

SRI LANKA MONITORING AND ACCOUNTABILITY PANEL

Initial Statement on the Recent Passage of the Office on Missing Persons Act

27 September 2016

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On 11 August 2016, Sri Lanka's Parliament adopted into law the Office on Missing Persons (Establishment, Administration, and Discharge of Functions) Act, No 14 of 2016 (the 'OMP Act'). The OMP Act represents the Government of Sri Lanka's (the 'GSL') effort at constructing the first of the four so-called pillars of its transitional justice agenda (the three others being an office for reparations, a truth and reconciliation commission, and a criminal-justice mechanism). It is estimated that up to 65,000 persons are unaccounted for as a result of Sri Lanka's protracted civil war.

The Terms of the OMP Act

The OMP Act provides for the establishment of the Office on Missing Persons (the 'OMP'), a truth-seeking mechanism tasked with the tracing of missing persons 'in connection with armed conflicts, political unrest, and civil disturbances'; protecting the rights and interests of such persons; assisting the relatives of such persons; creating a database of such persons; ensuring non-recurrence; setting out procedures and guidelines applicable to the powers and functions of the OMP; and all other incidental matters. The OMP shall be situated in Colombo, with regional offices established as necessary, and shall consist of members appointed by the President on recommendation of the Constitutional Council. Notably, the OMP is mandated to, among other things: 'make recommendations to the relevant authorities towards addressing the incidence of missing persons' and 'identify avenues of redress to which missing persons and relatives of missing persons are entitled [...]'. There is no temporal limitation on the OMP's mandate, and its powers of investigation are broad and its functions comprehensive—at least on their face.

As expected, '[t]he findings of the OMP shall not give rise to any criminal or civil liability'. However, the office does have the *discretionary* power to refer apparent criminal cases 'to the relevant law enforcement or prosecuting authority' in consultation with the relatives of the missing person. And, *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'. Moreover, the OMP 'shall be charged with', among other things, informing '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 OMP is to be comprised of a Secretariat, a Tracing Unit, and a Victim and Witness Protection Division. And all OMP officers, staff members, and consultants are required to maintain confidentiality in connection with their duties. The GSL is mandated to provide 'adequate funds to enable the OMP to discharge the functions assigned to it'; such funds may be raised domestically and internationally.

The Act specifically creates a cause of action—‘contempt against the authority of the OMP’—for a variety of offences related to hindering or obstructing the work of the office. Any such offence ‘shall be punishable by the Court of Appeal as though it were an offence of contempt committed against the Court of Appeal’. The Act provides for civil and criminal immunity for OMP members, officers, and servants for ‘any act which in good faith is done or omitted to be done, by him, as such member or officer or servant’ and ‘any report made in good faith by the OMP under this Act’. And it provides for consequent civil, criminal, and administrative immunity to any ‘person in good faith providing evidence or documentation to the OMP’. The OMP is empowered with broad rule-making authority. Any proposed rules ‘shall be tabled before Parliament and shall be published in the *Gazette* within a reasonable period not exceeding three months’.

The term ‘missing person’ is specifically defined by the OMP Act and includes individuals ‘whose fate or whereabouts are reasonably believed to be unknown and which person is reasonably believed to be unaccounted for and missing’ due to ‘the conflict which took place in the Northern and Eastern Provinces or its aftermath’; ‘political unrest or civil disturbances’; or ‘enforced disappearance as defined in the “International Convention on Protection of All Persons from Enforced Disappearances”.’ And the term ‘relative of missing persons’ specifically includes: spouses, children, parents, siblings, in-laws, grandchildren, and grandparents.

The OMP Act has been published in Sinhala, Tamil, and English.

The Consultation Process

While the SLG has rightly prioritized the establishment of the OMP, the manner in which the OMP Act was adopted has raised legitimate questions as to the government’s commitment to a process of collaborative consultation and has failed to generate trust and confidence among victims and affected communities.

A draft version of the current legislation (the ‘Bill’) was presented to a select audience of civil-society leaders by Sri Lanka’s Foreign Minister earlier this year, shortly before it was approved by the GSL cabinet and gazetted in late-May. A working group, whose membership and mandate remains unclear, was apparently appointed by the GSL to draft the Bill, which appears to have been done without taking into account the views and suggestions provided by victims and affected communities, in contravention of a key GSL promise (per HRC Resolution 30/1) of a broad national consultation process. With barely any information presented to the media and no strong GSL spokesperson to explain the consultation process, public participation was limited. As one commentator put it: ‘The government leadership very consciously restricted the process to a closed-door exercise.’ Unsurprisingly, this has raised skepticism among stakeholders.

On 12 August 2016—notably, one day *after* Parliament’s adoption of the OMP Act—the Consultation Task Force on Reconciliation Mechanisms (the ‘CTF’) released an interim report based on public submissions and consultations with groups representing family members of the disappeared. According to the CTF’s report:

The lack of information and awareness about the process by which the [OMP] was established, its role and functions has contributed to the fear and suspicion, including amongst the families of the Missing in Action (MIA), that the OMP will exclude them. Therefore whilst the government's commitment to expedite the establishment of these mechanisms is appreciated, the lack of information, awareness, and attention to incorporating public views, particularly of those families affected by disappearances, reveals a troubling lack of sensitivity to the widespread nature of the crime of disappearances in Sri Lanka [...].

Moreover, the CTF received complaints of intimidation, harassment, and torture during the consultation process and reported a climate of fear of participation in the north and east of the country arising from ongoing human-rights violations.

Substantive Issues of Immediate Concern

Of course, it remains to be seen how the OMP Act will be implemented by the GSL. While, on its face, it appears to have addressed some of the issues raised by the CTF, there are notable exceptions. At this stage, the MAP simply wishes to highlight two significant concerns as a matter of urgency; it will release a more detailed and comprehensive report on the OMP Act in due course.

The Appointment Process Does Not Ensure the Independence and Impartiality of OMP Members

According to the OMP Act, its members shall be appointed by the President on recommendation of the Constitutional Council. Yet, given its present composition, it seems clear that the recommendations of the Council would be entirely in the hands of the current regime and would almost certainly exclude members of civil-society and/or individuals with viewpoints opposed to the GSL's agenda. Even though the OMP Act, on its face, requires the Council to ensure 'that the composition of the OMP reflects the pluralistic nature of the Sri Lankan society' and that its members are persons of relevant professional expertise, there is nothing in the Act itself to ensure that such individuals would be independent and impartial. As recommended by the CTF, the OMP Act should have included a provision requiring a more transparent nominating, vetting, and selection process. Additionally, public submissions recommended that membership of the OMP should be open to foreign individuals. While there is nothing on the face of the Act to prevent the Council from nominating non-Sri Lankans, it seems highly unlikely that it would take this step without an explicit reference to the possibility in the text of the OMP Act.

The Confidentiality and Immunity Provisions Threaten to Impede the Consequent Efforts of a Special Court

As noted, the OMP is not intended to directly address accountability measures for those responsible for the plight of missing persons and/or their families. Such remit, it is hoped, will belong to a special court (which has yet to be established). Nevertheless, the OMP Act puts in place two policies that could impede the work of any future mechanism tasked with the adjudication of enforced disappearances as a criminal matter.

With regard to the issue of potential amnesty, the OMP Act provides for civil, criminal, and administrative immunity to persons who ‘in good faith provid[e] evidence or documentation to the OMP’. It is appreciated that such measures—as rules of general application—may be necessary in order to incentivize certain individuals to cooperate with the OMP. However, it is apparent that very little thought was given, if any, to the potential interplay between the work of the OMP and any future accountability mechanism that may be adversely affected by such provisions. In this regard, it is worth noting that the provision of amnesty for certain crimes may be incompatible with international law.

Additionally, the OMP Act preempts the mandatory disclosure ‘in any court’ by an OMP ‘member, officer, servant, or consultant’ of ‘any material communicated to him in confidence in the performance of his duties under this Act, except as may be necessary for the purpose of carrying out or giving effect to, the provisions of this Act’. This appears to mean, in effect, that OMP personnel could never be compelled to provide relevant evidence to any duly constituted special court on matters related to their work at the OMP.

Such issues are highly charged ones, both politically and legally. As such, the particular provisions of the OMP related to immunity and disclosure—and the necessity and practicality of possible exceptions to those provisions—should have been the subject of a far more robust public debate.

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