

2015

Certificates of Absence: A Practical Step to Address Challenges Faced by the Families of the Disappeared in Sri Lanka

DISCUSSION PAPER
THE CENTRE FOR POLICY ALTERNATIVES

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September 2015



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The Centre for Policy Alternatives (CPA) is an independent, non-partisan organisation that focuses primarily on issues of governance and conflict resolution. Formed in 1996 in the firm belief that the vital contribution of civil society to the public policy debate is in need of strengthening, CPA is committed to programmes of research and advocacy through which public policy is critiqued, alternatives identified and disseminated.

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INTRODUCTION

The search for truth, justice and reparations continues for those affected by the war in Sri Lanka. Successive governments have publicly promised a credible domestic mechanism to address past violence, yet it remains to be seen whether processes and mechanisms introduced will constitute genuine action to address issues of transitional justice. It is imperative that the government when attending to these concerns, recognizes the range of violations, the distinctive impact on individuals and communities as a result of the war and post-war context, and identifies both immediate and long term responses. In this regard, immediate attention must focus on the issue of missing persons.

Thousands of people went missing during the near three decade long war but due to the lack of a comprehensive and independent investigation, the exact number is unknown. As of September 10, 2015 the Presidential Commission to Investigate into Complaints of Missing Persons (PCICMP) has received some 18,099 civilian complaints and an additional 5,000 cases of missing armed forces personnel.¹ Including those numbers, at least 65,000 complaints of enforced or involuntary disappearances from across Sri Lanka have been filed with various ad hoc Presidential Commissions of Inquiry since 1994.² These numbers by no means capture the full caseload of enforced or involuntary disappearances in Sri Lanka due to several limitations including instances of multiple complaints to different initiatives regarding the same individual, and that the above is limited to those complaints made to past Commissions of Inquiry (COI) and does not factor in the complaints made to police, the National Human Rights Commission of Sri Lanka or international organizations. Regardless, the number of individuals missing is staggering. Also, that thousands have gone before the various state initiatives is an indication of the many questions that remain unanswered. Furthermore, that the exact circumstance of the disappearance, whether enforced or involuntary, is unknown prolongs the suffering of families.

The need for tracing of missing persons, legal support, mental health care and compensation as well as the provision of Death Certificates for families was recommended in the Lessons Learnt and Reconciliation Commission (LLRC) report.³ Currently, under legal and policy directives in Sri Lanka, families are required to have Death Certificates in order to address practical issues, including the facilitation of property transfer and ownership, the ability to formalize new partnerships (remarriage), apply for compensation

¹ <http://www.pcicmp.lk/>.

² There have been three “Commissions of Inquiry into the Involuntary Removal or Disappearance of Persons” that were focused on specific geographic zones covering the period of January 1995 - September 1997 and one “All Island” Commission from 1998 – 2000. These four commissions have a total of 43,831 cases reported of which 21,215 cases had been verified as cases of disappearances by 2007. There was a fourth commission, chaired by Mahanama Tilakaratne that looked into abductions, disappearances and unexplained killings from January 1, 2006-September 13, 2006 excluding the Jaffna and Batticaloa Districts with a special, separate investigation into those in the Batticaloa District. This commission adds 53 cases of disappearances, categorized as distinct from abductions and unexplained killings, which is not in alignment with the internationally recognized definition and complicates the numerical addition.

³ Relevant LLRC recommendations: 9.37, 9.46, 9.48, 9.49, 9.50, 9.52, 9.58, 9.91, 9.155, 9.156, 9.157, 9.158, 9.159, 9.160, 9.161, 9.162, 9.164, 9.166

under the Rehabilitation of Property, Persons and Industries Authority (REPPIA), qualify for social welfare payments and pensions, and access frozen bank accounts. Temporary provisions relating to Death Certificates have been created to respond to the aforementioned needs of families with missing relatives, and to facilitate registration of deaths for missing persons.⁴ However, the measures taken thus far, in addition to normal administrative procedures, have proven inadequate in that they address overly specific needs of families and fail to comprehensively address their access to truth and justice as well as that of civil society.

In light of the failures and rigidity of the present framework and within the context of truth and justice, there must be greater attention on how best to address the needs of the victims and families of the missing. In this regard, it is critical to revisit the existing legal and policy framework and explore options for reform. Such action will recognize the large number of families still searching for their loved ones and assist them with the related practical issues they face described in more detail below. This discussion paper takes note of the four internationally recognized pillars of transitional justice- right to know, right to justice, right to reparations and guarantees of non-recurrence- and provides a solution within the Sri Lankan context.

This is one in a series of policy documents that CPA hopes will facilitate a wider dialogue on the incorporation of basic international standards pertaining to transitional justice, particularly as they relate to processes and mechanisms in a post-war context of reform.⁵ This paper focuses on the concept of developing a ‘Certificate of Absence’ as a more victim-centered alternative to the current process that requires that families obtain a Certificate of Death under the Registration of Deaths (Temporary Provisions) Act.⁶

A ‘Certificate of Absence’, as conceived here, would be an official document issued to family members of the disappeared persons, affirming their status as “missing” as opposed to “deceased.” This option has been used in countries that experienced high numbers of disappearances, based on the perception that it is better tailored to balance family members’ emotional and psychological needs without dismissing the need for active investigation into cases of disappearances. This mechanism, described in detail below, would be able to address practical issues faced by families of the disappeared, including those that currently require a Death Certificate mentioned above.

CPA believes this measure will be of special significance/support to families in the war affected areas including female headed households. A Certificate of Absence is by no means a panacea for the needs of the missing and their families, which the government is required to address. However, a certificate issued by competent administrative authorities attesting to the uncertainty of the fate of a disappeared person allows for the protection of his or her rights and the rights of their family members. It also contributes to repairing the social

⁴ Registration of Deaths (Temporary Provisions) Act No. 19 of 2010

⁵ CPA has approached the Ministry of Home Affairs, Registrar Generals Department, Ministry of Technology and Research and Ministry of Justice for information about what has been done thus far.

⁶ Registration of Deaths (Temporary Provisions) Act No. 19 of 2010

impact of enforced disappearance on wives and partners by publicly acknowledging their loss and officially providing them with a social status that transcends the traditional roles of either widow or wife. Thus, it is important for the government to engage in a constructive dialogue among all parties, including families of missing persons and communities about this issue.⁷

CPA calls for amendment of the legislation on which the issuance of Death Certificates is currently based and for the introduction of new legislation creating Certificates of Absence. While CPA recommends legal reform, it must also be noted that until this is accomplished, the practical difficulties faced by a large number of families will continue. Therefore CPA recommends that administrative steps be taken immediately to initiate the acceptance and issuing of Certificates of Absence, which must be followed by legal reform. CPA also recommends immediate action in terms of the ratification of relevant international conventions and improvements in the criminal code as applicable to cases of enforced disappearances. More details on these steps are provided below.

Relevant Concepts

Absence

“Absence” generally refers to someone who is missing or unable to be located; someone whose whereabouts are not known and cannot be ascertained by diligent effort. Legally, a person who is absent still has rights⁸ which must be upheld and if said rights are threatened, it may be necessary to appoint a guardian to protect those rights from violation regardless of the reason for absence. Absence also implies an assumption that the person is alive unless the contrary is proven.

Prohibiting Forced Disappearance as an International Obligation

CPA and other groups both in Sri Lanka and internationally including the United Nations Working Group on Enforced or Involuntary Disappearances (WGEID) have noted cases of enforced or involuntary disappearance in Sri Lanka committed by government forces, the Liberation Tigers of Tamil Eelam (LTTE) and other armed groups. Countless families have gone before the numerous initiatives appointed by successive governments and await the results of their inquiries. According to CPA’s research, this information has not been centralized and the lists have not been consolidated, which otherwise would greatly facilitate the release of information to family members as well as eventual accountability action.

Disappearances are prohibited in the United Nations Declaration on the Protection of all Persons from Enforced Disappearances, the International Convention for the Protection of

⁷ International Center for Transitional Justice. GENDER JUSTICE The Disappeared and Invisible Revealing the Enduring Impact of Enforced Disappearance on Women. March 2015. Accessed on May 30 2015 at <https://www.ictj.org/sites/default/files/ICTJ-Global-Gender-Disappearances-2015.pdf>

⁸They still have the right to recognition as a person before the law as ensured/stated by article 6 of the Universal Declaration of Human Rights and article 16 of the International Covenant on Civil and Political Rights

All Persons from Enforced Disappearance and the Rome Statute of the International Criminal Court. These define enforced disappearances as comprising of three elements:

1. A person is detained or abducted against their will
2. There is involvement by officials of Government, or by organized groups or private individuals acting on behalf of, with the support, or acquiescence of the Government and
3. This action is followed by a refusal to disclose the fate or whereabouts of the persons concerned or a refusal to acknowledge the deprivation of their liberty, which places such persons outside the protection of the law.⁹

The UN's Declaration on the Protection of All Persons from Enforced Disappearance declares that enforced disappearances violate the United Nations charter. Thus, there is a universal obligation on all states to prevent this act. The International Convention for the Protection of All Persons from Enforced Disappearance solidifies a state's commitment to uphold its obligation to the charter of the UN, but Sri Lanka has failed to ratify the convention. Sri Lanka has also not ratified the Rome Statute of the International Criminal Court, however it remains important to note that that Statute specifically envisages "disappearance" as possible either at the hands of state actors or political organizations, the latter *explicitly including non-state armed groups*, important in the Sri Lanka context as this definition would provide for investigation into the actions of the LTTE and other armed groups. The Rome Statute also states that, if the crime is part of a widespread or systematic attack directed against any civilian population, it qualifies as a crime against humanity which, by definition, confirms the non-applicability of statutes of limitations.¹⁰

The crime of enforced disappearance is of an exceptional nature in that it is continuous: the absent persons' rights have been violated and continue to be violated as do the rights of their family members until their "fate or whereabouts" have been established.¹¹ It is a repressive tactic that is difficult to detect or link to a particular governing regime.¹² The act of removing a person without a trace is aimed at ensuring silence, avoiding international scrutiny and depriving the rights of the missing and their family members in order to enforce terror and a sense of powerlessness.

What has Sri Lanka done in the past

Current Legal Framework

Sri Lanka has not enacted a domestic law criminalizing enforced disappearances. As it has not been codified as a separate crime, the current legal framework permits that a disappearance be investigated as a case of abduction defined in Section 353 of the Penal Code as follows: "Whoever by force compels, or by any deceitful means, or by abuse of authority or any other means of compulsion, induces any person to go from any place, is

⁹ Proclaimed by the General Assembly in its resolution 47/133 of 18 December 1992

¹⁰ UN General Assembly. *Rome Statute of the International Criminal Court* (last amended 2010), 17 July 1998.

¹¹ <http://www.ohchr.org/Documents/Issues/Disappearances/GC-EDCC.pdf>

¹² Payne, C. L. and Abouharb, M. R., 2008

said to ‘abduct’ that person.”¹³ However, these “abductions” are not being investigated effectively at present, an issue the government should address immediately.¹⁴

The process for registering deaths in Sri Lanka is overseen by the Registration General’s Department which operated under the Ministry of Public Administration and now operates under the new Ministry of Home Affairs.¹⁵ The general procedure for registering a death was amended in 1995, 1998, 2005 and 2010 to respond to cases where the normal procedures for registration of death cannot be met. The most recent amendment, currently in force, and relevant to the cases of enforced disappearance, is the Registration of Deaths (Temporary Provisions) Act, No. 19 of 2010, which facilitates the registration of deaths of persons missing due to terrorist or subversive activity or civil commotion and allows the provision of Death Certificates for their families.¹⁶ The certificate issued under the Temporary Provisions Act is essentially the same as a general Death Certificate; however there are two main differences. The reason for death is given as “missing for more than a year and believed to be dead” and the certificate states it has been issued under the Act of 2010. Importantly, the Act provides for cancelation of the Death Certificate should the missing person be found alive. This law, albeit passed with the intention of assisting, unfortunately imposes an emotional and psychological toll on the relatives of the missing since family members requesting the certificate must assert that they believe the disappeared person to be dead and sign an affidavit swearing such. This places the presumption of death squarely on family members.

The application procedure for family members wishing to obtain Death Certificates under the Temporary Provisions Act involves submitting an application to the Divisional Secretary (DS) office or directly to the Grama Niladharis (GN) where the person was last seen or had his permanent residence. If the DS office approves the registration of death, the Registrar General’s Department issues the certificate and the applicant receives the Death Certificate through the local registrar for Births and Deaths.

Past Commissions

For twenty years successive presidents have appointed multiple ad hoc “commissions of inquiry” to investigate disappearances. There have been three “Commissions of Inquiry into the Involuntary Removal or Disappearance of Persons” that focused on specific geographic zones covering the period of January 1995 - September 1997 and one “All Island” Commission from 1998 – 2000. These four commissions received a total of 43,831 cases of which 21,215 cases had been verified by 2007 as disappearances of individuals.¹⁷ There is also the current PCICMP created in August 2013, which has to date received more

¹³ Penal Code No. 2 of 1883 Section 353 “abduction”

¹⁴ CPA is currently in the process of clarifying the number of cases of abductions that have been prosecuted in the post war context with a request sent to the Attorney Generals department.

¹⁵ Letter from Ms. A.D. Udyani Perera, Personal Assistant to Secretary-Ministry of Public Administration, 22 June 2015; Interview with Mr. Boralessa, Secretary- Ministry of Home Affairs, 24 June 2015.

¹⁶ This act also facilitated death registration for persons whose “deaths are directly attributed to any natural disaster or calamity”.

¹⁷ International Crisis Group. Sri Lanka’s Human Right’s Crisis. Asia Report No 135, p 5. June, 14 2007. http://www.crisisgroup.org/~media/Files/asia/south-asia/sri-lanka/135_sri_lanka_s_human_rights_crisis.ashx

than 23,000 reports of disappearances between the years of 1983 and 2009.¹⁸ A year into its existence, the government expanded PCICMP's mandate to make this commission the sole mechanism for addressing past violations of IHRL and IHL, compounding this commission's task with a number of other inquiries not directly related to the issue of disappearances.¹⁹

Weaknesses in Current Framework

There are a number of problems with the Temporary Provisions Act including that it does not take into account the realities on the ground for these families who in many instances have been subject to multiple displacements, are living in poverty and have low levels of literacy. The age and position in the family of the person who is missing affects the families' willingness to accept their death and the time it takes to come to terms with the loss. An overwhelming majority of missing persons are adult males, thus disappearance has affected women and children disproportionately.²⁰ There has been very little sensitivity in the administration of this Act with limited training for bureaucratic officials carrying out the process as to the psychological impact on the family of discussing, applying for and obtaining a Death Certificate. The use of the military, military intelligence and police to promote and administer the Act causes families to feel as though they are being treated like criminals. Rather than a piecemeal response, the Act should be part of a coherent plan, as outlined in the LLRC Report, and its application needs to be part of a comprehensive response by the government.

With allegations of the involvement of security forces in enforced disappearances in Sri Lanka, it is worrisome that they have taken a particular interest in the promotion of the Temporary Provisions Act. For example, in a mass campaign in July 2012, family members of missing persons were called to police stations across the Northern Province by military personnel. After registering their cases families were told that their relative was presumed dead and that the missing person case was now closed, advising them to apply for a Death Certificate.²¹ In addition, media has reported that security personnel, including Criminal Investigation Departments, the Terrorist Investigation Department and the Intelligence Wing of the Sri Lankan Military have made multiple coercive home visits to affected families advising application for Death Certificates.²² This is problematic because in other countries the presumption of death of a disappeared person, based on the issuance of a Death Certificate has been used to hamper investigations and grant impunity to those

¹⁸ This is according to the PCICMP website- <http://www.pcicmp.lk/>, last accessed 7 September 2015

¹⁹ Center for Policy Alternatives, The Presidential Commission to Investigate into Complaints Regarding Missing Persons: Trends, Practices and Implications, December 17, 2014. <http://www.cpalanka.org/the-presidential-commission-to-investigate-into-complaints-regarding-missing-persons-trends-practices-and-implications/> (accessed May 26, 2015).

²⁰ Legal Aid Commission Briefing Note on the Registration of Deaths (Temporary Provisions) Act 19 of 2010 for the Issuance of death certificates for missing persons, February 2013.

²¹ Ibid.

²² Ibid.; Virakesari. "The Relatives of the Disappeared in Kilinotchi pressurized to accept the death certificates." January 21, 2014.

responsible for any crimes which that may have led to the missing person’s absence.²³ Thus the involvement of the security forces could be viewed as an attempt to prevent accountability. Furthermore, this belies a larger issue of continued militarization of functions, which should be within the civil administration.

Finally, the fact that currently, under legal and policy directives in Sri Lanka families are required to have Death Certificates in order to address practical issues can have a negative impact on the mental health of family members of the missing. Not only can it force them to relieve the initial trauma of the disappearance but it may also make them feel guilty as though the family is betraying their loved one, giving up hope that they are still alive and the search for their whereabouts.²⁴

Table 1: Families’ Considerations in Obtaining Certificate of Death²⁵

Reasons to Obtain a Death Certificate	Reasons Not to Obtain a Death Certificate	Obstacle to Obtaining Death Certificate
<ul style="list-style-type: none"> • Allows for application for compensation under REPPIA in the total of Rs100,000 to heirs of the dead²⁶ 	<ul style="list-style-type: none"> • Families do not believe their relatives are dead and are unwilling to receive document stating as such—the procedure now in force requires family members to sign an affidavit swearing they believe the missing person is dead 	<ul style="list-style-type: none"> • GN’s are reluctant to administer Act²⁷
<ul style="list-style-type: none"> • Perception that it will assist in receiving support from humanitarian and 	<ul style="list-style-type: none"> • Families want tracing and searching to continue and worry it will cease 	<ul style="list-style-type: none"> • Cost—poverty and the cost of travelling to the GN division where the

²³ For example in Algeria. See Citroni, G. (2014). The pitfalls of regulating the legal status of disappeared persons through declaration of death. *Journal of International Criminal Justice*, 12(4), 787. Accessed June 11, 2015.

²⁴ International Center for Transitional Justice. *GENDER JUSTICE The Disappeared and Invisible Revealing the Enduring Impact of Enforced Disappearance on Women*. P.7, 21-26. March 2015. Accessed on May 30 2015 at <https://www.ictj.org/sites/default/files/ICTJ-Global-Gender-Disappearances-2015.pdf>; “To presume the death of people you have not seen dead, without knowing the conditions for their death, implies that one has to kill them oneself...to accept their deaths we have to kill them ourselves” Arditti, Rita 1999 *Searching for Life: The Grandmothers of the Plaza De Mayo and the Disappeared Children of Argentina*. Berkeley: University of California Press. 15.

²⁵ Adapted from Legal Aid Commission Briefing Note on the Registration of Deaths (Temporary Provisions) Act 19 of 2010 for the Issuance of death certificates for missing persons, February 2013 p. 3-4.

²⁶ Cabinet Memorandum RB/MRDRS/CM/3 obtained from the PCICMP

²⁷ We were informed through conversations with public officials that it was policy that “terrorists” and their dependents should be excluded from being paid compensation. Thus GNs may be reluctant to issue Certificates to those with whom they are not familiar.

development organizations		disappearance took place 28
<ul style="list-style-type: none"> • Allows for the transfer of land and property in the name of the missing person to the next of kin 	<ul style="list-style-type: none"> • Family member saw relative die and is unwilling to receive an official document (Certificate of Death) that states the family member is missing believed to be dead, when they know the truth 	<ul style="list-style-type: none"> • Lack of awareness— Tamil version not readily available and many families are not aware that the certificate can be recalled if person should return
<ul style="list-style-type: none"> • Supports receipt of Samurthi payments, other forms of social welfare and receipt of the missing or deceased persons pension²⁹ 	<ul style="list-style-type: none"> • Worries that registration of death will mean they receive no further information as to what actually happened to the missing person 	<ul style="list-style-type: none"> • Access to original copies of supporting documents are required, however due to multiple displacements families have lost documents
<ul style="list-style-type: none"> • Allows for remarriage • May support psychological closure for families 	<ul style="list-style-type: none"> • Worries the application will bring undue attention to their family from the military intelligence or has already 	<ul style="list-style-type: none"> • Fear and insecurity

Suggested Legislation

CPA recommends legal reform with which the issuance of Death Certificates is currently based and for the introduction of new legislation to prevent, address and resolve situations of missing persons. This legislation would create a legal status of “absent” and allow for the issuance of Certificates of Absence. This is in alignment with ICRC recommendations for States affected by armed conflict and international violence.³⁰ While CPA recommends legal

²⁸ Registration of Deaths (Temporary Provisions) Act 19 of 2010, S. 8 (1)

²⁹ Legal Aid Commission Briefing Note on the Registration of Deaths (Temporary Provisions) Act 19 of 2010 for the Issuance of death certificates for missing persons, February 2013 p. 3.

³⁰ ICRC. GUIDING PRINCIPLES / MODEL LAW ON THE MISSING Principles for Legislating the Situation of Persons Missing as a Result of Armed Conflict or Internal Violence: Measures to prevent persons from going missing and to protect the rights and interests of the missing and their families. 2009. In this document the ICRC states that to ensure the best possible protection for missing persons and their families, such situations must be dealt with on the basis of legal considerations and has thus provided domestic legislative templates based on international human rights law and international humanitarian law that allow for the protection of the rights and interests of missing persons and their families. CPA feel s the important elements of the draft legislation in the Sri Lankan context address: creating a legal status of missing persons, instituting tracing mechanisms for missing persons, the search recovery and treatment of the dead and criminal responsibility/enactment of domestic legislation criminalizing the specific crime of enforced disappearance.

reform, it must also be noted that until this is accomplished, the practical difficulties faced by a large number of families will continue. CPA acknowledges that legislative reform will take some time but therefore suggests exploring administrative options until legal reform is introduced and implemented.

Certificates of Absence³¹

The Scope of the Certificate

A Certificate of Absence would be an official declaration allowing the relatives of the disappeared to exercise certain rights on their behalf while continuing to hold the government accountable to investigate the case. Thus, a Certificate of Absence does not close the case of the missing but validates that this person is unaccounted for and must be found. Such declarations of absence would not interrupt nor terminate investigations to determine the fate and whereabouts of victims, though Death Certificates might have those effects. The Certificate of Absence may be revoked if the person is found alive or their remains are recovered. It may also be converted into a Death Certificate after a certain period of time has passed and the victim's family chooses to avail themselves of this option. In that regard, it might be reasonable that a law be promulgated stating that after some number of years have passed from the issuance of a Certificate of Absence, that it would automatically convert to a Death Certificate.

As mentioned above, as an official document, a Certificate of Absence can provide many practical benefits, particularly to women and children. Up until now, family members may have been prevented from accessing REPIIA benefits if they refused to file for a Death Certificate.³² These benefits include:

- Access to bank accounts of family members who have disappeared
- Property transfer/ownership
- The ability to formalize new marriages
- Access to public assistance via Samurthi payments

³¹ According to the ICRC's article "Accompanying the Families of Missing Persons", "[i]deally, the family of a missing person should be able, without delay, to report his or her disappearance to the designated authorities (police or others) and receive an official document attesting that they have done so. This document, often called a "Certificate of Absence" is considered proof of absence and used to process administrative and pension claims, in accordance with existing law and procedures. In particular, it entitles the missing person's representatives to preserve his or her rights and to manage property and assets in his or her interest. For instance, financial assistance for dependents might be arranged when no public assistance is available – in the form of an allowance drawn from the assets of the missing person. A Certificate of Absence would also enable the missing person's heirs to take provisional possession of his or her estate, with certain restrictions. In many countries, depending on domestic law, victims of a conflict are entitled to apply for compensation as well as to obtain other benefits (pensions, land, housing, scholarships, job opportunities, etc.). A person should not be declared dead without sufficient evidence. It is therefore desirable to provide for a certain period of absence before a death certificate may be issued. The duration of this period of absence depends on domestic law and on existing procedures, which can be quite complex."

³² Legal Aid Commission Briefing Note on the Registration of Deaths (Temporary Provisions) Act 19 of 2010 for the Issuance of death certificates for missing persons, February 2013.

- Family members of the disappeared may also qualify for REPPIA assistance and compensation including:
 - self-employment loans for war affected widows/ others
 - payment of death & injury compensation for those affected (up to Rs100.000)
 - if the spouse of a disappeared person chooses to remarry, marriage prosperity allowances for couples who wed while displaced
 - Special programs for the welfare of the affected persons and for the displaced families, and assistance to war affected orphan children and widows.³³

Certificates of Absence may be tied to screening and accountability measures. For example, they may be tied to access to compensation from the government in the form of reparations in the future, and may be a means of establishing an official consolidated list of disappearances.³⁴ In Sri Lanka, the Registrar General’s Office could issue these certificates working closely with relevant government offices.

Other Cases Where Similar Initiatives Have Been Implemented

The concept of a legal status of absence was introduced in Argentina in 1994 with the issuance of “Certificates of Absence by Enforced Disappearance” as opposed to a Death Certificate. This was closely followed by the creation in Latin America of the Inter-American Convention on Enforced Disappearance of Persons. Following this convention Colombia, Guatemala, Paraguay, Peru and Venezuela incorporated “enforced disappearance” into their national law as a criminal act.³⁵ There are currently national laws prohibiting enforced disappearance in 29 countries, however, only a few have created a legal status of absence similar to Argentina.³⁶ In many countries including Bosnia and Algeria, a ‘forced declaration of death’ instead of a provision for the status of absence, leads to the requalification of these cases as homicides instead of enforced disappearances, and unfortunately this has been invoked to suspend investigations on certain cases on the basis that they would be time-barred due to a statute of limitations.³⁷

Argentina: In 1994 the Argentine legislature created two laws to address absence: Law No. 24321 allowed families to petition for a declaration of absence which gives access to

³³ Family members who receive certificates of absence should be entitled to the REPPIA benefits explained on the government website

http://resettlementmin.gov.lk/site/index.php?option=com_content&view=article&id=146&Itemid=72&lang=en; Cabinet Memorandum RB/MRDRS/CM/3 obtained by from the PCICMP upon request after reading the Response To Memorandum to H.E. the President by Fr. V. Yogeshwaran S. J. found at: <http://www.pcicmp.lk/images/NewsEvents/Yogeshwaran.pdf>

³⁴ In other countries, this procedure has been tied to official reporting to certain government agencies or commissions of inquiry—for example in Argentina relatives had to demonstrate that they reported the disappearance to a judicial authority, to the National Commission on the Disappearance of Persons (Spanish Acronym CONADEP)³⁴, or to the Sub-secretariat of Human Rights of the Ministry of Interior.

³⁵ ICRC, Customary IHL Database. https://www.icrc.org/customary-ihl/eng/docs/v2_cha_chapter32_rule98 Accessed on June 10,

³⁶ Ibid.

³⁷ Ibid.

rights/benefits similar to those that can be obtained when there is a presumption of death; however, in this law there is language which acknowledges that the family of the absent member has not and need not declare their family member dead to any State authority with which they might have to interact. In order to obtain the declaration, relatives had to demonstrate that they reported the disappearance to a judicial authority, to the CONADEP, or to the Sub-secretariat of Human Rights of the Ministry of Interior. Law No. 24411, also of 1994, specified that a family presenting a declaration under Law 24321 could be considered for State compensation.³⁸

Peru: In 2004 the Peruvian government created a category of “absence by reason of forced disappearance” (Law No. 28.413, Article 2). The legislation allowed women to access practical benefits such as social security, inheritance, property and to formalize new relationships. In reality the law has been hard to implement as the process is complex and rural families who may need legal assistance have been unable to benefit.³⁹

Uruguay: In 2005 Uruguay allowed for a declaration of absence (Law No. 17894 of 6 September 2005). However those allowed be declared absence were limited to those already on the list of disappeared persons drafted by the Peace Commission and ratified by the government through Decree No. 146/003 of 16 April 2003⁴⁰

Colombia: In 2012 Colombia created a progressive law which covered cases that had already been declared as well as future cases of enforced disappearance (Law No. 1531 of 23 May 2012). Also, importantly, Article 9 of that law clarifies that the declaration of absence due to enforced disappearance does not produce any effect in terms of statutes of limitation applicable to criminal proceedings, and it must not hinder the continuation of the investigations aiming at establishing the truth and searching for the victim until he or she is found alive or dead and duly identified.⁴¹

Chile: In 2009, Chile legislated a provision for declaration of disappearance (Law No. 20.377). This law provides benefits such as allowing relatives of the disappeared to inherit wealth and assets without a Death Certificate and spouses to dissolve marriages without divorce papers, if desired. Similar to Colombia’s law, Chile’s law expressly recognizes that such a declaration has no effect on criminal investigations or statutes of limitation for criminal prosecutions.⁴²

³⁸ Citroni, G. (2014). The pitfalls of regulating the legal status of disappeared persons through declaration of death. *Journal of International Criminal Justice*, 12(4), 787. Accessed June 11, 2015.

³⁹ International Center for Transitional Justice. GENDER JUSTICE The Disappeared and Invisible Revealing the Enduring Impact of Enforced Disappearance on Women. March 2015. Accessed on May 30 2015 at <https://www.ictj.org/sites/default/files/ICTJ-Global-Gender-Disappearances-2015.pdf>

⁴⁰ Citroni, G. (2014). The pitfalls of regulating the legal status of disappeared persons through declaration of death. *Journal of International Criminal Justice*, 12(4), 787. Accessed June 11, 2015.

⁴¹ Ibid.

⁴² International Center for Transitional Justice. GENDER JUSTICE The Disappeared and Invisible Revealing the Enduring Impact of Enforced Disappearance on Women. March 2015. Accessed on May 30 2015 at <https://www.ictj.org/sites/default/files/ICTJ-Global-Gender-Disappearances-2015.pdf>

Bosnia and Herzegovina. In 2004 Bosnian legislators passed a “Law on Missing Persons”, which confers on disappeared persons a status similar to that under Argentine law and on family members the right to temporarily make use of the property of the disappeared person (Law No. 109/04 of Bosnia and Herzegovina on the Law on Missing Persons, Article 18). Unfortunately, Article 27 of the same law presumes after three years without consulting the family, which severely undermines the beneficial value of this category.⁴³ In regards to Article 27, the Human Rights Committee (HRC) has found that this provision is a breach of the right to an effective remedy and the rights to life, personal integrity, liberty and security.⁴⁴ In a different ruling the HRC found that making the availability of compensation dependent on a harmful process, obliging family members to declare the disappeared dead, “constitutes inhumane and degrading treatment in violation of article 7 read alone and in conjunction with article 2, paragraph 3,” of the International Covenant on Civil and Political Rights.⁴⁵

The Bosnian Law also provides for the establishment of a Central Record of Missing Persons (CEN). The establishment of such a centralized database of information is recommended by the International Committee of the Red Cross for all countries putting in place legislation and/or services to families of disappeared persons. This should facilitate information sharing across departments/ministries/organizations. In order to access the practical social welfare measures provided in Bosnia, relatives of missing persons must enter of the name of victims in the CEN.⁴⁶

⁴³ Ibid.

⁴⁴ Citroni, G. (2014). The pitfalls of regulating the legal status of disappeared persons through declaration of death. *Journal of International Criminal Justice*, 12(4), 787. Accessed June 11, 2015.

⁴⁵ *Rizvanovic v. Bosnia and Herzegovina*, HRC Communication No.1997/2010, UN Doc. CCPR/C/110/D/1997/2010, 21 March 2014. Cited in Citroni, G. (2014). The pitfalls of regulating the legal status of disappeared persons through declaration of death. *Journal of International Criminal Justice*, 12(4), 787. Accessed June 11, 2015.

⁴⁶ Citroni, G. (2014). The pitfalls of regulating the legal status of disappeared persons through declaration of death. *Journal of International Criminal Justice*, 12(4), 787. Accessed June 11, 2015.

Recommendations

In Preparation

- 1) Immediately **formulate a framework** to issue Certificates of Absence.
- 2) A Cabinet memo should be presented by the respective ministry in charge of documentation in support of this policy position.
- 3) Upon receiving Cabinet approval, the ministry should issue a circular initiating the issuance of Certificates of Absence, providing the appropriate level of guidelines to assure that this is accomplished, and indicating that there will be monitoring and a timeframe to assess the success of the implementation. The circular should be public so that the public and government officials are aware of the initiative.
- 4) Legislation should be drafted on this issue that meets international standards.
- 5) **Draft a Sri Lankan specific Certificate of Absence template** that meets international standards.⁴⁷
- 6) The Government should **consult with the relevant local and national officials** and others in terms of how best to facilitate issuing certificates and taking into consideration practical issues/difficulties faced by the families of the disappeared.
- 7) Have **an information dissemination plan** across Sri Lanka to inform what a Certificate of Absence is and to raise awareness in all three languages Sinhala, English and Tamil.

When Implementing

- 8) Change wording in the Temporary Provisions Act No. 19 of 2010 to **take the burden of proof off relatives of missing persons and place it squarely on the State**. The State should take full responsibility if, due to negative results of government search operations, the missing person is presumed to be dead. This is in contrast to the current legislation which requires family members to sign an affidavit that they “verily believe”⁴⁸ the missing person dead.
- 9) **Enact legislation allowing for a legal status of “Missing”** providing the freedom for the family to choose between a Death Certificate or Certificates of Absence. Ideally this is separate legislation from the Temporary Provisions Act No. 19 of 2010.⁴⁹
 - a. **Include a mechanism for issuing Certificates of Absence in this legislation.**
 - b. **Explore temporal limitations** for the issuance of Certificates of Absence and the time period for which they would be applicable.
 - c. Ensure that family members who possess these certificates will be able to **access all the administrative benefits of Certificates of Death** including but not limited to transfer of property, remarriage, REPPIA, ongoing investigation.

⁴⁷ A template is included in: International Committee of the Red Cross. Accompanying the Families of Missing Persons, 31. Accessed on June 10, 2015 at <https://www.icrc.org/eng/assets/files/publications/icrc-002-4110.pdf>

⁴⁸ Registration of Deaths (Temporary Provisions) Act No. 19 of 2010

⁴⁹ CPA was informed by the Attorney Generals Department and the Registrar Generals Department that certificates of absence cannot be issued through the Temporary Provisions Act.

- 10) The Government should **continue to investigate all cases** to determine the fate and whereabouts of the disappeared and to ensure accountability of those responsible for the commission of enforced disappearances, even if Death Certificates have been issued previously.
- 11) Ensure local administrative officers are informed of the **pertinent policies and procedures** to ensure the even application of the law.
- 12) Implement a **comprehensive training** for all staff who are to be involved in the process and ensure information material and all relevant documents are available in **Sinhala, Tamil and English**.
 - a. Ensure that said information is sensitive to the needs of families.
 - b. Also ensure the authorities who will be interacting with the families of the missing are prepared through training to handle the emotional duress of the family members.⁵⁰
- 13) Provide access to sufficient counseling resources to address psychosocial issues of family members grief.

Long Term Recommendations

- 14) **Ratify the International Convention for the Protection of All Persons from Enforced Disappearance** and introduce enabling domestic legislation.
- 15) In many ways the legal status of absence is inextricably tied to legality or illegality of disappearances—thus making enforced disappearances a separate criminal category in the Penal Code is important. **Explore creating legislation to legalize the status of “Absence through Enforced or Involuntary Disappearance”**
- 16) Other steps could include:
 - a. Attempt to address each individual families “Right to Know” the fate of their loved ones
 - i. Through the creation of a comprehensive and independent truth telling process
 - ii. Investigation, documentation and prosecution for those responsible for enforced disappearances
 - iii. Accountability processes including independent prosecutions of alleged perpetrators
 - b. Initiate a comprehensive reparations policy.
 - c. Establish an Office for the Missing that can among other functions have a centralized database on the missing, investigate into cases of missing persons and provide for the right to truth.

⁵⁰ International Commission of the Red Cross. Accompanying the Families of Missing Persons, 31. Accessed on June 10, 2015 at <https://www.icrc.org/eng/assets/files/publications/icrc-002-4110.pdf>

Conclusion

It is the responsibility of the Government to address the large numbers of disappearances in terms of transitional justice obligations and their implications for reconciliation. In this regard, practical issues must be addressed and therefore reform brought through legal and administrative means. This issue requires a well thought through plan and the process and consultations should commence with relevant actors.

CPA reiterates that a Certificate of Death should not be issued in cases of enforced disappearance without sufficient supporting evidence as it leaves the families without certainty (access to truth), which is a widely recognized right in international law.⁵¹ Family members should be appointed as representatives for the missing to safeguard their rights and they should be provided with a Certificate of Absence.⁵² These would be deposited in a centralized institution providing a reliable estimate of the scope of the problem and easing access for those agencies and people participating in searching for missing persons.

The complex context within Sri Lanka, the families' experience of multiple displacements and the high levels of ambiguity around people's loss means that families in Sri Lanka will naturally require more time to process their loss and the choices around the finality of the loss. The current framework, including the Temporary Provisions Act of 2010, has gaps in legislation and implementation and ultimately poses a significant concern for reconciliation. It is essential that all forms of intervention with regard to missing persons center on the needs of the missing person and family members. CPA continues to advocate focus on the families that continue to be affected by disappearances. Initiatives under the existing Commission of Inquiry (COI) Act – for violations including enforced disappearances, unlawful killings, and torture – as well as the Temporary Provisions Act, have failed to comprehensively address the families' needs and therefore the Sirisena administration needs to initiate reform, including structural change, that can bring about truth, justice and accountability.

⁵¹ See Working Group on Enforced or Involuntary Disappearances' General Comment on the Right to the Truth in Relation to Enforced Disappearances for a more detailed explanation. Found at http://www.ohchr.org/Documents/Issues/Disappearances/GC-right_to_the_truth.pdf

⁵² Ibid.

Annex 1: Temporary Provisions Act Application for Registration of Death for Missing Persons

12 *Registration of Deaths (Temporary Provisions)
Act, No. 19 of 2010*

SCHEDULE (Sections 2, 8 and 10)

APPLICATION FOR REGISTRATION OF DEATH OF A MISSING PERSON

1. Full Name of missing person :
2. Sex and race ;
3. Age :
4. Date of Death (approximately) :
5. Address of last known residence:
6. Address of permanent residence :
7. Rank or profession :
8. Applicant's full name and residence :
9. Applicant's relationship to missing person :

I..... of
..... do hereby state that
the said..... (name of the
person missing)..... has
been missing for a period of over one year, and I verily believe that
the said..... is dead.

I therefore request that the death be registered under the Births
and Deaths Registration Act (Chapter 110) and a Certificate of Death
in respect of such death be issued to me.

.....
Signature of Applicant

Date :

(Title of responsible authority)

CERTIFICATE OF ABSENCE

Reference number.....

Name and first names.....

Place and date of birth.....

Address.....

Citizenship Sex.....

Occupation.....

Type and number of document.....

Father's name

Mother's name

Name of spouse

Dependents

Date and place of last sighting

Name of the reporting person.....

Address of the reporting person.....

REPRESENTATIVE OF THE MISSING PERSON

Authority

or

Name and first name.....

Address

Citizenship.....

Type and number of document.....

Duration of the validity of the declaration of absence.....

(Date, seal and signature of the responsible authority)