

MEMORANDUM TO THE CONSULTATION TASK FORCE: AMENDMENTS TO THE OMP BILL

Introduction

1. Further to our memorandum to the Consultation Task Force (“CTF”), dated 1 May 2016, and our follow-up letter to the Foreign Minister, dated 16 May 2016, we write a further follow-up memorandum relating to the Office of Missing Persons (“OMP”). This memorandum specifically relates to the amendments that, in our view, are essential to the current version of the OMP Bill.

Preliminary matters

2. **Lack of transparency and proper consultation.** Contrary to the commitment given by the Government to consult victims and affected communities the OMP Bill was developed without any transparency or real consultation by a Working Group appointed for the purpose and whose membership and mandate remains unclear to the public. Consultation on this was limited to two hastily arranged briefing meetings with a limited group. The Consultation Task Force appointed to hear from the victims for the purpose had been side lined and had very little input into this. The OMP Bill was approved by Cabinet before the Consultation Task Force conducted any face-to-face consultations on the proposed OMP. The manner in which the first of the four transitional justice mechanisms promised by Government has been introduced, has given rise to scepticism and a fear as to whether the rest of the transitional justice mechanisms too will be designed without due input from affected people. This will call into question the credibility of these institutions in the eyes of the victims. They will see this as being no different to the various Commissions of Inquiry appointed by previous governments. Further, the lack of consultation impoverishes the design of the OMP in servicing the needs of those who will be using it.
3. **Piecemeal transitional justice approach.** Introducing the transitional justice mechanisms in a piecemeal manner without giving an indication as to the mandate and powers of each of the four and how they will interact with and complement each other makes it difficult to assess if victims’ right to truth and justice will be fulfilled. If the people were to repose confidence in a truth-seeking institution like the OMP, as a part of an over-all reconciliation mechanism, it is imperative they also are told in some detail about the justice delivery mechanisms – and how the Government proposes to ensure that justice is delivered.
4. **Sequencing.** Given the existence of draft legislation for the OMP, it is now essential that victims know the Government’s intended sequencing of the remaining three mechanisms. The remaining three mechanisms should be created immediately, to enable the work of the OMP to be co-ordinated. In particular, the Office for Reparations should be created without delay, after consultations by the Consultation Task Force.
5. **Criminalising enforced disappearance.** The Government ratified the Enforced Disappearance Convention¹ on 25 May 2016, however, the status of the enabling

¹ 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”).

legislation is unknown. Enabling legislation should now follow as a matter of urgency. It is imperative that enforced disappearance is criminalised in Sri Lanka prior to the enactment of OMP Bill into law. Enforced disappearance, as an ordinary crime and as a crime against humanity, must exist as separate autonomous offences under Sri Lankan criminal law. If not, there will be jurisdictional barriers² to criminal accountability that will be built into the OMP and any ensuing criminal accountability proceedings. The risk of investigating and prosecuting acts and conduct of enforced disappearance as lower gravity crimes will be an unacceptable situation given the history, and lack of criminal accountability, for disappearances in Sri Lanka

6. **Prosecutions resulting from OMP.** Since the special court is yet to be established, it appears that those instances where the OMP deems that there is an offence committed, the cases will be referred to the Police for further investigation and Attorney-General for prosecution. These institutions in their current status do not have the trust of the victims.³ Further, it might also lead to situations where law enforcement who are implicated in disappearances (including the Terrorism Investigation Department (“TID”) and Criminal Investigation Department (“CID”)) may get involved in the investigations. Therefore, it is imperative that adequate administrative arrangements and checks are instituted to ensure independence and foster confidence in the eyes of the families of the missing and disappeared. The nature of such administrative arrangement should be clarified before the OMP Bill is passed into law.

Abductions and arrests – update

7. On the night of 30 June 2016, around 11.30pm, Santhiogu Anton, a fisherman from Mannar was found dumped on the roadside, badly beaten up and burnt.⁴ He had been blind-folded and abducted by unidentified persons, from a Church in Mannar in the early hours (approx. 3.30-4am) of 29 June 2016. They had repeatedly questioned Anton with regard to where the arms (weapons) had been hidden, and where his other friends were now.
8. He was hiding in the Church, in fear for his life, as he had been continuously subjected to intimidation and harassment by the state intelligence since 1998. Earlier this year, and also last year, intelligence officers, believed to be from the TID or the CID, have been looking for him, and have threatened him and his family members. His wife has been kicked and slapped. He has been arrested several times since 1998 and tortured badly, and although he has been acquitted through courts, he has been constantly harassed by the state security forces.
9. Anton has not been the only person who was abducted in recent months. Also last month, Renukaruban, a Tamil with a British passport who was visiting Sri Lanka, was

² The inability to prosecute enforced disappearance as *enforced disappearance*.

³ On 19 May 2016, the night prior to the second briefing at the Foreign Ministry, a discussion was held with approximately 55 family members of disappeared persons from Jaffna, Vavuniya, Kilinochchi, Mannar, Trincomalee, Batticaloa, Puttalam, Ampara, Moneragala, Gampaha, Hambantota, and Colombo. A document was compiled containing questions and comments raised by the families on the OMP and was submitted to the Foreign Minister on 20 May 2016. The document is **attached** as **Annex 1** to this memorandum. The families also directly conveyed these questions and comments at the briefing on 20 May 2016.

⁴ Information provided by Anton’s family to Watchdog Collective.

assaulted and abducted from his home in Jaffna⁵, in front of his mother and sister, by unidentified men. He was later found in remand custody. In April 2016, Jeyanthan, a former Liberation Tigers of Tamil Eelam (“LTTE”) cadre, was abducted from his home in Jaffna by unidentified men claiming to be from the Police, and later found to be in TID custody.⁶ Nakulan⁷ and Ram⁸, two other former LTTE leaders, were abducted in two separate incidents in April 2016, in Jaffna and Ampara respectively, were also subsequently found to be in TID custody.

10. One of the men who was abducted and found, has reported that he had seen another man in custody, badly injured. Two men had been reported to authors as abducted and subjected to severe physical injuries and in hiding after being released, in two separate incidents. Two others in one incident reported to the authors, remain disappeared after more than two months, despite complaints to the Police and the Human Rights Commission of Sri Lanka (“HRSC”). Details of the latter four have not been publicised, due to the victims’ fears for themselves and their families.
11. Anton was abducted and subjected to severe physical injuries on the day the Sri Lankan Foreign Minister was claiming to the UN Human Rights Council in Geneva that incidents of torture had reduced. Anton was being burnt and beaten at a hidden location, whilst the President of Sri Lanka, along with senior Police officers were marching on the streets of Colombo, at a historic and well publicised anti-torture rally organized by the HRCSL.
12. Overall, the authors note that at least 10 abductions have been reported over the last three months (30 March – 29 June 2016). Most of the incidents have happened in the heavily militarised Northern Province, and all the victims have been Tamil males.
13. This new wave of abductions come at a time when the draft Bill for OMP is before Parliament, and the Government having ratified the Enforced Disappearance Convention, is in the process of preparing draft legislation to criminalise disappearances. Further, the Government appointed Consultation Task Force is currently conducting consultations on transitional justice, with a special focus on disappearances. Whilst all these are important measures to address disappearances in Sri Lanka, the unwillingness of the Government to condemn or even acknowledge these abductions, and take stringent actions against perpetrators is appalling. Further, if such abductions are being carried out by state forces without Government authorisation, it is indicative of a far more alarming state of affairs, as it implies that the Government is not in control of the security forces and surveillance structures.
14. The disturbing number of abductions over the last three months, and the Government’s inaction in this regard, has led to skepticism and lack of confidence in initiatives of the Government to ensure truth, justice and reparations for previous incidents and guarantee non re-occurrence.

⁵ Marisa de Silva, Swasthika Arulingam and Ruki Fernando (WATCHDOG), *Continuing abuse under PTA: Abductions, Arbitrary Arrests, Unlawful Detentions and Torture* - <http://groundviews.org/2016/06/28/continuing-abuse-under-pta-abductions-arbitrary-arrests-unlawful-detentions-and-torture/>.

⁶ Swastika Arulingam, Marisa de Silva and Gajen Mahendra (WATCHDOG) - *White Vans and unlawful detention under the PTA* - <http://groundviews.org/2016/06/01/white-vans-and-unlawful-detention-under-the-pta/>.

⁷ Rathindra Kuruwita - *Ex-LTTE leaders Ram and Nagulan arrested* - <http://www.ceylontoday.lk/print20160321CT20160630.php?id=1258>

⁸ HiruNews, *A Former LTTE Leader Ram arrested by TID*, <http://www.hirunews.lk/131732/former-ltte-leader-ram-arrested-by-tid>

15. Further, as at 24 June 2016, the authors know of 28⁹ arrests of Tamil persons from the North and East of Sri Lanka, with 24 of the 28 arrests having taken place under the Prevention of Terrorism Act.¹⁰

Amendments to the OMP Bill

Name of the office and title of the Bill/Act.

16. Clause 3(1) should be amended to refer to the establishment of an Office of Missing and *Disappeared* Persons. The families with whom we have consulted, as well as the families who spoke at the second briefing at the Foreign Ministry on 20 May 2016,¹¹ feel very strongly about this issue. Given the history of denials and trivialising of the disappearances issue, it is important to recognise the fact that many were deliberately disappeared. While the description inside the OMP Bill does contain enforced disappearance as one of the categories, in order to inspire the confidence of the families it would be of great value to recognise it in the title of the proposed institution as well as the long form and short form title of the Bill. Families at the 20 May 2016 briefing were told this issue would be taken into consideration.
17. The term ‘missing’ should also also retained in the title of the office and the legislation to ensure that persons’ whose fate and whereabouts are unknown for reasons other than due to enforced disappearance are not excluded from the OMP’s mandate.
18. The preamble should also be re-formulated on a rights basis (not use “entitlement” language), including: the right of individuals to be protected from being forcibly disappeared, abducted, or any other form of deprivation of liberty resulting in individuals’ fate and whereabouts being unknown; the right of families to know the truth about the fate and whereabouts of their missing family members; the right to criminal justice; the right to reparations; and the right to guarantees of non-recurrence. The preamble should reflect that the OMP is part of the Government’s initiative to ensure that these rights are provided for.

Enforced Disappearance Convention

19. The OMP and the Enforced Disappearance Convention should go hand-in-hand. Giving effect to the rights and obligations contained in the Enforced Disappearance Convention should be part of the mandate/purpose of the OMP. Clause 10, the mandate section, should have a separate provision reflecting this: to assist in the implementation of, the adherence to, and the monitoring of, the rights and obligations contained in the Enforced Disappearance Convention.

Inclusion on non-state actors in definition of enforced disappearance

20. The OMP should also be empowered to trace those that were abducted by non-state actors (including the LTTE, the Karuna faction, the Eelam People’s Democratic Party (“EPDP”), and the People’s Liberation Organisation of Tamil Eelam (“PLOTE”). As it currently stands, the definition of ‘missing person’ in relation to an enforced

⁹ This also includes the four persons mentioned as abducted in para 9.

¹⁰ Prevention of Terrorism (Temporary Provisions) Act No. 48 of 1979. For more details, see <http://groundviews.org/2016/06/28/continuing-abuse-under-pta-abductions-arbitrary-arrests-unlawful-detentions-and-torture/>.

¹¹ See document **attached** as **Annex 1**.

disappearance in clause 27(iii) refers only to the Enforced Disappearance Convention, which excludes non-state actors as possible perpetrators. Clause 27(iii) should make explicit reference to the inclusion of non-state actors as possible perpetrators of enforced disappearance.

Language

21. Victims and families must be able to communicate in their own language/language of their preference in all their transactions with the OMP. To this end, the OMP must have staff at all levels who are able to respond to and interact with victims and families without having to resort to translations on a regular basis. The OMP Bill must contain an explicit provision stating this language requirement relating to OMP personnel (relating to the Members, the Tracing Unit, the Victims and Witnesses Division, and all other intended units/divisions of the OMP).
22. The OMP Bill must also contain an explicit provision requiring that information provided to families must be in the language of the particular family's preference and that the OMP request this information from the families. It is imperative that families receive information in the language that they can read and understand directly, without the need for translation. Specifically, information provided to families under clauses 13 (1)(a)(i), (ii), and (iii); 13 (1)(b); 13(1)(c); and 13(1)(d)(i) and (ii) must be in the language of a family's preference as it is crux of what will enable families to know the 'truth' of what happened.

Formal inclusion of families in the OMP structure

23. The OMP Bill must make provision for the inclusion of families/representatives of families of the missing and disappeared in the OMP. For instance, at least two family member should be appointed to the highest oversight body.
24. The OMP should also strive to ensure that the victims have a structured role in the monitoring of progress at the regional and national level. For instance, by way of an advisory or monitoring body, which reviews the work of the OMP quarterly and makes public findings. Further, such an advisory/monitoring body should ensure that the roles are rotated every three years, to enable different families to be represented.

Mandatory updates to families

25. Clause 13(1)(c) should be amended to remove the OMP's discretion around updates to families on ongoing investigations. It should be mandatory for families to be provided updates relating to an ongoing investigation whenever there is a significant development AND periodically at least twice a year.

Information provided to families

26. Maximum information should be given to families at the conclusion of an investigation (clause 13(1)(d)) as well as in relation to an ongoing investigation (clause 13(1)(c)). Maximum information would include the fate of the missing or disappeared, the circumstances related to the disappearance, and the challenges in pursuing the truth. The exceptions/information withheld should be spelt out to families (for example, the identity of witnesses/informants when confidentiality has been guaranteed, when provision of information may be detrimental to the processes of establishing the whereabouts and/or prosecutions).

Existing evidence from state appointed mechanisms

27. The collation of data and centralisation of data into a database under clause 10(e) does not sufficiently address the need for this to happen as a very crucial **preliminary task**. The volume of existing evidence and information on the missing and disappeared, including from state investigative mechanisms, is vast. This vast quantity should be rationalised and collated, and individual victim files created, to ensure that (1) the OMP can properly execute its function of tracing, utilising all available evidence and (2) the OMP does not unnecessarily require families to, yet again, make complaints to a state investigative body.
28. The pre-existence of, at the very least, a combined list of missing and disappeared persons as found by previous state investigative mechanisms will enable the OMP to determine whether an instance of a missing or disappeared person is new or not. If it is new, then the OMP can require a full and detailed complaint to be made by the family. If it is *not* new, the OMP should not require a family to make another full and detailed complaint: the existing information should be assessed prior to seeking any further information from the family.
29. An explicit provision should be inserted under clauses 13 (functions and duties) reflecting this procedure and providing that it should be a mandatory preliminary task of the OMP.
30. Once the OMP consolidates all the information and evidence from previous state investigative mechanisms, it should inform the families in writing of whose cases are being considered by the OMP.

Confidentiality regime of the OMP

31. Based on information provided by the Working Group drafters prior to the gazetting of the OMP Bill, confidentiality was envisaged as the key method of facilitating witnesses to provide information to the OMP. It was also understood that information provided on the basis of confidentiality would not be transmitted out of the OMP. Given the significant implications this confidentiality regime would have on criminal accountability process, or any legal processes outside of the OMP, the almost passing reference contained in cl 12(c)(v) is wholly inadequate. Clause 15 also is insufficient in detailing the confidentiality regime envisaged. If confidentiality is to be used by the OMP as a means of accepting and withholding information, it ought to be a regime that is transparent and regulated by the governing statute. There should be clear and identifiable criteria where confidentiality would be triggered. It should not be a discretionary system that is to be established by the OMP.
32. Clause 12(c)(v) and the OMP Bill should be amended to include the confidentiality regime envisaged, including the criteria when confidentiality would apply and the criteria where confidentiality would result in the OMP withholding information from any other mechanism/institution/body.

Appointment procedure for OMP Members

33. The Constitutional Council should publicise the expected qualifications and selection criteria for the Members when seeking nominations from the public. The Constitutional Council should also provide sufficient time and opportunities for families and the public to nominate suitable persons.

34. Prior to making the recommendations to the President, the Constitutional Council should publish the nominations it has short-listed and invite families and the public to comment, as a part of the vetting process, providing sufficient time and opportunities to do so. It should take into account such comments before creating the final list of Members to recommend to the President. The publication of the short-listed names process should be explicitly provided for in clause 4.
35. Clauses 4(1)(a) and (b) should be amended to stipulate that the President shall not make an appointment outside of the recommendations of the Constitutional Council.

Composition and background of OMP Members

36. Gender and ethnicity should be mentioned as specific criteria in ensuring diversity of the OMP. In this regard the current formulation that it “reflect the pluralistic nature of Sri Lankan Society”¹² is weak. Taking into consideration the ethnic profile of the case load of missing and disappeared persons with the last Paranagama Commission of Inquiry, as well as the poor track record of appointments in the previous Commissions of Inquiry when it came to public confidence, it is imperative that there be stronger and more directive provisions in this regard. Clause 4(2)(a) should be amended to make explicit reference to gender and ethnicity: women should comprise more than 50% of the Members and the ethnicity of the Members should reflect the caseload of the OMP. Clause 9 should also be amended to ensure that the quorum for meetings of the Members is reflective of the same gender and ethnicity considerations.
37. Those nominated by the Constitutional Council should be persons who have never been implicated/held responsible for disappearances/missing or being complicit by way of denying, justifying, or covering up the crime in the past in any local and international fora. Persons who are or have been members of the security forces or armed groups should not be appointed as Members. Persons are or have held political office should also not be appointed. Clause 4(2) should contain a separate explicit provision setting out the persons who are ineligible to be Members of the OMP.
38. In addition to the qualifications stated under clause 4(2)(b), professional experience working with the families of the missing and disappeared and psycho-social support experience should also be explicitly included.

Role/function of the Members of the OMP

39. The OMP Bill should specify the role, function, and tasks of the seven Members. As it presently stands, the OMP Bill describes the functions of the OMP as an institution, however, it does not provide details about role and function of the Members. For example, it should clarify the nature of interaction the Members will have with complainants and families. In addition, the ‘governance’ and ‘executive’ role of the Members should be clarified.
40. Further, it is unclear how the Members’ role/function will relate vis-à-vis the Tracing Unit, the Victims and Witnesses Protection Division, and any other unit created.

¹² OMP Bill, cl 4(2)(a).

41. It is also unclear what is meant by “meetings of the OMP” in clause 8. Either in clause 8 or in the interpretation clause 27, an explanation of the type of meetings should be provided.

Working days of the OMP Members

42. The OMP Bill should stipulate the minimum number of days per month that the Members need to commit. In our view, the Members must be able to commit to at least 15 working days a month and this should be part of the eligibility criteria for selection. Further, given the commitment for the functioning of the OMP, at least four of the seven Members should be full-time Members (a full-time job commitment to the OMP).

Recruitment criteria for OMP staff/personnel

43. The OMP Bill should stipulate clear criteria for recruiting staff/personnel, of all levels, to the OMP. All staff should have the requisite professional qualifications, experience, and language requirements relevant to their particular position. All staff should also have a demeanour that reflects an aim to pursue and provide truth to families of the missing and disappeared.
44. The OMP Bill should also stipulate those who are ineligible to be recruited as staff/personnel and that all staff/personnel shall be thoroughly vetted. Individuals who are implicated of having any involvement in any instance of a missing or disappeared person or involvement in any other serious crime must be categorically excluded. In this regard, there should be an explicit provision containing this exclusion relating to the recruitment of current or former law enforcement and military personnel.

Investigative powers

45. It is unclear who within the OMP will execute the investigative powers for the tasks set out in clause 12. For example, tasks such as examining persons as witnesses (clause 12(c)(i)), summoning appearances before the OMP or to produce documents (clause 12(c)(ii)), admitting ordinarily inadmissible evidence (clause 12(c)(iii)), and the wording, are quasi-judicial in nature. However, it is not stipulated whether it will be the seven Members or the Tracing Unit or some other unit that will execute those tasks.
46. The OMP Bill should clearly state who, within the OMP, will execute the investigative powers and tasks envisaged in clause 12.

OMP initiating an inquiry/investigation

47. Under clause 12(b), the OMP’s ability to initiate an inquiry and/or investigation should not be limited to complaints it receives and information from previous Commissions of Inquiry. The OMP should be able to do so based on complaints made to any national or international body, including the police, the HRCSL, the UN Working Group on Enforced and Involuntary Disappearance (“WGEID”), and the International Committee of the Red Cross. The OMP should also be able to initiate an inquiry and/investigation in relation to *habeas corpus* cases. The OMP Bill should contain an explicit provision authorising the OMP to obtain and assess all court records in relation to *habeas corpus* cases.

48. A part of this function should be assisting the Government to respond to the WGEID to clarify cases transmitted directly to the Government.
49. The criteria for the prioritisation of cases under clause 12(b) should include the public's view, in particular, the instances that *families* believe should be prioritised. The public importance criteria of clause 12(b)(iii) is discretionary as it relates to instances of public importance in the *OMP's* view. There should be a separate criterion where the public can make written submissions to the OMP of cases that should be prioritised.
50. The prioritisation of cases criteria should also include cases where there are indications, as reported by the affected family or any other institution, organisation, or person, that a person may still be alive, or have been sighted after having gone missing or being disappeared.
51. The OMP should not exclude a case as outside its mandate until at least a preliminary inquiry/investigation has been carried out and there is a valid basis that would justify the exclusion of a case.

Referral of cases not within definition of 'missing'

52. Under clause 12(h), the referral of cases to other bodies that do not fall within the meaning of 'missing person' should be done with the explicit consent, not consultation, of the complainant/family. The referral should also be to any relevant body, not just police or law enforcement authority. For example, the Human Rights Commission of Sri Lanka, ministerial and parliamentary bodies, and international bodies.

Handling of human remains

53. The OMP should devise and implement plans to handover identified human remains to families, and assist and facilitate them to carry out last rites and/or religious or other rituals. Further, upon the conclusion of investigations into establishing the fate and whereabouts, there could be information pertaining to specific gravesites (based on investigations and witnesses), which, cannot be exhumed or the remains identified at the time due to various reasons. However, if/when this information is available, it should to be provided to families as comprehensively as possible.
54. The OMP should also devise and implement plans to preserve and dispose of unidentified human remains in a dignified manner.

Preservation of detention sites

55. The OMP Bill should contain an explicit provision giving authority to the OMP to cordon off and preserve sites identified as places of detention (including secret/ungazetted detention centres) which could lead to establishing the fate and whereabouts of missing and disappeared persons.

Internal policies

56. The OMP's issuance of internal rules and guidelines under clause 11(c) should be subject to regular review by families and the public. The discretion about gender-sensitive policies should be removed: it should be mandatory for the OMP to issue gender-sensitive internal policies.

Certificates of absence and death certificates

57. The draft legislation relating to certificates of absence should be subject to consultations by the Consultation Task Force. It should not be enacted without providing sufficient time for consultations to be conducted and for any problematic clauses to be addressed.
58. Subject to the above qualification, interim reports and reports issued under clauses 13(1)(a)(i) and (ii) to the Registrar-General for the issuance of certificates of absence and death certificates should be in the form of binding directives. Clause 13(1)(v) should be amended to state that interim reports and reports issued by the OMP shall be binding on the Registrar-General.

Recommendations by OMP

59. Clauses 10(1)(b) and 13(k) should stipulate that all recommendations made by the OMP will be publicly available and in all three languages. They should be done by way of public statements of the OMP. Clauses 10(1)(b) and 13(k) should be amended to remove any ambiguity about the public nature of the OMP recommendations: the recommendations must be public.
60. In relation to clause (13)(k), it should be mandatory to consult both families AND persons/organisations representing families, instead of “and/or”. It should also include a clause that will make it mandatory for the OMP to consult the concerned family when the recommendations are related specifically to one case and not of a general nature.

OMP's database

61. The centralised database to be created under clauses 10(1)(e) and 13(1)(h) should also include information from international bodies, such as the WGEID, the Human Rights Committee, and the Committee Against Torture.
62. The OMP should also specifically co-ordinate with the HRCSL to ensure approaches to cases of missing and disappeared persons, as well as evidence, is not duplicated.

Transferring information for criminal investigation/prosecution

63. The Bill must specifically provide for a unit that archives material collected during the course of the tracing investigation and which, subject to confidentiality conditions, can be shared with any other mechanism and with other law enforcement/prosecutorial agencies.
64. The OMP should conduct investigations in a way that information and evidence discovered (related to individual cases as well as overall patterns), can be used to fulfil rights of families to criminal justice (prosecutions). In this respect, clause 12(i) is extremely problematic for criminal accountability for a number of reasons.
65. There are multiple levels of discretion in this clause: “an offence ... has been committed, *that warrants investigation*”, “the OMP *may*”, and “after consultation with such relatives of the missing person *as it deems fit*”. Where offences are at play, there ought to be no discretion in the OMP sharing information with law enforcement/prosecutorial authorities. As the OMP has been constructed, at pains, to exclude any form of prosecutorial involvement, the necessary consequence of that decision is that the OMP must not have any discretion in relation to pursuing criminal accountability. Decisions of

whether, for example, a matter warrants criminal investigation are squarely within the realm of law enforcement and prosecutorial authorities. There should not be a preliminary filter through the OMP, in the absence of prosecutorial involvement in the OMP. Consequently, it should be law enforcement/prosecutorial authorities that consult with victim families about pursuing a prosecution. Clause 12(i) should remove all discretionary references and provide a mandatory function of transferring information where offences are involved.

66. It is of concern that the report to law enforcement/prosecutorial authorities will have civil status information and the date and location the person went missing only. Such information is skeletal. The OMP will clearly have a file about a missing person where there appears to be an offence; containing substantial information and evidence that led the OMP to come to the conclusion that there appears to be an offence. Law enforcement and prosecutorial authorities should have the benefit of all information that the OMP has where there appears to be an offence. Otherwise, law enforcement/prosecutorial authorities will, in effect, have to start from scratch. It is then disingenuous to claim that the OMP will not hinder 'justice' processes.
67. The process envisioned through this clause also completely fails to address the issue of minimising requiring witnesses to give evidence multiple times. Protecting witnesses, both with regard to re-traumatisation and their credibility,¹³ must be a paramount concern in these state processes. There is grave danger, firstly to victims and witnesses and then the broader criminal accountability for wrong doing, if this process is constructed in the way planned.

Next steps

68. In our view, the Consultation Task Force:
 - 68.1 Must make a public statement about the current context of abductions and the detrimental impact it will have on the public confidence and willingness to participate in consultations. This should issue should be taken up as a matter of urgency with the President and Prime Minister.
 - 68.2 Must ensure that the OMP Bill is subjected to consultation and that the views heard from affected people are communicated to the Government in order to influence the Bill. After the consultations, an interim report of the consultations, specifically in relation to the OMP, should be provided to the Government as the Bill gets debated in Parliament. It is crucial that the interim is made publicly available in all three languages.
 - 68.3 Must have separate focus group discussions with families of the missing and disappeared under different circumstances (for example those who surrendered to the Army and disappeared and those listed as deserters and are missing)
 - 68.4 Must make it clear to the Government where the OMP Bill falls short of what the affected families are expecting.

¹³ The more times a witness provides information or is required to give evidence, the higher the chance of errors in the account they give, including discrepancies, inaccuracies, and memory differences. These directly affect the credibility of a witness and the evidential value attributable to his/her evidence.

- 68.5 Must make a public commentary of the recommendations that have and have not been taken on board by the Government.
69. In our view, the Government:
- 69.1 Must imbue the OMP Bill with a significant amount of more detail than the current form.
- 69.2 Must **NOT** hastily or under urgency enact the OMP Bill prior to the Consultation Task Force concluding its consultation process on the current version of the Bill and has conveyed its findings to the Government and made the findings public.
- 69.3 Must issue a summary document, in all three languages, that describes how the OMP will actually operate. The summary document should be one that is readily accessible and comprehensible to anyone, in particular families of the missing and disappeared.
- 69.4 Must issue a diagrammatic representation/flow-chart of how the OMP is intended to operate, in all three languages, that could be used for consulting with victims and families. A document like the two-page leaflet issue by the Secretariat for Co-ordinating Reconciliation Mechanisms¹⁴ will not be sufficient to explain how the OMP will actually work.
- 69.5 Must create public awareness of the OMP Bill, the need and importance for having the OMP, and the importance of the OMP for the reconciliation process among all citizens of Sri Lanka. This should be done using all state infrastructure, including all state media. In order to imbue the process with sufficient political support for this initiative, the President and Prime Minister must publicly spearhead this process.

Memorandum submitted by:

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5 July 2016
Colombo, Sri Lanka

¹⁴ Secretariat for Co-ordinating Reconciliation Mechanisms, *Proposal for the Office of Missing Persons (OMP)*, 13 May 2016.

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. Hon Rajavorothiam Sampanthan, Leader of the Opposition.
7. Madam Chandrika Bandaranaike Kumaratunga, Chair, Office for National Unity and Reconciliation.
8. Mano Tittawella, Secretary-General, Secretariat for Co-ordinating Reconciliation Mechanisms.
9. Dr Deepika Udagama, Chair, Human Rights Commission of Sri Lanka.
10. Zeid Ra'ad Al Hussein, UN High Commissioner for Human Rights.
11. Houria Es-Slami, Chair-Rapporteur, UN Working Group on Enforced and Involuntary Disappearances.
12. Claire Meytraud, Head of Delegation, International Committee of the Red Cross Sri Lanka.
13. Andreas Kleiser, International Commission on Missing Persons.