

MEMORANDUM TO THE CONSULTATION TASK FORCE: THE OFFICE OF MISSING PERSONS

Introduction

1. In September 2015, the Government stated that it will create “an Office on Missing Persons based on the principle of the families’ right to know, to be set up by Statute with expertise from the ICRC, and in line with internationally accepted standards.”¹ Although the Consultation Task Force has initiated public consultations on the proposed transitional justice mechanisms, the Government appears to be running a parallel process shrouded in secrecy. It has been brought to our notice that the Government has shared draft documents relating to the Office of Missing Persons (“OMP”) with selected international agencies, such as the International Committee of the Red Cross (“ICRC”) and the Office of the High Commissioner for Human Rights (“OHCHR”). However, the Government has not disclosed any information relating to the key elements and ideas that are contained in these drafts to the public. To date, other than the title “Office of Missing Persons”, there is no publicly available information about the Government’s intended proposals for the OMP.
2. The Government has stated officially that the OMP will be a separate transitional justice mechanism. There are also indications that the OMP will be created prior to the other transitional justice mechanisms. In these circumstances, it is imperative to establish at the start of the process that the OMP does not operate in isolation from the other transitional justice mechanisms, in particular the special court, as well as the existing criminal justice system.
3. We, the signatories to this memorandum, take this opportunity to make submissions on issues we believe are of importance in relation to the OMP.

Current context

4. According to news reports, between 11 and 23 persons have been detained under the Prevention of Terrorism Act (“PTA”),² from the North and East, during the period March to April 2016.³ We have verified and documented the case of at least one person, Jeyanthan, who was abducted in a white van from his home in Jaffna on 10 April 2016 and was subsequently found to be detained by the Terrorism Investigation Department (“TID”) under the PTA.
5. News reports and confidential interviews indicate that Tamils in the North, particularly former Liberation Tigers of Tamil Eelam (“LTTE”) cadres and detainees who underwent

¹ Speech by Hon Mangala Samaraweera, Minister of Foreign Affairs, Human Rights Council, 14 September 2015; Human Rights Council Resolution, Promoting reconciliation, accountability, and human rights in Sri Lanka, 14 October 2015, UN Doc. A/HRC/RES/30/1 (adopted 1 October 2015).

² Prevention of Terrorism (Temporary Provisions) Act No. 48 of 1979.

³ The Island, “Chava explosive cache: Ex-LTTE intelligence head in East arrested”, 26 April 2016, http://island.lk/index.php?page_cat=article-details&page=article-details&code_title=144238; TamilNet, “23 Tamils detained under PTA in recent weeks”, TamilNet, 24 April 2016, <https://www.tamilnet.com/art.html?catid=13&artid=38235>.

rehabilitation and were released, have been subjected to fresh investigations.⁴ It has also been reported that an unspecified number of rehabilitated and released former LTTE cadres have been summoned to Colombo on 30 April 2016, by the Ministry of Rehabilitation.⁵ On 27 April 2016, a journalist and youth political activist who had spoken out against the recent incidents of arrests and abductions was himself arrested and detained by the TID.⁶

6. Three other persons who were reported as missing to the Paranagama Commission⁷ and who were subsequently found in a prison in The Maldives, were returned to Sri Lanka this month. The Sri Lankan authorities had not informed the detainees' family members of their return. Having searched for them, the family members eventually found them to be detained at the Welikada Prison. However, more than two weeks following their return to Sri Lanka, their family members were not informed as to the reasons for their detention.⁸
7. Based on our own interviews and news reports, April 2016 appears to have recorded the highest number of arrests and 'abduction turned arrests' under the PTA, in the North and East since March 2014. At the time of writing, new reports of arrests and 'abductions turned arrests' continue to emerge. The official state response on the arrests has been to justify them on the grounds that the security forces have the right to arrest anyone that they believe to be involved in criminal activity and that former LTTE cadres have been arrested in connection with a hidden cache of weapons.⁹
8. The use of white van abductions and increased number of arrests under the PTA, and not the general Penal Code, which should apply to criminal acts, is a matter of grave concern. The PTA is a regressive piece of legislation which this Government has committed to amend and/or repeal and is currently under review. Particularly provisions of the PTA, including those enabling extended administrative detention, ousting judicial supervision over detention, and rendering admissible confessions obtained before a police officer, arguably do not conform to the requirements of 'law' or legality under international law.
9. The manner of arrest, in the case of persons who have been abducted and later found to be detained by the TID under the PTA, constitutes a clear violation of their fundamental rights to equality, freedom from arbitrary arrest and detention, and freedom from torture. As mentioned above, we have verified at least one instance of an 'abduction turned arrest' in the case of Jeyanathan on 10 April 2016.
10. The incidents above have caused a fear psychosis amongst Tamils in the North and East. Individuals who will be integral to the functioning of the OMP, including families of

⁴ Confidential interviews conducted by activists from the Watchdog Collective. See also, Ceylon Today, "Ex LTTE leaders Ram and Nagulan arrested", 28 April 2016,

<http://www.ceylontoday.lk/print20160321CT20160630.php?id=1258>.

⁵ Tamil Guardian, "Former LTTE cadres summoned by Rehabilitation Ministry as arrests continue", 27 April 2016, <http://www.tamilguardian.com/article.asp?articleid=17791>.

⁶ Tamil Guardian, "TTAK Youth Leader Sivakaran arrested by TID", 27 April 2016, <http://tamilguardian.com/article.asp?articleid=17798>.

⁷ Presidential Commission to Investigate into Complaints Regarding Mission Persons, The Gazette of the Democratic Socialist Republic of Sri Lanka, Extraordinary, No. 1823/42, 15.08.2013, The Gazette of the Democratic Socialist Republic of Sri Lanka, Extraordinary, No. 1871/18, 15.07.2014 ("Paranagama Commission").

⁸ Confidential interviews conducted by activists from the Watchdog Collective.

⁹ Ceylon Today, "Ex LTTE leaders Ram and Nagulan arrested", 28 April 2016, <http://www.ceylontoday.lk/print20160321CT20160630.php?id=1258>.

missing and disappeared persons, witnesses, and informants, will not feel free to engage with the process if this insecure environment prevails.

Aims of the OMP

11. The aims of the OMP should be:
 - 11.1 **Clarifying the fate and whereabouts of missing persons.** This includes providing families with the circumstances of death where death is confirmed, and returning the remains to the family where possible. This also includes providing details of detention, if the person is so detained.¹⁰
 - 11.2 **Facilitating and enabling prosecutions.** The OMP must operate according to criminal procedural and evidential requirements to ensure that current and future legal proceedings, in particular relating to criminal accountability, are not jeopardised.
 - 11.3 **Providing reparations.** This includes both interim and final reparations.
 - 11.4 **Operating the certificate of absence scheme.**
 - 11.5 **Creating a comprehensive evidence database of persons reported to be missing.**¹¹
 - 11.6 **Public outreach.** This includes raising awareness and building public opinion against the phenomenon of missing persons, including enforced disappearances, and its psychosocial, economic, and social implications.
12. These aims should operate on the basis of complementarity: one aim should not be pursued at the expense of another aim. It is crucial that the OMP is imbued with a purpose that recognises and addresses missing persons and disappearances as a deeply personal tragedy which has become immensely political and has legal dimensions. For this reason, the OMP must approach this issue in a holistic manner, that takes into account the multi-faceted aspect of missing persons and disappearances and its effects on victims and families.

Process leading to the creation of the OMP

13. According to the media, the Government has stated that “laws to create a permanent office on missing persons is expected to be finalised by May or June this year”.¹² It is unclear if this statement means a Bill will be tabled in Parliament in May or June.
14. It is imperative that sufficient time is given in the legislative process for stakeholders to assess and comment on the proposed law. Once the Bill to create the OMP is tabled in Parliament, there must be at least a two-month period where families of the missing and

¹⁰ The methodology should also include identifying lists of persons who surrendered to Government authorities during and at the end of the war, and then determining the surrenderees’ current status.

¹¹ This includes existing information from sources such as the previous Presidential Commissions of Inquiry, the Human Rights Commission of Sri Lanka, the Police, the Judiciary, the ICRC, and the UN Working Group on Enforced and Involuntary Disappearances.

¹² “Laws to create office on missing persons by May-June”, Colombo Gazette, 31 March 2016, <http://colombogazette.com/2016/03/31/laws-to-create-office-on-missing-persons-by-may-june/>.

disappeared, civil society, politicians, and other stakeholders have the opportunity to digest, analyse, and comment on the proposed OMP.

15. If a Bill is to be tabled in May or June, it is unlikely to have had the benefit of the public consultations conducted by the Consultation Task Force. Therefore, extensive public access to the Bill, and sufficient time to comment on the Bill, must be prioritised.
16. In particular, the Government should conduct a public outreach campaign to disseminate the OMP Bill in a form that is understandable to lay persons. In order for the Government to genuinely consult with stakeholders, particularly families of the missing and disappeared, the Government must (1) declare its intentions for the OMP and take ownership of the obligation to consult citizens and (2) ensure that the OMP Bill and the Government's proposals for the OMP are easily accessible and understandable, and actively disseminated by the Government. The proposed law should also be made available in Tamil, Sinhala, and English.
17. The ICRC's needs assessment is one avenue through which the Government could obtain information about the needs and views of families of the missing. Information available in the public domain suggests that a comprehensive island-wide assessment was conducted using a representative sample to identify the multi-faceted needs of families of the missing, including their emotional, psychosocial, economic, and legal needs. The report was submitted in January 2016 and a presentation of the analysis and findings was made to Government authorities in February this year. On 8 March 2016, the Minister of Foreign Affairs, Hon Mangala Samaraweera, acknowledged in Parliament that the Ministry, other line ministries, and the Office for National Unity and Reconciliation were in the process of studying the content of the report and recommendations to identify and address pressing issues of the families and pledged that action would be expedited to explore what interim relief could be provided to them.¹³

Public outreach campaign

18. This Government has a poor track record of disseminating information to its citizens. This is particularly evident in relation to the transitional justice processes. As mentioned above, one aspect of the Government's public outreach campaign should relate to disseminating information about the OMP.
19. Another aspect should relate to soliciting information from the public to enable the OMP to carry out its tracing tasks. There is undoubtedly a wealth of information known or held by individuals, institutions, and organisations. The Government should conduct a targeted public campaign to enable the flow of information into the OMP. State and non-state media should be used, and a dedicated phone number, email address, and postal address created for the OMP to receive information. However, this should only occur *after* the OMP has rationalised the existing evidence about missing and disappeared persons (addressed below).

¹³ Hon Mangala Samaraweera, Minister of Foreign Affairs, on the topic of families of the disappeared and the missing, Parliamentary Debates (Hansard), 8 March 2016, Vol 243 No 1, p 107, <http://parliament.lk/uploads/documents/hansard/1457932518009431.pdf>.

20. The third aspect should relate to official Government denunciation of, and education about, the crime of enforced disappearance.¹⁴ The abhorrent nature of the crime, and its devastating effects on a family, are not understood, nor acknowledged, by significant sections of Sri Lanka society. Enforced disappearance is a crime that transcends ethnicity in Sri Lanka. Its commission is not limited to the war nor is it a crime that came into being during the war. Enforced disappearances have been reported since 1971¹⁵ (the first Janatha Vimukthi Peramuna (“JVP”) insurrection), right throughout the war, and post-war. JVP or suspected JVP were predominantly Sinhalese. Therefore, it is a crime that has been committed against Sri Lankan citizens, irrespective of ethnicity.
21. The cultural desensitisation that exists in Sri Lanka in relation to enforced disappearance is also particularly dangerous. The divisive propaganda that exists serves to paint the victims of enforced disappearance, and those who seek accountability for enforced disappearance, as the enemy or terrorists or people who threaten the existence of the current regime, thereby threatening the existence of the people who the current regime represents. In other words, “the enemy within”.¹⁶ This strategy is deadly as it capitalises on existing societal divisions and uses those divisions to mask the danger that exists when the rule of law is not adhered to by blatant criminal activity, such as the state committing enforced disappearance. The danger being overlooked is that criminal activity by the state is ignored. In a society where the rule of law is not adhered to, ordinary citizens are put at risk. The danger with condoning or overlooking the breaches of the rule of law committed by the state authorities is that it is only the law that is able protect citizens against abuses of state power. If there are no checks and balances on those who wield power in society, or if the checks and balances are not administered, they become a law unto themselves. Critically, the state is prohibited from committing criminal acts against its citizens. The commission of certain crimes, such as enforced disappearance, can never be justified. No exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability, or any other public emergency, may be invoked as a justification for enforced disappearance.¹⁷ In essence, enforced disappearance is a complete failure of a state’s obligations vis-à-vis its citizens.
22. Compounding the cultural desensitisation around enforced disappearance, is that it is a crime that is not well understood in society, resulting in its criminality being underplayed. The notion that people who the government perceives as a threat to its existence “are disappeared” is common knowledge in Sri Lanka. Yet, there is also a disconnect as it not accepted or perceived possible that the state could commit such horrendous crimes against its citizens.
23. Enforced disappearance is a crime that is particularly destructive to the well-being of a society as thousands of families of victims are left in a state of mental anguish as the fate and whereabouts of their loved ones is unknown.¹⁸ A society that is transitioning from a 26 year war cannot do so while the fates and whereabouts of thousands of its citizens are

¹⁴ This third aspect focuses on enforced disappearances committed by, or with the authority, support, or acquiescence of, the state.

¹⁵ Asian Human Rights Commission, *Sri Lanka: Government treats disappearances as ‘normal occurrences’*, 4 September 2007, available at <http://www.humanrights.asia/news/ahrc-news/AS-214-2007>.

¹⁶ B Skanthakumar, “The Enemy Within: Human Rights Defenders in Sri Lanka” (2008) LST Review 253, 3.

¹⁷ International Convention for the Protection of All Persons from Enforced Disappearance, adopted 20 December 2006, UN Doc. A/61/488 (entered into force 23 December 2010) (“Enforced Disappearance Convention”), Art 1(2).

¹⁸ UN Office of the High Commissioner for Human Rights, *Enforced or Involuntary Disappearances: Fact Sheet No. 6/Rev.3*, p 1.

unknown, or denied. Working towards ethnic resolution and a cohesive society when crimes committed against its citizens are ignored is simply not feasible.

Involvement of families of the missing and disappeared

24. The creation, operation, and oversight of the OMP should have significant participation of families of the missing and disappeared. The exclusion of families of the missing and disappeared in discussions relating to the OMP so far is ominous and raises significant alarm bells. As mentioned above, families of the missing and disappeared should have involvement in the prior consultations to the creation of the OMP and in the oversight body of the OMP.

Criminalisation of enforced disappearances

25. The criminalisation of enforced disappearance, as an autonomous crime, both as an ordinary crime and a crime against humanity, must be a legal pre-requisite to the creation of the OMP.
26. In September 2015, the Government committed to ratifying the Enforced Disappearance Convention, “without delay”.¹⁹ While the Enforced Disappearance Convention was signed in December 2015, to date, it has not been ratified and incorporated into domestic Sri Lankan law. The consequence is that, *to date*, enforced disappearance *still* does not constitute a crime in Sri Lanka.
27. It is fundamental that acts of enforced disappearance and conduct that amounts to enforced disappearance is prohibited immediately. Disappearances in Sri Lanka cannot be addressed without an emphasis on criminal accountability, in other words punishment. A practice that has existed since the early 1970s cannot be stopped (or even attempt to be stopped) without the deterrent effect of punishment. Further, the *nullum crimen sine lege* principle of criminal law holds an act cannot be a crime unless there is a law that prohibits it. To ensure the ability to punish perpetrators is not prevented, it is imperative that enforced disappearance is operative law in Sri Lanka prior to the OMP beginning to function.
28. It is accepted international law that the crime of enforced disappearance constitutes a continuous crime. Enforced disappearance is only completed as a crime at the point at which the fate and whereabouts of a disappeared person is determined. The function of the OMP will be to determine the fates and whereabouts of missing and disappeared persons. If the OMP begins to function (and consequently complete the crime by determining a person’s fate and whereabouts) *prior* to enforced disappearance being a crime in Sri Lanka, and absent retrospective legislation,²⁰ there will be a jurisdiction bar to prosecutions. In other words, the ‘crimes’ occurred (were completed) before enforced disappearance was a crime in Sri Lanka, resulting in a scenario where they cannot be considered criminal acts and, therefore, there is no basis to prosecute them.²¹

¹⁹ Speech by Hon Mangala Samaraweera, Minister of Foreign Affairs, Human Rights Council, 14 September 2015; Human Rights Council Resolution, Promoting reconciliation, accountability, and human rights in Sri Lanka, 14 October 2015, UN Doc. A/HRC/RES/30/1 (adopted 1 October 2015), para 13.

²⁰ Retrospectivity for enforced disappearances will not be addressed in detail in this memorandum.

²¹ While this would not bar prosecutions for other existing crimes, these other existing crimes would not capture the gravity or complexity of the crime of enforced disappearance. Further, given Sri Lanka’s history of disappearances, it

29. Given the historical problem of disappearances in Sri Lanka, in particular the lack of criminal accountability, the prohibition of enforced disappearance should be deemed to occur retrospectively. There should be specific jurisdiction to be able to prosecute enforced disappearance from at least 1971²² onwards. While legislation criminalising enforced disappearance should have retrospective effect, for criminal accountability purposes, it is ill advised to rely exclusively on the retrospectivity avenue.

Mandate, powers, and operation

30. The OMP should be constituted as a permanent office. It should not be *ad hoc* in nature, such as the previous Commissions of Inquiry, committees, or bodies.
31. The subject-matter mandate should be ‘missing’ defined as any person who is reported as missing due to the armed conflict, insurgency situations, or as a result of criminal acts, and whose current fate and whereabouts is unknown. Any such person should fall within the OMP’s mandate. It is important that victims are not excluded due to terminology definitions.
32. The OMP should have an open temporal mandate: it should be able to consider any claim of a missing or disappeared person, irrespective of when or where the incident occurred in Sri Lanka. Foreign nationals who have gone missing or have disappeared while in Sri Lanka, and Sri Lankan nationals who have gone missing or have disappeared overseas, should also fall within the mandate of the OMP.²³
33. The OMP should have the same powers, or more, than the Human Rights Commission of Sri Lanka (“HRCSL”); it should not be an institution less powerful than the HRCSL.
34. The OMP should have powers to request and seize information, including documentary and non-documentary material, from any source, including government, military, and law enforcement institutions, and individuals. There should also be powers to visit sites and locations, without prior notice, and be granted access.
35. Without just cause, an obstruction or refusal to comply with a request from the OMP, including for documents or access, should constitute the offence of contempt against the OMP. Contempt offences against the OMP should be deemed contempt offences against the Supreme Court of Sri Lanka, and the Supreme Court should be vested with jurisdiction to try those offences.
36. Refusals to provide documents, provide access, or comply in any other way with an OMP request on the basis of national security should be permitted only in narrow circumstances. Refusals unrelated to national security should be permitted only in exceptional circumstances.
37. The HRCSL’s existing database of disappearance cases should be utilised and procedures established for the HRCSL and the OMP to work in complementarity in order to avoid duplication.

will be wholly unacceptable for the Government to continue to deny citizens protection against enforced disappearances as *enforced disappearance*.

²² 1971 is when disappearances first started to be reported as occurring in Sri Lanka.

²³ Qualified by ‘due to the armed conflict, insurgency situations, or as a result of criminal acts’.

38. The OMP must not be a Commission of Inquiry and must not have the restrictions and limitations that previous Commissions of Inquiry had. Given the complete lack of tangible results, victims and witnesses have an apathy and distrust towards government mechanisms, in particular given the number that have existed and the numerous times they have been required to give evidence and tell their story. The way previous governments have attempted to address the problem of disappearances, by creating these mechanisms, has categorically failed. The OMP must be charged with a different approach; one that does not repeat the methodology of requiring victims and witnesses to *yet again* provide evidence from scratch. The previous mechanisms resulted in lists of persons who were confirmed as missing.²⁴ The OMP should reconcile these lists of names of confirmed missing persons. A reconciled list will provide the means to collate the evidence that exists, per missing person, and from which mechanism. This evidence should be analysed prior to requiring victims and witnesses to give evidence again. For instance, where there is evidence relating to a missing person from one mechanism, that evidence should be analysed prior to requiring further evidence. Where there is evidence relating to a missing person from two mechanisms, the evidence from both mechanisms should be analysed prior to requiring further evidence. The existing evidence should be compiled to form individual victim files, per missing or disappeared person.
39. All information and evidence from previously created government mechanisms should be officially transferred to the OMP. This includes material under 30-year seal at the National Archives. The OMP should also request Police “B reports” for all victim files.
40. The first task of the OMP should be to analyse the evidence that already exists (see section below on existing evidence from government mechanisms). The OMP should not request additional information from families relating to existing victim files, request information from the public, or conduct field investigations until the existing evidence is analysed and rationalised. In this first phase of the OMP, the only new information it should accept should be completely new cases of missing or disappeared persons. That is, cases that have not previously been reported to **any** Sri Lankan government mechanism (including Commissions of Inquiry, the HRCSL, the Police, and other investigative mechanisms into missing and disappeared persons).
41. The OMP should give particular attention to pending cases (those where the fate and whereabouts of a person were not determined) from previous mechanisms. The OMP should be able to follow-up on complaints lodged with the HRCSL and Police, and on cases pending before the courts, especially in relation to *habeas corpus* cases.
42. Specific consideration should be given to military personnel with the status of ‘deserter’. Where a family reports an individual with ‘deserter’ status as missing to the OMP, the OMP should investigate the file, as per the other victim files. Through OMP investigations, where information surfaces that would negate the status, that information should be passed on to the military in order to officially remove the individual’s ‘deserter’ status. In these cases, families should be entitled to reparations through the OMP.
43. The OMP should seek assistance, in terms of best practices, from comparable offices created in other jurisdictions. The specialised nature of the work that will be undertaken

²⁴ Many of the mechanisms used the term ‘disappeared’, however, factually and for the purposes of the OMP, it is a better approach to use the word ‘missing’.

by the OMP necessitates that the different units of the OMP receive specialised and intensive training.

Structure

44. The senior management structure of OMP should comprise an oversight body (such as a governing board, executive committee, or similar), a Chief Executive, a Deputy-Chief Executive, and the heads of units of the various the OMP units/departments.
45. The core functional units/departments of the OMP should include: a forensics unit, with a DNA bank; an investigations unit; a psychosocial and other support unit; a victim and witness protection unit; an interim reparations unit; a final reparations unit; an evidence unit (including data entry teams), a legal unit; and an information request unit. There should also be other units necessary for an institution such as the OMP, such as administrative and financial units.
46. The OMP head office should be situated in Colombo, however, there should be properly functioning and resourced branch offices. The branch offices should primarily deal with investigations (once they begin), decision-making and implementation of reparations, and issuing certificates of absence. The head office should handle public outreach matters. All investigations should start in Colombo with reviews of the existing evidence. Once an overview of the existing evidence is possible and victim files have been created, the files can then be divided according to the branches and field investigations can begin.

Independence and credibility

47. The OMP should operate, and be seen to operate, independently without any constraints of executive government influence. In particular, that officers in leadership positions within the OMP are able to take decisions without government interference or adverse repercussions. Ensuring independent operation of the OMP is fundamental in the Sri Lankan context given the extensive alleged complicity of state actors in committing or enabling disappearances (including both military and political officials).
48. The oversight body of the OMP should comprise individuals with varied expertise and experiences and be able to actively steer the OMP, uncompromisingly, in the pursuit of truth and justice.
49. There should be a clear criteria and procedure for personnel who can be part of the different structures within the OMP. All appointments to the OMP, at all levels, should be based on professional qualifications and expertise in an individual's particular area of work.
50. Any individual with any allegation of complicity in disappearances must be categorically excluded. Where information about complicity in disappearances surfaces after appointment, immediate steps should be taken to remove that person from employment in the OMP.
51. The OMP should be a transparent and public office. Subject to legal privilege and confidentiality (including witness protection), families should be able to receive all information held by the OMP on their missing or disappeared family member.

52. Given the clear expression of the lack of confidence in domestic mechanisms by many families of disappeared, there should be sufficient international involvement to establish credibility and trust of families of the missing and disappeared.
53. It is important that the domestic and international agencies involved in the OMP will advance and not block, in anyway, the pursuit of truth and justice.

Appointment procedure

54. Appointments to the OMP senior management (the oversight body, Chief Executive, Deputy-Chief Executive, and heads of units) should occur through the Constitutional Council, through nominations received by way of a public call for nominations. There should be sufficient time given for nominations to be made and the public call should be made through all available avenues, including the official government gazette, state and non-state media, and social network sites. Nominations for a Sri Lankan citizen to be appointed should be accepted from any interested party, from anywhere in the world. Serving Sri Lankan executive government officials should also be able to make nominations.
55. The nomination process must be a public process: any person nominated should have their name and credentials gazetted and published on an official government website. For the integrity of the appointment process, it is crucial that individuals nominated are able to be vetted and critiqued by the public.
56. Appointments should not be made prior to the deadline for nominations and only one month after the deadline has lapsed, to ensure sufficient time for public vetting. Importantly, appointments should only be from the list of nominees. No appointment should be permitted from outside of the gazetted list of names.
57. Where foreign nationals are required for appointment to senior management positions, OHCHR's advice should be sought. OHCHR, in consultation with the UN Working Group on Enforced or Involuntary Disappearances, should provide a list of suitable candidates to the Constitutional Council. As for the Sri Lankan citizen appointment procedure, the list of names from OHCHR should be gazetted and published on an official government website, appointments should be made only one month after the names have been gazetted and published online, and appointments should not be permitted outside of the list of names provided by OHCHR and gazetted.
58. The Chief Executive, Deputy-Chief Executive, and heads of units should have extensive educational and professional experience, as well as integrity and credibility in their chosen field.
59. The oversight body should be comprised of 25% of families of the missing or disappeared. As mentioned, the oversight body should be comprised of individuals with varied expertise and experience. Being a family member of a missing or disappeared person provides unique experiences adding depth to the OMP. The 25% allocation should be representative of families, across ethnicity, geography, and time when incidents occurred. Given the complete lack of faith in government mechanisms consistently expressed by families of the missing and disappeared, formalising their position in the OMP's oversight body will assist in providing a sense of inclusion and a voice within the OMP governing structure.

60. All serving and past military and law enforcement personnel should be excluded from appointment to the OMP's senior management. This specifically includes all units of the Police,²⁵ the Army, the Navy, and the Air Force. As a matter of functional necessity, the investigative personnel of the OMP will have to be drawn from current or past Police officers or military investigators, after a thorough vetting process.
61. All current and past members of armed groups, including the LTTE, the Eelam People's Democratic Party, and Iniya Bharathi, should be excluded from appointment to the OMP's senior management.
62. Current and past holders of political office should also be excluded from appointment to the OMP senior management.

Language and accessibility

63. The OMP must operate in all three languages; Tamil, Sinhala, and English. Families who wish to engage with the OMP must be able to do so in their preferred language. Procedures for families to follow (such as filling out forms and selecting from available options) should be communicated in all three languages. Families should not be detrimentally affected due to language. The personnel involved should include adequate numbers of persons from the Tamil and Muslim communities, so that there are no language and communication obstacles.
64. There should be more than a 50% representation of female personnel at all levels of the OMP, in particular the oversight body and the staff who are dealing with families, as the majority of complainants are female.
65. The OMP should be accessible to the families of missing and disappeared persons. This includes having procedures that are readily understandable. Or, at the very least, properly trained staff that will accurately and genuinely assist families. The demeanour and approach of the OMP staff will be crucial. The overriding purpose of the OMP should be to assist a family find their missing or disappeared family member. Families should not feel judged, treated like criminals, or dismissed when engaging with the OMP and its staff. The OMP should operate with a focus on assisting victim families and create a caring, accepting, and respectful environment for the victim families.
66. The OMP should have ability to identify and provide families with the options and resources available to them (resource mapping) in pursuing the truth about their missing and disappeared family members, including avenues of obtaining legal assistance.

Reparations

67. Having a dedicated Office of Reparations is certainly required, however, the OMP should also be mandated and structured to provide reparations as the mechanism specialising on missing and disappeared persons. The OMP should have the ability (statutory mandate), as well as the resources, to provide interim and final reparations. Enabling the OMP to deal with reparations relating to missing and disappeared persons will reduce the work load of the Office of Reparations. Individuals and families who receive reparations

²⁵ Specifically, the Criminal Investigation Department, the Special Task Force, and the TID.

through the OMP should not, therefore, receive reparations through the reparations office.

Interim

68. The OMP should provide three types of interim reparations:
- 68.1 **Monthly monetary amount commensurate to the income of the missing person until the fate and whereabouts of the person has been determined.** This is to compensate the immediate or primary remaining family (for example, parents of missing child, child of missing parent(s), dependents, spouses/partners) for the loss of income, or potential future income of the missing person (in the case the missing or disappeared person was a minor at the time of the incident). To avoid iniquity through a blanket rule, the monthly amount should be calculated taking into account several factors, such as the last generated income, expertise, skills, age, and experience of the missing person, and external factors, such as inflation and cost of living.
 - 68.2 **Scholarships for children.** Scholarships for primary, secondary, and tertiary education should be available. For instance, for primary and secondary students, the scholarship should be equivalent to the school the child was at (prior to the absence of the parent/primary caregiver).
 - 68.3 **Special allowances for vulnerable groups, including disabled persons and senior citizens.** In addition to the monthly monetary amount and scholarships, special allowances should be given to vulnerable groups to reflect the additional care needed for their maintenance.
69. An application for interim reparations should be verified, assessed, and a decision made within two months of the application. Once a decision to provide interim reparations is made, the provision of the reparations should begin within one month.
70. The beneficiaries of interim reparations should be the immediate family members and/or dependants of the missing person. Applicants should prove the family or dependant relationship through documentation. However, where documents are unavailable, other sources of proof should be admissible.
71. It is acknowledged that there will be instances of duplicate applications and competing claims. The OMP should take into consideration instances where other institutions/bodies have already provided or continue to provide reparations (for example, pensions to spouses upon the submission of a death certificate) when determining reparations.
72. The reparations units of the OMP should operate distinct from the investigations and other units of the OMP. In particular, to avoid the situation reported in relation to the Paranagama Commission that families were asked about livelihood matters at the expense of giving testimony about their missing family member.
73. Within four months of the establishment of the OMP, the reparations fund should be created, and applications for reparations should be accepted from the funds' date of inception. The fund should primarily be an allocation of the National Budget, however, must also have the independence to obtain funds from other sources, including well wishers, institutional donors, and the diaspora.

Final

74. In addition to interim reparations, there should be final reparations after a person's fate and whereabouts has been determined, to compensate for the loss of the person. Final reparations should be in the form of a lump sum monetary payment. To ensure maximum equity, the OMP must take into consideration the duration of time a family has received monthly allowances, and the other considerations specified in para 68 above, when determining the final lump sum.
75. Scholarships for children should continue until the end of the course/programme to ensure educational needs are not abruptly stopped. There should be a policy to give priority for job opportunities in the government sector.
76. In the event the missing person is found alive, an additional monetary payment must be made to the victim for income loss and trauma caused over the duration that he/she was missing. An additional compensation should be awarded to the missing person, if he/she was tortured or sustained injuries whilst in custody.

Certificates of absence

77. The Government committed to issuing certificates of absence as an interim measure.²⁶ However, no certificates have been issued and there is no information available about what the procedure will entail. Further, on 21 January 2015, the Minister of Health and Spokesperson for the Cabinet, Dr Rajitha Senarathne, announced that the Government had decided to issue death certificates in relation to those who are missing/disappeared.²⁷ This was following a statement made by the Prime Minister, Ranil Wickremesinghe, at Thai Pongal celebrations in Jaffna that those who are missing are presumed dead.²⁸ The presumption that those who are missing are dead and, therefore, to issue death certificates is of great concern as it fundamentally does not resolve issues about the truth of what happened to the person and accountability for those who are responsible. It also raises concerns about whether issuing death certificates will extinguish victim families' rights to pursue truth and seek accountability.
78. The Government should adhere to its commitment relating to certificates of absence and this should be a function carried out by the OMP. As a certificate of absence is only an interim measure, the procedure for obtaining one should not be cumbersome (like for death certificates). The unit of the OMP issuing certificates of absence should ideally be mobile and be able to travel to the various villages and districts to enable families to easily access this procedure. The OMP unit should also provide details about the resources available to victim families upon the issuance of a certificate of absence.

²⁶ Speech by Hon Mangala Samaraweera, Minister of Foreign Affairs, Human Rights Council, 14 September 2015; Human Rights Council Resolution, Promoting reconciliation, accountability, and human rights in Sri Lanka, 14 October 2015, UN Doc. A/HRC/RES/30/1 (adopted 1 October 2015), para 13.

²⁷ "Death certificates to all disappeared persons", Lankasiri News, 22 January 2015, <http://www.lankasrinews.com/view.php?22ALQ202iPR4e2EqAca27ZRdd35d0bc3oDge43TeT022oHU3>; "Death certificates to be issued to missing persons: the Government announces", The Tamil Diplomat, 22 January 2015, <http://tamildiplomat.com/death-certificates-to-be-issued-to-missing-persons-the-government-announces/>.

²⁸ "Death certificates to all disappeared persons", Lankasiri News, 22 January 2015, <http://www.lankasrinews.com/view.php?22ALQ202iPR4e2EqAca27ZRdd35d0bc3oDge43TeT022oHU3>; "Death certificates to be issued to missing persons: the Government announces", The Tamil Diplomat, 22 January 2015, <http://tamildiplomat.com/death-certificates-to-be-issued-to-missing-persons-the-government-announces/>.

79. It will be important to ensure that the issuance of a certificate of absence will not terminate families' rights to pursue truth and justice: to continue to seek their missing family member through official channels nor the Government's obligation to investigate the circumstances. The application document for a certificate of absence should make explicit reference to the fact that applying for the certificate in no way prevents the family (or individual) from pursuing other rights to truth and justice, including interim reparations and justice (prosecutions). The same caveat should be explicitly stated in the actual certificate that is issued.
80. Where families of missing and disappeared persons make a *bone fide* application for a certificate of absence and declare that they have no current knowledge about the fate and whereabouts of the person in question, there should be no penalties resulting in the subsequent discovery of the person as being alive.
81. Given the complete lack of official Government information relating to missing and disappeared persons in Sri Lanka, the OMP should be charged with the responsibility of being the primary source of official information in relation to **all** missing and disappeared persons in Sri Lanka. Annually, the OMP should compile and transmit the following information to the Department of Census and Statistics, and request that it be published alongside official information relating to registers of births, deaths, and marriages: (1) a list of certificates of absence issued, (2) a list of persons who were reported as missing but whose death has been determined by the OMP, and (3) a list of persons whose fates and whereabouts are still unknown.

Witness protection

82. There must be a thorough witness protection regime for victims and witnesses who engage with the OMP, which must continue through to any criminal investigations and prosecutions that ensue. Personnel must be thoroughly vetted prior to being allowed into the regime and a zero-tolerance policy adopted for breaches of confidentiality.

Support services

83. Psychosocial support to victims and families should be a core function of the OMP. In particular, that there be a group mechanism for families to grieve, share experiences, discuss/strategise campaigns. Families should be offered psychological assistance either via the above support mechanism or separate referrals given to psychologists who would meet with these families on a *pro bono* basis.
84. Persons providing services, in particular psychological or medical services, should be academically and professionally qualified, or have equivalent competencies and work under the supervision of qualified and regulated supervisors.
85. The OMP should assist in establishing psychosocial support programmes, including trauma healing centres with proper facilities and experts.

Evidence database

86. The OMP must have an electronic, sophisticated, and comprehensive evidence database. The OMP evidence database should have three functional purposes: (1) to collate and analyse information and evidence to enable the fates and whereabouts of missing and

disappeared persons to be determined, (2) to house all information relating to cases of missing and disappeared persons in Sri Lanka, including DNA information, and (3) to collate and analyse information and evidence for potential use in future criminal prosecutions and other legal proceedings.

87. In order to facilitate identification of relevant evidence for criminal proceedings (and other legal proceedings), it is crucial that the electronic database system chosen is customised and tailored to the legal elements of enforced disappearance as a crime, and the factual circumstances in which disappearances have occurred in Sri Lanka.
88. The security, confidentiality, and integrity of the evidence database is paramount. Expert IT advice should be sought to ensure the technological infrastructure of the system is secure and the hardware, software, and information contained within, are protected. Given the highly sensitive, and possible highly controversial, nature of the information that will be contained in the evidence database, ensuring thorough procedures about OMP staff access to the database is critical. The system chosen should cater for individualised staff access whereby all steps taken on the database are traceable and can be audited. There should be different levels of access to the information in the database by the OMP staff. For example, comments and analyses made on a victim file by the legal unit should not be accessible nor visible to the first-level data entry staff.
89. The OMP evidence database should not be open for public access. However, there should be a procedure whereby families can request information held by the OMP in relation to the particular victim file of their family member. These requests should be handled by an information request unit. Requests for information should be handled on the basis of full disclosure, subject to redactions made for legally privileged material and confidential information (including witness protection).

Existing evidence from government appointed mechanisms into disappearances

90. Sri Lanka has a history of creating/appointing government mechanisms, including Commissions of Inquiry,²⁹ to deal with significant issues of societal concern. This is particularly evident with regards to disappearances. In the last 22 years (1991 – 2013), there have been at least 11 Presidential Commissions of Inquiry³⁰ and two additional

²⁹ Appointed under the Commission of Inquiry Act No. 17 of 1948.

³⁰ Presidential Commission of Inquiry into Involuntary Removals of Persons, The Gazette of the Democratic Socialist Republic of Sri Lanka, Extraordinary, No. 644/27, 11.01.1991 (“Premadasa Commission I”); The Gazette of the Democratic Socialist Republic of Sri Lanka, Extraordinary, No. 697/5, 13.01.1992 (“Premadasa Commission II”), cited in Law & Society Trust, *A Legacy to Remember: Sri Lanka’s Commissions of Inquiry 1963-2002*, Kishali Pinto-Jayawardena (ed) (Law & Society Trust, Colombo, 2010), p 20, footnote 31; The Gazette of the Democratic Socialist Republic of Sri Lanka, Extraordinary, No. 751/1, 25.01.1993 (“Premadasa Commission III”); Presidential Commission of Inquiry into Involuntary Removals of Persons, The Gazette of the Democratic Socialist Republic of Sri Lanka, Extraordinary, No. 784/1, 13.09.1993 (“Wijetunga Commission”); Commission of Inquiry into the Involuntary Removal and Disappearance of Persons in the Northern & Eastern Provinces, The Gazette of the Democratic Socialist Republic of Sri Lanka, Extraordinary, No. 855/19, 25.01.1995 (“Northern Commission”); Commission of Inquiry into the Involuntary Removal and Disappearance of Persons in the Central, North Western, North Central and Uva Provinces, The Gazette of the Democratic Socialist Republic of Sri Lanka, Extraordinary, No. 855/18, 25.01.1995 (“Central Commission”); Commission of Inquiry into the Involuntary Removal and Disappearance of Persons in the Western, Southern and Sabaragamuwa Provinces, The Gazette of the Democratic Socialist Republic of Sri Lanka, Extraordinary, No. 855/20, 25.01.1995 (“Southern Commission”); Commission of Inquiry into Involuntary Removal and Disappearance of Certain Persons (All Island), The Gazette of the Democratic Socialist Republic of Sri Lanka, Extraordinary, No. 1060/13, 31.12.1998 (“All Island Commission”);

investigative mechanisms³¹ specifically mandated to inquire into large-scale disappearances, two Presidential Commissions of Inquiry³² mandated to inquire into other matters, including disappearances, and two departmental units³³ created to address disappearances.

91. The corollary to numerous government appointed mechanisms is that they are exactly that: *official government mechanisms* that have created significant volumes of official documentary³⁴ information and recorded evidence. Irrespective of the criticisms and failings of these mechanisms, the information that exists as a result of these mechanisms is extensive, and therefore, valuable.
92. To date, this vast catchment of information has not been formally assessed in its totality (by a formal body/institution/mechanism combining all of the evidence collected by each mechanism and making determinations). Further, to date, the majority of the reports have not been published in their entirety, have large portions of withheld material (including findings of evidence and lists of suspected perpetrators), and the material that was published is no longer available. For example, from all of the mechanisms referred to in this section, only the LLRC report is readily accessible to the public in its entirety (it is available online).³⁵ However, the interim report of the LLRC, which included evidence relating to the conduct of the security forces given by persons with authority to speak about those matters, was initially published on the website but subsequently removed and is no longer publicly accessible. Audio/video recordings and transcripts of public hearings from the mechanisms are also not readily available. All of this material should be requested, in entirety, by the OMP and thoroughly analysed.
93. In order to begin comprehensively addressing disappearances in Sri Lanka, the evidence that already exists through these mechanisms must be properly analysed and used as a platform in the proposed mechanisms, in particular the OMP and the judicial mechanism/special prosecutor. There are two crucial reasons that the existing evidence must be utilised: accountability and non-recurrence, and preventing the re-traumatisation of victims and witnesses.
94. Further, while the recorded evidence and other information from the mechanisms does not reach the criminal accountability standard, its significance is that it provides a basis

The Gazette of the Democratic Socialist Republic of Sri Lanka, Extraordinary, No. 1462/30, 15.09.2006 (“Tillekeratne Commission I”); The Gazette of the Democratic Socialist Republic of Sri Lanka, Extraordinary, No. 1505/17, 07.11.2007 (“Tillekeratne Commission II”); Presidential Commission to Investigate into Complaints Regarding Mission Persons, The Gazette of the Democratic Socialist Republic of Sri Lanka, Extraordinary, No. 1823/42, 15.08.2013 (“Paranagama Commission mandate 1”); The Gazette of the Democratic Socialist Republic of Sri Lanka, Extraordinary, No. 1871/18, 15.07.2014 (“Paranagama Commission mandate 2”).

³¹ Ministry of Defence – Board of Investigation into Disappearances in the Jaffna Peninsula, appointed 5 November 1996 (“Board of Investigation”); Human Rights Commission of Sri Lanka – Committee on Disappearances into the Jaffna Region, appointed 2002 s 11(b) of the Human Rights Commission Act No. 21 of 1996 (“Committee on Disappearances”).

³² The Gazette of the Democratic Socialist Republic of Sri Lanka, Extraordinary, No. 1471/6, 13.11.2006 (“Udalagama Commission”); The Gazette of the Democratic Socialist Republic of Sri Lanka, Extraordinary, No. 1658/19, 16.06.2010 (“LLRC”).

³³ Disappearance Investigation Unit, created in December 1997 within the Criminal Investigation Department of the Police; Missing Persons Commission Unit, created in July 1998 within the Attorney-General’s Department.

³⁴ As well as audio recordings.

³⁵ Report of the Commission of Inquiry on Lessons Learnt and Reconciliation, Colombo, November 2011, http://www.priu.gov.lk/news_update/Current_Affairs/ca201112/final_report_llrc.htm.

for beginning or further pursuing investigations, both to clarify the fate and whereabouts of those individuals as well as criminal investigations.

Barriers to prosecutions

95. Given the thousands of persons who are, to date, missing, the OMP will be undertaking an enormous task in determining the fate and whereabouts of those persons, and in doing so, generating a significant body of evidence. It is imperative that the Government's transitional justice process, specifically the OMP, does not have built in barriers preventing those who were responsible for or complicit in disappearances being held to account for their crimes. Evidence received or generated by the OMP **must not** be restricted from being subsequently used for criminal accountability purposes. If evidence from the OMP is firewalled, blocked, or prevented, in any way, from being subsequently used, including in prosecutions, it calls into question the genuineness of the Government's claims to be committed to addressing the issue of disappearances in Sri Lanka.
96. This should apply to any involvement the OMP may have with any institution, body, or individual, including the ICRC and the Attorney-General's Department.
97. Where families want to pursue prosecutions, the OMP should facilitate and assist to the fullest extent.

Memorandum submitted by:

1. Swasthika Arulingam.
2. Marisa De Silva.
3. Shenali De Silva.
4. Ruki Fernando.
5. Balachandran Gowthaman.
6. M C M Iqbal.
7. Gajen Mahendran.
8. Deanne Uyangoda.

1 May 2016
Colombo, Sri Lanka

Memorandum copied to:

1. Hon Ranil Wickremesinghe, Prime Minister.
2. Hon Mangala Samaraweera, Minister of Foreign Affairs.
3. Hon Dr Wijeyadasa Rajapakse, Minister of Justice.
4. Hon Jayantha Jayasuriya PC, Attorney-General.
5. Hon Mano Ganesan, Minister of National Co-existence Dialogue and Official Languages.
6. Madam Chandrika Bandaranaike Kumaratunga, Chair, Office for National Unity and Reconciliation.
7. Mano Tittawella, Secretary-General, Secretariat for Co-ordinating Reconciliation Mechanisms.
8. Dr Deepika Udagama, Chair, Human Rights Commission of Sri Lanka.
9. Zeid Ra'ad Al Hussein, UN High Commissioner for Human Rights.
10. Houria Es-Slami, Chair-Rapporteur, UN Working Group on Enforced and Involuntary Disappearances.
11. Claire Meytraud, Head of Delegation, International Committee of the Red Cross Sri Lanka.
12. Andreas Kleiser, International Commission on Missing Persons.