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Human rights situations that require the Council's attention

Written statement* submitted by Association des étudiants tamouls de France, non-governmental organization in special consultative status

The Secretary-General has received the following written statement which is circulated in accordance with Economic and Social Council resolution 1996/31.

[30 May 2016]

* This written statement is issued, unedited, in the language(s) received from the submitting non-governmental organization(s).

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Sri Lanka's Office for Missing Persons, on Tamil Civil Society Forum perspective

Comments on the draft proposal to establish an OMP

We the undersigned organisations and individuals from the North-East of Sri Lanka submit as follows our view on the draft outline of the proposals put forward by the Prime Minister's Secretariat and the Ministry of Foreign Affairs on the setting up of an 'Office for Missing Persons' (OMP).

The Process:

Consultations with regard to all Transitional Justice Mechanisms including the OMP were entrusted with the Task Force on Consultations functioning under the SCRM. However in the design of the OMP the perception exists that the Foreign Ministry has taken over the consultation process. The mandate and terms of reference of the Task Force are extremely vague and the process to date has been handicapped by inadequate resources and has made very little progress. In the midst of this, the Foreign Ministry, it appears, is seeking to rush through a tokenistic consultation process on the OMP. The undermining of the Task Force by the Foreign Ministry makes clear the disdainful and instrumental use of the Task Force on Consultation. This runs contrary to the observations made by the Special Rapporteur on the Promotion of Truth, Justice, Reparations and the Guarantee of Non-recurrence following his visit to Sri Lanka in April 2015 wherein he noted that, consultation with those affected by the violations is essential and that they cannot be simply presented with 'solutions' in the design of which they were given no role. In his observations on his second visit to Sri Lanka the Special Rapporteur noted that 'consulting victims is crucial because it constitutes in itself a mode of recognition and respect – that people whose rights were violated, often in the most brutal ways, will be listened to respectfully and their views taken seriously as to the most effective ways of redressing those violations'.

The Government despite repeated requests has also refused to engage with victims who are abroad in the consultation exercise. The OHCHR in its Rule of Law Tools on Consultations raises the need to consult with all victims even those abroad. We are unfortunately forced to conclude that there is no genuine willingness to consult the victims on the part of the Government in the setting up of mechanisms for Transitional Justice.

We categorically state that an OMP that is designed without proper consultation with the victims and their communities would be unacceptable.

Substance:

We are constrained in our ability to respond in detail to the substantive content of the proposals. The Foreign Ministry's proposed consultation is being carried out with a two page leaflet that is quite insufficient on the details. A full draft of the proposals on the OMP should be made available for any meaningful consultation.

Missing Persons or Enforced Disappearances? : Not just about nomenclature

Enforced Disappearances is a recognised crime in international law whereas 'missing persons' is a generic term and may cover situations that do not amount to a crime. An example of the category of missing persons not falling under 'enforced disappearances' are Sri Lankan Army soldiers who are missing in action. The OMP's mandate, if it is conceived as being part of the Transitional Justice process, has to be in relation to the crime of an 'enforced disappearance', at the hands of the state, its security forces and non-state actors. The issue of soldiers missing in action is no less important, but should be kept distinct and should not be conflated with the crime of enforced disappearances. In this regard, the terminology of 'tracing' in the context of disappearances is problematic because it denies the fact that a crime has been perpetrated which must be investigated so that those responsible may be

prosecuted. It is also not clear as to whether the OMP has been mandated to carry out investigations with a view to prosecutions.

Composition of the OMP:

Without international involvement in the OMP it will be extremely difficult for the victims to place faith in the institution. Given that the Sri Lankan Armed Forces are to-date involved in threatening victims and activists in the North-East and the veneration accorded to them by most if not all major political actors in the South, it will be very difficult to envisage willingness and imagine the possibility of an OMP made up of exclusively Sri Lankan nationals, undertaking a vigorous process of evidence collection and tracing. For example, it is difficult to conceive how the OMP made exclusively of Sri Lankans, in the current power imbalance, will have the moral and practical courage to enter camps and prisons and properly investigate alleged acts of disappearances. The OMP will be sufficiently empowered to be independent only when qualified foreign individuals known for their integrity, independence and professionalism are included in its composition. We wish to stress that this is the underlying rationale of the hybrid process recommended in the OISL report and the UNHRC Resolution of March 2015.

We would recommend that the Government approach the UNWGED and or the OHCHR to recommend suitable names for appointment to the OMP. We also recommend that one half of the membership of the OMP is drawn from such a process. We also wish to emphasise that representatives of the victims and an adequate number of Tamils and Muslims with strong links to the community with lived experience in the North-East should be appointed to the OMP. Gender balance should also be a key consideration in designing the composition of the OMP.

The Appointment Process:

The Constitutional Council cannot be considered to be a sufficiently independent body capable of ensuring an independent appointment process to the OMP. The Constitutional Council as provided for in the 19th amendment, contrary to common understanding, does not provide for an independent appointment process to public institutions. This is manifested for example in the fact that 5 out of 10 members of the current council are members of the ruling coalition. The partiality of the Constitutional Council should be offset by allowing, as suggested above, the UNWGED and/or the OHCHR to recommend/appoint members to the OMP and mandating that the Constitutional Council work in close consultation with victims and their communities in making the domestic appointments. Representatives of victims should be allowed to vet nominations prior to appointment.

Prosecutions and Justice:

The leaflet issued by the Foreign Ministry says that prosecutions relating to enforced disappearance will be dealt with by 'another mechanism'. For reasons explained below this 'other mechanism' we fear refers to the current organisational apparatus for criminal prosecutions – the Police, Attorney General's Department and the Judiciary who have no credibility or willingness to investigate these serious crimes. No explanation has been provided for such dichotomisation of the tracing and prosecution aspects in addressing enforced disappearances. The ICED, which Sri Lanka is signatory to, provides that the state is obliged to investigate acts of enforced disappearance and bring those responsible to justice.

The right to truth:

We note with concern that the leaflet provides that the OMP will have discretion on the decision to share information received by it with the families of the victims. That this is not mandatory reduces the OMP's usefulness even as a truth seeking institution. The families of the victims have a right to know and this cannot be compromised. Furthermore the Government is obliged to ensure that victims of enforced disappearance or those directly affected by it have a right to obtain reparation and compensation.

Witness Protection

The Assistance to and Protection of Victims of Crimes and Witnesses Act, as was acknowledged in the UNHRC Resolutions, falls far short of providing adequate protection. Those authorities from whom protection is required find representation in the National Authority established under the Act. Out of the twelve members of the authority seven are ex-officio and represent different organs of the state including the Police and the Attorney General's Department. Given that the relatives of the disappeared are desperate for information it is likely that they will engage with the OMP even without adequate witness protection. But the Government should not take this for granted. It is the Government's responsibility to put in a proper mechanism for witness and victim protection.

Collectif La Paix au Sri Lanka, Swiss Council of Eelam Tamil NGO(s) without consultative status, also share the views expressed in this statement.
