

Mandates of the Working Group on Enforced or Involuntary Disappearances and the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence

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2 August 2016

Excellency,

We have the honour to address you in our capacities as Working Group on Enforced or Involuntary Disappearances and Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence, pursuant to Human Rights Council resolutions 27/1 and 27/3.

In this connection, we wish to make reference to the ongoing efforts by Your Excellency's Government to comply with UN Human Rights Council resolution 30/1, as well as with the observations and recommendations made by a number of Special Procedures mandate holders, who have recently visited Sri Lanka, including the Working Group. We also take this opportunity to reflect on some continuing issues of concern, particularly related to the matter of enforced disappearances, and to reiterate our support to Your Excellency's Government's in the efforts it is undertaking in this regard.

Ratification of the International Convention and implementing legislation

At the outset, we welcome the ratification of the International Convention for the Protection of All Persons from Enforced Disappearance, on 25 March 2016. We also welcome the initial steps taken towards the formulation of accompanying implementing legislation, such as the approval by the Cabinet of Ministers, on 7 June 2016, of draft legislation enabling the issuance of Certificates of Absence.

It is now of outmost priority to continue developing relevant legislation, notably to criminalize enforced disappearance as a separate offence, consistent with the definition given in the Convention, and in the Declaration on the Protection of All Persons from Enforced Disappearances. In this connection, we understand that a specific law on enforced disappearances is currently being drafted, yet, reportedly, without adequate consultation and participation of victims, their families, civil society and other relevant stakeholders. In this sense, we respectfully call on Your Excellency's Government to see to it that the draft law is publicly shared and that genuine efforts are made to discuss its contents with all those concerned - victims, civil society actors and organizations, whose involvement and expertise on the matter is critical to ensuring that the new legislation adequately addresses the reality of enforced disappearances in Sri Lanka.

The Prevention of Terrorism Act

According to information received, Your Excellency's Government has initiated the drafting of new security laws to replace the Prevention of Terrorism Act No 48 of L979 (PTA), as recommended by a number of United Nations human rights mechanisms and bodies, including the Working Group on Enforced Disappearances. We also understand that His Excellency President Sirisena issued directives in June that would facilitate the Human Rights Commission to exercise its powers, functions and duties in relation to arrests and detention under the PTA and that would reinforce the protection afforded to persons subject to arrest and detention under extraordinary laws. We welcome these positive developments and endorse the recommendations made by the Human Rights Commission of Sri Lanka on this matter, which reflect those identified by the UN Special Rapporteur on Protecting and Promoting Human Rights While Countering Terrorism, as an integral part of any future national security legislation.

Office of Missing Persons

We would also like to welcome the publication of the bill providing for the establishment of the Office on Missing Persons (OMP)¹, which is tasked, *inter alia*, with the responsibility of searching and tracing those who have disappeared. The establishment of the OMP is a crucial transitional justice development in Sri Lanka, in support of the right of victims to learn the truth about the fate and whereabouts of their disappeared ones. However, in addition to the observations we made on the OMP in our country visit report, we wish to convey a number of concerns regarding the content of the draft legislation, as well as the process by which it has been drafted.

According to the information received, the OMP bill was developed by a working group of Government advisors, whose membership and mandate remain unclear to the public. The draft was prepared without transparency or proper consultation with victims, affected population and civil society. We understand that when victims and civil society raised concerns regarding the lack of public debate on the draft, a last minute effort was made to incorporate submissions by stakeholders; yet civil society organizations claim that this was limited to two hastily arranged debriefing meetings with a small group of participants. We are concerned that the manner in which the first transitional justice mechanism has been introduced by Your Excellency's Government has given rise to skepticism and the fear that other transitional justice mechanisms may also be designed in a similar fashion, i.e. without due consultation with all relevant stakeholders, in particular the affected population. A balance should be struck between the need to prioritize and

¹ Bill to provide for the establishment of the Office on Missing Persons; to provide for the searching and tracing of Missing Persons; to provide assistance to relatives of Missing Persons; for the setting up of a database of Missing Persons; for setting out the procedures and guidelines applicable to the powers and functions assigned to the said office; and to provide for all matters which are connected with or incidental to, the implementation of the provisions of this Act, issued on 27 May 2016.

expedite the establishment of these mechanisms, and the need to build confidence among victims and minority communities, to ensure their positive engagement with them.

As regards the content of the draft bill, we wish to bring to your attention a number of issues. We welcome that article 12 (i) of the OMP bill envisages that the OMP may report to relevant law enforcement or prosecuting authorities the commission of offences that warrant an investigation. However, the bill also establishes that it will do so “after consultation with the relatives of the missing person as it deems fit”. Civil society organizations have expressed concern at the discretion given to the OMP in deciding whether or not to report an offence, and the exceedingly broad grounds on which it would be able to exercise such discretion. There are fears that crucial information could be redacted and unavailable to investigators and prosecutors, on the grounds that the confidentiality clauses set out in article 15 of the bill would preclude it.

We reckon that the OMP should help enhance, facilitate and support the right of victims and their relatives to access the criminal justice system. The OMP should conduct investigations in a way that the information and evidence collected, whether it relates to individual cases, to groups or to patterns, can be used to prosecute acts under the criminal justice system. In this sense, the OMP bill must include precise rules concerning the way in which it will handle confidential information.

A related concern is the pending establishment of the special prosecutor’s office and special courts, and the current status of the police and the Attorney General. As these institutions do not have the trust of the victims or the public generally and lack credibility, it is imperative that adequate legal and administrative arrangements and safeguards are instituted to ensure the independence of the investigative and prosecutorial bodies, so as to foster the confidence of, and thus support from victims, their families and other concerned parties. As mentioned in its report on its country visit, the Working Group on Enforced Disappearances recommends the establishment of an accountability mechanism that integrates international judges, prosecutors, lawyers and investigators.

In relation to the issue of prosecution, it is essential that the envisaged law criminalizing enforced disappearances as a separate offence be in place in conjunction with the OMP. This will ensure that any offences of enforced disappearance identified and reported by the OMP can be duly investigated as enforced disappearances, and not as crimes of a lesser gravity. No amnesties or immunities can apply to crimes under international law, including enforced disappearances.

With regard to the composition of the OMP, we welcome that Article 4 of the bill provides that the members to be appointed by the President on the recommendation of the Constitutional Council shall reflect “the pluralistic nature of the Sri Lankan society” and 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”. Further provisions and safeguards should be envisaged, however, to ensure that the appointment of the members is transparent, participatory and diverse. We particularly wish to stress the need to specifically mention gender and ethnicity as basic criteria to ensure the diversity of the OMP. Other measures could include: publicizing the expected qualifications and selection criteria for the nominees, providing sufficient time and opportunities for families and the public to nominate suitable persons, publicizing the names of persons the Constitutional Council intends to recommend, and allowing the public to comment as a part of the vetting process. Another concern is that the members of the OMP are to be appointed on a part-time basis only, which might hinder their actual capacity to implement its mandate.

A number of civil society actors have expressed concern about the name of the Office and the draft Act, and fears that the broader focus on “missing persons” may lead to the denial or dilution of enforced disappearances perpetrated by State actors. While the description in the bill does specify enforced disappearance as one of the categories, recognizing the term in the title of the proposed institution would clearly signal the main purpose of the body, and inspire the confidence of the families and therefore their active involvement in the process.

We also respectfully recommend that the OMP ensures that victims and families are able to communicate in their own language/languages. Staff at all levels should be able to respond to and interact with victims and families, who should receive throughout the process information in the language they can read and understand directly, without having to translate them. Families should receive regular updates regarding the progress of the ongoing investigations.

Finally, we recommend that the efforts of the new OMP should not be undertaken in a vacuum, but rather build on the relevant information already generated through past truth-seeking mechanisms. This information should be adequately compiled and formally analyzed as a starting point to determine the fate or whereabouts of the disappeared, and to feed in and support the investigation and prosecution of alleged perpetrators. In the spirit of further enhancing trust and participation of victims and civil society actors , the reports of previous truth-seeking mechanisms and commissions, including their interim reports and other classified material, should be made public and easily accessible.

We wish to reiterate our commitment to support and assist Your Excellency’s Government’s in the efforts underway towards the implementation of the observations and recommendations made by the Special Procedures mandate holders to Sri Lanka, and to maintain a continued and constructive dialogue in this regard.

Please note that this letter, as well as any response received from Your Excellency's Government, will be made available in a report to be presented to the Human Rights Council for its consideration.

Please accept, Excellency, the assurances of our highest consideration.

Houria Es-Slami
Chair-Rapporteur of the Working Group on Enforced or Involuntary Disappearances

Pablo De Greiff
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