

CONCLUDING OBSERVATIONS OF THE CTF

INTERIM REPORT

**The Office on Missing Persons Bill
and Issues Concerning the Missing, the Disappeared
and the Surrendered**

This interim report is based on all written submissions received as at 17th July 2016 and consultations conducted as at 8th August 2016.

Consultation Task Force on Reconciliation Mechanisms

August 2016

Concluding Observations of the CTF

As at 08th August 2016, the CTF had received 304 written submissions, a considerable number of which—either wholly or partly—address issues related to the missing and the disappeared, the OMP and/or the OMP Bill. These issues also formed a central part of the consultations conducted by the ZTFs, including in the public meetings and in the FGDs carried out with the families of the missing and the disappeared.

That the issue of disappearances was a recurring theme makes it clear that this is an issue on which the families of victims and the organisations working with them seek to actively engage with the State. Accordingly, consultations provided an unprecedented and invaluable opportunity for both families and organisations to do so from across the country and with sections of the community that have never been consulted on this issue before, such as Up-Country Tamils and families of service personnel missing in action. This report bears testimony to the large number of recommendations—some ambitious and far-reaching, others concrete and specific—that this process has elicited even before the conclusion of the consultation process. In order to facilitate serious consideration of these recommendations, this interim report has attempted to link all the relevant submissions to specific provisions of the OMP Bill and the proposed Bill on Certificates of Absence.

The CTF would like to make the following observations about the process so far and about the suggestions and recommendations that emerged with respect to TJ and the OMP:

Lack of Awareness of TJ Processes

The CTF notes a serious lack of awareness of the transitional justice process—and the mechanisms proposed by the Government—across the country, particularly amongst ordinary people, including victims. The level of awareness is alarmingly low in the South. This clearly has an impact on the extent to which the public can contribute to a discussion on the design of mechanisms, including the design of the OMP. In the North, East and South of the country, there is a need for more public awareness of this process and of the relevant mechanisms.

Climate of Fear

In the North and East, the CTF notes that people bravely engaged in the consultation process despite a climate of fear arising from continuing human rights violations and from the possible consequences of engaging in the consultations. The CTF along with ZTFs in the North and East received a number of complaints relating to incidents of intimidation, harassment and even torture that occurred during the consultation process. This is despite the fact that from the time of its appointment in January 2016, the CTF has been insisting that State cooperation is vital for the success of the consultation process, particularly in terms of ensuring that such incidents do not take place.

The continuation of violations has had a direct impact on the process both in terms of the number of people willing to engage and also in relation to the quality of engagement. Some had been warned by their families abroad not to testify or attend the consultations due to risks to those remaining. In other cases, family members of the disappeared did not want to discuss justice options as they felt this would have a direct impact on their family members whom they believe are being held by the State.

Lack of Faith and Trust in Consultations

Furthermore, it is worth noting that victims, organisations and the general public continue to engage in the consultation process despite a deep level of suspicion and distrust surrounding the Government's commitment to the transitional justice process. With regard to Sinhala and Tamil families both in the South and the North, there is little expectation of a state process being able to deliver truth or justice. Many said they lacked faith in anything the State would do. Many doubted that there would be any benefit from the consultations but they still came forward out of love for the disappeared or in hope. There were individuals from the North who opposed the establishment of the OMP as they believed it was a cover for the State to not commit itself to the task of searching for the forcibly disappeared. Others refused to suggest compensation options as they stated that the State would give what it wanted, irrespective of suggestions made at the consultations.

The experience of having to seek answers from multiple mechanisms with little or no success, especially with regard to tracing missing family members, has steadily eroded trust in the State. The OMP is thus viewed as the most recent in a series of processes and structures that they have engaged in and found nothing but false hope. Indeed, it is difficult to fully convey the determination, exhaustion and desperation expressed by family members who have attempted to seek redress from multiple actors, including successive commissions.

In addressing the issue of disappearances today, this long and tragic history needs to be taken into account. In particular, years of searching without an answer has given rise to the demand for urgent and immediate attention to their questions. Many victims laid out time frames for carrying out investigations ranging from 3 months to 1 year. In a number of cases, victims expressed a very simple and immediate sentiment—they just wanted their family members back or to know what happened to them. Hence, even whilst many victims welcome the OMP and see the vital importance of a permanent institution to address this issue, they are looking for immediate results, not necessarily new mechanisms. It is incumbent on the State and the OMP to focus on devising immediate measures to address the issue of the disappeared/missing within the OMP and outside. While submissions note the need to consolidate existing state records, the CTF notes the need to take steps to develop a comprehensive system to protect records and data.

This is not to say that there was no demand for truth from family members in the South. In the South too, family members expressed a need to know what happened to both soldiers missing in action as well those that disappeared during the political violence of the '87-'91 period.

The Commonality of Suffering across Different Communities

The submissions and consultations at the national and zonal level reveal the widespread nature of the problem as well as the enormous and diverse number of individuals who are affected by disappearances in the country. Despite the shared experience of enforced disappearances, it is also evident that there are specificities to each group and community, particularly with respect to the nature and scale of the disappearance and its impact, which require acknowledgement and further understanding. The CTF notes that the acknowledgement of such specificities and differences is important to the families.

Some activists working with families of the disappeared, mainly located in the North, claim that the OMP should be a mechanism that is limited to those who were disappeared by the State. The reason for such a distinction is mainly that the security

forces already have mechanisms through which they provide services for the families of missing service personnel. They also stated that by calling attention to the distinction, the State's culpability for disappearances will and should be recognised through the OMP. At the same time, families of the missing in action believe that they deserve greater consideration from the State given that their loved ones went missing "for their country." It is also noteworthy that families of surrendeers expressed a similar sentiment as they felt their issue was different to other cases of the disappeared and the missing; they stressed that their family members had been taken into the custody of the State.

Furthermore, the insistence of the families of the missing and the disappeared that the title of the Office should be altered to include the term "involuntarily or forcibly disappeared" and "surrendered" arises from the need for acknowledgement of this specificity.

However, the CTF notes that it is the realisation that the diverse experiences of loss are shared across ethnic, regional, linguistic and institutional cleavages that will ultimately lead to both a credible transitional justice process and lasting reconciliation. Sri Lanka still has a long way to go before this is a possibility. However, the consultation process is one step towards an ultimate goal of understanding mutual suffering.

Impact of Disappearances on Family and Society and Need for Reparations

The consultation process also brought home to the CTF the enormity of suffering that disappearances have caused to family members. Many of the families of the disappeared reflected on what it was like to live with the fact of a disappeared family member for a long period of time, to see children grow up without one parent (about whom no information is available) and often in abject economic conditions, facing stigma from the community and marginalisation from state structures.

While investigation and clarification of the status of the disappeared must inform the setting up of the OMP, the lived experiences of the families whose members have been disappeared also speak to the reparations needs of the families. In the consultation process, a variety of suggestions for reparations were made, ranging from livelihood support, housing assistance to victim families and education for the children to the restoration of LTTE gravesites and construction of memorials for civilian victims of the conflicts. Many expressed a need for psychosocial services and in-community support. Yet, some victims refused to accept any compensation or reparation, but were willing to discuss victim assistance to help them in their efforts to trace family members.

Composition of the OMP

The CTF notes that the distrust of and disenchantment with the State may in part explain some of the suggestions and recommendations made in relation to the composition of the OMP. For example, there were repeated requests for international involvement in the OMP (and other transitional justice mechanisms) and repeated demands for the involvement of family members, not just from groups in the North and East, but also families from South and, North and East. In the North family members expressed to be involved in the actual activities of searching and even exhumations.

The inclusion of representatives of family members, from respected international organisations like the UN and ICRC, local people of good standing from all ethnic communities, religious bodies and other organisations in the membership were seen as vital to ensuring trust and confidence in the OMP. The submissions viewed international representatives as credible and effective members of investigatory teams searching for the disappeared as they may be better placed to undertake certain aspects of investigations that would require challenging law enforcement and security forces.

The demand for Tamil speakers in the Office, which was a recurrent theme from consultations in the North and East, has to be understood in the context of years of experience of families trying to communicate and deal with government officials with no knowledge of Tamil.

Institutional and Sectoral Reforms

The CTF also notes that recommendations need to be factored into the precise relationship between the OMP, other transitional justice mechanisms and the existing justice system. With regard to the latter, it is evident that currently there are serious problems in the dispensing of justice with respect to disappearance cases and mass graves. Hence, turning over these cases to the justice system without addressing the systemic and fundamental gaps and weaknesses within the system will only serve to undermine public trust in this current initiative.

Families of the disappeared had different positions on the issue of justice. Some insisted on prosecution and punishment and even ruled out the option of amnesty, whilst others did not see the purpose of a judicial process altogether. Moreover, some sought non-traditional forms of redress, including the perpetrator providing labour for a family's needs, in place of the disappeared. The lack of detail with regard to the larger transitional justice architecture has also complicated the discussion on the OMP, with fears of justice being denied. Written submissions and participants in consultations repeatedly made the point of prosecutions being a critical element to addressing the demands of victims. Therefore, in addition to carrying out investigations, there is a demand for the OMP to be directly involved in prosecutions.

If the OMP does not deal with justice and reparations, the State must establish the other mechanisms in swift succession.

Trust Building

While the CTF appreciates the Government's efforts so far, it urges the Government to take greater cognizance of the problem of disappearances and the manner in which the country's social fabric was destroyed. It is a damning indictment of successive governments that the problem of disappearances is one that they have tried and failed to address for over three decades.

Giving the victims an opportunity to participate in the design of a mechanism in order to substantively and meaningfully address the issue of disappearances is an unprecedented first step towards addressing the damage caused. Having provided a space for hearing their concerns and recommendations, the incorporation of these in the OMP Bill and in the design of other measures and mechanisms would help to reestablish trust in the State's commitment to redress.

It is necessary for the government to take on board all suggestions made by victims and groups working with them—if the OMP is to be victim-centred. In order for the OMP to gain trust and public legitimacy, the Government needs to ensure a sense of ownership of the OMP.

The CTF believes that an OMP, which takes into account the voices represented at public consultations and in written submissions, will go a long way towards addressing the distrust and polarisation that currently prevails and ensure greater public trust and legitimacy. Such an Office will also go a long way towards ensuring victims' rights as equal citizens of this country and helping families bear their loss with a greater measure

of dignity. However, as this report points out, the current Government must also devote its attention to the future non-recurrence of this most damaging of crimes.