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Statement to the National Assembly Joint Committees of Regional Government, Lands and IEC, and Human Rights & Constitutional Matters in Relation to Diaspora Voting and Representation and the Elections Bill, 2020

Co-chairs, Honourable Members of the National Assembly;

We thank you for inviting us to give evidence regarding diaspora voting and representation and the Elections Bill, 2020.

The Migration and Sustainable Development in The Gambia project (MSDG) took keen interest in the evolution of the Elections Bill 2020, in the past year. During the pre-parliamentary consultation stage, we liaised with various stakeholders and made several recommendations pertaining to diaspora voting and representation, which were incorporated in the draft currently tabled before this August Assembly. From November 2020 to date, we continued with further consultations, research and analysis, and have also followed the proceedings of this parliamentary joint committee, including its outreach sessions across the country. Consequently, we have further recommendations to make, which shall be presented verbally and will be submitted in writing.

Co-chairs, Honourable Members; your diligent enquiry has elucidated a number of important points, whilst also highlighting issues that have caused some confusion and a great deal of consternation amongst the diaspora community. Kindly allow me therefore co-chairs, to put on record our observations on these matters of concern.

1. Basic Entrenched Constitutional Rights

Many of us no doubt have heard the question being asked on several occasions recently, as to whether the diaspora should be allowed to vote in national elections. That question is as unhelpful as asking whether you the Honourable Members present in this chamber today, should be allowed to vote in national elections. The right of the Gambian diaspora to vote and be voted for is a basic and fundamental constitutional right, enshrined in clauses 26, 33 and entrenched clause 39(1) of the 1997 Constitution of The Gambia, applicable to all Gambians without distinction.

S26(a)(b) states: "Every citizen of The Gambia of full age and capacity shall have the right, without unreasonable restrictions - (a) **to take part in the conduct of public affairs**, directly or through freely chosen representatives; (b) **to vote and stand for elections** at genuine periodic elections for public office, which election shall be by universal and equal suffrage and be held by secret ballot".

S39(1) states: "Every citizen of the Gambia being eighteen years or older and of sound mind shall **have the right to vote** for the purpose of elections of a President and Members of the National Assembly, and shall be entitled to be registered as a voter in a National Assembly constituency for that purpose".

S33(2) states: "Subject to the provisions of subsection (5), no law shall make any provision which is discriminatory either of itself or in its effect".

It therefore follows that any law, policy or practice that purports or seeks to discriminate against the diaspora, must be disregarded, as it is the Constitution that reigns supreme as stipulated in:

S4, which states: "This Constitution is the supreme law of the Gambia and any law found to be inconsistent with any provision of this Constitution shall, to the extent of the inconsistency, be void".

2. Supreme Court Judgement

For anyone who doubted the clarity of the Constitution on diaspora voting rights, pray pay heed to the Supreme Court of The Gambia. On 27th January 2021, in the case of Bakary Bunja Dabo and Others versus Attorney General and Independent Electoral Commission, Case No. SC 001/2020, the Supreme Court of The Gambia reaffirmed and clarified the entrenched rights of Gambians in the diaspora to vote. It stated that:

"Pursuant to section 39 of the Constitution, every Gambian, including those residing outside the jurisdiction, is entitled to be registered and to vote in election to the offices of President, members of the National Assembly, for local government offices and traditional rulers as well as in referenda".

3. IEC Constitutional Obligations

The Independent Electoral Commission (IEC) has an obligation to discharge its Constitutional and legal mandate and responsibilities regarding the Gambians residing outside the jurisdiction. In July 2020, IEC published the 'Elections Calendar 2021-2023', including scheduled dates for diaspora voter registration and diaspora voting for the Presidential elections on Saturday, 4th December 2021. IEC's commitment is acknowledged in the Supreme Court judgment of 27th January 2021, which stated that:

"Indeed the 2nd defendant [Independent Electoral Commission] has accepted responsibility for ensuring that the provisions of section 39 of the Constitution are adhered to and its obligations under section 11 of the Elections Act Cap 3:01, are complied with".

4. Urgency of Action

We want to make it abundantly clear that on the issue of voter registration and diaspora voting in the Presidential Elections of 4th December 2021, there are no legal impediments whatsoever. However, for diaspora representation in the 2022 Parliamentary elections, Constitutional Amendments are needed. Therefore, it is imperative that IEC and all stakeholders focus on full enfranchisement for the December 2021 Presidential elections, first and foremost. The MSDG project, in cooperation with IEC has undertaken extensive analytical and planning workshops on the logistics and operations of diaspora voter registration and voting, but as we sit here today, no specific plans have been announced publicly. This indeed is a cause for major concern. Given the constitutional provisions; the recent Supreme Court judgment; the fact that the diaspora constitutes about 10 percent of the population; if a catastrophe was to occur such that the diaspora does not vote in the Presidential elections on 4 December 2021, the very legitimacy of the entire elections would be in question.

For the IEC in particular, and for public institutions and civil society in general, let us remind ourselves that good intentions alone are not enough. There would be no reason good enough to continue to disenfranchise 10 percent of your daughters, sons and grandchildren, in flagrant contravention of the Constitution. Instead, IEC and all stakeholders should act with utmost urgency to ensure that on Saturday the 4th day of December 2021, the diaspora would go out and vote, for the first time in our country's history.

5. Current Electoral Law and Voter Registration

Co-chairs, Honourable Members; the IEC published the 'Elections Calendar 2021-2023' in July 2020 in accordance with section 14 of the Elections Act Cap 3:01 (2009). The current Elections Bill, 2020 which when passed shall replace the Elections Act Cap 3:01 (2009), was first tabled at the National Assembly on 22 March 2021, by the Attorney General and Minister of Justice. According to the 'Work Plan' of this National Assembly Joint Committee scrutinising the Elections Bill 2020, public hearings are being held in April/May 2021 and the report is expected in June 2021. Given these tight timelines and the fact that the Presidential elections are scheduled for 4th December 2021, IEC has clarified that it will undertake voter registration in Gambia and in the diaspora under the existing legislation, namely the Elections Act Cap 3:01 (2009). The 'Elections Calendar 2021-2023' published by IEC in July 2020, scheduled the diaspora voter registration for 1st to 31st July 2021. Due to procurement disputes faced by the IEC, the voter registration schedules have changed. In our analyses, diaspora voter registration needs to begin, not later than 1st August 2021, and to last until 15th October 2021 or later.

6. Registration in Existing Constituencies

In accordance with section 39 of the 1997 Constitution of The Gambia, Gambians in the diaspora are **"entitled to be registered as a voter] in a National Assembly constituency"**. The Constitution has demarcated 53 constituencies and Gambians in the diaspora can register in any one of these constituencies. This provision for stating 'Constituency of Origin in The Gambia' shall continue to be relevant to Gambians in the diaspora even after the IEC demarcates specific Diaspora Constituencies. Direct linkage of the diaspora to a constituency in The Gambia reinforces the ties of the diaspora to local communities in their motherland. Registering Gambians in the diaspora in the existing 53 in-country constituencies is in line with several provisions of the Constitution, including: S26(a)(b) and section 39 of the 1997 Constitution of The Gambia; the 27th January 2021 judgment of the Supreme Court of The Gambia; and the Elections Act Cap 3:01 (2009), specifically sections 3(2), 11 and 141:

S3(2) states: *"The Commission may, in the application of the provisions of this Act, **make such adaptations as may be necessary for the conduct of elections...**"*

S11(1) states: *"The Commission shall prepare, compile, and maintain in accordance with this Part, a register of voters for each constituency **and a register of Gambian registered voters in foreign countries**"*.

S11(3)(c)(i) states: *"The Commission shall cause each register to be divided into such parts as it may determine and the register shall contain, though not limited to, the following – (c) the voter's usual residence and address at the time of registration (i) the district, ward, town, village or such other area in which the voter is resident"*.

S141 states: *"The Commission may **make rules for Gambians in any foreign country to vote in a Presidential election**"*.

7. Operational Actions and Rules for Diaspora Voting

In accordance with the existing electoral law, namely the Elections Act Cap 3:01 (2009), the IEC has already: published the original schedule for diaspora voter registration; prepared and submitted to the National Assembly a budget to cover the costs of in-country and out-of-country diaspora voting; and on 27th April 2021, it received the funds from the Ministry of Finance to cover amongst other things, the costs and expenses for in-country and out-of-country voter registration. If extra financial resources are needed to cover voting expenses in Decembers, the IEC has time to follow appropriate procedure to acquire such funds. In accordance with section 141 of the Elections Act Cap 3:01 (2009), IEC need to publish the specific rules on Diaspora Voting, urgently, by 31st May 2021. MSDG reiterates its commitment to continue technical cooperation with IEC on all logistical and operational elements of diaspora voter registration and voting.

8. Separate Work on Parliamentary Elections

Beyond diaspora voting in the Presidential election on 4th December 2021 as discussed, further and separate work is required regarding diaspora parliamentary representation. Pursuant to S26(a)(b), S39(1) and S50 of the 1997 Constitution of The Gambia, the IEC need to demarcate new diaspora constituencies, and produce Rules and Regulations for Gambians in foreign countries to elect diaspora National Assembly Members in the parliamentary elections in 2022. For utmost clarity and consistency, election of diaspora National Assembly Members shall require Constitutional Amendments of three non-entrenched clauses. These proposed amendments are already being examined by the National Assembly Foreign Affairs Standing Committee (FASC), for tabling as a Committee Bill. The three amendments are: *Deletion of clause S90(1)(a), which currently disqualifies Gambians with dual citizenship from being elected to the National Assembly; Amendment of clause S88 to state that there shall be five out-of-country diaspora constituencies demarcated by the Boundaries Commission; and Deletion of clause S71(2), which currently disqualifies Gambians with dual citizenship from holding office of Cabinet Minister.*

Honourable members, when the Constitution Amendment (Diaspora Representation) Bill 2021 is put before you, we appeal to you to come as one, and vote 58 out of 58, to pass these amendments; such that the world will know, that Gambia has taken the final steps to end the discrimination, alienation and rejection of her children; so that Gambians away from home shall no longer be political orphans, excluded from their sovereign inheritance; so that Gambian elections shall be a true and faithful manifestation of democracy, and a festival of civic engagement at home and abroad.

Co-chairs, Honourable Members, I thank you for you kind attention; my colleagues will address you on the specific recommendations for the Elections Bill 2020 and related matters. Thank you once again.

**Statement Delivered by Mr. James Bahoum
MSDG Programme Consultant, 18 May 2021.**