

The Office on Missing Persons in Sri Lanka: The importance of a primarily humanitarian mandate

Vishakha Wijenayake*

Vishakha Wijenayake is a doctoral student at McGill University. She worked as a Legal Adviser for the Colombo Delegation of the International Committee of the Red Cross in 2016–18.

Abstract

This article attempts to situate the Office on Missing Persons (OMP) in Sri Lanka in relation to varying approaches to mechanisms for searching for the missing. In particular, the article examines the possible tensions between a humanitarian and an accountability-based mandate and supports the position of the International Committee of the Red Cross that these two approaches can in fact be complementary in nature. It goes on to contend that the OMP's mandate is primarily humanitarian rather than exclusively humanitarian, and analyzes how this distinction may impact possible criminal prosecutions. It emphasizes the importance of preserving the humanitarian character of the OMP with the objective of ensuring that the victims' rights are at the centre of transitional justice processes.

Keywords: transitional justice, missing persons, enforced disappearances, criminal proceedings.



* The views expressed in this article are those of the author and do not necessarily reflect the position of the International Committee of the Red Cross.

Introduction

I am dying bit by bit. Sometimes when I set off on the road, I wish that a vehicle would hit me. But she [pointing to the other lady next to her] says don't die, we will see them again... we will.

Mother at Kandavalai public meeting¹

Every year, as a result of armed conflicts and other situations of violence, many persons are separated from their loved ones. Some return, while the fate and whereabouts of others remain unknown long after the fighting has ceased. The families of the missing wait in an ambiguous state of trauma in hopes that their loved ones will one day return.² This has been the case in Nepal,³ Georgia,⁴ Lebanon⁵ and Cyprus,⁶ as in many other countries. In Sri Lanka, the numbers paint a similar picture in which, almost a decade following the end of the three-decade non-international armed conflict, 16,000 persons remain missing.⁷ The Tamil New Tigers was formed in 1972 and became the Liberation Tigers of Tamil Eelam (LTTE) in 1976. After they conducted an attack in Jaffna in July 1983, during which a hospital was badly damaged and thirteen government soldiers were killed, communal violence erupted across the country in what became known as “Black July”.⁸ More than 3,000 Tamils were killed, properties and businesses of Tamils were destroyed, and many fled Sinhalese-majority areas.⁹ The LTTE developed as a military organization, capable of conducting attacks on military objectives and civilian objects in all parts of the island.¹⁰ In 2009, the government forces were able to secure a military defeat of the LTTE.¹¹ In

- 1 Consultation Task Force on Reconciliation Mechanisms (CTF), *Interim Report: The Office on Missing Persons Bill and Issues Concerning the Missing, the Disappeared and the Surrendered*, August 2016, p. 13, available at: https://docs.wixstatic.com/ugd/bd81c0_1872d48845bd45afaafa7813ce2c89a0.pdf (all internet references were accessed in October 2018).
- 2 For more on this, see Pauline Boss, “Families of the Missing: Psychosocial Effects and Therapeutic Approaches”, in this issue of the *Review*.
- 3 International Committee of the Red Cross (ICRC), “Nepal: Families of Missing Persons Still Searching for Loved Ones”, 16 October 2014, available at: www.icrc.org/en/document/nepal-families-missing-still-searching-loved-ones: “According to the ICRC, 3,777 individuals went missing during the internal armed conflict. Of them, 1,347 – about one in three – are still missing.”
- 4 ICRC, “Georgia: Efforts to Clarify the Fate of Missing Persons”, 26 April 2106, available at: www.icrc.org/en/document/georgia-missing-persons-clarifying-the-fate. According to ICRC data in Georgia, “more than 2,300 persons are still reported missing as a result of armed conflicts in the 1990s and in August 2008”.
- 5 International Centre for Transitional Justice, “A Mapping of Serious Human Rights and Humanitarian Law Violations in Lebanon (1975–2008)”, 2013: “It is estimated that as a result of the 15-year conflict, ... 17,415 [people are] missing or disappeared.”
- 6 According to the Committee on Missing Persons (CMP) in Cyprus, there are approximately 2,000 missing. See: www.cmp-cyprus.org/content/facts-and-figures.
- 7 ICRC, *Living with Uncertainty: Needs of the Families of Missing Persons in Sri Lanka*, July 2016, available at: www.icrc.org/sites/default/files/wysiwyg/Worldwide/asia/sri-lanka/families_of_missing_persons_in_sri_lanka_-_living_with_uncertainty.pdf.
- 8 Human Rights Council, *Report of the OHCHR Investigation on Sri Lanka (OISL)*, UN Doc. A/HRC/30/CRP.2, 16 September 2015, para. 48.
- 9 *Ibid.*
- 10 *Ibid.*, para. 49.
- 11 *Ibid.*, para. 732.

addition to the armed conflict between the Sri Lankan armed forces and the LTTE, the country also saw two other situations of violence involving the leftist rebels Janatha Vimukthi Peramuna, once in 1971 and then again from 1987 to 1989. During these situations of violence, in addition to loss of life,¹² thousands were reported missing.¹³

Enforced disappearances have also been a recurrent phenomenon in Sri Lanka even following the end of the war.¹⁴ The government of Sri Lanka has come under constant pressure from the international community to address the needs of war-affected communities.¹⁵ There is a demand by segments affected by the armed conflict for the “truth”, as evidenced by submissions made to the Consultation Task Force on Reconciliation Mechanisms (CTF) by families of the missing.¹⁶ Submissions received by the CTF also articulate the need to punish perpetrators and to hold them accountable.¹⁷ While it may not be possible to quantify and hierarchize these varying demands, it is important to recognize their prevalence.

Tracing footsteps towards a process for transitional justice

It would be remiss not to highlight certain notable milestones in the path towards transitional justice in post-war Sri Lanka. Firstly, in the immediate aftermath of the armed conflict, two bodies of similar yet different mandates were constituted to look into the alleged violations during the conflict. The Lessons Learned and Reconciliation Commission appointed in 2010 by the then president, Mr Mahinda Rajapaksa, was mandated to investigate the facts and circumstances which led to the failure of the ceasefire agreement made operational in 2002, the lessons that should be learned from those events, and the institutional, administrative and legislative measures which need to be taken in order to prevent any recurrence of such concerns in the future, and to promote further

12 “Sanguinary Memories: JVP Insurgence of 1971”, *Daily News*, 5 April 2017, available at: <http://www.dailynews.lk/2017/04/05/features/112482/sanguinary-memories-jvp-insurgence-1971>. According to this article, 8,000–10,000 deaths have been recorded in the 1971 uprising. See also Ben Christian and Mogdeh Rahimi, “Sri Lanka (JVP) 1987–1990”, 1 October 2015, p. 2, available at: www.hsfk.de/fileadmin/HSFK/hsfk_publicationen/Sri-Lanka-JVP-1987-1990.pdf. These authors state that “[d]uring the 41 months of war, 2,000 people were killed according to the UCDP [Uppsala Conflict Data Program]. This number is highly contested by the estimates from other sources – the range of these estimates lies between 10,000 and more than 60,000.”

13 Asian Federation Against Involuntary Disappearances, “Sri Lanka: The Phenomenon of Disappearances”, 1 January 2005, available at: www.afad-online.org/resources/books/healing-wounds-mending-scars/sri-lanka-the-phenomenon-of-disappearances. “About seventeen thousand (17,000) persons disappeared during this period of 1971. Non-governmental organizations claim that over sixty thousand (60,000) persons disappeared between 1987 and 1991.”

14 Human Rights Watch, “Sri Lanka: No Progress in Investigating Journalist’s Disappearance”, 24 January 2011, available at: www.hrw.org/news/2011/01/24/sri-lanka-no-progress-investigating-journalists-disappearance.

15 UN News Center, “UN Officials Outraged at Accounts of Sri Lanka War Crimes, Stress Need for Accountability”, 17 September 2015.

16 CTF, *Final Report: Consultation Task Force on Reconciliation Mechanisms*, Vol. 1, 17 November 2016, p. xiii.

17 *Ibid.*, p. xvi.

national unity and reconciliation among all communities.¹⁸ The Commission submitted its report to the president on 15 November 2011. On the other hand, the Panel of Experts appointed by the United Nations (UN) Secretary-General to advise the Secretary-General on the issue of accountability with regard to any alleged violations of international human rights and international humanitarian law (IHL) during the final stages of the Sri Lankan Civil War produced a 2011 report finding credible allegations which, if proven, indicated that war crimes and crimes against humanity were committed by the Sri Lankan military and by the LTTE.¹⁹ These efforts, irrespective of the extent of their success, were important to signal that inaction was not an appropriate response in the immediate aftermath of the conflict.

In its Resolution A/HRC/25/1, adopted in March 2014, on “Promoting Reconciliation, Accountability and Human Rights in Sri Lanka”, the UN Human Rights Council requested the UN High Commissioner for Human Rights to

undertake a comprehensive investigation into alleged serious violations and abuses of human rights and related crimes by both parties in Sri Lanka during the period covered by the Lessons Learnt and Reconciliation Commission, and to establish the facts and circumstances of such alleged violations and of the crimes perpetrated with a view to avoiding impunity and ensuring accountability, with assistance from relevant experts and special procedures mandate holders.²⁰

The mandate of the UN Office of the High Commissioner for Human Rights (OHCHR) Investigation on Sri Lanka, which was more extensive than that of the Panel of Experts, required the OHCHR to undertake investigations into alleged serious violations and abuses of human rights and related crimes by both parties to the conflict. The request for a comprehensive investigation followed increasing international and national concerns about the absence of a credible national process of accountability, including for allegations of war crimes and crimes against humanity allegedly committed towards the end of the conflict in 2009 by both the government of Sri Lanka and the LTTE.²¹ The report concluded that, *inter alia*, egregious violations occurred on a large scale during the last phase of the armed conflict, and noted the persistence of serious human rights violations, abuses which include extensive and endemic patterns of extrajudicial killings, enforced disappearances, abductions, unlawful arrests and arbitrary detention, torture and sexual violence.²² The report was instrumental in consolidating, locally and internationally, a movement towards recognizing the necessity of comprehensive transitional justice mechanisms in Sri Lanka.

18 *Report of the Commission of Inquiry on Lessons Learnt and Reconciliation*, November 2011, p. 1.

19 *Report of the Secretary General's Panel of Experts on Accountability in Sri Lanka*, 31 March 2011, p. 1.

20 Human Rights Council, Res. A/HRC/25/1, “Promoting Reconciliation, Accountability and Human Rights in Sri Lanka”, March 2014, para. 10 (b).

21 Human Rights Council, above note 8, p. 5.

22 *Ibid.*, para. 1269.

Following the aforementioned events, Resolution 30/1 on “Promoting Reconciliation, Accountability and Human Rights in Sri Lanka” was adopted without a vote in October 2015 by the UN Human Rights Council.²³ The resolution was co-sponsored by the newly elected government of Sri Lanka. At the Universal Periodic Review of 2017, the Sri Lankan delegation reaffirmed its commitment to implementing Resolution 30/1.²⁴ The resolution welcomed a comprehensive approach to dealing with the past, incorporating the full range of judicial and non-judicial measures.²⁵ In this regard, it also welcomed the proposal by the government to establish a Commission for Truth, Justice, Reconciliation and Non-Recurrence, an Office on Missing Persons (OMP) and an Office for Reparations. It further welcomed the government’s willingness to conduct trials and punish those most responsible for the full range of crimes under the general principles of law recognized by the community of nations relevant to violations and abuses of human rights and violations of international humanitarian law, in a manner consistent with its international obligations.²⁶ Likewise, Sri Lanka has taken several measures to ensure the implementation of its obligations under this resolution. Of such measures, those of the most relevance for this paper are the establishment of the OMP,²⁷ a step which has been complemented by the passing of the law criminalizing enforced disappearances;²⁸ enacting legislation to enable families to apply for Certificates of Absence;²⁹ establishing an authority to provide protection to victims and witnesses;³⁰ and the presenting before Parliament of a bill to set up an Office for Reparations in July 2018.³¹ Following the enactment of the Office on Missing Persons (Establishment, Administration and Discharge of Functions) Act (OMP Act) in August 2016,³² and its Amendment in September 2017,³³ the seven OMP commissioners were appointed by the president of Sri Lanka in February 2018.³⁴ Since then the OMP has been engaged in inquiries on specific cases, supporting the ongoing excavation and exhumation of a mass grave in Mannar, consolidating existing records of missing

23 Human Rights Council, Res. A/HRC/RES/30/1, “Promoting Reconciliation, Accountability and Human Rights in Sri Lanka”, 14 October 2015.

24 Sanja de Silva Jayathileke, “Sri Lanka Reaffirms ‘Very Firm Commitment’ To Resolution 30/1 At UPR In Geneva”, *Colombo Telegraph*, 17 November 2017, available at: www.colombotelegraph.com/index.php/sri-lanka-reaffirms-very-firm-commitment-to-resolution-301-at-upr-in-geneva/.

25 Res. A/HRC/RES/30/1, above note 23, p. 2.

26 *Ibid.*, para. 7.

27 *Gazette of the Democratic Socialist Republic of Sri Lanka (Extraordinary)*, No. 2036/21, 12 September 2017, available at: www.documents.gov.lk/files/egz/2017/9/2036-21_E.pdf.

28 Sri Lanka, International Convention for the Protection of All Persons from Enforced Disappearance Act, No. 5 of 2018.

29 Sri Lanka, Registration of Deaths (Temporary Provisions) (Amendment) Act, No. 16 of 2016.

30 Sri Lanka, Assistance to and Protection of Victims of Crime and Witnesses Act, No. 4 of 2015.

31 Office of Reparations Bill, *Gazette of the Democratic Socialist Republic of Sri Lanka*, Part II of 22 June 2018 (Supplement) (issued on 25 June 2018).

32 Sri Lanka, Office on Missing Persons (Establishment, Administration and Discharge of Functions) Act, No. 14 of 2016.

33 Sri Lanka, Office on Missing Persons (Establishment, Administration and Discharge of Functions) (Amendment) Act, No. 9 of 2017.

34 “President Appoints OMP Commissioners”, *News.lk*, 1 March 2018, available at: www.news.lk/news/political-current-affairs/item/19662-president-appoints-omp-commissioners.

persons, and preparing recommendations and clarifications on legal issues affecting victims and families.³⁵

The ICRC in post-conflict Sri Lanka

As part of its activities in Sri Lanka following the end of the conflict, the International Committee of the Red Cross (ICRC) has been particularly interested in ensuring that the families of missing persons know the fate and whereabouts of their loved ones. To this end, the ICRC, between October 2014 and November 2015, conducted an island-wide assessment during which it met 395 families of missing persons, including those of missing security forces and police personnel, along with the authorities and organizations providing assistance to these victims. The findings of the Families' Needs Assessment highlight the need of the families to know the fate and whereabouts of their missing loved ones, as well as circumstantial information related to their disappearance.³⁶ Additionally, it finds that the families have emotional, economic, legal and administrative needs,³⁷ as well as needs relating to acknowledgement and justice.³⁸ Accordingly, the ICRC shared comparative best practice with the government of Sri Lanka in the process of drafting the OMP Act. Further to the appointment of the commissioners of the OMP, the ICRC has been providing technical support to the OMP in multiple disciplines in order to assist the Office in its functions.

The ICRC's involvement with the OMP has not been received positively by all segments of Sri Lanka's transitional justice process. The fact that the ICRC's institutional position supports a solely humanitarian mandate for mechanisms to search for the missing has been interpreted to mean that the ICRC does not support criminal investigations into serious violations of IHL committed during armed conflict. To this effect a false dichotomy has been created, painting humanitarian and accountability measures as being mutually exclusive in mechanisms such as the OMP.³⁹ Furthermore, segments of society have expressed their concern about information-sharing by the ICRC with the OMP with a view to facilitating the search for missing persons. These concerns stem from the fact

35 OMP, *Interim Report*, August 2018, p. 3.

36 ICRC, above note 7, p. 15.

37 *Ibid.*, p. 24: "Families referred to the following legal and/or administrative hurdles to address their day-to-day needs, because they were dependent on obtaining a certificate of death (CoD): inability to access/close the bank account of the missing person; difficulties in making insurance claims entered into by the missing person; inability to release property pawned by the missing person; difficulties to register children in school; inability to claim the monthly salary of the missing person which was deposited by the employer; inability to reclaim wrongful occupation of land owned by the missing person; difficulty/inability to make transactions with movable or immovable property owned by the missing person."

38 *Ibid.*

39 Isabelle Lassée, "Criminal" and "Humanitarian" Approaches to Investigations into the Fate of Missing Persons: A False Dichotomy, South Asian Center for Legal Studies, May 2016, p. 2. Lassée acknowledges that investigations into the fate of missing persons may stem from different approaches, either humanitarian or criminal, which are not mutually exclusive. However, she highlights the risk of this dialogue being falsely dichotomized, thereby presenting victims with an artificial and unfair choice between truth and justice. She therefore argues that pursuing both concurrently through an integrated approach would help further both truth-seeking and criminal prosecutions.

that such information can only be shared by the ICRC on the basis of a guarantee that it will not be used in criminal investigations or prosecutions.⁴⁰ While such concerns may still exist in a non-politicized context, the antagonism between the ICRC's confidentiality policy and the pursuit of justice can be expected to be heightened in a context where such terms as "truth" and "justice" can often become politicized. Various actors involved in the issue of the missing are heterogeneous and represent different points of view, which may at times be political, and/or may not be representative of the views of the families of the missing. This politicization of victims' needs has also affected the discourse on the missing in Sri Lanka. The debate on whether the OMP's functions are seen as humanitarian or accountability-focused cannot be understood outside of this context.

In light of the above, this article intends to analyze where the OMP stands in relation to varying approaches to mechanisms for searching for the missing. In particular, the article examines the argument that there may be tensions between a humanitarian and an accountability-based mandate and the position of the ICRC that these two approaches are complementary in nature. It goes on to argue that the OMP's mandate is *primarily* humanitarian rather than *exclusively* humanitarian and emphasizes that it is important to preserve this humanitarian character of the OMP, with the objective of ensuring that the victims' rights, including the right to know, are at the centre of transitional justice processes.

Different approaches to setting up mechanisms to search for the missing

A uniform approach has not been developed by States or other actors (such as the UN, ICRC and International Commission on Missing Persons) to address the issue of the missing. In fact, the issue, which is often generally labelled as dealing with "missing persons", can contain further subcategories such as the "disappeared" or "enforced disappearances", "surrendees", and "missing in action" as its constitutive elements.⁴¹ Unlike in certain languages – such as French and Spanish, where the terms *disparus* and *desaparecidos* encompass both the missing and the disappeared as one and the same – in Sri Lanka there is a cultural and political difference between the terms "missing" and "disappeared". Disappearances, in this context, are associated with enforced disappearances and with criminal proceedings that seek to attribute accountability for a criminal act. The term "missing", on the other hand, does not imply an attribution of guilt for a person's absence.⁴² Accordingly, certain parties may perceive that the term

40 Niran Anketell, *Commentary on the Bill Titled Office on Missing Persons*, South Asian Center for Legal Studies, June 2016, p. 17.

41 ICRC and Inter-Parliamentary Union, *Missing Persons: A Handbook for Parliamentarians*, 2009 (Handbook for Parliamentarians), pp. 9–10.

42 CTF, above note 1, p. 17: "My child didn't suddenly grow wings or fall out of someone's pocket to go missing, they were taken" – Mother at Kandavalai public meeting".

“missing” in the title of the OMP was intended to frame this highly political issue in such a manner as to dilute the criminal acts due to which certain persons may have gone missing. For example, submissions to the CTF emphasize the need to explicitly acknowledge the “disappeared” in the title of the Office.⁴³

The discussions surrounding the OMP’s functions have been influenced by these political and contextual factors and should not be disregarded. However, such debates, which may or may not necessarily reflect the views of the victims themselves, should not also stand in the way of and jeopardize the actual work that the OMP is mandated to perform. Contrary to concerns by certain segments of society, the OMP does not ignore the significance of the issue of enforced disappearances in the overarching issue of the missing. As per the OMP Act, the definition of a missing person includes enforced disappearance as defined in the International Convention on the Protection of All Persons from Enforced Disappearance (ICPPED). It is significant that the Act makes direct reference to the ICPPED definition as opposed to a definition that may be provided in a domestic legislation.⁴⁴

The definition of enforced disappearance does not cover all missing persons. Rather, it covers only

the arrest, detention, abduction or any other form of deprivation of liberty by agents of the State or by persons or groups of persons acting with the authorization, support or acquiescence of the State, followed by a refusal to acknowledge the deprivation of liberty or by concealment of the fate or whereabouts of the disappeared person, which place such a person outside the protection of the law.⁴⁵

Accordingly, this is a narrower group of people as compared to the missing as identified in IHL, which is in turn narrower than the definition of missing persons used by the ICRC. As per IHL, as soon as circumstances permit, and at the latest from the end of active hostilities, a party to the conflict must take all feasible measures to account for persons who have been reported missing as a result of armed conflict and must provide their family members with any

43 *Ibid.*, p. 18: among the submissions made, one view calls for the replacement of “missing persons” with “involuntary or enforced disappearances”, while another calls for the addition of “disappeared” or “involuntary disappearances”. However, for family members of those who surrendered to the army during the final phase of the war, neither “missing” nor “disappeared” captures their experience, and therefore they also call for the inclusion of “surrendees”.

44 Section 27 of the OMP Act, above note 32, defines a “missing person” as “a person whose fate or whereabouts are reasonably believed to be unknown and which person is reasonably believed to be unaccounted for and missing –
(i) in the course of, consequent to, or in connection with the conflict which took place in the Northern and Eastern Provinces or its aftermath, or is a member of the armed forces or police who is identified as “missing in action”; or
(ii) in connection with political unrest or civil disturbances; or
(iii) as an enforced disappearance as defined in the ‘International Convention on Protection of All Persons from Enforced Disappearances’.”

45 ICPPED, Art. 2.

information it has on their fate.⁴⁶ The term “missing” can be found in Article 32 of Additional Protocol I to the Geneva Conventions (AP I), which recognizes the right of families to know the fate of their relatives, as a guiding principle that shall prompt States, parties to armed conflicts and humanitarian organizations in the implementation of the obligations of parties to the conflict relating to missing and dead persons.⁴⁷

There is, however, no definition of missing persons in IHL. Despite this, the term is generally understood as including all persons, whether civilian or military, whose whereabouts are unknown to their relatives and who, on the basis of reliable information, have been reported missing in connection with an armed conflict.⁴⁸ By “missing persons”, the ICRC refers to individuals whose whereabouts are unknown to their families and/or who, on the basis of reliable information, have been reported missing as a result of an armed conflict – international or non-international – or of internal violence not amounting to armed conflict, internal disturbances or any other situation that might require a neutral and independent intermediary.⁴⁹ Likewise, the definition of a family member or relative of a missing person will in principle be found in domestic law, but must be interpreted in a broad sense in line with international human rights law and must include at least close kin such as children born in and out of wedlock; adopted children and step-children; life partners, whether by marriage or not; parents, including step-mothers, step-fathers, mothers-in-law, fathers-in-law and adoptive or foster parents; brothers and sisters, whether born of the same parents, of different parents, or adopted; and, where applicable, members of the extended family or community as provided by local custom.⁵⁰ Given that IHL does not make a distinction based on the cause due to which a person is missing, such provisions would capture persons who go missing due to criminal activities, including as a result of enforced disappearances.⁵¹ According to the Customary Law Study conducted by the ICRC, the obligation to account for missing persons is consistent with the prohibition against enforced disappearances.⁵²

Given that activities related to missing and dead persons must be prompted mainly by the right of families to know the fate of their relatives, as provided in

46 See Jean-Marie Henckaerts and Louise Doswald-Beck (eds), *Customary International Humanitarian Law*, Vol. 1: *Rules*, Cambridge University Press, Cambridge, 2005 (ICRC Customary Law Study), Rule 117, available at: www.icrc.org/eng/assets/files/other/customary-international-humanitarian-law-i-icrc-eng.pdf. For more information on the legal framework applicable to missing persons and their families, see: ICRC, *Missing Persons and Their Families*, Factsheet, 31 December 2015, available at: www.icrc.org/en/document/missing-persons-and-their-families-factsheet.

47 Protocol Additional (I) to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts, 1125 UNTS 3, 8 June 1977.

48 Nils Melzer, *International Humanitarian Law: A Comprehensive Introduction*, ICRC, Geneva, 2016, p. 156.

49 Handbook for Parliamentarians, above note 41, p. 9; definition based on ICRC, *The Missing and Their Families: Documents of Reference*, Geneva, 2004, p. 6.

50 Handbook for Parliamentarians, above note 41; note that section 27 of the OMP Act, above note 32, refers to all these groups of persons as constituting “relative[s] of a missing person”.

51 ICRC Customary Law Study, above note 46, Rule 98.

52 *Ibid.*, Rule 117. See also the explanation to Rule 11, stating that the obligation to account for missing persons is consistent with the prohibition against enforced disappearances.

Article 32 of AP I, addressing the humanitarian needs of the families of the missing is fundamental. The present article terms this the “humanitarian approach”. Juxtaposed to this is what can be termed the “accountability approach”, which may integrate the search for missing persons into a criminal investigation or delve exclusively into the issue of the “disappeared” or “enforced disappearances”⁵³ as set out in human rights law.⁵⁴ However, it is important to note that international human rights law does not exclusively support the accountability perspective, as it also looks at disappearances from a transitional justice perspective, and refers to the right of families to know. In a post-conflict context, a State may implement both humanitarian and accountability approaches concomitantly, while some States have opted for one approach over another. For example, in 2003 a Working Group on Missing Persons was set up in Kosovo, with a purely humanitarian mandate; this organization was established under UN auspices and chaired by the ICRC to clarify the fate and whereabouts of people unaccounted for in connection with events in Kosovo, and to inform their families accordingly.⁵⁵ On the other hand, the UN Working Group on Enforced or Involuntary Disappearances’ (WGEID) mission to Kosovo was concerned with cases of enforced disappearance that had not been properly investigated by the UN Mission in Kosovo during its full-range administration there.⁵⁶

An exclusively humanitarian approach may not always be at ease with certain international obligations, in particular those related to the investigation and prosecution of international crimes. The Committee on Missing Persons (CMP) in Cyprus, for example, does not attempt to attribute responsibility for the deaths of any missing persons or make findings as to the cause of such deaths, and merely draws up lists of missing persons of both communities, specifying whether they are alive or dead, and in the latter case noting the approximate time of their deaths.⁵⁷ The CMP also only works to determine the identity of a person when human remains are found. In the *Cyprus v. Turkey* case, the European Court of Human Rights (ECtHR) stated that although the CMP’s procedures are undoubtedly useful for the humanitarian purpose for which they were established, they are not of themselves sufficient to meet the standard of an effective investigation required by Article 2 of the Convention for the Protection of Human Rights and Fundamental Freedoms, especially in view

53 National Commission on the Disappearance of Persons (CONADEP), *Nunca Más – Never Again*, 1984, Prologue: “Thus, in the name of national security, thousands upon thousands of human beings, usually young adults or even adolescents, fell into the sinister, ghostly category of the *desaparecidos*, a word (sad privilege for Argentina) frequently left in Spanish by the world’s press.”

54 In 1980 the UN Commission on Human Rights established the United Nations Working Group on Enforced or Involuntary Disappearances (WGEID) through Resolution 20 (XXXVI) of 29 February 1980. It was the first *ad hoc* mechanism set up by the United Nations with the humanitarian mandate to “assist the relatives of the disappeared”.

55 Manfred Nowak, “Disappearances in Bosnia and Herzegovina”, in Michael O’Flaherty and Gregory Givold, *Post-War Protection of Human Rights in Bosnia and Herzegovina*, Martinus Nijhoff, Leiden, 1998, pp. 107–122.

56 WGEID, *Report of the Working Group on Enforced or Involuntary Disappearances: Mission to Serbia, including Kosovo*, UN Doc. A/HRC/30/38/Add.1, 2015, para. 69.

57 CMP, Terms of Reference and Mandate, Cyprus, 1981, section 13.

of the narrow scope of that body's investigations.⁵⁸ However, in the same case, in a partly dissenting opinion, Judge Fuad stated that the CMP's procedures are in themselves sufficient to meet the standard of an effective investigation required by Article 2, given that the cooperation provided by both sides to the conflict enables the creation of an effective investigating team.⁵⁹ This case demonstrates the divergence of opinion and the lack of clarity that exists with regard to the obligations and standards that the mechanisms set up by States to deal with the missing are required to respect.

Where does the ICRC stand in the humanitarian and accountability spectrum?

In fulfilling its role as the guardian of IHL, the ICRC advocates for the respect and ensuring of respect of the Geneva Conventions by all States Parties.⁶⁰ This includes the obligation of States to ensure criminal prosecution of war crimes. To this effect, the ICRC has advocated for domestic legislation to implement the Geneva Conventions. Moreover, as per the ICRC's position on customary IHL, States are bound by customary international law to criminally prosecute all war crimes, whether in international or non-international armed conflicts. The ICRC also provides trainings on IHL for prosecutors and the judiciary in order to ensure the effective application of IHL if and when the violations are redressed through judicial proceedings. For example, in Sri Lanka the ICRC has consistently advocated for the implementation of an effective Geneva Conventions Act.⁶¹ However, although an important part of its work is to call on States to comply with their obligations related to the criminal repression of war crimes, the ICRC does not participate in or associate itself with any process charged with looking into abuses and violations of domestic or international law that may have occurred in situations of armed conflict or other situations of violence, nor does it cooperate with any such processes. This is a manifestation of the ICRC's strict observance of a confidential approach, which is essential to enable it to fulfil its internationally recognized humanitarian mandate in full conformity with its Fundamental Principles.⁶² Indeed, should the ICRC breach or be seen as breaching its commitment to confidentiality, it would risk undermining the perception that the organization is a neutral, independent and impartial

58 ECtHR, *Cyprus v. Turkey*, Appl. No. 25781/94, 2001, para. 135.

59 *Ibid.*, Dissenting Opinion of Judge Fuad, para 22.

60 Article 1 common to the four Geneva Conventions of 1949.

61 In Sri Lanka, the Geneva Conventions Act, which was enacted in 2006, has not yet been operationalized. Furthermore, the Act as it stands now does not criminalize violations of common Article 3.

62 For more information, see "Memorandum: The ICRC's Privilege of Non-Disclosure of Confidential Information", *International Review of the Red Cross*, Vol. 97, No. 897/898, 2016, available at: www.icrc.org/en/download/file/19024/irc_97_1-2-18.pdf; Jérémie Labbé and Pascal Daudin, "Applying the Humanitarian Principles: Reflecting on the Experience of the International Committee of the Red Cross", *International Review of the Red Cross*, Vol. 97, No. 897/898, 2016, available at: www.icrc.org/en/download/file/19006/irc_97_1-2-8.pdf; Fiona Terry, "The International Committee of the Red Cross in Afghanistan: Reasserting the Neutrality of Humanitarian Action", *International Review of the Red Cross*, Vol. 93, No. 881, 2011, available at: www.icrc.org/en/download/file/14050/irc-881-terry.pdf.

humanitarian actor and, consequently, may risk losing the trust necessary to open and maintain an effective dialogue with authorities and parties to armed conflict, to secure access to conflict zones, and to ensure the security of its staff and beneficiaries, who include families of the missing. In recognition of the ICRC's unique operational needs and the risks associated with the use of information gathered in the framework of its humanitarian activities in judicial proceedings, the ICRC enjoys a privilege of non-disclosure of its confidential obligations under both international and domestic law. This privilege protects the ICRC's confidential information from being used, and ICRC staff from being compelled to testify, in legal proceedings.

At the international level, the privilege of non-disclosure was first explicitly recognized by a Trial Chamber of the International Criminal Tribunal for the former Yugoslavia (ICTY), which in its decision of 27 July 1999 in the case of *The Prosecutor v. Simić et al.* ruled that as a matter of customary international law, the ICRC enjoys an absolute privilege to withhold information related to its activities.⁶³ The ICTY decision concludes that the ICRC's mandate to protect victims of armed conflict under the Geneva Conventions, the Additional Protocols and the Statutes of the International Red Cross and Red Crescent Movement represents a "powerful public interest, the fulfilment of which depends on the willingness of warring parties to grant the ICRC access to the victims of such conflict. Such willingness, in turn, depends upon the ICRC's adherence to its principles of impartiality and neutrality, and rule of confidentiality".⁶⁴ The ICRC's privilege of non-disclosure has since been reaffirmed by the ICTY Appeals Chamber,⁶⁵ by the International Criminal Tribunal for Rwanda (ICTR)⁶⁶ and, indirectly, by the Special Court for Sierra Leone (SCSL),⁶⁷ the Special Tribunal for Lebanon (STL),⁶⁸ the Mechanism for International Criminal Tribunals (MICT),⁶⁹ and the Kosovo Specialist Chambers and Specialist Prosecutor's Office.⁷⁰

At the domestic level, the ICRC has been granted privileges and immunities that are necessary to fulfil its functions, including protection of ICRC information, in more than 100 countries to date, be it through bilateral status agreements or through primary legislation. In Sri Lanka, the ICRC's confidential information is protected from disclosure, even when it is in the hands of the government, by virtue of the status agreement between the government of the Democratic

63 ICTY, *The Prosecutor v. Blagoje Simić, Milan Simić, Miroslav Tadić, Stevan Todorović, Simo Zarić*, Case No. IT 95-9. PT, Decision (Trial Chamber), 27 July 1999, para. 73.

64 *Ibid.*

65 ICTY, *Prosecutor v. Brdjanin*, Case No. IT-99-36, Decision on Interlocutory Appeal (Appeals Chamber), 11 December 2002, para. 32.

66 ICTR, *Prosecutor v. Muvunyi*, Case No. ICTR-2000-55, Reasons for the Chamber's Decision on the Accused's Motion to Exclude Witness TQ, 15 July 2005, paras 14–16.

67 Statute of the Special Court for Sierra Leone, 16 January 2002 (entered into force 12 April 2002), Rule 20, para. 3, providing that the SCSL follows the jurisprudence of the ICTY and the ICTR.

68 STL, Rules of Procedure and Evidence, STL-BD-2009-01-Rev.6-Corr.1, 20 March 2009, Rule 164.

69 MICT, Rules of Procedure and Evidence, MICT/1, 8 June 2012, Rule 10.

70 Rules of Procedure and Evidence before the Kosovo Specialist Chambers including Rules of Procedure for the Specialist Chamber of the Constitutional Court, 25 Aug 2017, Rule 111, paras 4, 6.

Socialist Republic of Sri Lanka and the ICRC relating to the granting of immunities, privileges and facilities to the ICRC and its delegation in Sri Lanka of 16 July 1990, and its 2016 Addendum.⁷¹

Yet, it is false to assume that the ICRC's confidential approach or its privilege of non-disclosure would be exercised in a manner that prevents families of the missing from seeking justice. Accordingly, the ICRC's involvement in a transitional justice process must be analyzed bearing in mind its protection policy, which emphasizes the imperative to ensure that its actions do not have adverse impacts on, or create new risks for, individuals or populations.⁷² This principle requires, firstly, that the form of humanitarian assistance and the environment in which it is provided do not further expose people to physical hazards, violence or other rights abuses. The ICRC in Sri Lanka is not only careful to ensure that it does not expose people to such risks and violations through its actions, but it also promotes a system for victim and witness protection in transitional justice processes that would minimize such violations.

Secondly, such assistance and protection efforts should not undermine the affected population's capacity for self-protection. Accordingly, the ICRC informs beneficiaries about available mechanisms to seek justice and, in that way, avoids undermining their right to do so. Finally, humanitarian agencies should manage sensitive information in a way that does not jeopardize the security of the informants or those who may be identifiable from the information.⁷³ In that light, recognizing the obligation of the parties to the conflict to investigate and, if appropriate, prosecute persons suspected of committing war crimes as well as the obligation of public authorities under international human rights law to carry out an effective investigation into alleged violations, the ICRC's humanitarian action does not hinder the beneficiaries' ability to seek justice through criminal prosecutions, civil reparations or administrative means. Nevertheless, the fact remains that the ICRC itself would not take part in or associate itself with such procedures. Indeed, if the ICRC was to proactively share its confidential information with criminal prosecutors, there is a distinct possibility that such information may be used to advance the case in certain situations. However, as was highlighted in the *Simić* judgment, such possible benefits must be weighed against the adverse implications on beneficiaries, in a more global and long-term

71 *Gazette of the Democratic Socialist Republic of Sri Lanka (Extraordinary)*, No. 1987/23, 5 October 2016, p. 14A.

72 "This 'do no harm' imperative is fleshed out in the first protection principle of the Humanitarian Charter and Minimum Standards in Humanitarian Response, emphasizing the need to "avoid exposing people to further harm as a result of your actions".' Kristin Bergtora Sandvik, Katja Lindskov Jacobsen and Sean Martin McDonald, "Do No Harm: A Taxonomy of the Challenges of Humanitarian Experimentation", *International Review of the Red Cross*, Vol. 99, No. 904, 2018, p. 323, available at: www.icrc.org/en/download/file/72619/irrc_99_17.pdf; "ICRC Protection Policy", *International Review of the Red Cross*, Vol. 90 No. 871, 2008, available at: www.icrc.org/en/download/file/20806/irrc-871-icrc-protection-policy.pdf.

73 K. B. Sandvik, K. L. Jacobsen and S. M. McDonald, above note 72, p. 323. As regards personal data, the ICRC applies its own Rules on Personal Data Protection, available at: www.icrc.org/en/publication/4261-icrc-rules-on-personal-data-protection. It also refers in its work to the *Handbook on Data Protection in Humanitarian Action*, available at: www.icrc.org/en/publication/handbook-data-protection-humanitarian-action.

context, of the ICRC not being allowed to carry out its humanitarian mandate.⁷⁴ In a post-conflict context, from a beneficiary's point of view, this may be a difficult premise to fully appreciate. Beneficiaries tend to more easily understand operational implications, and therefore the importance of the confidential approach, when the conflict is still ongoing.

In light of this, the ICRC's involvement in the drafting of the OMP Act was observed with scepticism by certain parties,⁷⁵ who were concerned that the ICRC's privilege of non-disclosure would be extrapolated to the mandate of the OMP by making the OMP completely alienated from criminal prosecutions. Likewise, some have seen the OMP as having a purely humanitarian mandate that has the capacity to hinder families of the missing from gaining access to criminal prosecutions. The following sections of this article will aim to clarify the nature of the mandate of the OMP as going beyond purely catering to the identification of missing persons. However, the article will reiterate and provide reasons to justify the importance of the OMP functioning with adequate independence from other transitional justice mechanisms as well as from judicial proceedings in general, and exercising a primarily humanitarian function.

The OMP's mandate: Purely humanitarian or primarily humanitarian?

A broad scope and a humanitarian mandate

When one delves into the mandate of the OMP, it can be deduced that its purpose and powers go beyond a purely humanitarian mechanism which has no links whatsoever to the justice system. On the contrary, the OMP's mandate is a broad one, which considers the multifaceted needs of families of the missing and which adopts a forward-thinking attitude in dealing with the issue of the missing. Accordingly, the OMP has the power to make recommendations to the relevant authorities, relevant to its mandate, including recommendations relating to the prevention of future disappearances, based on patterns identified in the course of its work.⁷⁶ This is vital in light of the fact that the OMP does not have a time-bound mandate. It is also empowered to cooperate with various government agencies in order to ensure the effective fulfilment of its mandate.

As per the OMP Act, the Office is mandated to search for and trace missing persons and identify appropriate mechanisms for the same and to clarify the

74 Laura M. Olson and Toni Pfanner, "Cooperation between Truth Commissions and the International Committee of the Red Cross", *International Review of the Red Cross*, Vol. 88, No. 862, 2006. See, for instance, on p. 365: "Providing assistance in the short-term must be weighed against medium- and long-term needs. Action taken in one context must also be assessed in the light of its impact on ICRC operations worldwide." Other articles in that issue of the *Review* may also be of interest, available at: www.icrc.org/en/international-review/truth-and-reconciliation-commissions.

75 N. Anketell, above note 40, p. 17; I. Lassée, above note 39.

76 OMP Act, above note 32, section 10(1)(b).

circumstances in which such persons went missing.⁷⁷ Initially, this marks a departure from mechanisms considered to be exclusively humanitarian such as the CMP in Cyprus, the mandate of which does not warrant investigations into the circumstances in which a person went missing so as to establish a cause of death but purely to identify the status of a missing person as dead or alive.⁷⁸ In order to facilitate the process of searching for missing persons, the OMP is also vested with a mandate to collate data related to missing persons obtained by processes presently being carried out, or which were previously carried out, by other institutions, organizations, government departments, commissions of inquiry and Special Presidential Commissions of Inquiry, and to centralize all available data within the database established under the OMP Act.⁷⁹ Such a database is vital in order to establish a uniform narrative on the issue of the missing in Sri Lanka. Currently, there is no consensus as to the numbers of the missing, which leads not only to disagreements about the gravity and scale of the problem but also to fragmented and politicized narratives. Moreover, the consolidation of the work of previous commissions of inquiry means that such work does not need to be duplicated. The Interim Report of the CTF specifically notes that families of the missing have conveyed their exhaustion with having had to approach multiple mechanisms but having received no answers;⁸⁰ consolidation of work would mean that the victims do not have to be subjected to filing complaints and going through the harrowing experience of providing evidence again and again, leading to the trauma of revictimization.

The OMP is also mandated to protect the rights and interests of missing persons and their relatives, as provided for in the OMP Act.⁸¹ One such right protected under the Act is 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 to be informed of the availability of any mechanism through which they may make claims for administrative relief.⁸² The international human rights law obligation to protect requires States to protect individuals and groups against human rights abuses and entails a positive duty to adopt a legal framework to identify, prevent and mitigate the risks of violations of rights, to avoid such rights being abused, and to account for any negative impacts.⁸³ Accordingly, this mandates the OMP to go beyond a passive tolerance of criminal prosecutions in order to actively help families of missing persons to refer matters to other authorities. Finally, one of the OMP's mandates is 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 their

77 *Ibid.*, section 2(a).

78 CMP, Terms of Reference, Establishment of the Committee on Missing Persons in Cyprus, 1981, Art. 11.

79 OMP Act, above note 32, section 10(1)(e).

80 CTF, above note 1, p. 14.

81 OMP Act, above note 32, section 2(c).

82 *Ibid.*, section 13(i).

83 Human Rights Committee, General Comment No. 31, "The Nature of the General Legal Obligation Imposed on States Parties to the Covenant", 29 March 2004.

relative of the same.⁸⁴ Full and effective redress must take into consideration the human consequences of violations of human rights and humanitarian law and the situation of the victims in the present day.⁸⁵ Accordingly, the OMP has the power to provide, or facilitate the provision of, administrative assistance and welfare services – including, where required, psychosocial support – to the relatives of the missing person. Furthermore, it can recommend that the relevant authority grant reparations to missing persons and/or relatives of missing persons, including but not limited to compensation, and/or recommend the provision of other administrative and welfare services, including psychosocial services.⁸⁶

Drawing the contours of the OMP’s link to criminal prosecutions

In spite of the fact that the OMP has been vested with this broad mandate and powers which go beyond a strict mandate to identify missing persons to the exclusion of all other needs of families of the missing, what has given rise to much controversy is the OMP’s ability to forward cases for prosecution and the extent to which the OMP’s functions overlap with that of a criminal prosecutor or that of a judicial body.⁸⁷ Certain families of the disappeared have submitted that the OMP should have punitive powers if its investigations reveal the identity of perpetrators.⁸⁸ It must be noted, however, that according to the ICRC’s Family Needs Assessment for Sri Lanka, some families did not express a need for justice.⁸⁹

The OMP Act does not aim to completely divorce the search for missing persons from criminal prosecutions. As per section 12(i) of the Act,

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 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:

Provided 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.

84 OMP Act, above note 32, section 10(1)(d).

85 UN General Assembly, *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*, adopted and proclaimed by UNGA Res. 60/147, 16 December 2005.

86 OMP Act, above note 32, section 13(1)(f).

87 K. Rajasingham, “Can OMP Deliver Justice when Sri Lanka’s President Won’t?”, *Journalists for Democracy in Sri Lanka*, 12 June 2018, available at: www.jdslanka.org/index.php/news-features/human-rights/782-can-omp-deliver-justice-when-sri-lankas-president-wont.

88 CTF, above note 1, p. 29.

89 ICRC, above note 7, p. iv.

This provision can be seen as an attempt to compromise the need to facilitate criminal prosecutions while also ensuring that even at this stage, the public interest of doing so and, more importantly, the views of the relatives of the missing person are taken into consideration. It takes cognizance of the fact that the right to a criminal investigation is one that certain families may not wish to exercise for various reasons. This section of the Act has to be read in line with section 13(2), which states that the findings of the OMP shall not give rise to any criminal or civil liability.⁹⁰ While these two provisions may seem contradictory at first glance, a closer examination reveals that they indicate that the OMP is neither a purely and exclusively humanitarian body nor an accountability mechanism; rather, it is a mechanism with a primarily humanitarian mandate which facilitates links to prosecutorial mechanisms so as not to hinder the families' ability to exercise their right to a judicial remedy through criminal prosecutions.

Section 13(2) of the OMP Act must be examined while also considering section 12(c)(iii), which states that the OMP has the power to admit any statement or material, whether written or oral, which might be inadmissible in civil or criminal proceedings. This provides an explanation for the fact that findings of the OMP would not give rise to criminal or civil liability. However, the Act also provides for such evidence that cannot be replicated to be accessed through the justice system so that the work of the Office does not render valuable evidence before judicial proceedings useless. Accordingly, the OMP must apply to the appropriate magistrate's court having territorial jurisdiction for an order of court to carry out an excavation and/or exhumation of suspected grave sites, and to act as an observer at such excavation or exhumation, and at other proceedings, pursuant to the same.⁹¹ Furthermore, the OMP is obliged to make an application to the magistrate having territorial jurisdiction for the issuance of a search warrant, to enable police or specified officers of the OMP to search any premises suspected to contain evidence relevant to an investigation being conducted by the OMP, and to examine, make copies of, extract from, seize and retain any object that is deemed necessary for the purposes of any investigation being conducted by the OMP.⁹²

These provisions, which require coordination between the justice system and the OMP, can be of concrete practical use. One example of this is the management of human remains in the identification process. In such a process, the dignity, honour, reputation and privacy of the deceased must be respected at all times while also taking into consideration the known religious beliefs and opinions of the deceased and his or her relatives. Importantly, the families should be kept informed of the decisions taken in relation to exhumations and post-mortem examinations, and of the results of any such examinations, while also permitting, to the extent feasible, the presence of the families or of family

90 OMP Act, above note 32, section 13(2).

91 *Ibid.*, section 12(d).

92 *Ibid.*, section 12(g).

representatives when carrying out exhumations.⁹³ Such concerns are best addressed through a humanitarian body such as the OMP rather than a judicial body, which does not have the expertise or the incentive to attend to such needs. However, the processes of identifying human remains for the families' sake and of investigating the cause of death for the purpose of judicial proceedings are both of equal importance. The analysis of human remains can be vital in the identification process for the humanitarian purposes of the OMP as well as in establishing criminal liability in a potential mechanism for accountability. Currently, the criminal justice system in Sri Lanka is not equipped to collect biological reference samples of families of the missing in order to ensure that a match can be made if and when human remains are found. This is a process that the OMP may have to conduct under its mandate to search for and trace missing persons. However, under the OMP Act, the Office has limited power to perform the function of observer in handling human remains and excavations. Therefore, it would appear that the OMP's mandate would not hinder the justice system from retaining these remains and using them as evidence in a potential criminal prosecution. Accordingly, it is feasible and in fact necessary to have close collaboration and cooperation between the justice system and the OMP in order for each to carry out its functions without hindering those of the other.

For the aforementioned reasons, it can be inferred that the OMP Act has been drafted in a manner that does not proactively hinder criminal prosecutions but which facilitates such judicial investigations and prosecutions while also maintaining its independence from them. In the following section this article will elaborate as to why such independence from criminal proceedings is vital for a mechanism that seeks to search for missing persons.

Why should the OMP function as a primarily humanitarian mechanism?

While, as argued above, the primarily humanitarian functions of the OMP do not hinder possible criminal proceedings, the inverse is not equally true. Writers have examined how extensive overlap between criminal prosecutions and the search for the missing could result in adversely affecting such proceedings and then deprive the victims of control over the process of searching for their relatives.

In their article entitled "The Missing in the Aftermath of War: When Do the Needs of Victims' Families and International War Crimes Tribunals Clash?", Stover and Shigekane examine the tensions that may arise in balancing the humanitarian needs of families of the missing and the evidentiary needs and limitations of international war crimes tribunals in the aftermath of mass

93 ICRC, *The Missing and Their Families: Summary of the Conclusions Arising from Events Held Prior to the International Conference of Governmental and Non-Governmental Experts (19–21 February 2003)*, 2003, p. 31.

killings.⁹⁴ They submit that international war crimes tribunals, which are charged with investigating large-scale killings, may lack the resources and/or political will to undertake forensic investigations aimed at identifying all of the dead. In another article, Vasuki Nesiah outlines how reasonably well-functioning judicial mechanisms address, or could address, family needs.⁹⁵ She accepts that judicial investigations ensure that the information gathered is focused on the crime and feeds into accountability processes. Moreover, because police and prosecutorial investigators have training and professional experience that have been honed precisely for the purpose of procuring information about crimes, they can be particularly effective in gathering sensitive information. At the same time, however, police and prosecutorial investigations for judicial proceedings can also be unresponsive to the needs of families. In most cases, the launching of a criminal investigation with a view to a trial may depend solely on the prosecutor's decision as to whether to pursue the matter, with little or no input from victims. Investigations are designed to attain the prosecutorial goals of identifying those who can be proven to be legally culpable, but families of the missing may have broader goals. Hostile cross-examination can further exacerbate the injury suffered by victims even in the process of providing accountability. This may be a symptom of a broader problem: the manner in which judicial systems are often alienated from victims and attuned to the needs of the law and legal victory rather than to the needs of victims and their families.

The above sheds light on the fact that while the investigations carried out in criminal proceedings and by mechanisms such as the OMP seem similar at a cursory glance, in practice they differ in terms of their ultimate purpose and objective. Firstly, for the purposes of the OMP it is necessary to maintain a database of all missing persons and to strive to search for them irrespective of whether their absence is related to criminal activity. To this extent, the collection of evidence, whether it be ante-mortem data, biological reference samples or post-mortem data, is geared towards identification of a missing person for the benefit of their families or in the interest of a missing person being found. On the other hand, a criminal investigation focuses on the crime and is directed in a manner which facilitates the establishing of the elements of a crime. Accordingly, it is a serious concern that making a mechanism set up to search for the missing dependent on criminal investigations, or allowing such a search to be instrumentalized for the purposes of criminal investigations, can adversely affect the control and agency that families would have otherwise had over the process of identifying their loved ones and could require them to sacrifice their right to know the fate and whereabouts of their loved ones for more accountability-oriented interests of justice.

The Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence has addressed the issue of complementarity between

94 Eric Stover and Rachel Shigekeane, "The Missing in the Aftermath of War: When Do the Needs of Victims' Families and International War Crimes Tribunals Clash?", *International Review of the Red Cross*, Vol. 84, No. 848, 2002.

95 Vasuki Nesiah, "Overcoming Tensions between Family and Judicial Procedures", *International Review of the Red Cross*, Vol. 84, No. 848, 2002.

humanitarian and judicial aims and has insisted that “efforts are made to satisfy both humanitarian and judicial aims with regard to the missing”.⁹⁶ For him “it is important to be clear about the diversity of the ends to be reconciled”.⁹⁷ He has further recommended focusing in the early stages of truth-seeking processes “on a type of case that is important also in the post-conflict settings in terms of both its prevalence and its consequences – namely, those missing in general, and those who have been forcibly disappeared”.⁹⁸ UN Resolution 30/1 on Sri Lanka was reflective of this broad and inclusive approach to transitional justice. It pushes the post-conflict society to consider and actively address varying needs of those affected by the conflict, which may include humanitarian concerns and economic needs as well as a demand for accountability. In this sense, it is important as well as prudent not to prioritize one element of transitional justice over another or to fashion implementing mechanisms which allow one mechanism or one aspect of transitional justice to dominate the others. This will enable those affected by the conflict to choose from multiple options and redresses without being forced to give up certain needs in order to achieve some others.

A glance at practice from other comparable jurisdictions emerging from conflict situations highlights the fact that justice achieved through criminal prosecutions cannot be the be-all and end-all of post-conflict justice and that space should be provided for “truth” to be achieved through more than just one means. For example, a study conducted by Simon Robins shows that while Nepal’s transitional justice process is polarized between a human rights community that prioritizes prosecutions and a political class that seeks to avoid them, victims emphasize the need to know the truth about the disappeared and for economic support to help meet basic needs. He notes in this light that while families of the disappeared would welcome justice, this is not their priority.⁹⁹ In Peru, where a law on the search for persons who went missing during the period 1980–2000 was adopted in 2016, the transitional justice process is shifting from a mechanism to search for the missing, which is framed in investigations and criminal proceedings aimed at determining responsibilities for the commission of a crime (e.g. gross or serious violations of international human rights law), to a new process which prioritizes the humanitarian search for missing persons and the clarification of the circumstances in which a person went missing, including their fate and whereabouts. Such a process puts the families at its centre.¹⁰⁰ Currently, “authorities can turn over remains uncovered by forensic scientists

96 Human Rights Council, *Report of the Special Rapporteur on the Promotion of Truth, Justice, Reparation and Guarantees of Non-Recurrence*, UN Doc. A/HRC/36/50, 21 August 2017, para. 82.

97 *Ibid.*

98 *Ibid.*, para. 79.

99 Simon Robins, “Towards Victim-Centred Transitional Justice: Understanding the Needs of Families of the Disappeared in Postconflict Nepal”, *International Journal of Transitional Justice*, Vol. 5, No. 1, 2011.

100 See Ximena Londoño and Alexandra Ortiz, “Implementing International Law: An Avenue for Preventing Disappearances, Resolving Cases of Missing Persons and Addressing the Needs of Their Families”, in this issue of the *Review*.

before determining a cause of death or completing an investigation”.¹⁰¹ There is also no requirement for families to file a complaint with the chief prosecutor’s office first.¹⁰²

A victim-centred approach requires either broad prior consultation with victims or for victims and their representatives to be engaged at all levels of planning and implementation.¹⁰³ It must also be kept in mind that victims are not a monolithic group, and they should not be expected to speak in a unified voice.¹⁰⁴ It is necessary to recognize the agency of victims and to be wary of others who claim to speak on their behalf. To this end the OMP Act has also included provisions to ensure that the families of the missing will not be denied agency while the search for their loved ones is ongoing. For example, the OMP has to provide relatives of a missing person with information relating to the status of an ongoing investigation pertaining to that person, unless the Office is of the view that doing so would hinder the investigation or that it is not in the best interests of the missing person. The OMP also protects the rights of victims and families by protecting their personal data.¹⁰⁵ Furthermore, in making policy-level recommendations to relevant authorities, the OMP must consult, as it deems appropriate, the relatives of missing persons and/or organizations representing missing persons. The victims must be allowed to change their minds, and they will. Accordingly, the choices available to the victims must be flexible. This is most true for families of the missing, given the ambiguous state in which they find themselves.

Conclusion

The task before the OMP is not a simple one, and the road to finding those who went missing is long and arduous. The Office will have to engage in fulfilling its mandate while also contending with changes in political regimes domestically and internationally. Accordingly, political will, which is indeed an important contributive element in the OMP successfully implementing its mandate, is at best variable. The OMP’s ability to balance its humanitarian mandate while not jeopardizing potential criminal prosecutions, efficient cooperation between the OMP and other governmental entities, the security provided to victims and witnesses who engage with the mechanism, the appointment of commissioners who are suitable to carry out the mandate, and the overall perception with which the society at large views the OMP will be largely dependent on this consistently

101 Rodrigo ABD and Franklin Briceno, “Families of Peru’s Disappeared Hope for Answers”, *AP News*, 17 August 2018, available at: apnews.com/d6c4990fe60e4b06a5853571985c4536.

102 *Ibid.*

103 S. Robins, above note 99.

104 Bhavani Fonseka and Joanna Naples-Mitchell, *Victim-Centred Transitional Justice in Sri Lanka: What Does it Really Mean?*, Center for Policy Alternatives, February 2017, p. 4.

105 See OMP Act, section 13(1)(k)(v), which states that the publishing of information on issues of missing persons for public knowledge must be done with due consideration to all relevant laws pertaining to confidentiality and protection of data.

volatile political climate. However, to view the future of the OMP only through the lens of political will, thereby completely surrendering to political forces beyond its control, could be a self-fulfilling prophecy and deny the OMP the power that it is in fact capable of exercising.¹⁰⁶ Furthermore, while the OMP is merely one element of a larger transitional justice project, other such transitional justice mechanisms are yet to be fully concretized and their success is at best speculative. The relationship that the OMP would have with these bodies is uncertain.

The ICRC will continue to work to ensure the families' right to know the fate and whereabouts of their loved ones who went missing during the armed conflict in Sri Lanka. To this end, the ICRC supports the primarily humanitarian functions of the OMP. While recognizing that cooperation with justice is necessary, and while acknowledging the importance of accountability for serious violations of human rights and humanitarian law during an armed conflict, this paper has argued that victims' interests should be at the centre of the implementation of all transitional justice mechanisms and in particular of mechanisms to search for the missing. In this light, a humanitarian focus for the OMP which is not instrumentalized for the purpose of other mechanisms will do the most to expand the rights of victims. This, as argued above, is not a zero-sum game. The humanitarian and accountability-based approaches are complementary. Searching for the missing and informing families should not take precedence over justice, but these processes should be separate and judicial proceedings should not interfere with the work of the humanitarian mechanism.

106 The OMP Act has provided the OMP with certain tools which may be used to protect the Office from political influence in order to fulfil its mandate without interference.