 to 2016; arrested in Switzerland in January 2017, he is being charged of crimes against humanity, (https://trialinternational.org/latest-post/ousman-sonko/).

85. Trial International, "Gambia: US Charges Alleged 'Death Squad' Member With Torture", 12 June 2020, (https://trialinternational.org/latest-post/gambian-death-squad-member-charged-with-torture-in-the-united-states/).

86. The 9 accused persons from the NIA include the former director of the NIA, former director of operations. The former deputy director died in custody, during the course of the trial.

87. Africa Press, "Prosecution Files for Stay of Proceedings in NIA 9 Case", 5 November 2019, (https://www.africa-press.net/gambia/all-news/prosecution-files-for-stay-of-proceedings-in-nia-9-case).

88. See *Report of the Special Rapporteur on Transitional Justice on The Gambia*, op. cit.

89. See Essa Faal, Legal Counsel at the TRRC, (https://www.justiceinfo.net/en/justiceinfo-comment-and-debate/in-depth-interviews/43575-essa-faal-we-dont-want-the-truth-commission-to-be-seen-as-a-toothless-bulldog.html).

90. "It is unclear if the lack of progress in this field [of prosecution] is due to lack of political will, or the result of a phasing exercise in which truth (..) will precede criminal investigations and prosecutions. It may be also, to some extent, consequence of an ineffective judicial system which is highly inadequate for the challenge facing it." *Report of the Special Rapporteur on Transitional Justice on The Gambia*, op. cit, p. 5.

91. M. Kersten, "'Some reasons are Obvious, Some are Not'.The Gambian Experience with Transitional Justice" S. El-Masri, T. Lambert, J.R. Quinn, eds., *Transitional Justice in Comparative Perspective: Preconditions for Success*, London, 2020, p. 162.

92. OHCHR, *Rule-of-law tools for post-conflict states. Vetting: an operational framework*, 2006.

93. On 28 September 2018, The Gambia ratified both the Convention against Torture and Other Cruel Inhuman or Degrading Treatment or Punishment and the Convention for the Protection of All Persons from Enforced Disappearance. The Gambia has however not yet ratified the Optional protocol of the Convention against Torture, which provides a system of regular visits of the Special Rapporteur to prisons.

94. Farewell press statement by Minister of Justice Hon. Abubacar Tambedou, June 2020, (http://www.kerr-fatou.com/farewell-press-statement-june-2020/).

95. ICTY, *Prosecutor v. Tadic*, para. 300; ICTY, *Prosecutor v. Erdemovic*, para. 65.

96. Ironically, all police forensic experts, and some investigators, have joined the TRRC, which indicates a detrimental effect of the TRRC process on the operational capacity of the security sector.

97. SSR Strategy, op. cit., p. 27.

98. National Security Strategy, 2020, para. 46.2.2.

99. A. Mayer-Rieckh and H. Varney, *Recommending change. Truth Commission Recommendations on Institutional Reforms: An Overview*, DC

Notes

Notes

DCAF Geneva Headquarters

P.O. Box 1360
CH-1211 Geneva 1
Switzerland
info@dcaf.ch
+41 22 730 9400

www.dcaf.ch

@DCAF_Geneva

DCAF Geneva Centre for Security Sector Governance