

Comments on the Draft Guiding Principles for the search for disappeared persons

1. Introduction

- 1.1. The Office on Missing Persons (OMP) established under the Office on Missing Persons (Establishment, Administration and Discharge of Functions) Act No. 14 of 2016, has a primary mandate to provide a mechanism for searching and tracing missing persons and to clarify the circumstances in which such persons went missing, and their fate.¹
- 1.2. The OMP welcomes the opportunity to comment on the Draft Guiding Principles for the search for disappeared persons (**Draft Guiding Principles**). The efforts by the Committee on Enforced Disappearances (**the Committee**) to develop a normative framework for searching missing and disappeared persons is an important step that can assist in harmonising multiple approaches adopted when investigating the fate of disappeared persons.

2. General Comments

- 2.1. The OMP welcomes the principles enumerated in the Draft Guiding Principles and believes that they facilitate a comprehensive and holistic framework to guide the search for missing and disappeared persons. The OMP notes that the Draft Guiding Principles facilitates an investigative approach that permits both a humanitarian approach and a criminal investigation. The OMP believes that such an approach is consistent with the rule of law and reinforces the obligation on a competent authority to enforce existing laws.
- 2.2. The OMP observes that the Draft Guiding Principles could provide more tailored guidance where widespread enforced disappearances have occurred over multiple decades. In such contexts, a competent authority is required to discharge its investigative functions amidst a range of political, legal and institutional challenges.
- 2.3. The OMP encourages the Committee to draft an additional report to accompany the Draft Guiding Principles that provides guidance on considerations that informed each of the principles. In particular, further information on best practices developed by competent authorities in different jurisdictions in implementing the relevant principles would be welcome.
- 2.4. The OMP offers comments on specific principles below.

3. Comments on individual principles

Principle 1. The search for a disappeared person should be conducted under the presumption that he or she is alive

- 3.1. The OMP believes that a presumption of life underpinning the search for missing and disappeared persons reinforces existing obligations under Sri Lanka's domestic law and is an approach consistent with the rule of law.

Principle 2. The search should be governed by a public policy

- 3.2. The OMP believes that a public policy underpinning the search for missing and disappeared persons is to be welcomed. Clearly enumerated policies can signal a clear break from the past and express a commitment on behalf of the state, including members of the public service and

¹ Office on Missing Persons (OMP) established under the Office on Missing Persons (Establishment, Administration and Discharge of Functions) Act No. 14 of 2016 (OMP Act), Section 2(a).

law enforcement authorities, to establish the truth and provide justice for enforced disappearances.

- 3.3. However, the OMP believes that such a policy should be informed by the rights of the disappeared and their families. Often systemic impunity is a cause of widespread disappearances. Thus, a public policy should be informed primarily by the right to truth and right to justice of the disappeared and their families.
- 3.4. A rights-based approach would facilitate a holistic response to widespread disappearances. It can facilitate the inclusion of an array of related issues including those related to non-recurrence such as vetting of personnel in the public service and security sector, memorialisation, repairing the harm caused to families of the disappeared, and victim and witness protection.
- 3.5. However, OMP notes that in contexts where enforced disappearances have occurred in a large scale over several decades, policy statements can amount to mere tactical concessions on behalf of the state, in lieu of genuine and robust support for investigations. Therefore, a clearly articulated public policy should be strengthened by the inclusion of explicit and time bound commitments for the enactment of relevant legislation and for the provision of necessary financial resources.

Principle 3. The search should be immediate

- 3.6. The OMP acknowledges that a search should be immediate when information concerning a disappearance has come to the attention of a competent authority in a timely manner. However, where a competent authority is established many years after the occurrence of widespread disappearances, investigations must be initiated with strategic considerations in mind, including the existence of relevant evidence and public importance of the case.

Principle 4. The search should be carried out with a strategic approach

- 3.7. The OMP observes that a strategic approach is an essential component of effective investigations, especially where disappearances have occurred over multiple decades in a widespread and systemic manner and or as part of armed conflict. Further, such a strategic approach should also facilitate the investigation of all those involved in the commission of enforced disappearances, directly or indirectly, irrespective of their rank or position.
- 3.8. The OMP recommends that principle four be amended to explicitly require states to support such a strategic approach in investigating enforced disappearances through the enactment of relevant legislation.

Principle 5. The search should be exhaustive

- 3.9. The OMP agrees with the principle that the search for the disappeared person and the criminal investigation of the persons responsible for the disappearance be mutually reinforcing.
- 3.10. Where a competent authority does not have an explicit mandate to conduct a criminal investigation and a prosecution, cooperation with law enforcement agencies is essential to ensure that crimes uncovered in the course of the search for the disappeared person are investigated and prosecuted. However, the OMP notes a number of challenges to ensuring cooperation with law enforcement agencies.
- 3.11. A common challenge to ensuring cooperation among law enforcement authorities, is that sharing information can undermine the confidentiality of information. Further, multiple

investigations concerning the same set of facts can undermine the progress of investigations and the ability to use certain evidence in a subsequent prosecution.

- 3.12. In contexts where wide spread disappearances have occurred, the armed forces, police, prosecuting authorities and other law enforcement agencies have played a role in the failure to investigate and prosecute enforced disappearances. Their inability and unwillingness to investigate and prosecute often catalyses the creation of a specialised competent authority responsible for searching disappeared persons.
- 3.13. In such contexts, it is important to ensure that law enforcement authorities are reformed to address structural issues that undermine the progress of criminal investigations into disappearances. Further, it is important to vet personnel in law enforcement institutions to ensure that individuals credibly accused of human rights violations are no longer in positions of influence over the conduct of investigations, or in a position to interfere with potential witnesses.

Principle 6. The search should be effective

- 3.14. A competent authority should necessarily have an administrative structure and financial resources to conduct investigations. Further, it should have explicit legal authority to seek help from specialised international bodies, and where necessary to enter into agreements.
- 3.15. The authority to conduct unannounced visits to places of detention can assist to advance searches to locate a disappeared person.
- 3.16. Further, a competent authority should have the power to access sensitive and confidential information held by other state actors, including defence actors, when such information relates to disappearances. In order to facilitate such access, relevant legislation and policies concerning the confidentiality of national security information, records and archives should be amended to permit a competent authority to access such information. Further, a competent authority should be required to adopt measures to prevent the misuse and abuse of confidential information obtained from other actors.
- 3.17. OMP notes that in some jurisdictions the use of genetic banks has proved integral in advancing investigations. However, when establishing such measures States should be explicitly required to adopt relevant laws, policies and standard operating procedures to ensure the security, privacy and integrity of the information stored in such a bank.

Principle 7. The search should be informed

- 3.18. The OMP believes that a centralised database containing a record of all alleged disappearances within a territory can facilitate a strategic approach to investigations. Further such a database can serve a truth telling function, facilitate the memorialisation of the disappeared, and assist in providing relief and support to address the harms caused to the families of the disappeared. As stated with respect of principles 6 and 8, necessary amendments to laws and policies should be enacted to facilitate a competent authority to access all records relevant to such a centralised database.

Principle 8. The search should be coordinated

- 3.19. The OMP acknowledges the need to coordinate a search among different agencies and recommends that the refusal to cooperate with the orders of a competent authority be deemed an offence.

Principle 9. The search should be independent

- 3.20. OMP notes that the independence of a competent authority is integral to the conduct of effective investigations. A competent authority's independence must be provided for in the appointment of its members and the security of their tenure. Further, independence must be provided in the operationalisation of the competent authority including in their internal administrative and financial affairs.

Principle 10. The search should be governed by the principle of transparency

- 3.21. The OMP believes that rules and procedures of a competent authority should be made public. Further, relevant stakeholders, including families of the disappeared and civil society organisations, should monitor the competent authority's adherence to relevant rules and procedures.
- 3.22. However, ensuring full transparency in the conduct of investigations can at times be challenging. Competent authorities must often carry out their work in deeply polarised and politically fragile contexts. Basic information concerning whether the competent authority has opened an investigation can contribute to political instability and invite a backlash. This is especially the cases in instances where the alleged perpetrators or their associates continue to occupy positions of power.

Principle 11. The search is a continuing obligation

- 3.23. The OMP agrees that the obligation to search for a disappeared person is continuous until where their whereabouts have been determined with certainty or in cases where the disappeared person has deceased and their remains have been identified and returned to a family member.
- 3.24. Where the disappeared person is found alive, the obligation to disclose their whereabouts to the disappeared person's family must be subjected to the disappeared person's consent.
- 3.25. The OMP recognises the need to consult the views of the families when determining whether to continue to search when only partial remains of a deceased disappeared person has been recovered. In such contexts the OMP notes a number of challenges to making a continued search conditional on the consent of the family members. In particular, where partial remains of a disappeared person have been uncovered in the context of a mass grave site, the continuation of the search would become contingent on the consent of multiple, possibly hundreds of families, who may have divergent views on whether or not to continue the search. In such a situation, if the decision to continue the search was made conditional on the consent of the families, a competent authority would be faced with the challenge of mediating the conflicting views among families.
- 3.26. Where the families are being consulted on whether to continue a search, the OMP recommends that in such scenarios it is important to emphasise the need for a psychosocially responsive approach. There is a need to recognise that the decision-making process among families on whether to continue the search could be a complex one that involves diverse standpoints from different family members, different emotional stresses, and varying capacities to understand and reconcile with the technicalities of the investigation process (even when these may be explained to them by a competent authority).
- 3.27. These diverse standpoints and the pressure to make decisions on whether to continue or discontinue the search may cause fresh trauma and disharmony among family members. Therefore, the Draft Guiding Principles need to underscore the significance of providing psychosocial support to help mediate such decision-making processes. Such support should

consist of providing space for family members to express and explore emotions related to the disappearance, its consequences, and whether or not to continue a search.

Principle 12. The search should be participatory

- 3.28. OMP believes that the work of a competent authority, including their investigations should be participatory. Family members of the disappeared have a right to be informed and make interventions in an investigation provided that such participation doesn't undermine the progress of an investigation. Further, the competent authority should have an explicit obligation to inform family member of the disappeared of all forms of redress available to them.
- 3.29. However, as noted above, it is important to ensure that such participation is facilitated in a manner that is psychosocially responsive. If a search for disappeared persons is launched or revived many years after the disappearance, mechanisms and procedures that enable participation should take into consideration the impact of the search on the emotional wellbeing of family members. News of renewed search efforts may re-traumatise family members and some family members may have reconciled with the circumstances of the disappearances and emotional pain of the loss.
- 3.30. Some family members may elect not to participate in an investigation process and such decisions need to be respected without any stigmatization. Even in contexts where families may elect not to participate in an investigation, space could be facilitated to them, with their consent, to explore their fears or decisions to refrain from engaging in an investigation.

Principle 13. The search should be protected

- 3.31. A robust victim and witness protection framework is essential for an effective investigation. Such a framework should include families of the disappeared, witnesses, informants, and all other justice collaborators. A competent authority or a credible, independent body must be legally mandated and empowered to implement such a protection framework. A body that is charged with witness protection should be fully vetted, and persons credibly accused of human rights violations should not be among its ranks.
- 3.32. Any financial assistance that is provided to the families should be offered in a manner that respects their dignity and their right to have such support. In particular, any financial assistance provided should not increase a sense of dependency among families, undermine their agency and their will to be economically resilient through their own initiative.
- 3.33. Where criminal investigations require families to participate as witnesses it is imperative to ensure that families have access to psychosocial support to assist them. In such scenarios family members should not be treated as homogenous groups that share the same vulnerabilities. Some amongst them may have personal or professional capacities to better respond to such experiences. Any psychosocial care that is provided should not intentionally or unintentionally undermine such capacities. The principle of Do No Harm, widely accepted in humanitarian and psychosocial care provision will be useful in helping psychosocial care providers to determine the nature of support needed.

Principle 14. The search should be conducted using a differential approach

- 3.34. In facilitating a differential approach, it is important to ensure that widely held stereotypes concerning assumed vulnerabilities of certain groups are not reinforced during the search process. The Draft Guiding Principles specifies that search processes related to disappeared adolescents and adult women should be conducted with a gender perspective. It is important that gender considerations are extended to cover disappeared male and female persons of all

age groups. Stereotypical gendered norms place adult men and older men and women as requiring less gender considerations which may undermine their ability to receive necessary support.

- 3.35. The Draft Guiding Principles should be amended to explicitly recognise age appropriate support as a specific category. Special consideration of elderly relatives (e.g. elderly parents) children (e.g. toddlers, adolescents) need consideration to ensure that service providers have planned to respond to such diversity.
- 3.36. Families of the disappeared, especially female relatives of the disappeared, have been subjected to sexual harassment and at times violence when they have attempted to inquire after their missing loved one. It is important that specific measures are adopted across the state sector to ensure that families of the disappeared are protected from all forms of sexual harassment and violence.
- 3.37. Further a differential approach, may mandate the provision of comprehensive psychological care and psychosocial support. At times such support can inadvertently increase a sense of helplessness and vulnerability among families. As such, psychosocial support should be provided in the best interest of the families, with a view to strengthen their resilience and coping mechanisms. Further, such support should strive to reduce their sense of dependency on the state and other agencies that provide psychosocial care. Caution should be exercised to ensure that their identity as the family member of a disappeared person does not override their other family and social identities and skills and capacities to progress in life.

Principle 15. The search should guarantee respect for human dignity

- 3.38. Ensuring the dignity of victims include multiple considerations such as the manner in which public officials interact with victims, and more broadly in how they are viewed and dealt with throughout the search process.
- 3.39. The OMP notes that an important facet of ensuring respect for the dignity of victims is facilitating sensitive and respectful media coverage of disappearances and related investigation processes. Media coverage of investigations may lean on interpretations related to political standpoints or social narratives that favour selected constituencies. Such narratives may cause judgemental coverage of disappearances and search processes resulting in stigmatization of families of the disappeared, and cause disharmony both within society and among family members. Competent authority should adopt measures to ensure sensitive and respectful media coverage of investigation processes and of disappeared persons and their families.