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SRI LANKA: BRIEFING NOTE 3

ENFORCED DISAPPEARANCES

"The family and friends of disappeared persons experience slow mental torture, not knowing whether the victim is still alive..."

OHCHR'

Enforced disappearances have become emblematic of the suffering of hundreds of thousands of Sri Lankans over the decades as a result of the families' agonising search for their loved ones and the refusal of State officials at the highest level to acknowledge their fate and whereabouts.² Under international law an enforced disappearance constitutes a serious violation of human rights and, under certain circumstances, may constitute a crime against humanity or a war crime.

In 2015, Sri Lanka had the second largest case-load of disappearances in the world after Iraq, according to the UN Working Group (WGEID).³

In the last days of the civil war in Sri Lanka, hundreds of Tamils connected to the Liberation Tigers of Tamil Eelam (LTTE), its civil administration and family members including young children, surrendered themselves into the custody of the Sri Lankan Army only to disappear without trace. This is the largest number of people to disappear in one place at one time in Sri Lanka. The ITJP has published the names and details of 392 people who allegedly disappeared between 16-19 May 2009 in Army custody.⁴ Clearly this is not the only incidence of enforced disappearance in Sri Lanka that has occurred over decades, but it is the most emblematic of impunity for this crime.

Tamil mothers, grandmothers and wives sat on the roadside for more than 1,400 days demanding answers from the Sri Lankan State.⁵ Some had personally handed over their family members to the Army at the war end, only to have them disappear. Over the years, families have been insulted, threatened, abused and co-opted by political agendas as they bravely spearheaded the struggle for justice. Many participated in commissions and documentation initiatives because they hoped their loved ones were still alive, in detention. The uncertainty inherent to enforced disappearance makes it a crime that is distinct from arbitrary detention or extrajudicial execution: the families' feelings swing between hope and disillusionment, which equates to psychological torture.

Enforced disappearances violate not only the rights of the direct victim, but also those of his or her relatives, who are regarded in law as victims too. A recent report published on the Disappeared in Sri Lanka indicates that since 2017 more than 73 family members involved in the protests around loved ones have died primarily out of sorrow, disappointment, stress and sickness.⁶ For these family members, searching for their loved ones is

their only mission in life and they have lost interest in all other activities. The death of family members has the potential to erase the evidence for enforced disappearance, especially when it has become so politicised.

The only transitional justice mechanisms established as a result of UN HRC Resolution 30/1 have been the Office on Missing Persons (OMP) and the Office for Reparation.

CURRENT GOVERNMENT'S RESPONSE

Key figures in the current Government would have knowledge of the fate of the hundreds of Tamils who disappeared in Army custody at the war end. The current President of Sri Lanka, Gotabaya Rajapaksa, was the powerful Secretary of Defence in command and control of military forces; the current Army Commander, Shavendra Silva, and the current Secretary of Defence, Kamal Gunaratne, were brigade commanders who were present at the frontline in the final days of the war and were even photographed standing over piles of enemy corpses.

On 17 January 2020, President Gotabaya Rajapaksa callously and deceitfully informed the UN Resident Coordinator that "these missing persons are actually dead" and "most of them had been taken by the LTTE or forcefully conscripted".⁷ In 2016 the former Prime Minister Ranil Wickremesinghe had also told a journalist that the disappeared "were probably dead".⁸

In an interview to the State-run paper during the run up to the March 2021 session in Geneva, the Secretary of Defence disparagingly called the Office on Missing Persons "absurd":

Q: The Office of the Missing Persons (OMP) was established during the previous regime as per the UNHRC recommendations. How effective do you think this was?

A: This is absurd. Anyone can just come and complain that their son or family member is missing. But you need to ascertain the accuracy of these claims. They are just accepting complaints and those giving evidence are kept secret and they want the members of the Security Forces to be charged, without being given any opportunity for cross-examination as those people are not identified. This is a totally wrong procedure and it does not suit our legal system".⁹

OFFICE ON MISSING PERSONS (OMP)

In August 2016, the Sri Lankan Parliament passed the Office on Missing Persons (Establishment, Administration and Discharge of Functions) Act [OMP Act] in compliance with Resolution 30/1. The OMP was envisaged as a discrete mechanism for receiving complaints and investigating the tens of thousands of missing persons cases that remain unresolved to date, despite the past setting up of several Commissions of Inquiry tasked with a similar mandate.¹⁰

Criminal accountability: In conceptualizing the OMP in Sri Lanka, the Government has been accused of creating a false dichotomy between a humanitarian and criminal approach, presenting victims with an absolutely artificial and unfair choice between truth and justice.¹¹ Enforced Disappearances are usually associated with criminal proceedings that seek to attribute accountability for a criminal act. The term 'missing', on the other hand, does not imply an attribution of guilt for a person's absence. Some critics have noted that the use of the word 'missing' in the title of the Office on Missing Persons in Sri Lanka was deliberately intended to dilute the criminal element which attaches to most of those who were disappeared.¹²

Failure to Subpoena: The OMP has been severely criticised by the families of the disappeared for failing to investigate and subpoenaing any of the military commanders who were present when the surrenders took place, despite being requested to do so by the Mothers of the Disappeared, the ITJP and numerous civil society organisations and human rights activists.

Conflicts of Interest: The Association for Relatives of the Enforced Disappeared in Sri Lanka noted the "glaring contradictions" in the composition of the Office on Missing Persons and the conflict of interest it presents. Major-General Mohanti Peiris, one of the OMP Commissioners, was the Chief Lawyer for the Army from 2007-2009.¹³ During her tenure, there were a massive number of disappearances of those who were in the custody of the Army occurring 16-19 May 2009. Her job description included¹⁴: preparing court martials, suspending Army personnel, preparing charges against them, and preparing the Army Commander's opinion on courts of inquiry. At the very least Commissioner Peiris is both a witness and an investigator, a dual role which is prohibited by Sri Lanka's rules of conduct and etiquette for lawyers.¹⁵

A new Chairman of the Office of Missing Persons was appointed after the Government changed; he is Justice Upali Abeyrathne, who, in his capacity as Chairman of the Presidential Commission of Inquiry into Political Victimisation, allegedly blocked investigations into some of the emblematic cases and is allegedly responsible for attempting to exonerate perpetrators through trying to quash trials and set aside indictments as well as recommending acquitting and releasing complaints.¹⁶ UN High Commissioner for Human Rights, Michelle Bachelet, recently noted that the Presidential Commission on Political Victimisation had "undermined police investigations and court proceedings related to several high-profile human rights and corruption cases".¹⁷

PROBLEMS WITH THE OMP LISTS

On 26 November 2020, the OMP published various lists of missing and disappeared persons.¹⁸ Despite the communication that they have carried out a verification process, there are a number of problems in respect of the list which prejudice the inalienable rights of families to the truth about the fate and whereabouts of loved ones and to justice and accountability. This includes the following:

- The lists conflate those who have gone missing and those who are the subject of the crime of an enforced disappearance;
- The OMP does not set out its methodology for documentation, the criteria it used to establish the names

on the list and the basis for verification. It is also not clear whether they utilised identity documents or birth certificates to confirm the identity of those missing and disappeared. It is also not clear whether the OMP collected photos from those so that witnesses could identify the missing and disappeared;

- The OMP has published lists that are linked to the location that victims (or their surviving family members) come from, rather than of where they went missing or were disappeared from, and this obscures the fact that large numbers of people who surrendered into the custody of the security forces between 16-19 May 2009 and who were last seen in the custody of the security forces have been disappeared;
- Numerous organisations including family members of the disappeared and the ITJP have collected data on victims who have been the subject of enforced disappearances in the aftermath of the conflict, between 16-19 May 2009, which the ITJP collated. The list for this period alone totals at least 392 names. These names are not included on the OMP lists, with the exception of 15 names which belong to around 3 family groups;
- The names of the victims on the lists for the North and East have been misspelled and also require that the birth names be reconciled with noms de guerre;
- A comparison between the OMP list of the Missing for the JVP period pertaining to Matale District and the All-Island / Zonal Commission lists reveals incorrect names and dates of disappearances;
- Furthermore, the comparison with contemporaneous lists reveals a problematic verification process by the OMP;
- Victims of emblematic cases have not been included on the list, for example the victims in the Trinco 11 Navy case;
- Furthermore the Paranagama Commission appears to have received more submissions from family members of the disappeared;
- The publication of lists of security force personnel who have gone missing in action appears to muddy the waters. There is no clarity on the facts and circumstances under which they went missing or whether the OMP carried out an independent verification process. Furthermore, the organisation of the Army lists by regiment suggests that this is probably how the military handed them over. Moreover, it's not clear whether those security force members designated missing in action would be entitled to receive some form of reparations, given that their families would be entitled to compensation and benefits linked to their employment in the security forces.

The manner in which these lists have been compiled, ie listing those disappeared under their home districts rather than by the date and place they disappeared, obscures the facts and circumstances of the disappearance. Furthermore, the failure by the OMP since its establishment to call the military to account on the thousands who were the subject of an enforced disappearance between 16-19 May 2009, denies families their inalienable rights described by Louis Joinet to the truth about

the fate and whereabouts of loved ones.¹⁹ It also prejudices their rights to criminal justice as set out in the Joint Principles to Combat Impunity.²⁰

OFFICE FOR REPARATIONS

Created in 2018, the Office for Reparations is best described as an advisory body. It has no financial independence and has barely started functioning. The status of the office under the current regime is also unclear. The former Government appointed a retired Director General of the Civil Security Department to its Board of Directors²¹ who went on to contest and lose²² as a candidate for the current President's political party, the SLPP, in the former conflict area.²³

Omitted: Though thousands of survivors of torture and other gross violations of human rights have fled abroad, there is no plan to include them in the reparations programme. This is short-sighted if the Government of Sri Lanka is committed to reconciliation, and is in breach of the rights of victims to equality and to access a remedy including reparations.²⁴

Confusion as to Beneficiaries: In 2021, OHCHR reported to the Council that USD \$750 million had been paid over to families of victims in Sri Lanka as reparations for the conflict. However, there is a disturbing lack of transparency about who the beneficiaries are. While the Office for Reparations website²⁵ indicates that assistance was provided to the Victims of Political Violence and Civil Unrest, this is contradicted by the State-run media,²⁶ which instead reported on an event held in the former Prime Minister's official residence Temple Trees to pay compensation to members of his political party, the United National Party, who were victims of political victimisation, as well as owners of property damaged in anti-Muslim violence in 2018 in Digana.

Civil society groups have rightly called for an audit of the funds allocated to the Office on Missing Persons to establish how it has been used, and whether victims of conflict-related human rights violations have benefitted at all. Furthermore, the plight of families of the missing and disappeared is quite desperate and cannot wait for final reparation.

The Office for Reparations needs to ensure that the rights of the families of disappeared to truth and to justice are not undermined in the process of accessing reparations and that the acknowledgement of responsibility for serious violations is safeguarded.

ENDNOTES

1 <https://www.ohchr.org/Documents/Publications/FactSheet6rev.2en.pdf>

2 <https://www.aljazeera.com/features/2018/5/14/abduction-and-forced-disappearance-sri-lankas-missing-thousands>

3 Human Rights Council, Report of the Working Group on Enforced or Involuntary Disappearances, thirtieth session, 10 August 2015, UN Doc. A/HRC/30/38, <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G15/176/90/PDF/G1517690.pdf?OpenElement>

4 <https://disappearance.itjpsl.com/#filter=date:15-01-2009&lang=english> Not including other dates which brings the total to 451 without counting those who are missing as opposed to disappeared.

5 <https://www.tamilguardian.com/content/vavuniya-court-blocks-families-disappeared-marking-1400-days-protest>

6 Erasures. Families of the Disappeared, 18 December 2020

7 <https://www.bbc.com/news/world-asia-51184085>; <https://www.president.gov.lk/death-certificates-for-missing-after-investigations/>

8 <https://www.youtube.com/watch?v=pKkhLIBRzyc>

9 <https://www.dailynews.lk/2021/01/29/features/240100/sri-lankans-are-free-today-thanks-humanitarian-operation>

10 Sri Lanka, Office on Missing Persons (Establishment, Administration and Discharge of Functions) Act, No. 14 of 2016 (OMP Act).

11 The Sri Lankan Office on Missing Persons: Truth and justice in tandem?, https://international-review.icrc.org/sites/default/files/imrc_99_905_9.pdf

12 Ibid.

13 <http://www.parliament.lk/uploads/documents/paperspresented/performance-report-srilanka-army-2004.pdf> onwards, available online by substituting the relevant year.

14 Report to Parliament 2008.

15 P 31, IIGEP Report, Rule 8 and 12, Supreme Court (Conduct of and Etiquette for Attorneys-at-Law) Rules (1988).

16 <https://www.colombotelegraph.com/index.php/full-text-of-the-leaked-report-war-criminals-murderers-and-fraudsters-exonerated-by-nandasenas-political-victimisation-commission/>

17 https://www.ohchr.org/Documents/Countries/LK/Sri_LankaReportJan2021.docx

18 <http://www.ompsrilanka.org/omp-documents/omp-publications>

19 UN Commission on Human Rights, Impunity., 17 April 1998, E/CN.4/RES/1998/53, available at: <https://www.refworld.org/docid/3b00f09310.html> [accessed 15 January 2021]

20 Ibid.

21 http://www.reparations.gov.lk/web/index.php?option=com_content&view=article&id=6&Itemid=118&lang=en; <https://www.linkedin.com/in/rathnapriya-bandu-66a6309a/?originalSubdomain=lk>

22 <http://www.newswire.lk/2020/08/07/vanni-rishad-tops-no-place-for-col-rathnapriya-bandu/>

23 <http://www.sundayobserver.lk/2020/07/19/opinion/slpp-will-win-wanni-district-col-rathnapriya-bandu>

24 UN General Assembly, Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law : resolution / adopted by the General Assembly, 21 March 2006, A/RES/60/147, available at: <https://www.refworld.org/docid/4721cb942.html>

25 http://www.reparations.gov.lk/web/index.php?option=com_content&view=article&id=90:assistance-to-the-victims-due-to-political-violence-and-civil-unrest&catid=8&Itemid=200&lang=en

26 <http://www.dinamina.lk/2019/08/07/පුවත්/78246/ඊටක්-පිළිගැනීමට-ලක්-වත්තේ-ගිණි-සමාජයක්-නිවුණේ-පමණයි>

The banners at the event clearly says that it was to honour UNP members who were politically victimized and lost their lives. Dinamina says, "Compensation was paid to UNP members who underwent many physical and mental harassments and difficulties since 1994 by sacrificing their lives and property". Ranil: "We are fortunate to be able to pay compensation in this manner to members who suffered immensely for the party. When we make commitments, we honour them. Such a pledge was fulfilled today."
