

Adayaalam Centre for Policy Research (ACPR)<sup>1</sup>

## **Issue Brief No. 2: Families of the Disappeared and the OMP: Is there a path forward?**

May 9, 2017

Over eight months ago, the Sri Lankan parliament passed the Office of Missing Persons (OMP) Act, designed to create an investigatory mechanism to provide answers to the over 100,000 families of disappeared who still do not know the fate of their loved ones.<sup>2</sup> The OMP Act was passed through parliament chaotically with no opportunity for debate and families of the disappeared criticized the fact that they were not sufficiently consulted.<sup>3</sup> However, the Act was welcomed by segments of civil society, elected Tamil representatives and the international community, as a step in the right direction.<sup>4</sup> The Sri Lankan government repeatedly pointed to the OMP Act, both in September 2016, and March 2017, during the UN Human Rights Council sessions as an example of progress towards accountability.

Yet over eight months later, the OMP Act remains just a piece of paper having not even been assigned to a ministry, and with an amendment that potentially restricts its ability to enter into agreements with international bodies such as the International Committees of the Red Cross (ICRC), who could provide invaluable technical assistance. Families of the disappeared have grown tired of waiting and are now even more skeptical of the OMP, saying that it will just be used to further delay an answer to the whereabouts/fate of their disappeared loved ones. Having lost all faith in government processes, families of the disappeared have now been sweltering on the roadside in protest for over two months across the North-East, demanding answers to the fate of their loved ones. On April 27, 2017, a hartal was declared across the North-East, and mothers of the disappeared from Kilinochchi led their protest to block the A9 road.<sup>5</sup> The levels of anger, frustration and sheer exhaustion felt by families of the disappeared are enormous, and their turn to roadside protests indicate that they are at the end of the rope. According to many mothers of the disappeared, “we don’t need another office, we need to know where our loved ones are and have our children returned to us!”

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<sup>1</sup> This issue brief was researched and written by Dharsha Jegatheeswaran, Senior Researcher & Research Coordinator of ACPR, with inputs from Guruparan Kumaravadivel, Research Director of ACPR. It is the first in a series of briefs ACPR is writing about addressing the issue of disappearances. Forthcoming briefs will consider the certificates of absence program, victim and witness protection; and the voices of protesting families of the disappeared.

<sup>2</sup> Amnesty International, “Sri Lanka- Victims of disappearance cannot wait any longer for justice” (3 April 2017), accessed here: <<https://www.amnesty.org/en/latest/news/2017/04/sri-lanka-victims-of-disappearance-cannot-wait-any-longer-for-justice/>>.

<sup>3</sup> Ruki Fernando, “Sri Lanka’s Transitional Moment and Transitional Justice” (29 August 2016) *Sri Lanka Brief*, accessed here: <<http://srilankabrief.org/2016/08/sri-lankas-transitional-moment-and-transitional-justice-ruki-fernando/>>

<sup>4</sup> See for example: “IMADR and Britto Fernando welcome OMP on International Day for Victims for Enforced Disappearances” (30 August 2016), *Tamil Guardian*, accessed here: <<http://tamilguardian.com/content/imadr-and-britto-fernando-welcome-omp-international-day-victims-enforced-disappearances>>.

<sup>5</sup> Meera Srinivasan, “Hartal shuts down Sri Lanka’s north-east” (27 April 2017), *The Hindu*, accessed here: <<http://www.thehindu.com/news/international/hartal-shuts-down-sri-lankas-north-east/article18260555.ece>>.

The question now is how to find a path forward that provides families of the disappeared with relief. In this brief, the first in a series where ACPR will consider the issue of disappearances, ACPR will consider this question in two parts. In Part I, ACPR outlines steps the government should immediately undertake to demonstrate its political will towards addressing the issue of disappearances and to rebuild confidence in families of the disappeared. This part outlines the unedited demands of the families of the disappeared based on interviews ACPR has conducted with protesting families of the disappeared across the North and with civil society organizations who work with them. In Part II, ACPR explores three of the families' key demands with regards to any process set up to investigate disappearances and how those demands should be incorporated into the establishment of the OMP under the OMP Act as it currently stands to help ensure its credibility: (1) appointments; (2) regional offices; and (3) linkage to criminal prosecutions. It is critical to understand that given the deep distrust held by families of the disappeared currently of the government, there will be very little success in trying to establish even a credible investigatory mechanism without first addressing the demands outlined in Part I.

Ultimately, in order to advance the issue of disappearances and provide relief to the thousands of families of disappeared in Sri Lanka, it is imperative that the government meaningfully listens to and incorporates the families' demands into any proposed solution. After decades of systemic and widespread enforced disappearances, the Sri Lankan government must find the political will to finally put an end to the culture of impunity and provide long overdue relief to families who have lived in anguish for far too long.

## **PART I: MOVES TO BUILD CONFIDENCE IN FAMILIES OF THE DISAPPEARED AND DEMONSTRATE POLITICAL WILL**

This section of the brief outlines three key steps that the Government of Sri Lanka (GoSL) needs to take with urgency at this juncture to rebuild the confidence of families of the disappeared and to build the trust necessary for any investigatory mechanism to be considered seriously by these families. The steps outlined here are an unedited reflection of the families' views based on multiple conversations ACPR has had with families of the disappeared in the North over the last few months, and Northern-based CSOs who work with them.

### ***1. Acknowledge and respond to the protestors and the need to address disappearances in Sri Lanka***

Despite the fact that families of the disappeared have been protesting continuously for over two months in the North-East, there has been no public response to the protests by the President or Prime Minister. The only public statement around disappearances from Prime Minister Wickremesinghe was a callous comment he made in January 2016, suggesting that most of the disappeared were probably dead.<sup>6</sup> In order to earn the trust of the families of the disappeared, a key step will be having the head of state and government publicly acknowledge and take ownership on the issue of enforced disappearances, and provide a meaningful response to the protestors.

### ***2. Release lists of surrendees/detainees:***

Releasing the list of surrendees at the end of the war and detainees, is one of the key demands of the families of disappeared. Many mothers of the disappeared in the Vanni region told ACPR that if the government released the list of surrendees, they could begin to start trusting that the government was serious about dealing with the issue of disappearances. The timeline that the families of disappeared have suggested to ACPR, was for the government to release the list of surrendees within the month of May 2017.<sup>7</sup>

### ***3. Release any disappeared persons the government is aware of being held in secret detention sites and/or elsewhere in the country***

*"Why do we need an office to investigate when they could just release our children? After they release our children we can think about the OMP to investigate the leftover cases."*

– Mother of the Disappeared in Kilinochchi

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<sup>6</sup> "Missing and disappeared persons most likely dead says Sri Lanka prime minister" (25 January 2016), *Tamil Guardian*, accessed here: <<http://tamilguardian.com/content/missing-and-disappeared-persons-most-likely-dead-says-sri-lanka-prime-minister>>.

<sup>7</sup> The existence of a list of surrendees in May 2009 who moved across the front-line was confirmed by Major General Chanayaka Gunaratna (head of the Sri Lankan Army's 58<sup>th</sup> Division) in February 2016 during the hearing of a habeus corpus application filed by Northern Provincial Councillor and wife of a disappeared, Ananth Sasitharan. However in response the army has still failed to produce this list. See: Sri Lanka Campaign, "Call for Sri Lankan Army to release Record of War 'Surrendees' (July 11, 2016) *EurAsia Review*, accessed here: <<http://www.eurasiareview.com/11072016-call-for-sri-lankan-army-to-release-record-of-war-surrendees-oped/>>.

A demand that was repeatedly emphasised in conversations with ACPR by almost every member of the families of disappeared interviewed was that the “government should just release all the children being held in the South.” Most of the families of the disappeared, particularly those in the Vanni region who surrendered their loved ones to the armed forces in 2009, firmly believe that at the very least, the children who were surrendered are still alive, and are being kept either at secret detention sites, or at orphanages/rehabilitation centres in the South of the island. Many of the families report having received phone calls from their children or other covert information that supports this theory. Their firm belief in this possibility is also part of the reason for their reluctance to engage in yet another commission on disappeared persons because they do not see the necessity for it when the government could just release the children they believe are being kept in various secret detention centres in the South.

**ACPR Recommendations with regard to the immediate demands of the families of the disappeared:**

The demand for releasing a list of detainees/ surrendeers is an immediately actionable demand. The demand for the release of such a list also is not a new demand and has been voiced a number of times in the past eight years since the end of the war. The Government should consider the following on an immediate basis:

1. Release a list of all those who surrendered<sup>8</sup> or were detained by the Sri Lankan Armed forces during the last stages of the war (latter part of 2008 – 2009). Such detention/ surrender took place at a number of exit points from LTTE controlled areas to Sri Lankan Army controlled areas throughout the last stages of the war but mostly over the last few days of the war in May 2009. These lists should be available with the different divisions of the armed forces in charge of the exit points. The Government should collate this information and make them available to the families to scrutinise.
2. Release a list of all secret detention centres run by the Sri Lankan Armed Forces/ Police throughout the war and after the war, their current status and an annual list of detainees held in such detention centres throughout the war and after the end of the war.
3. Release a list of all Tamil detainees being held under the PTA/ Emergency Regulation or unlawfully in any legal detention centre in Sri Lanka. Release a list of annual detainees held in these legal detention centres/ remand prisons/ prisons from 1983 onwards.
4. The Government should consult with the families as to the appropriateness of publicly releasing these lists. ACPR recommends that these lists be made available to families of the disappeared, their lawyers and any representatives that they authorize.

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<sup>8</sup> We use the term ‘surrendered’ with caution given that most did not surrender voluntarily and were coerced to surrender under threats to life and bodily harm.

## **PART II: GUIDE TO ESTABLISHING A CREDIBLE OFFICE OF MISSING PERSONS (OMP)**

In order to provide relief to families of the disappeared as soon as possible, ACPR believes that the government must first undertake the confidence-building measures outlined in Part I, and then act quickly to establish the OMP, but only if they incorporate victims' demands into that establishment. In order for the OMP to provide answers to the families of disappeared who are at the end of their ropes, it is imperative that it be established in a way that is credible and incorporates victims' concerns. Without doing so, the OMP will risk being yet another failed commission that will provide no resolution for the thousands of families of the disappeared who for almost a decade or longer now have lived in anguish not knowing what happened to their sons, daughters, husbands and wives.

This section focuses on addressing three of the key concerns brought forth by families of the disappeared which are central to any proposed mechanism to investigate disappeared and can be incorporated into the OMP within the parameters of the OMP Act: (1) appointments to the OMP ; (2) regional offices; and (3) linkage to criminal prosecutions. The OMP Act is far from perfect, and affords an enormous amount of discretion to the OMP's Commissioners, which leaves the credibility of the OMP entirely dependent on the intentions of the Commissioners appointed. In Sri Lanka this is less than ideal because it means the OMP is subject to political will or the lack thereof. However, as a result of this discretion, there is also room for the OMP to set up guidelines and protocols that incorporate victims' demands, and increases the likelihood of the OMP breaking with the past pattern of failed and corrupt commissions. Much of this will depend on a) the credibility and the political/security risks that those appointed as commissioners of OMP are willing to take and b) the political will of the Government to allow the OMP to act independently without resorting to extra-legal pressure. ACPR believes that though the Act has significant deficiencies, all three of the above mentioned victims' demands can be addressed within the parameters of the Act, only if the government has the political will to do so.

However, as a cautionary note, ACPR has based this analysis upon the version of the OMP Act that has been officially gazetted and made publicly available. Given ongoing discussions about possible additional amendments being proposed by opposition parties, it is unclear that this version of the Act will continue to remain the same.

### **Concern #1 - Appointments to the OMP**

#### ***Victims' Demands***

1. Appointments to the OMP must be made in consultation with victims' communities
2. Respected, independent and credible international experts should be appointed to the OMP
3. Representatives of families of the disappeared who are viewed as credible by victims' communities across the country should be appointed to the OMP

#### ***Law governing Appointments according to the OMP Act***

The OMP is going to be made up of seven members appointed by the President on recommendation of the Constitutional Council. The criteria for these appointments are laid out in s. 4(2) of the OMP Act, which states that the Constitutional Council must have regard to the following when making appointments:

- Ensuring that the composition of the OMP reflects the pluralistic nature of the Sri Lankan society; and
- Ensuring that the members of the OMP shall be persons with previous experience in fact finding or investigation, human rights law, international humanitarian law, humanitarian response, or possess other qualifications relevant to the carrying out of the functions of the OMP

The President does not have the power under the OMP Act to reject recommendations made by the Constitutional Council, but can remove a member of the OMP if that member meets any of the following circumstances laid out in s. 7(3) of the Act:

- Is found to be insolvent by a court of competent jurisdiction
- Is found to have a conflict of interest which conflicts with his duties as a member of the OMP (note – that this conflict of interest must be found in consultation with the Prime Minister, Speaker and Leader of the Opposition)
- Is unfit to continue in office by reason of infirmity of mind or body;
- Is declared to be of unsound mind by a court of competent jurisdiction;
- Is convicted of an offence involving moral turpitude; or
- Absents himself from three consecutive meetings without previously obtaining leave of the OMP

It is important to note that while the Constitutional Council was envisaged as a check on the President's power, the council's composition itself is inherently political. The Council is composed of:

- Three ex-officio members (the Prime Minister, the Leader of the Opposition in Parliament and the Speaker);
- A nominee of the President who shall be a Member of Parliament
- Five members jointly nominated by the Prime Minister and the Leader of the Opposition in Parliament, three of whom are civil society members and two members of parliament; and
- One member nominated on consensus by the majority of members of parliament of the parties in parliament other than the two parties represented by the President and Leader of the Opposition.

Currently the Constitutional Council is comprised of the following persons:

- Three ex-officio members: Prime Minister Ranil Wickremesinghe, Leader of the Opposition R. Sampanthan, and Speaker Karu Jayasuriya;
- Nominee of the President: Minister Champika Ranawaka
- Members of Parliament: Ministers Wijeyadasa Rajapaksa, and WDJ Seneviratne
- Nominee of the smaller parties: Vijitha Herath MP
- Civil Society: Dr. T. Ariyaratne, Radhika Coomaraswamy and Shibly Aziz

The Constitutional Council while comprising members of civil society is still overwhelmingly composed of politicians, and subject to the same political forces that are

designed to provide a check and to balance to the Presidency. Furthermore at least two of the three ministers on the council representing the Prime Minister's party and the President are known for their anti-accountability stances. Further, there is very little transparency around how nominations are received by the Council, and procedures/criterion for decision-making.

### ***ACPR's Recommendations to address Concern #1:***

In order to address the victims' demands regarding appointments, ACPR recommends that the Constitutional Council adopts the following guidelines:

1. A minimum of 5 of the 7 appointments that the Constitutional Council recommends to the President will come from nominations provided by victims' groups and civil society, ensuring that there is fair representation of victims' groups and civil society from the North-East; The process to select these nominations should take place in an inclusive, fair and transparent manner.
2. At least 2 members of the OMP should be direct representatives from the victim community of the families of the disappeared who are viewed as credible and independent by those victims' communities; and
3. At least 2 or 3 commissioners of the OMP should be foreign nationals who are independent, credible international experts on enforced disappearances and appointed on the recommendation of the Working Group on Enforced and Involuntary Disappearances (WGEID) in line with the recommendation made by the WGEID's report on Sri Lanka in September 2016 for the OMP to be "possibly integrated with an international component". We believe that the presence of international experts on the OMP will not only help build confidence among victim communities but also empower/incentivise the domestic commissioners to work independently. The international nominees moreover will be able to respond to the political and security challenges/threats, openly and defiantly – something that the local commissioners might not be able to given the circumstances.

Note that there is nothing in the Act, or in Sri Lankan law, preventing the Constitutional Council from appointing international actors to any of the 7 positions of the OMP.

### **Concern #2 – Regional Offices**

#### ***Victims' Demands***

1. The OMP should be located in the areas where the enforced disappearances occurred.

#### ***Law governing the location(s) of the OMP according to the OMP Act***

Pursuant to s. 3(3) of the OMP Act, the Head Office of the OMP will be situated in Colombo. However, the OMP is permitted under that same section to "establish such number of regional offices as may be necessary, to achieve its mandate".

### ***ACPR's Recommendation to address Concern #2:***

1. Immediately after the OMP's Commissioners are nominated, the OMP should hold a consultation with victims' groups and civil society about where regional offices should be located.
2. The OMP should establish regional offices in the locations determined by the aforementioned consultations and establish rules that grant the Regional Offices all of the investigatory powers in s. 12 of the OMP Act.
  - a. Individuals must have right of appeal to appeal decisions made by the Regional Offices to the OMP Head Office or some other constituted appeal body<sup>9</sup>
3. Appointments to the Regional Offices:
  - a. Must be made by the OMP in consultation with victims' communities from those areas and associated civil society;
  - b. applying the criterion in s. 4(2) of the Act; and
  - c. reflecting the ethnic composition of the area in which the Regional Offices will be located.

### **Concern #3 – Linkage to Criminal Prosecutions for crimes relating to enforced disappearances**

#### ***Victims' Demand(s)***

1. The OMP should be linked to criminal prosecutions of the perpetrators of enforced disappearances.

#### ***Law governing OMP's linkage to any criminal prosecutions under the OMP Act***

The OMP does not contain an internal prosecutorial arm for crimes relating to enforced disappearances.

While referring identified perpetrators or evidence of crimes to a criminal prosecutorial authority is not explicitly listed under the powers of the OMP in section 10 of the Act, it is possible that they could fall within the following two powers, which are listed:

- To identify avenues of redress to which missing persons and relatives of missing persons are entitled and to inform the missing person (if found alive) or relative of such missing person of same; and
- To do all such necessary things that may become necessary to achieve the objectives under the Act.

The most explicitly stated linkage between the OMP and criminal prosecutions is in s. 12(i) of the Act (part of s. 12 which lays out the OMP's investigative powers):

- S. 12(i) where it appears to the OMP that an offence within the meaning of the Penal Code or any other law, has been committed, that warrants investigation, the OMP may, after consultation with such relatives of the missing person as it deems fit, in due consideration of the best interests of the victims, relatives and society, report the same to the relevant law enforcement or prosecuting authority: such

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<sup>9</sup> There is nothing in the OMP Act preventing the OMP from setting up an internal appeal mechanism. This appeal mechanism must not preclude individuals from applying to the courts for appeal.

report will provide information relating to the missing person's civil status (such as the name, age and gender of the missing person), the place(s) or district(s) in which the missing person was last seen and the date thereof:

Providing that where a witness consents, the OMP may also inform the relevant authority, of the details of such witness, in order to enable such relevant authority to secure a statement from such witness to be used in the process of investigation. [emphasis added]

Section 12(i) however provides the OMP with significant levels of discretion raising the following questions about the following terms therein:

- “appears to the OMP” – what evidentiary threshold is the OMP going to use to determine if the evidence rises to the meaning of an offence? Will the OMP have a lawyer appointed to make that judgment or who will be making that call?
- “warrants investigation” – what types of crimes will “warrant” investigation? What guidelines are going to be used for that?
- “best interests” of in particular “society” – what is this defined as?
- the OMP “may” refer information, and where the OMP “may” refer a witness → if a situation meets the other criteria within s. 12(i) then what does this additional discretionary power permit?

Section 13 (i) also adds that the OMP is charged with among other things, the following function:

- To inform victims, relatives, witnesses and other informants who provide information to the OMP, of their right to directly refer matters to relevant authorities, including their right to report serious crimes to the relevant law enforcement or prosecuting authority and of the availability of any mechanism through which they may make claims for administrative relief

The implied powers in s. 10 and the explicit power in s. 12(i) are possibly limited by s. 13(2), which states, “the findings of the OMP shall not give rise to any criminal or civil liability.” It's unclear how those sections will work in conjunction with each other.

### ***ACPR's Recommendations to address Concern #3:***

1. Guidelines should be established by the OMP minimizing the amount of discretion available to the OMP in s. 12(i), in effect making it mandatory to refer evidence of offences under the Penal Code or any other law to a criminal prosecuting authority except where the relative of the missing person or victim expresses that they do not want such a referral to occur.
2. Where there is evidence of crimes related to enforced disappearances or more generally violations of international human rights law, humanitarian law, war crimes or crimes against humanity, the criminal prosecuting authority which the OMP should refer those cases to should be the Special Court of the Judicial Mechanism which the government has committed to setting up. Even if the OMP begins operations before the Special Court commences, those referrals should be queued to be sent to the Special Court as soon as it begins except where the relatives of the missing person or

the victim would opt otherwise after being informed of all options available to them under s. 13(i).

3. A clarification should be sought from Parliament establishing that the legislative intent of s. 13(2) is not to limit in any way the power of the OMP under ss. 10 or 12(i). If s. 13(2) does limit the criminal prosecution referral ability of the OMP then the Act should be amended to be remove that section.

## CONCLUSION

Sri Lanka has a long history of ineffective commissions that have failed to meaningfully address the crimes of enforced disappearances in the country due to a lack of political will. Families of the disappeared have now reached the end of the line in terms of their frustration and anger at not knowing the whereabouts/fates of their disappeared loved ones, and will wait no longer to receive the truth they rightfully deserve.

The post-2015 'National Unity Regime' which many in the international community believe opened a window of opportunity to address Sri Lanka's past, has unfortunately still failed to demonstrate the political will necessary to gain the trust of families of the disappeared, and has only left them feeling further disillusioned by their lack of action that goes beyond tokenistic steps.

As the international community continues to place pressure on Sri Lanka to set up the OMP which it legislated over eight months ago, it is critical that families of the disappeared and the victims are kept at the centre of this process. It will not be enough to set up yet another commission with the same inadequacies of those before it. As outlined in this brief, even under the OMP Act with its imperfections, it is possible for at least three of families' core demands to be incorporated meaningfully, regarding the issue of appointments, regional offices and linkages to criminal prosecutions. Thus, the question of whether the OMP can be set up credibly rests entirely on the political will of the government.

Additionally as outlined in this brief, as families of the disappeared have lost all faith in the notion of an OMP, prior to its establishment it will be critical that the government undertake the steps that families have articulated as necessary to gain their confidence. Those steps are: (i) publicly addressing the protests; (ii) releasing the list of surrendees/detainees; and (iii) releasing any disappeared persons whose locations are already known to the government.

The issue of enforced disappearances has plagued victim communities in Sri Lanka for far too long, and if this government is serious about addressing it and ending the cycle of anguish for families of the disappeared, then it must give it immediate priority.

*(This brief is the first in a series which ACPR is writing about addressing the issues of disappearances)*