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Brief Note

**Office on Missing Persons:
Outstanding Issues for Consideration to Strengthen Legislation
and Post-Enactment Implementation**

**Centre for Policy Alternatives
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Overview

The Government of Sri Lanka committed to several mechanisms and initiatives on transitional justice in the consensus resolution 30/1, “Promoting reconciliation, accountability and human rights in Sri Lanka.” One was the establishment of the Office on Missing Persons (OMP). Draft legislation to establish the OMP is presently before Parliament, providing with it the first permanent and independent office to address the issue of the missing in Sri Lanka. Despite several successive Commissions of Inquiry (CoIs) on enforced and involuntary disappearances and missing persons, many victims continue to search for truth and justice. The OMP offers hope for families who have searched for their loved ones for years without answers.

The Centre for Policy Alternatives (CPA) has long advocated for transitional justice and monitored proposed reforms, including policy changes on disappearances and missing persons. CPA recently published a guide on the OMP bill, which is attached to the present note. Included here are ideas to strengthen the bill and ensure that implementation provides for a robust and independent office. Effectiveness requires that the OMP have the necessary powers to find the truth and obtain justice within a victim centered approach.

The bill has prompted a number of debates among victims and civil society over outstanding issues, a few of which we address below. Although there is some disagreement amongst nongovernmental and survivors’ organizations over specific provisions of the bill, there is a broad consensus that victims belong at the center of the OMP’s work and that a victim centered approach is critical. The victim’s rights to truth and justice must be its animating principles. Thus, the OMP must have a primarily humanitarian mandate to ensure families’ right to know, with safeguards in place to ensure there is no undermining of future efforts to hold perpetrators accountable—through either a special court or the existing criminal justice system. In this regard, the OMP must have coherent and clear working methods, ensuring that steps are taken at the outset to reduce any tensions between humanitarian and prosecutorial goals. CPA also notes concerns raised about possible tradeoffs between truth and justice and the need to address these issues.

While noting several submissions by others within Sri Lanka to strengthen the mandate of the OMP, CPA makes specific recommendations to ensure that truth and justice are achievable. This note does not contain an exhaustive list, and CPA hopes to engage with the OMP in the future to raise other key legal and policy issues. The proposals made here are based on lessons from other contexts with the primary aim of strengthening the mandate of the OMP.

1. Establish a Dedicated Forensics Unit or Team

Forensic investigations are indispensable to the task of locating and identifying the missing. After its November 2015 visit to Sri Lanka, the UN Working Group on Enforced or Involuntary Disappearances stated that Sri Lanka's disappearances mechanism should "have the technical capacity to conduct exhumations, including forensic expertise."¹ An independent and centralized office, staffed with experts in forensic anthropology, archeology, and pathology, is crucial to ensure impartial and effective inquiries. Since 2012, mass graves have been discovered in Matale, Mannar, and Kalavanchikudy, and it is likely that others exist as well. Forensic specialists within the OMP should lead the process of dating and exhuming these gravesites, identifying victims, determining the cause of death, and returning bodies to families to ensure proper burial and mourning.

The OMP bill already contains provisions that lay the groundwork for a forensics unit, but these should be clarified and expanded in the following ways:

- Clause 11(a) grants the OMP the power "to enter into such agreements, where necessary, with any person or organization whether incorporated or otherwise, and whether domestic or foreign, including agreements...obtaining technical support and training (forensic or otherwise) and collaboration."
- Clause 12(d) lists among the OMP's investigative powers "to apply to the appropriate Magistrate's Court having territorial jurisdiction, for an order of Court to carry out an excavation and/or exhumation of suspected grave sites, and to act as an observer at such excavation or exhumation, and at other proceedings, pursuant to same." **The text of the bill should be amended to give the OMP the power not only "to act as an observer" but to lead, coordinate, and carry out excavations and exhumations. The OMP should have exclusive custody of all forensic evidence and responsibility for coordinating any outside testing or expertise. While CPA notes the role of the Magistrate's Court in excavations and exhumations, it is critical to ensure that this work is carried out by individuals with experience in the area. Thus, while the Magistrate's Court may retain territorial jurisdiction, the OMP's forensic team should have the independence to carry out its mandate.**
- Clause 17 provides for a Tracing Unit which is "responsible for tracing and searching for missing persons and for assisting in clarifying the circumstances of such disappearance, and the whereabouts and fate of such missing person" and which "shall include competent experienced and qualified investigators, including those with relevant technical and forensic expertise." **The OMP should either establish a separate forensics unit or team or ensure the Tracing Unit has the required skills, resources, and personnel.**

¹ Preliminary observations of the Working Group on Enforced or Involuntary Disappearances at the conclusion of its visit to Sri Lanka (9-18 November 2015), available at <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=16771&LangID=E#sthash.mVg4dEyy.dpuf> (last visited 18 July 2016).

Other countries' experiences with forensic investigations provide useful models for Sri Lanka to consider when designing its own program. Forensics units that have been the least costly and most effective have put families at the center of the process. These include investigations led by civil society groups in Latin America like the Peruvian Team of Forensic Anthropology (EPAF), Forensic Anthropology Foundation of Guatemala (FAFG), and the Argentine Forensic Anthropology Team (EAAF), as well as the Office on Missing Persons and Forensics (OMPF) in Kosovo. In each of these countries, the establishment of a single, autonomous forensics unit with exclusive custody over forensic evidence prevented possible tampering with or mishandling of evidence and ensured its preservation for future criminal investigations and prosecutions. Each team took an investigative-led approach and worked closely with the families of the disappeared to gather ante-mortem data (physical description, age, clothing, date of disappearance) about victims and use that to identify existing human remains and possible mass grave locations. Forensic experts then compared ante-mortem data with post-mortem data (pathological, anthropological and material evidence from the forensic investigation) to identify the probable victim.²

In Kosovo, the OMPF developed an ante-mortem database based on repeated interviews with families over an extended period of time and open communication about the status of the investigation. By putting families at the center of developing leads, the OMPF avoided the high cost of setting up a DNA lab first to identify victims, only using DNA testing later for corroboration if families requested it or if ante-mortem data was not sufficient. The OMPF signed a memorandum of understanding with the International Commission of Missing Persons (ICMP) to carry out all DNA tests.³ Sri Lanka's OMP, too, could have an arrangement with independent external actors as necessary for DNA testing.

Recommendation: The OMP should have a dedicated forensics unit or team that assumes sole responsibility for exhumation of mass graves and secures all current and future gravesites for investigation, with the Magistrate Court having territorial jurisdiction.

2. Clarify Prosecution Link

The Government has promised both truth and justice, but it is unclear how the OMP, Truth and Reconciliation Commission, and Special Court will be sequenced and what links, if any, will exist between them. The bill provides the OMP with powers to follow up with other government entities including the discretion to refer cases to prosecution authorities. Clause 12(i) states that when the OMP believes an offense may have been committed that warrants criminal investigation, the OMP "may report the same to the relevant law enforcement or prosecuting authority."

² Office on Missing Persons and Forensics, *Activity Report 2002-2004*.

³ Office on Missing Persons and Forensics, *Activity Report 2002-2004*.

While CPA notes that the primary focus of the OMP should be the victims' right to know, steps should be taken to promote both truth and justice and avoid excluding one at the cost of the other. Thus, consideration should be given to how the truth can subsequently lead to accountability.

Several other countries, including South Africa, Bosnia, and Iraq, have established missing persons offices under the auspices of their departments of justice or other government departments. In those cases, however, the ordinary criminal justice system had the responsibility to investigate crimes, rather than a special mechanism as promised in the Resolution. With delays in rolling out transitional justice commitments, it is unlikely that mechanisms on truth and justice will be established in tandem with each other. Recent statements by Minister Managala Samaraweera indicate that the OMP will be the first mechanism followed by proposals for accountability.⁴

The establishment of a dedicated forensics unit, as laid out above, would alleviate some of the concerns of parties advocating for accountability. Such a unit would allow for the standardization of forensic techniques and the preservation of evidence that could be used in future criminal investigations. This measure alone is insufficient, however, and there must be attention to the legal elements of the initial investigations that could ensure subsequent prosecutions. While the OMP has the ability to refer cases to prosecution authorities, this is merely a discretionary power and will depend on OMP members referring cases.

Several countries have established institutional links between truth and justice with key government actors playing complementary roles. For example, in South Africa, a Missing Persons Task Team was set up within the National Prosecuting Authority. Its main goal was to recover remains for affected families, but it was also possible that the evidence it gathered could yield criminal prosecutions.⁵ In Bosnia and Herzegovina (BiH) in May 2013, the state Prosecutor's Office established a mechanism for the identification of remains in BiH mortuaries that involved an inter-agency agreement with local Prosecutors' Offices, the Missing Persons Institute of Bosnia and Herzegovina (MPI), law enforcement, pathologists, and others.⁶ The MPI would inform the judiciary about the possible location of graves, request court orders for investigation, and participate in the process of exhuming and identifying mass and individual gravesites, as well as anthropological examinations and autopsies. The Prosecutor's Office, in turn, would lead the process of exhumation and identification and build war crimes cases.⁷

⁴ <http://www.media.gov.lk/news-archives/575-statement-by-foreign-minister-mangala-samaraweera-to-the-32nd-session-of-the-un-human-rights-council>; <http://www.sundayobserver.lk/2016/07/17/pol04.asp>

⁵ <http://www.icmp.int/press-releases/icmp-assists-south-africa>; <http://www.icmp.int/where-we-work/africa/south-african-republic/>; <http://www.csvr.org.za/index.php/media-articles/latest-csvr-in-the-media/2312-the-establishment-of-the-south-african-disappearance-task-team-the-roots-for-a-regional-network.html>;

<https://www.theguardian.com/global/2015/jun/06/odd-couple-apartheid-activist-madeleine-fullard-convicted-policeman-eugene-de-kock>; <http://www.iol.co.za/sunday-tribune/digging-up-the-dirt-1230973>

⁶ <http://www.icmp.int/where-we-work/europe/western-balkans/bosnia-and-herzegovina/>

⁷ <http://www.icmp.int/wp-content/uploads/2014/08/locating-and-identifying-missing-persons-a-guide-for-families-in-bih.pdf>

Other models are also worth considering. In Kosovo, the OMPF itself did not have a mandate to investigate criminal acts but shared all available information with the United Nations Interim Administration Mission (UNMIK) Police.⁸ The OMPF had exclusive authority to perform exhumations and autopsies and identify human remains in response to any court order. The OMPF structure included a Medical Examiner's Office, which collected evidence for investigation and prosecution and provided medico-legal forensic expertise to the UNMIK Department of Justice.⁹

In Iraq in 2006, the Parliament passed a Law on protection of Mass Graves, which invested in its Ministry for Human Rights the responsibility for exhumation of mass graves as well as documentation of evidence that could be used in criminal prosecutions. The ministry would collaborate with the court system, Prosecutor's Office, forensic experts, and others.¹⁰ The stated goals of the law included the protection of mass graves, the identification of both victims and perpetrators, the collection of evidence that could lead to criminal prosecutions, and the transfer of such evidence to courts of law. In each region where a mass grave was found, the Ministry would establish a commission led by a Ministry representative and consisting of a judge, prosecutor, police officer, forensic expert, and representative of the Municipal Council. The commission would have the responsibility for excavating and exhuming mass graves, identifying remains, preserving records, repatriating remains, and issuing identification documents. The law offered legal relief to perpetrators who cooperated with the commission, stating "It shall be considered as a legal extenuating excuse for a criminal should he or she report to the Ministry or the relevant authorities the mass grave location, or information on its victims or perpetrators of crimes against the victims."¹¹

In Guatemala, the Guatemalan Forensic Anthropology Team (FAFG) has exhumed mass graves, identified missing family members, and provided testimony to trials in Guatemala and Spain.¹² Working in coordination with the Public Ministry, Judiciary, and National Institute of Forensic Sciences, FAFG preserves evidence and reports of investigation and shares it with members of the criminal justice system.¹³ FAFG has announced that since 1992 it has "provided forensic evidence to the Guatemalan Justice System and Public Prosecutor's Office in 1,400 anthropological experts' reports related to legal cases of the IAC [Internal Armed Conflict]."¹⁴ To facilitate this process, FAFG has organized a group whose members include FAFG, the Human Rights Prosecution Office MP, plaintiffs' attorneys, and plaintiffs' civil society organizations, which promotes collaboration and develops strategies to ensure effective prosecutions.¹⁵

⁸ UNMIK was established at the end of the war in Kosovo in 1999 as the interim authority which would ease the transition to self-government and autonomy.

⁹ Office on Missing Persons and Forensics, *Activity Report 2002-2004*.

¹⁰ <http://www.icmp.int/where-we-work/middle-east-and-north-africa/iraq>

¹¹ <http://www.icmp.int/wp-content/uploads/2014/08/law-on-protection-of-mass-graves.pdf>

¹² <http://www.icmp.int/news/accountability-for-the-missing-and-disappeared-in-guatemala>

¹³ <http://fafg.org/en/causas/>

¹⁴ <http://fafg.org/en/acceso-a-la-justicia/>

¹⁵ <http://fafg.org/en/lo-que-hacemos>

In a landmark case in 2009, a Guatemalan court issued the first sentence in the country's history for the crime of enforced disappearance. Yet the case also illustrated the drawbacks of a system in which perpetrators have little incentive to reveal the location of their victims. The court sentenced former military commissioner Felipe Cusanero Coj to 150 years in prison for the enforced disappearance and murder of six Guatemalans in the early 1980s. Although families of the victims cheered in the courtroom when the sentence was announced, some witnesses said they regretted that Cusanero had refused to provide any information either before or during the trial about where the disappeared were buried. As a result, they still had no answers about the location of their loved ones' bodies and no opportunity for burial or mourning. The Cusanero case demonstrates the pitfalls of an approach that focuses on criminal accountability at the expense of victims' right to know. Any institutional arrangement between the OMP and prosecutors must prioritize the humanitarian aspects of disappearance investigations to increase the likelihood that perpetrators come forward with information. At the same time, Sri Lankans should be wary of models in which truth-seeking is not accompanied by efforts at criminal accountability. In Cyprus, for example, the Committee on Missing Persons has no link to prosecutions. Its mandate states, "The committee will not attempt to attribute responsibility for the deaths of any missing persons or make findings as to the cause of such deaths." Impunity reigns in the absence of an institutional agreement with prosecutors.¹⁶

For that reason, the OMP structure should at once support criminal investigations and incentivize perpetrator cooperation to locate the disappeared. Both Tunisia and Peru designed institutions in a way that prioritized the truth without compromising justice. Tunisia recognized truth and accountability as equal priorities after popular uprisings in 2010. The Tunisian government adopted the Law on Establishing and Organizing Transitional Justice in December 2013. Article 4 of this Law states that in addition to investigating missing persons, deaths, and enforced disappearances, the perpetrators, too, should be identified and prosecuted.¹⁷

Likewise, the Truth and Reconciliation Commission (TRC) in Peru played an active role in the initial stages of identifying alleged perpetrators against whom criminal proceedings were later instituted. A built-in 'judicialization' mechanism enabled the TRC to investigate and name such alleged perpetrators.¹⁸ A similar built-in mechanism for the OMP could facilitate the complementary goals of seeking truth and ensuring accountability.

Recommendation: To the extent that OMP investigations could unearth evidence that implicates criminal liability—evidence which the existing justice system is ill-equipped to analyze—further consideration should be given to having a legal counsel's office within the OMP which could flag evidence for subsequent criminal

¹⁶ <http://www.cmp-cyprus.org/about-the-cmp/terms-of-reference-and-mandate>

¹⁷ <http://www.icmp.int/the-missing/where-are-the-missing/tunisia/>

¹⁸ <http://www.recom.link/wp-content/uploads/2014/12/Comparative-Study-on-the-Impact-of-Truth-Commissions.pdf>

investigations from the outset. This office could also assist the OMP in liaising with prosecution authorities as provided in Clause 12(i) of the OMP bill. CPA notes the importance of having a clear link to possible prosecutions at the outset to ensure that future accountability efforts are not undermined by preventable issues such as the tampering with evidence. The bill allows the OMP to establish units and teams as it deems necessary, and it is critical that lawyers with the necessary experience and skills are recruited.

3. Reconsider the Scope of the OMP Mandate

Clause 27 of the OMP bill covers individuals who are missing (1) as a consequence of the conflict in the North and East, including soldiers who are missing in action; (2) in connection with political unrest or civil disturbances; and (3) from an enforced disappearance as defined by international law. Thus the OMP's mandate covers both civilian noncombatants and former combatants. Victims groups and civil society have taken different positions on the advisability of the bill's reach. Some civil society organizations have proposed narrowing the scope of the OMP's mandate so that it only covers civilians and excludes combatants. Others have suggested bifurcating the OMP office into two separate divisions, one for noncombatants and one for soldiers missing in action.

Offices of the missing in other countries have taken both approaches. Some, such as South Africa's Missing Persons Task Team and Argentina's National Commission on the Disappearance of Persons (CONADEP), have only covered cases of enforced and involuntary disappearances. Others, such as Cyprus's Committee on Missing Persons, have covered both enforced disappearances and missing soldiers.¹⁹

Recommendation: The Government will need to examine existing information related to cases of enforced and involuntary disappearances and missing to decide whether both categories can be included in one office. With Sri Lanka's high caseload of disappearances, there is concern that this caseload may not receive the recognition it requires if the OMP's mandate includes the missing. At the same time, issues raised by the families of missing soldiers also require attention. What must be noted are the several reports of previous CoIs and other investigations that may assist in some cases, which reduces some of the work of the OMP. Thus, the OMP will require all information from previous investigations and take steps to avoid duplicating past efforts.

Furthermore, CPA notes that there must be due attention given to the caseload of enforced and involuntary disappearances and that the OMP's title must reflect this focus. While acknowledging the grievances of all families, there must be due consideration for civilians regardless of ethnicity, geography, and other characteristics.

¹⁹ <http://www.newsincyprus.com/news/19604/soldiers-sought-over-nicosia-mystery-grave>

4. Incorporate a Transitional Provision Authorizing in Particular cases the Revocation of Death Certificates and Issuance of Certificates of Absence

Clauses 13(1)(a)(i), (ii) and (v) deal with the powers of the OMP to issue interim and final reports for the purpose of issuing certificates of absence under the Registration of Deaths (Temporary Provisions) Act, No. 19 of 2010.²⁰ The said Act is to be amended to allow the issuing of certificates of absence by the Registrar of Persons.²¹ Clause 8(G) of the Registration of Deaths (Temporary Provisions) (Amendment) Bill provides for the issuing of the certificate of absence in a situation where a commission of inquiry or the OMP finds that a person has disappeared or is missing.

Recommendation: The District registrar's report referenced in Clause 8(G) should be issued based on the report of the OMP that a person has disappeared or is missing and should not require a further investigation by the District registrar.

Furthermore, the provisions of the existing law (see Clause 13) seem to suggest that a death certificate issued under that Act can only be revoked if the deceased person is found to be alive, which requires an investigation by the police. This leads to undue delays in victims obtaining a certificate of absence. As such, specific transitional provisions need to be introduced to cover situations where family members of the missing person who have already obtained a death certificate under the Registration of Deaths (Temporary Provisions) Act may want to obtain a certificate of absence once the new laws come into effect. In such a situation there should be provision to cancel a death certificate and instead have a certificate of absence issued.

Recommendation: Introduce a transitional provision authorizing in particular cases the revocation of a death certificate and in its place the issuance of a certificate of absence.

²⁰ See http://www.documents.gov.lk/files/act/2010/12/19-2010_E.pdf

²¹ See http://www.documents.gov.lk/files/bill/2016/7/97-2016_E.pdf