

The Sri Lankan Office on Missing Persons: Truth and justice in tandem?

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Abstract

In October 2015, by co-sponsoring United Nations Human Rights Council Resolution 30/1 entitled “Promoting Reconciliation, Accountability and Human Rights in Sri Lanka”, the Sri Lankan government formally committed to embarking on a transitional justice process following three decades of armed conflict. Several thousand people allegedly disappeared during this period, often in connection with the armed conflict or as a result of internal disturbances. It is in this context that the Office on Missing Persons (OMP) was operationalized in 2018. This article discusses the nature of tracing investigations into the fate and whereabouts of missing persons of the type to be carried out by the OMP. It argues that these investigations, while ostensibly pursuing a humanitarian approach, cannot be artificially and hermetically separated from criminal justice processes. Further, it seeks to demonstrate that an integrated approach whereby strong linkages with criminal processes are provided for and encouraged best serves the interests of truth and justice.

Keywords: tracing investigations, missing persons, enforced disappearances, transitional justice, Office on Missing Persons, criminal investigations, humanitarian approach, international crimes, Sri Lanka, truth-seeking.

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Introduction

During a visit to Sri Lanka in November 2015 the Working Group on Enforced or Involuntary Disappearances emphasized that “the road that leads to truth and justice is long but is the right one to take, even if it may be painful at times”.¹ It is on this journey that Sri Lanka embarked in 2015 by co-sponsoring a landmark resolution at the United Nations (UN) Human Rights Council which addressed issues of reconciliation, accountability and human rights in Sri Lanka.² In doing so, the government of Sri Lanka committed itself to a comprehensive approach to dealing with the country’s atrocity-ridden past. In particular, it has undertaken to set up four special mechanisms to this end: a Special Court and a Special Prosecutor’s Office; a Truth, Justice, Reconciliation and Non-Recurrence Commission; an Office for Reparations; and an Office on Missing Persons (OMP).³ These proposed mechanisms are intended to address allegations of human rights and humanitarian law violations committed in the context of the thirty-year armed conflict between the Sri Lankan armed forces and the Liberation Tigers of Tamil Eelam (LTTE), as well as violations committed in the context of armed violence, internal disturbances and widespread State repression. The exact mandate of these institutions, other than the OMP, is yet to be determined.⁴

The OMP was envisaged as a discrete mechanism for receiving complaints and investigating the tens of thousands of missing persons cases that remain unresolved to date despite the past setting up of several commissions of inquiry tasked with a similar mandate. The work of these commissions – including the recent Paranagama Commission – has been criticized for lacking credibility and falling short of a full-fledged investigation.⁵ Therefore, the proposal to set up yet another mechanism has triggered both scepticism and high expectations.⁶ It is in this context that the Sri Lankan government received the advice and technical expertise of the International Committee of the Red Cross (ICRC) with respect to

- 1 United Nations (UN) Office of the High Commissioner for Human Rights (OHCHR), “Sri Lanka’s Disappearances: ‘The Road Towards Truth and Justice Is the Right One to Take’”, 15 September 2016, available at: www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=20499&LangID=E (all internet references were accessed in August 2017).
- 2 UN Human Rights Council, Res. 30/1, “Promoting Reconciliation, Accountability and Human Rights in Sri Lanka”, UN Doc. A/HRC/30/1, 1 October 2015.
- 3 High-Level Segment of the 34th Session of the UN Human Rights Council, “Statement by Hon. Mangala Samaraweera, MP, Minister of Foreign Affairs of Sri Lanka”, Geneva, 28 February 2017, available at: www.mfa.gov.lk/wp-content/uploads/2018/03/34-8.pdf.
- 4 The bill entitled “Office for Reparations”, gazetted on 25 June 2018, has a similar mandate *ratione materiae* to that of the OMP.
- 5 See Kishali Pinto Jayawardena, *Post-War Justice in Sri Lanka: Rule of Law, the Criminal Justice System, and Commissions of Inquiry*, International Commission of Jurists, January 2010; Isabelle Lassée, *The Last Stages of the War: Clarifying the Application of IHL*, South Asian Centre for Legal Studies, November 2015.
- 6 Consultation Task Force on Reconciliation Mechanisms (CTF), *Final Report of the Consultation Task Force on Reconciliation Mechanisms*, Vol. 1, 17 November 2016 (CTF Final Report), p. 188, available at: <https://tinyurl.com/yqky655>. Several participants stressed that “if the OMP is to truly provide them with the solutions, it has to address the obstacles they have already faced from the State, and crucially, to ensure that it wouldn’t repeating errors of other State agencies”.

the design of the OMP. The government has also engaged in – admittedly limited⁷ – consultations with civil society organizations on this question.

At the time, since the government was also considering the setting up of a Special Court and a Special Prosecutor’s Office, the envisaged linkages between the OMP and these proposed institutions were inevitably discussed among civil society. This debate was rooted in a more fundamental controversy regarding the very purpose of the OMP investigations. While some argued that the OMP investigations should serve a purely humanitarian objective of ascertaining the fate and whereabouts of missing persons without otherwise contributing to criminal investigations, others argued that the Office’s role should also be to prepare and assist criminal investigations. This view was shared by affected persons, as indicated in the report of the Consultation Task Force on Reconciliation Mechanisms.⁸

In August 2016, the Sri Lankan Parliament passed the Office on Missing Persons (Establishment, Administration and Discharge of Functions) Act (OMP Act).⁹ The OMP Act defines missing persons as persons who went missing in the context of “the conflict which took place in the Northern and Eastern Provinces or its aftermath”, as well as “member[s] of the armed forces or police who [are] identified as ‘missing in action’” and persons who went missing “in connection with political unrest or civil disturbances”.¹⁰ In addition, the Office’s mandate covers enforced disappearances as defined in the International Convention for the Protection of All Persons from Enforced Disappearance (ICPPED).¹¹ The OMP Act therefore recognizes that missing persons cases in Sri Lanka potentially involve criminal conduct. Interestingly, as will be explained below, the drafters of the Act did not appear to subscribe to the false dichotomy between criminal and humanitarian approaches to investigations into missing persons cases. This article argues that the OMP Act should be interpreted and implemented in a manner that is fully cognizant of the intricate nature of tracing and criminal investigations in order to enable the joint pursuit of truth and justice.

The humanitarian approach generally advocated for by the ICRC¹² aims at tracing missing persons, irrespective of the commission of a crime or of a violation of international law. Under this approach, a “missing person” would be anyone unaccounted for “in connection with an international or non-international armed conflict, a situation of internal violence or disturbances, natural catastrophes or

7 Human Rights Watch, “Sri Lanka: Consultations Lacking on Missing Persons’ Office”, 27 May 2017, available at: www.hrw.org/news/2016/05/27/sri-lanka-consultations-lacking-missing-persons-office.

8 CTF Final Report, above note 6, p. 230: “Although there is no provision for the OMP to get directly involved with prosecutions within the existing framework of the OMP, the expectation by affected families that the findings of the OMP would lead to some form of justice, cannot be overstated.”

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

10 *Ibid.*, section 27.

11 *Ibid.* Sri Lanka ratified the ICPPED in May 2016. In March 2017, Sri Lanka enacted the International Convention for the Protection of All Persons from Enforced Disappearance Act, No. 5 of 2018, available at: srilankalaw.lk/gazette/2018_pdf/05-2018_E.pdf. The Act criminalizes enforced disappearances.

12 See, for example, ICRC, *Action in Nepal for Missing Persons and Their Families*, Geneva, April 2011, p. 1, available at: www.icrc.org/eng/assets/files/2011/missing-nepal-report-icrc-2011-04.pdf.

any other situation that may require the intervention of a competent State authority”.¹³ For instance, a person may be unaccounted for as a result of combat operations, because the means to identify combatants were insufficient or inadequate. While in this case a crime or an international law violation may not have occurred, there remains a need to trace the person and provide answers to the family regarding his/her fate. Although the ICRC emphasizes the need for the prosecution of crimes uncovered through investigations into the fate of missing persons (tracing investigations),¹⁴ it does not through its work facilitate criminal prosecutions.¹⁵ In criminal investigations, on the other hand, the primary purpose is to establish individual criminal responsibility for a crime, be it national or international. The search for the person is therefore undertaken as part of the overarching search for evidence of the crime.

While the focus of each of these approaches and the scope of their corresponding investigations may vary slightly from one case to the next, they are not mutually exclusive. However, this author argues that conversations about the establishment of the OMP in Sri Lanka have falsely dichotomized the humanitarian and the criminal approaches, thereby presenting victims with an artificial and unfair choice between truth and justice. This article seeks to demonstrate that the two approaches have much in common and that pursuing both concurrently through an integrated approach would help further both truth and justice. The first part of the article explains that a strict separation between the OMP investigations and those carried out as part of a criminal process is neither desirable nor feasible. In light of this, the second part explores the institutional and operational arrangements that would be required to ensure that the OMP Act is implemented in a manner which enables the joint pursuit of truth and justice.

Humanitarian and criminal approaches to tracing investigations: A false dichotomy

When carrying out investigations into missing persons cases, humanitarian and criminal approaches should not and cannot be artificially separated. In fact, this

13 ICRC, “Guiding Principles/Model Law on the Missing”, in *The Domestic Implementation of International Humanitarian Law: A Manual*, Geneva, 2015, Annex IV, available at: www.icrc.org/eng/resources/documents/publication/pdvd40.htm

14 “Enforced disappearances are not specifically listed as grave breaches or other serious violations of IHL. However, when an act of enforced disappearance amounts to one of the grave breaches listed in the Geneva Conventions and Additional Protocol I (such as torture, inhuman treatment, willfully causing great suffering or serious injury to body or health, and taking of hostages), it must be investigated and the perpetrators prosecuted as required by the grave breaches regime.” ICRC Advisory Service, “Missing Persons and Their Families”, Geneva, December 2015, available at: www.icrc.org/en/download/file/17255/missing_persons_and_their_families.pdf.

15 *Ibid.*: “When the ICRC collects and processes information relating to missing persons, it does so within the framework of its neutral, independent, impartial and strictly humanitarian action. It will not participate in or associate itself with any process aimed at gathering evidence for the criminal prosecution of persons suspected of having committed a crime, nor will it cooperate with any such prosecution.”

author argues that a strict separation between tracing and criminal investigations has no added benefits for truth-seeking and is likely detrimental to the pursuit of justice. In addition, both types of investigations tend to converge in practice, so an artificial separation between them – that is, the absence of any link between the two investigations – could lead to undesirable interferences with one another.

Dispelling misconceptions regarding the perceived benefits of separate investigations

While the neutrality obligation of the ICRC requires it to adopt a purely humanitarian approach to investigations into missing persons cases, similar considerations do not apply to a State institution such as the OMP. Other arguments have nonetheless been put forward in Sri Lankan civil society circles to demand a strict separation of the OMP from criminal investigations and prosecutorial efforts. In fact, there exists a perception that a strict separation of the OMP from criminal investigations would have lessened the public resistance to the creation of this institution and could further incentivize lower-level perpetrators to participate in investigations carried out by the Office. The following section argues that both perceptions are unfounded and that in fact, a strict separation of criminal and tracing investigations would be detrimental to both endeavours.

Argument 1: A stated humanitarian approach would diminish public and political resistance to the OMP

In the Sri Lankan context, the main argument in favour of a strict separation between tracing and criminal investigations is one of political pragmatism. The proposal to set up the OMP was formulated in a context in which the majority of the Sri Lankan population is perceived to be averse to the pursuit of accountability for grave crimes allegedly committed by the armed forces, and where opposition and ruling politicians are openly making pronouncements against investigating these crimes.¹⁶ In such a context, the creation of the Special Court and the Special Prosecutor's Office was regarded by many in civil and political society as the government's most controversial transitional justice undertaking.¹⁷ As opposition to the transitional justice project crystallized around the setting up of the judicial mechanism, many considered a strict separation between the pursuit of truth and the pursuit of justice opportune. This stated separation would have ensured that the opposition to the justice project would not diminish public support for the establishment of the OMP.

However, this strategy is based on a political miscalculation – indeed, whether the OMP in fact proceeds from a purely humanitarian approach is

16 See “Updated: Flip-Flopping on Accountability – a Timeline”, *Groundviews*, March 2017, available at: groundviews.org/2017/03/27/updated-flip-flopping-on-accountability-a-timeline/.

17 *Ibid.*

irrelevant. The purpose, mandate and work of the Office have and will continue to be misrepresented in public and political discourse.¹⁸ Former president Mahinda Rajapakse, in a piece against the OMP, stated that “even though it is described as an ‘office’ the proposed OMP will be a tribunal for all practical purposes which can examine witnesses, issue summons and hold hearings”,¹⁹ concluding that “this Office of Missing Persons is meant to be an integral part of the judicial mechanism to deal with allegations of war crimes that the yahapalana government has undertaken to establish”.²⁰ This statement is characteristic of the position of the Joint Opposition with regards to the OMP, a position that was emphasized in public communications and mischaracterizes the OMP’s purpose and functions. Ultimately, despite the absence of provisions in the OMP Act enabling the OMP to directly and substantially contribute to criminal investigations,²¹ political opposition to the OMP led to protracted delays in its establishment. At the time of writing, close to two years after the passing of the OMP Act, while the OMP’s members have finally been appointed, they have yet to set up the Office’s units and divisions, adopt its rules and regulations, or hire its staff.

Argument 2: A purely humanitarian approach would incentivize collaboration with the OMP

Another reason adduced to justify the separation between tracing and criminal investigations is that this separation is necessary to incentivize witnesses to come forward and collaborate with the OMP. This argument is based on the premise that witnesses are more likely to effectively and meaningfully cooperate with a tracing body if the latter is strictly separated from a judicial process. However,

- 18 See, for example, “Mangala Urges Halt to Misleading Information over Office for Missing Persons Act”, *DailyFT*, 26 August 2016, available at: www.ft.lk/article/564001/ft. See also “An Open Letter to the Most Venerable Mahanayake Theras and Maha Sangha by Mahina Rajapaksa”, *Lanka Business Online*, 24 July 2017, available at: www.lankabusinessonline.com/new-laws-to-give-foreign-powers-a-central-role-in-persecuting-armed-forces-mr/. Former president Mahinda Rajapakse characterizes the OMP as a body set up to “give foreign powers a central role in persecuting our armed forces”. See “Wimal Weerawansa Wants the OMP Bill to be Brought Back to Parliament”, *Tamil Focus*, 24 August 2016, available at: news.tamilfocus.com/politics/02/102015. Member of Parliament Wimal Weerawansa characterizes the OMP as a “factory” for generating evidence with which to accuse and punish war heroes.
- 19 “Betraying the Armed Forces through the ‘Office of Missing Persons’”, *Colombo Telegraph*, 20 July 2016, available at: www.colombotelegraph.com/index.php/betraying-the-armed-forces-through-the-office-of-missing-persons/.
- 20 *Ibid.* *Yahapalana* means “good governance” in Sinhala. The current administration is referred to as the yahapalana government because “good governance” was its main electoral platform during the January 2015 presidential elections.
- 21 See OMP Act, above note 9, section 12(i) for the only provision that relates to the OMP’s obligation to contribute to criminal investigations. This section specifies that “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”.

this is based on a series of inaccurate assumptions with regard to the Sri Lankan context or even elsewhere.

First, non-perpetrator witnesses may be willing to cooperate with investigations into missing persons cases for a wide range of reasons, including assisting the pursuit of criminal accountability.²² In any event, their concern is not one of prosecution. They may, however, have safety concerns, which can be addressed by putting in place robust witness protection measures.²³

Second, even if the search for missing persons adopts a purely humanitarian approach, perpetrator witnesses – even those of lower rank or those whose participation in a crime was minimal – are unlikely to come forward willingly. Perpetrator witnesses summoned by the tracing body may also be reticent to cooperate fully. This is because the public revealing of the truth is never in the interest of perpetrators. In addition, even if the testimony of perpetrator witnesses remains confidential, the mere progress of the tracing investigation and the discovery of evidence of crimes invariably increases the prospect of prosecutions. The natural – and in fact rational – inclination is therefore to refrain from cooperating.²⁴ Thus, unless the tracing body is able to offer tangible guarantees that prosecutions will not take place – for instance, by granting amnesties – perpetrator witnesses are unlikely to cooperate. However, if there is *prima facie* evidence of an international crime (such as the crime against humanity of enforced disappearance or a war crime), amnesties would be deemed illegal by the UN²⁵ and under the international human rights framework.²⁶

Therefore, the separation of the tracing and criminal investigations does not provide an adequate or sufficient incentive for witnesses to come forward and

22 See CTF Final Report, above note 6, pp. 230–232.

23 See ICPPED, Art. 12.4, recalling the need to take measures “to prevent and sanction acts that hinder the conduct of an investigation”, including reprisals against witnesses.

24 It is important to recall in this respect that underlying the crime of enforced disappearance is the perpetrators’ willingness to hide evidence of their crimes. Therefore, perpetrators not only refrain from cooperating with investigations but often also actively temper with evidence in an attempt to hinder those investigations. See, for example, International Commission on Missing Persons (ICMP), *Bosnia and Herzegovina: Missing Persons from the Armed Conflicts of the 1990s: A Stocktaking*, Sarajevo, 2014, p. 94, available at: www.icmp.int/wp-content/uploads/2014/12/StocktakingReport_ENG_web.pdf.

25 UN Security Council, *Report of the Secretary-General on the Establishment of a Special Court for Sierra Leone*, UN Doc. S/2000/915, 4 October 2000, paras 22–24; UN Security Council, *The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies: Report of the Secretary-General*, UN Doc. S/2004/616, 23 August 2004, paras 10, 64(c); UN Economic and Social Council, Res. 1989/65, “Principles on the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions”, 24 May 1989, para. 19. See also UNGA Res. 47/133, “Declaration on the Protection of All Persons from Enforced Disappearance”, UN GAOR, 47th Session, Supp. No. 49, 18 December 1992, Art. 18.

26 See, for example, UN Human Rights Committee (HRC), CCPR General Comment No. 20, “Article 7 (Prohibition of Torture, or Other Cruel, Inhuman or Degrading Treatment or Punishment)”, 10 March 1992, para. 15. On the obligation to prosecute, see, more generally, Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Arts 5(1)(a–c), 5(2); ICPPED, Arts 9 (1)(b–c), 9(2); HRC, CCPR General Comment No. 31[80], “The Nature of the General Legal Obligation Imposed on States Parties to the Covenant”, 26 May 2004. While the Geneva Conventions also provide for an obligation to prosecute those who allegedly committed grave breaches (Geneva Convention I, Art. 49; Geneva Convention II, Art. 50; Geneva Convention III, Art. 129; Geneva Convention IV, Art. 146), these provisions only apply in international armed conflicts.

collaborate fully with the tracing body. However, the merging of both investigations into a single investigative effort that serves both the tracing and the criminal purposes is more likely to advance truth-seeking. Notably, if the OMP had been assisted by a prosecutor or had been invested with prosecutorial powers, it could have offered far more incentives for cooperation. In this configuration, many options could have been explored to obtain relevant information. These could have taken the form of immunity agreements, plea bargains or reduced sentences in the event that the witness is able to provide useful information.²⁷ This would have ensured that witnesses summoned by the tracing body could receive tangible guarantees in exchange for their full cooperation.

For these reasons, the strict separation between a tracing and a criminal investigation is not desirable. It is not feasible either, as both investigations tend to converge in practice.

Humanitarian and criminal approaches: Converging investigations

Humanitarian and criminal approaches to investigations into missing persons cases have much in common. In fact, while the scope of each type of investigation is somewhat different, the same type of evidence is relevant for both. Similar powers of investigation are also required to procure the evidence necessary for both tracing and criminal investigations. Therefore, these two types of investigations converge necessarily, and this is why they should ideally be carried out simultaneously and jointly. At the very least, the converging nature of both investigations ought to be recognized and should give rise to institutional and procedural arrangements required to ensure smooth cooperation between the various investigative efforts, including the sharing of relevant evidence.

Scope of tracing and criminal investigations

A criminal investigation commences when information about a crime is brought to the attention of the law enforcement authorities. The trigger for an investigation into a disappearance may therefore be a police complaint lodged by relatives of the disappeared or the discovery of a crime site, typically a gravesite. For this reason, a criminal investigation may be regarded as case-specific. On the other hand, in a post-conflict context, a “tracing investigation” – that is, an investigation aiming primarily at ascertaining the fate of missing persons – will adopt a broader approach. The first step will generally be the gathering and centralizing of all information relevant to tracing missing persons.²⁸ Depending on the context, this could be tracing requests made to different institutions, or lists of people in

27 In Bosnia and Herzegovina, the criminal procedure codes of the country were amended to allow plea bargaining in appropriate circumstances. This has been a mechanism to obtain evidence/information regarding mass graves from perpetrators. See, in this regard, Working Group on Enforced or Involuntary Disappearances, *Mission to Bosnia and Herzegovina*, 14–21 June 2010, available at: www2.ohchr.org/english/bodies/hrcouncil/docs/16session/A-HRC-16-48-Add1_fr.pdf.

28 ICRC, above note 13, Commentary on Arts 15, 17.

detention or medical facilities, displaced persons or refugee camps, morgues etc. In this respect, the OMP Act specifies that the Office should centralize all available data on missing persons.²⁹ To fulfil its mandate, the OMP must therefore collect and process large amounts of information and evidence, and to this end it must set up a database.³⁰

The centralization of this data increases the chances of generating leads and establishing correlations for as many cases as possible. In order to establish correlations, forensic experts and investigators compare ante-mortem data (information on missing persons, such as personal, physical, medical and dental information, as well as information on the circumstances of their disappearance) as well as post-mortem data (information obtained during post-mortem examination, including detailed pathology, anthropology and odontology data, and information related to the cause of death), often in a large-scale and systematic manner.³¹ Tracing investigations therefore proceed from a much more systematic approach than that of criminal investigations.

Pursuing the same evidence

Although they proceed from different approaches, both criminal and tracing investigations rely on the same type of evidence. For these reasons, both investigations are likely to overlap. For example, the physical evidence typically discovered at a mass grave site is relevant to tracing as well as criminal investigations.³² The physical characteristics of the bodies (height, dental print, fractures, injuries, etc.), the DNA collected, and any artefacts found on or near the body are highly relevant to a tracing investigation,³³ but this type of evidence is also relevant to a criminal investigation as it may assist in identifying the victim of a crime. Conversely, the position of the bodies, bullet holes and ties around the bones may constitute *prima facie* evidence of crimes, but they are also relevant evidence for a tracing investigation as they may give indications regarding the fate and whereabouts of missing persons. Similarly, evidence found at other crime sites may also be relevant to either type of investigation. Recognizing this, the OMP Act empowers the OMP – provided certain conditions are met – to carry out on-site investigations in order to procure relevant evidence.³⁴

In addition, as the tracing investigation progresses, it proceeds in a very similar way to a criminal investigation. In order to increase the chances of matching ante-mortem and post-mortem data, the tracing body would need to pursue other investigative methods including analyzing archival documentation,

29 OMP Act, above note 9, section 10(1)(e).

30 *Ibid.*, sections 10(1)(e), 13(1)(h).

31 ICRC, *Missing Persons, DNA Analysis and Identification of Human Remains*, Geneva, 2009, pp. 11–14, available at: www.icrc.org/eng/assets/files/other/icrc_002_4010.pdf.

32 Melanie Klinker, “Towards Mass Grave Protection Guidelines”, *Human Remains and Violence*, Vol. 3, No. 1, 2017, p. 53, available at: eprints.bournemouth.ac.uk/29259/7/Towards%20mass-grave%20protection%20guidelines.pdf.

33 *Ibid.*

34 OMP Act, above note 9, sections 12(f), 12(g).

conducting interviews of witnesses, and mapping criminal activities, events and networks.³⁵ Furthermore, in cases where a person may be missing as a result of a crime (enforced disappearance and/or murder), the mere identification of the person or the remains by the tracing body is insufficient. In fact, under international human rights law, any investigation into a human rights violation must determine the circumstances of the violation (disappearance or killing) and establish responsibilities.³⁶ This would also require an in-depth investigation akin to a criminal investigation.

Exercising similar powers

In order to carry out a full-fledged investigation, a tracing body must be able to exercise various powers. Interestingly, although they did not exercise them, the various commissions of inquiry into the fate of disappeared or missing persons in Sri Lanka were vested with wide-ranging powers of investigation.³⁷ Similarly, the OMP Act grants the Office with a broad range of powers to receive and procure information. In particular, the Act allows the OMP to receive and collate data and evidence on missing persons from governmental and non-governmental third parties.³⁸ It also enables the OMP to procure documents and statements from relevant sources,³⁹ including witnesses and government authorities. Notably, the OMP is vested with summoning powers.⁴⁰

The OMP Act also empowers the Office to carry out on-site investigations, including in actual or suspected detention sites⁴¹ and premises suspected to contain evidence relevant to its investigation.⁴² While the OMP's expected role with respect to on-site investigations and the extent of its powers depend upon the site concerned, the OMP Act notably empowers the Office to carry out warrantless⁴³ searches of suspected places of detention.⁴⁴

35 Medhaka Fernando and Isabelle Lassée, *Operationalizing the Office on Missing Persons: Manual of Best Practices*, South Asian Centre for Legal Studies, November 2016 (OMP Manual), Chap. 5, "Receiving and Procuring Information".

36 European Court of Human Rights (ECtHR), *Leonidis v. Greece*, Appl. No. 43326/05, Judgment, 8 January 2009, para. 68: "The investigation must be capable, firstly, of ascertaining the circumstances in which the incident took place and, secondly, of leading to the identification and punishment of those responsible. This is not an obligation of result, but of means. The authorities must have taken the reasonable steps available to them to secure the evidence concerning the incident, including, *inter alia*, eyewitness testimony and forensic evidence."

37 Commissions of Inquiry on Sri Lanka Act, No. 17 of 1948, sections 7 to 12.

38 OMP Act, above note 9, section 10(1)(e): "The OMP shall have the 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 and Commissions of Inquiry and Special Presidential Commission of Inquiry."

39 *Ibid.*, section 12(c).

40 *Ibid.*, section 12(c)(ii).

41 *Ibid.*, section 12(f).

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

43 *Ibid.*, section 12(f). The only obligation is for the OMP to report to the inspector-general of police within twenty-four hours of conducting the search. Other places may also be searched provided that the OMP has applied for and obtained a warrant (section 12(g)).

44 *Ibid.*, section 12(f).

In the event that the OMP exercises its powers fully in order to actively seek out evidence into the fate of missing persons, it may seize and handle evidence that is otherwise critical to the carrying out of a criminal investigation. It is therefore essential that this evidence could be summoned by judicial authorities when necessary; this would be the case unless the evidence had been obtained confidentially. This would ensure that the OMP's investigations do not hinder criminal investigations. As emphasized by the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence:

It is essential that efforts are made to satisfy both humanitarian and judicial aims with regard to missing and disappeared persons. Once again, such an ambition is not feasible in the short run; but virtually all decisions create path-dependence. It is therefore important to be clear about the diversity of the ends to be reconciled.⁴⁵

In light this, the OMP Act must be interpreted and implemented so as to ensure the joint pursuit of truth and justice.

Implementing the OMP Act to ensure the joint pursuit of truth and justice

While the OMP Act itself does not prevent the OMP from contributing to criminal investigations, in practice this may pose a number of challenges. Notably, institutional arrangements may be required to facilitate cooperation between the OMP and prosecutorial authorities. In addition, the OMP rules⁴⁶ must also address operational questions relevant to enabling the Office's contribution to criminal investigations and prosecutions of crimes uncovered while carrying out the tracing investigation.

Institutional arrangements required

A comparative study of tracing bodies vested with a mandate similar to that of the OMP reveals that these bodies are generally designed to support investigations led by the courts. The OMP Act, on the other hand, does not specifically provide for institutional linkages between the OMP and the courts that would directly enable the Office to support criminal investigations and prosecutions. The Act nonetheless leaves open the possibility of a sub-unit being created for that purpose. Whether or not that sub-unit is eventually created, close coordination and collaboration between the OMP and prosecutorial authorities will be required to avoid interferences and enable the joint pursuit of truth and justice.

⁴⁵ UN 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.

⁴⁶ *Ibid.*, section 26.

Comparative overview

While the ICRC's initiatives for tracing missing persons pursue a purely humanitarian objective, very few other initiatives proceed from the same approach. One notable exception is the Committee on Missing Persons in Cyprus (CMP), established in 1981. The mandate of the CMP is to locate and identify persons who went missing during inter-communal violence between the Greek Cypriots and Turkish Cypriots in the 1960s and 1970s. The Committee overtly pursues a humanitarian approach and is therefore not mandated to establish the cause of death or attribute responsibility for the death of missing persons.⁴⁷ However, for this reason, investigations conducted by the CMP have been considered as falling short of an effective investigation as required from the State under a human rights framework.⁴⁸ It is therefore important to recall that international human rights law requires States to fully investigate allegations of human rights violations, which includes identifying the circumstances of the violation and those responsible.⁴⁹

In many State-led initiatives, the search for missing persons departs from a purely humanitarian approach and is coupled with criminal investigations for domestic and international crimes. In some cases, the search is carried out directly by regular state institutions, with the assistance of international organizations (such as the International Commission on Missing Persons) or NGOs. For instance, in Iraq, the Law on Protection of Mass Graves provides that the Ministry of Human Rights assumes the leading role in the opening and indexing of mass graves, as well as documenting their contents.⁵⁰ When a mass grave is discovered, the Ministry takes possession of the location and an *ad hoc* commission is created to supervise the exhumation process.⁵¹ The commission is composed of representatives of the prosecutor's department, the police and the court of appeals, amongst others.⁵² The purpose of the investigation is explicitly to ascertain the fate of missing persons, to identify perpetrators and to assist in the collection of evidence to prove their criminal responsibility.⁵³

In Guatemala, investigations into the fate of missing persons are led by the judiciary. The purpose of the investigation is therefore both to assist the tracing of missing persons and to collect evidence for criminal prosecutions. An NGO, the Forensic Anthropology Foundation of Guatemala (Fundación de Antropología

47 Committee on Missing Persons in Cyprus, "About the CMP", 2015, available at: www.cmp-cyprus.org/content/about-cmp-0.

48 ECtHR, *Cyprus v. Turkey*, Appl. No. 25781/94, Judgment, 10 May 2001, para. 135: "[T]he respondent State's procedural obligations at issue cannot be discharged through its contribution to the investigatory work of the CMP. Like the Commission, the Court notes 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, especially in view of the narrow scope of that body's investigations."

49 *Ibid.*, read in conjunction with paras 27 and 127 of the Judgment.

50 Republic of Iraq, Law on Protection of Mass Graves, Law No. 5, 2006, Art. 1(II).

51 *Ibid.*, Art. 6.

52 *Ibid.*, Art. 6(I).

53 *Ibid.*, Art. 1(I)(d).

Forense de Guatemala, FAFG),⁵⁴ plays a central role in assisting the process. Its experts are appointed, in their individual capacity, as forensic experts by the courts or the prosecutor to conduct forensic investigations and participate in exhumations, generally after a complaint has been filed and a legal case initiated.⁵⁵

In other countries, specialized institutions have been created to address the problem of missing persons. For instance, in Bosnia and Herzegovina, a specialized body for the search and identification of missing persons – the Missing Persons Institute – was created in 2005.⁵⁶ However, the investigation of missing persons cases is carried out under the purview of the courts,⁵⁷ and the search is therefore linked to criminal prosecutions. The Prosecutor’s Office, which conducts war crimes investigations, initiates and supervises mass grave exhumations.⁵⁸ The Missing Persons Institute, on the other hand, plays a crucial role in locating mass graves and addresses exhumation requests to the prosecutor.⁵⁹

Similarly, in Kosovo, the Governmental Commission on Missing Persons is mandated to coordinate the search for missing persons and to centralize data on missing persons.⁶⁰ The Commission is composed of members of various ministries as well as representatives of families of missing persons.⁶¹ The role of the Commission is similar to that of the Missing Persons Institute in Bosnia and Herzegovina.⁶²

In Colombia, a National Commission for the Search of Disappeared Persons was created in 2007.⁶³ The role of the Commission was mainly to promote, support and assist the search for disappeared persons undertaken by other institutions, including by designing and evaluating search plans.⁶⁴ The Prosecutor’s Office was in charge of the investigation, together with other institutions referenced in the national search plan developed by the

54 FAFG, “Nuestra Labor”, 2016, available at: fafg.org/nuestra-labor.html.

55 The appointment of FAFG experts is often pursuant to a request by the human rights or victims’ organization that initiated the complaint. FAFG also collects ante-mortem DNA data from families, after having received informed consent. The families’ genetic profiles are entered into the National Genetic Database for Families and Victims of Enforced Disappearance for comparison with victims’ genetic profiles extracted from DNA samples collected during previous investigations. In the event of a positive identification, both the family and the prosecutor are informed.

56 Bosnia and Herzegovina, Law on Missing Persons, 2004, Art. 7.

57 *Ibid.*, Art. 5.

58 ICMP, above note 24, p. 46.

59 Law on Missing Persons, above note 56, Art. 7.

60 Republic of Kosovo, Law No. 04/L-023 on Missing Persons, 29 August 2011, available at: www.kuvendikosoves.org/common/docs/ligjet/Law%20on%20missing%20persons.pdf.

61 *Ibid.*, Art. 9.

62 ICMP, *Missing Persons from the Kosovo Conflict and Its Aftermath: A Stocktaking*, 2017, p. 17, available at: www.icmp.int/wp-content/uploads/2017/05/Kosovo-stocktaking-ENG.pdf

63 ICMP, “Where We Work: Colombia”, 2014, available at: www.icmp.int/where-we-work/the-americas/latin-america-and-the-caribbean/colombia/. Decree 929 of 2007 defined the structure and scope of work of the Commission.

64 OHCHR, “Committee on Enforced Disappearances Considers Report of Colombia”, available at: www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=20651&LangID=E; Lisa Haugaard and Kelly Nicholls, *Breaking the Silence: In Search of Colombia’s Disappeared*, Latin American Working Group Education Fund, December 2010, p. 10.

Commission.⁶⁵ Ten years later, a Missing Persons Search Unit was created by decree.⁶⁶ The decree asserts the humanitarian and extra-judicial nature of the Unit⁶⁷ as a remedy to the shortcomings of searches carried out within the ambit of the criminal justice system.⁶⁸ The newly created Unit is in charge of directing, coordinating and contributing to the search for and identification of missing persons. In order to ensure the humanitarian nature of the Unit, the decree specifies that the evidence received or procured by the Unit cannot be used in a criminal process.⁶⁹ As underscored in the decree, this represents a complete shift in the approach to the search for missing persons in Colombia. It also represents a shift in the approach in the region, since similar institutions were also created in Peru and El Salvador. Interestingly, despite the ostensible humanitarian nature of the Unit, the decree nonetheless specifies that the Unit shall establish cooperation protocols with the competent judicial authorities with respect to forensic investigations into gravesites,⁷⁰ thereby acknowledging the need for a minimum degree of cooperation with the judicial process.

In Peru, a recently adopted law assigns to the Justice and Human Rights Ministry the leading role in the search for missing persons who disappeared between 1980 and 2000.⁷¹ According to the law, the search ostensibly pursues a humanitarian approach and as such shall neither impede nor contribute to a judicial process.⁷² However, the implementation of the national search plan will be collaborative in nature and will involve various institutions.⁷³ Notably, the law specifically mentions the role and normative competency of the public prosecutor when carrying out forensic investigations.⁷⁴

In El Salvador, a National Commission on the Search for Disappeared Persons was created by decree in August 2017.⁷⁵ The Commission is tasked with formulating a national search plan and facilitating its implementation. One of the Commission's functions is to promote the right to access justice for victims of human rights violations and to transfer information, at their request, to competent authorities⁷⁶. The decree therefore adopts a victim-centred approach

65 ICMP, above note 63.

66 Republic of Colombia, Decreto 589 de 2017 por el Cual se Organiza la Unidad de Búsqueda de Personas dadas por Desaparecidas en el Contexto y en Razón del Conflicto Armado, 5 April 2017, available at: <https://tinyurl.com/y7lecbwa>.

67 *Ibid.*, Art. 3.

68 *Ibid.*, p. 6.

69 *Ibid.*, Art. 3.

70 *Ibid.*, Art. 5(13).

71 See Republic of Peru, Ley No. 30470 de búsqueda de personas desaparecidas durante el período de violencia 1980–2000, 22 June 2016, available at: busquedas.elperuano.com.pe/download/url/ley-de-busqueda-de-personas-desaparecidas-durante-el-periodo-ley-n-30470-1395654-1.

72 *Ibid.*, Arts 1, 2.

73 *Ibid.*, Art. 5.

74 *Ibid.*, Art. 8.

75 Republic of El Salvador, Decreto No. 33, Creacion de la Comision Nacional de Busqueda de Personas Adultas Desaparecidas en el Contexto del Conflicto Armado de El Salvador, 21 August 2017, available at: www.refworld.org/es/pdfid/59d28c8e4.pdf.

76 *Ibid.*, Art. 6(c).

whereby the Commission may contribute to justice if victims and families formulate a request in this respect.

Finally, in Nepal, while the Enforced Disappearances Enquiry Commission is not overtly a purely humanitarian endeavour,⁷⁷ the Enforced Disappearances Enquiry, Truth and Reconciliation Commission Act does not contain provisions regarding the use of evidence in a criminal process. This is particularly concerning since the Commission is also vested with extensive powers regarding the excavation and exhumation of mass graves.⁷⁸

As the above examples illustrate, in most countries where special legislation has been enacted to facilitate the search for missing persons – with the exception of Nepal and Cyprus – the relevant legislation contains provisions for coordination and cooperation between tracing investigations and criminal investigations and prosecutions. This is so even when the legislation explicitly mentions the humanitarian nature of the missing persons' commission or tracing mechanism. As explained below, these procedural as well as operational arrangements are essential to ensuring that the tracing investigation does not hinder the course of justice.

A specialized unit within the OMP to carry out or assist prosecutions?

In Sri Lanka, a number of considerations with respect to the magnitude of the missing persons problem, the poor track record of the Attorney-General's Department on human rights-related issues,⁷⁹ and the need for capacity support in forensic investigations⁸⁰ justified the setting up of a specialized body to carry out or assist in the carrying out of tracing investigations – the OMP. While the OMP could take the lead in investigations into the fate of missing persons, as explained previously, its work ought not to be artificially separated from criminal investigations.

Drawing from comparative experiences, and given the specific challenges of the Sri Lankan context, a number of options were available in terms of institutional arrangements for the OMP. However, it was paramount that the option finally adopted enabled coordination and cooperation between the OMP and other judicial mechanisms, whether regular or *ad hoc*. This is because the OMP may uncover international as well as domestic crimes in the course of its investigation.

These concerns were taken into consideration by the drafters of the OMP Act. According to the Act, the OMP is tasked *inter alia* with reporting to the relevant law enforcement or prosecuting authorities any offence uncovered in the course of

77 See Federal Democratic Republic of Nepal, Enforced Disappearances Enquiry, Truth and Reconciliation Commission Act, 2071 (2014), 11 May 2014, Art. 25, available at: www.ciedp.gov.np/downloadfile/actsrulesguidelines_1502092337.pdf.

78 *Ibid.*, Arts 14(6–7).

79 UN Human Rights Council, *Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment on His Mission to Sri Lanka*, UN Doc. A/HRC/34/54/Add.2, 22 December 2016, para. 94.

80 OMP Act, above note 9, section 17(2).

the investigation.⁸¹ In addition, this author argues that evidence collected by the OMP should ideally be made available to assist criminal investigations. As explained previously, this would avoid undue interference with ongoing or future criminal investigations.⁸²

Institutional arrangements may facilitate such coordination. A possible option to ensure the coordination of criminal investigations with that carried out by the OMP would have been to invest the OMP with prosecutorial powers. Such a model would have been similar to that adopted for the Sri Lankan Bribery Commission.⁸³ However, given the resistance to accountability for grave human rights violations in some political and public spheres, this option was not considered.

Although the OMP Act does not embed a special prosecutor within the OMP, other institutional arrangements may nonetheless be made to ensure coordination with criminal investigations. Indeed, while the Act provides for the OMP's basic structure,⁸⁴ it also specifies that the Office may establish committees, divisions and/or units to enable the fulfilment of its mandate.⁸⁵ Notably, the Act mandates the Office to identify avenues of redress to which missing persons and relatives of missing persons are entitled.⁸⁶ On this basis, the OMP may make recommendations for prosecutions based on evidence collected in the course of its investigations. The carrying out of this function may justify the setting up of a specialized sub-unit. That sub-unit may be dedicated to analyzing evidence of criminal conduct and making recommendations for the prosecution of specific cases. It could also be charged with liaising with prosecutors and criminal investigators.

Whether or not this sub-unit is eventually created to facilitate cooperation between the OMP and other institutions in charge of criminal investigations, coordination and cooperation between the various institutions carrying out investigations will be required.

The need for institutional cooperation

Cooperation between the OMP and prosecutorial authorities will be essential to enable the sharing of information as well as to ensure that the activities carried out by the OMP do not hinder the pursuit of justice. Any difficulties with respect to the coordination of the tracing and criminal investigations are likely to hinder both these investigations.⁸⁷ Collaboration will be needed when dealing with

81 *Ibid.*, section 12(h).

82 See above section "Humanitarian and Criminal Approaches: Converging Investigations".

83 Sri Lanka, Bribery Commission Act No.19 of 1994, sections 12, 13.

84 OMP Act, above note 9, sections 16, 17, 18.

85 *Ibid.*, section 11(e).

86 *Ibid.*, section 10(d).

87 For example, in South Africa a tracing body known as the Missing Persons Task Team (MPTT) has been placed within South Africa's National Prosecuting Authority (NPA). There have been allegations of selective investigations levelled against the MPTT by certain victims. See "NPA missing Persons Task Team Under Fire", *Press Reader*, 15 February 2016, available at: www.pressreader.com/south-africa/the-new-age-free-state/20160215/281702613768477.

questions of investigative strategies, and handling both testimonial and physical evidence. In addition, given the current institutional arrangements under the OMP Act, whereby investigations into gravesites are carried out under the purview of the Magistrates' Courts, this coordination and cooperation will also be necessary to ensure progress in the OMP investigations. Indeed, if inter-institutional arrangements derail, or if the criminal investigations stall, the tracing investigation will also be paralyzed.

As far as testimonial evidence is concerned, it is important to bear in mind that a witness statement obtained by the OMP may eventually differ from – or contradict – one obtained in a criminal investigation. In fact, the duplication of statements to parallel investigations invariably increases the chance of contradictions between the various statements made by the same witness.⁸⁸ In addition, given that the purposes of both investigations will be presented and perceived as different, the stakes for the witnesses and the motivation for giving a statement to either investigation are also likely to differ. This, in turn, may increase the likelihood of discrepancies. As a result of contradicting statements, key testimonial evidence risks being discounted in a criminal trial.⁸⁹ In addition, in the course of its investigation, the tracing body may reveal sensitive information to witnesses that it hears or interrogates. In some cases, the revealing of information may be detrimental to the prosecutorial work and strategy. Indeed, if witnesses and suspects are made aware at an early stage of key information regarding the course of the criminal investigation, they may anticipate the prosecutorial policy and may make strategic choices that they would not otherwise have made. This could also negatively impact their decision to further collaborate with the OMP investigation. In order to minimize the risks of this occurring, it will be essential for the OMP to closely liaise with prosecutorial authorities when carrying out its investigations. In this respect, the indefinite postponement of the establishment of the Special Prosecutor's Office is a matter of grave concern. Indeed, families of disappeared persons have often expressed distrust in the Attorney-General's Department.⁹⁰ For this reason, a close collaboration between this department and the OMP may be perceived as problematic.

Finally, cooperation between the OMP and the prosecution will be necessary to ensure the transfer and sharing of evidence.⁹¹ The question of who ultimately supervises the handling, transfer and preservation of physical and

88 See, for example, International Criminal Tribunal for Rwanda, *Prosecutor v. Akayesu*, Case No. ICTR-96-4-T, Judgment (Trial Chamber), 2 September 1998, paras 237–238.

89 International Criminal Court, *Prosecutor v. Lubanga Dyilo*, Case No. ICC-01/04-01/06, Judgment Pursuant to Art. 74 of the Statute (Trial Chamber I), 14 March 2012, para. 479.

90 CTF, *Interim Report on the Office on Missing Persons Bill and Issues Concerning the Missing, the Disappeared and the Surrendered*, August 2016, p. xvii, available at: <https://tinyurl.com/yctq5qy8>.

91 In Bosnia and Herzegovina, the Missing Persons Institute collects, classifies and preserves documents relating to missing persons, and shares such information with the Office of the Prosecutor of Bosnia and Herzegovina. Further, the Institute carries out joint investigations with the Special Department on War Crimes located within the Office of the Prosecutor and forwards exhumations requests to the latter. See, in this regard, ICMP, above note 24, p. 131.

testimonial evidence relevant to both the criminal and tracing investigation would have to be resolved.⁹² In addition, operational arrangements will also have to be put in place to facilitate the sharing of evidence between the OMP and prosecutorial authorities.

Operational aspects: Enabling the sharing of information and evidence

In order to enable the OMP's effective contribution to tracing investigations, standard operating procedures should be adopted to ensure that the evidence collected by the Office – whether physical or testimonial – will be admissible in a criminal process. Another important consideration pertains to the interpretation of the scope of the OMP's confidentiality obligation. Indeed, if this obligation is interpreted too broadly, it may prevent the OMP from sharing crucial information with the prosecution.

Standards for evidence collection

Special care must be taken to ensure that any handling of evidence by the OMP, whether physical or testimonial, does not compromise, render inadmissible or lower the probative value of this evidence in a judicial process, whether international, domestic or hybrid. Therefore, the collection, handling and preservation of evidence by this body must follow the same standards as those required in domestic as well as international criminal proceedings. For example, the chain of custody for physical as well as testimonial evidence must be rigorously documented throughout.⁹³ In addition, the sampling of physical evidence as well as the excavation of mass graves must follow criminal standards to ensure that no evidence relevant to a criminal investigation deteriorates or is lost.⁹⁴

Interestingly, the OMP Act provides that excavations and exhumations of mass graves must be carried out under the purview of a Magistrates' Court,⁹⁵ ostensibly to ensure that these are conducted in accordance with standards normally followed in criminal investigations. The OMP's role, limited to that of an observer, will be to ensure that the excavation, exhumation and "other proceedings pursuant to the same"⁹⁶ are done in a manner that will not

92 In Bosnia and Herzegovina, since 2011, the Prosecutor's Office has exercised full supervisory responsibilities over exhumation activities relating to both tracing and criminal investigations. See *ibid.*, p. 46.

93 OMP Manual, above note 35, Chap. 5, "Receiving and Procuring Information".

94 *Ibid.*, Chap. 6, "On-Site Investigations".

95 OMP Act, above note 9, section 12(d). In a partial recognition of the intricate nature of tracing and criminal investigations, the OMP Act limits the role of the OMP for the carrying out of excavations and/or exhumations of gravesites. While the Office may apply to the Magistrates' Court with territorial jurisdiction for an order to carry out excavations and/or exhumations, its subsequent role as envisaged in the Act will be limited to that of an observer. Accordingly, excavations and exhumations must be carried out under the purview of a Magistrates' Court.

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

compromise the identification of remains and subsequent OMP investigations into the fate and whereabouts of missing persons. Under the Act, the judiciary's involvement in investigations relevant to the OMP mandate is not limited to excavations and exhumations. In fact, although the OMP may carry out searches of suspected places of detention, the conduct of the search may be regulated by guidelines formulated by the minister of justice and approved by Parliament.⁹⁷ This provision is also meant to ensure that the search is carried out in compliance with standards typically adopted in criminal proceedings.

While provisions in the OMP Act evidence the drafters' concern for the probative value of physical evidence collected in the course of on-site investigations, a similar concern does not arise for the handling and preservation of other types of evidence, including physical and testimonial evidence otherwise received and procured by the OMP. However, this evidence will be equally relevant to criminal investigations. Therefore, when handling received or procured documents or audio/video recordings, the OMP must also comply with investigative best practices to ensure that their probative value is preserved. Documents and audio/video recordings are physical evidence, and as such, their probative value depends on proof that no one has forged or tampered with them. This is best provided by producing a written chain of custody record; such a record documents the collection and handling of a piece of physical evidence from its creation (in the case of documents and recordings) until the moment it was transferred to the relevant criminal court. The OMP must therefore adopt standard operating procedures for the systematic documentation in writing of the chain of custody of physical evidence.⁹⁸ It is also essential that physical evidence is stored in a manner that is appropriate to ensure its preservation.⁹⁹ The Office would also need to adopt standard operating procedures for witness examination, and investigators conducting the interviews and recording the statements must be specifically trained in investigative best practices for criminal investigations.¹⁰⁰

The adoption of standard operating procedures for the collection, handling and preservation of evidence would enable the sharing of that evidence with criminal investigators, provided that the evidence is not covered by a confidentiality agreement.

Scope of confidentiality

At the conclusion of an investigation into each case, the OMP must inform the relatives of the missing person of his or her fate or whereabouts and the

⁹⁷ *Ibid.*

⁹⁸ International Institute of Higher Studies in Criminal Sciences, *Siracusa Guidelines for International, Regional and National Fact-finding Bodies*, eds M. Cherif Bassiouni and Christina Abraham, Intersentia, Cambridge, 2013, guideline 8.6.

⁹⁹ *Ibid.*, guideline 8.7: "physical evidence should be properly preserved and protected from contamination while in the custody of the fact-finding body".

¹⁰⁰ OMP Manual, above note 35, Chap. 5, "Receiving and Procuring Information".

circumstances in which that person went missing.¹⁰¹ However, the provision of information to relatives is subject to the Office's obligation of confidentiality under the OMP Act. Section 15 of the Act provides that "notwithstanding anything to the contrary in any written law, except in the performance of his duties under this Act, every member, officer, servant and consultant of the OMP shall preserve and aid in preserving confidentiality with regard to matters communicated to them in confidence".¹⁰² However, the scope of the confidentiality obligation under this section is not defined in the Act.

A broad interpretation of the scope of confidentiality under section 15 could deprive families of essential information regarding the circumstances in which the person went missing and therefore hamper the right to truth. Such an interpretation could also impede the pursuit of justice. In light of this, it is essential that the determination of the scope of confidentiality be guided only by two imperatives: (1) the safety of witnesses and (2) victims' right to truth and justice. In order to strike a balance between these two objectives, the scope of confidentiality agreements should ideally be limited to potentially identifying information.¹⁰³ It should not be extended to other information unless absolutely necessary to obtain key information¹⁰⁴ or to ensure the witness's safety. This would have to be assessed on an individual basis and justified in light of the circumstances. For confidentiality agreements to be used on a strict need basis, the OMP will also have to develop a full-fledged witness protection programme that will encompass a wide range of protection measures to replace or complement the granting of confidentiality.¹⁰⁵

Conclusion

While humanitarian and criminal approaches to investigations into missing persons cases proceed from a different logic and ultimately have different purposes, operationally they tend to converge and overlap. In particular, both investigations pursue the same type of evidence and exercise similar investigative powers. For this reason, if not integrated or coordinated, they may compete for access and

101 OMP Act, above note 9, section 13(1)(d).

102 *Ibid.*, section 15(1).

103 Federal Democratic Republic of Nepal, Commission of Investigation on Enforced Disappeared Person Rule, 2072 (2016), 13 March 2016, Rule 28(1), available at: www.ciedp.gov.np/downloadfile/CIEDP%20Rules_1464689744.pdf; Bosnia and Herzegovina, Witness Protection Program Law, 2003, Art. 6(2), available at: <https://advokat-prnjavorac.com/legislation/The-Law-on-Witness-Protection-Programme-in-Bosnia-and-Herzegovina.pdf>; Republic of Kenya, Witness Protection Act, 2012, section 23(3), available at: www.unodc.org/res/cld/document/ken/witness-protection-act_html/Kenya_Witness_Protection_Act_Revised_Edition_2012.pdf; Republic of the Philippines, An Act Providing for a Witness Protection, Security and Benefit Programme and for Other Purposes, 24 April 1991, sections 3, 7, available at: www.lawphil.net/statutes/repacts/ra1991/ra_6981_1991.html.

104 It is noteworthy that when the witness's concerns are not related to his/her security, granting confidentiality to his/her information is rarely sufficient to incentivize participation in a truth-seeking process for the reasons explained in the "Argument 2" section above.

105 OMP Manual, above note 35, Chapter 3, "Witness Protection".

custody of evidence and interfere with one another. In addition, the handling of evidence by various institutions in charge of criminal or tracing investigations may compromise the evidentiary value of the information collected. In light of this, an integrated approach between criminal and tracing investigations is required. This approach was adopted in most countries where institutions with a mandate similar to that of the OMP were created.

In Sri Lanka, the perception that a purely humanitarian approach would lessen the resistance to the OMP and encourage participation in the institution had gained some traction within civil society prior to the adoption of the OMP Act. However, as explained in this article, such a perception is unfounded. Any progress in tracing investigations would necessarily render the prospect of prosecutions for crimes relating to disappearances and/or death of missing persons more likely. Therefore, those who oppose prosecutions will also oppose the OMP for this very reason. Similarly, a stated humanitarian approach to the OMP is unlikely to convince perpetrator witnesses to collaborate.

The OMP Act indirectly recognizes the overlapping scope of criminal and tracing investigations by bringing the excavation and exhumation of gravesites under the purview of the Magistrates' Courts. It also specifies that the minister of justice may issue guidelines for on-site investigations in suspected places of detention. However, the Act does not offer guidance regarding the handling and preservation of other evidence which may be equally important for criminal investigations, nor does it specify the scope of confidentiality. This evidences a limited understanding of the intricate nature of tracing and criminal investigations. It is therefore crucial that the OMP issues rules to fill this legislative gap in a manner that would ensure the sharing of evidence with prosecutorial authorities.

Given that the OMP investigations are formally separated from criminal investigations, an in-depth collaboration between the OMP and prosecutorial authorities will be required to ensure that the various investigations do not interfere with one another. Unless and until the Special Court and Special Prosecutor's Unit are created, the OMP will have to coordinate its investigations with regular judicial institutions, including the Magistrates' Courts and the Attorney-General's Department. This is problematic given the poor track record of these two institutions in many disappearance cases. It is therefore essential that special institutions dedicated to investigating, prosecuting and trying international crimes are created without further delay.

