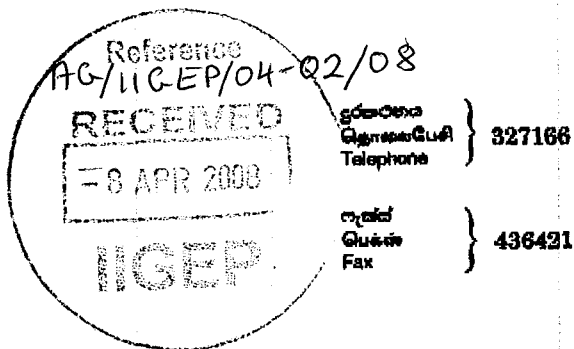




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 சட்டத்துறை அபிப்பதியின் கூடம்
 கொழும்பு 12, இலங்கை.
Attorney-General's Chambers
 Colombo 12, Sri Lanka.



RESPONSE OF THE ATTORNEY GENERAL OF SRI LANKA TO THE 6TH PUBLIC STATEMENT OF THE IIGEP

(i) Background to the establishment of the Commission of Inquiry (CoI)

In November 2006, the President of Sri Lanka HE Mahinda Rajapaksa acting in pursuance of the powers conferred on him by the Commissions of Inquiry Act, appointed a Commission of Inquiry to investigate and inquire into incidents amounting to serious violations of Human Rights including in particular fifteen incidents allegedly amounting to such serious violations. The primary purpose of establishing this fact finding Commission was to create an independent and credible mechanism that would be empowered to collect relevant material through investigation and inquiry enabling the Attorney General to institute criminal proceedings against the perpetrators identified by the Commission for having committed serious violations of Human Rights including in particular the fifteen incidents specified in the Warrant of the Commission. Secondary objectives were to (a) ascertain the correct factual circumstances pertaining to these incidents, (b) ascertain the propriety and adequacy of investigations conducted into these incidents by the routine competent authorities, (c) provide a forum for aggrieved parties to complain of losses and damage caused to them, (d) create a protective environment in which victims and witnesses could testify, (e) establish a mechanism to enable interested parties, the media and the public at large to directly ascertain the truth pertaining to these incidents, and (f) receive recommendations as to the nature of reparation, compensation etc. to be provided to the victims and other affected parties.

In view of the interest shown by certain segments of the international community with regards to certain incidents which were alleged to

amount to serious violations of Human Rights, the mandate (terms of reference) of the Commission to be established were made known to diplomatic representatives of such segments of the international community, and based on suggestions made by them, certain modifications were made to the Warrant establishing the Commission. The Commission was established only after such diplomatic representatives indicated overall satisfaction regarding the terms of reference of the Commission to be appointed. During the discussion phase with representatives of the international community, there was no objection or concern raised regarding the possible participation of the Attorney General or his representatives in the Commission that was to be established. Consequently, the Commission was appointed chaired by a retired judge of the Supreme Court carrying nearly thirty years of unblemished judicial service and comprised of seven other eminent Sri Lankans who reflect the multiple socio-ethnic diversities of the Sri Lankan community. In making appointments, due regard was paid to the need to ensure legal expertise, commitment to the promotion and protection of Human Rights, experience in conducting affairs of commissions of inquiries, management and administration of the affairs of state institutions and non-governmental organizations, need to represent the thinking of civil society and gender balance. The professional integrity, eminence and reputation, of the Commissioners have never been in doubt nor have attempts been made in the past to challenge the propriety of their decisions. It is heartening that, no person has to-date commented adversely regarding such appointments made by the President.

It is in that backdrop, that the criticisms levelled by Members of the IIGEP against the Commission and decisions taken by the Commissioners should be viewed.

The Commission of Inquiry became functional in December 2006.

(ii) Establishment and mandate of the International Independent Group of Eminent Persons (IIGEP)

In view of the need to ensure that interested parties are satisfied that the work of the Commission is carried out in a transparent manner and in accordance with international norms and standards, after detailed discussions with the international community, a separate mechanism

called the *'International Independent Group of Eminent Persons (IIGEP)'* was established **to observe investigations and inquiries conducted by the Commission of Inquiry**. The mandate of the IIGEP was discussed at length with diplomatic representatives of the international community and with officials of the office of the United Nations High Commissioner for Human Rights. The mandate of the IIGEP was finalised only after such officials indicated their overall satisfaction regarding the purpose of the mechanism and the mandate to be vested in the IIGEP. The mandate of the IIGEP did not provide for IIGEP Members to 'supervise' the conduct of the CoI or to conduct alternate investigations or inquiries. The IIGEP was only vested with an observation role. Additionally, where certain processes of the CoI were found to be short of international norms and standards, the IIGEP was empowered to suggest corrective action to the CoI. Therefore, it is clear that the role of the IIGEP is to observe the functioning of the CoI. Its mandate does not empower it to observe the functioning of other agencies and institutions of Sri Lanka which may be linked to the CoI, nor could it observe and comment on prevailing overall situation in Sri Lanka pertaining to Human Rights, or observe and comment on the status of legislation and law enforcement.

Consequent to agreement being reached regarding the mandate of the IIGEP, the international community was invited to nominate eminent persons to function as Members of the IIGEP, and such nominees were appointed to the IIGEP along with certain Assistants nominated by them. Certain countries that nominated eminent persons and the European Union undertook to fund the functioning of the IIGEP. The IIGEP became functional in the end of February 2007.

The national CoI and the IIGEP which was required to function in partnership and in harmony was a unique creation established by the Government of Sri Lanka in pursuance of its policies of transparency and commitment towards the enforcement of the domestic law in respect of alleged Human Rights violations. Such a unique hybrid mechanism has never been established in any other country.

It became evident during the initial stages of the CoI and the IIGEP, that certain Members of the IIGEP had originally understood their mandate to include 'supervising' the CoI and 'overseeing' the functioning of the Commission. This became evident when certain leading Members of the IIGEP addressed plenary meetings between the CoI and the IIGEP. That such eminent persons entertained such lack of understanding of their

mandate, is a matter of record and regret. Furthermore, as the IIGEP commenced functioning, it became evident that most Members of the IIGEP were not willing to be present in Sri Lanka and directly observe the work of the Commission, and had instead entrusted substantive duties they were originally required to perform to their respective Assistants. Such Assistants sought on numerous occasions to perform functions which were totally outside their mandate as well as certain functions of the eminent persons which could not be delegated by the respective Members to their Assistants. On such occasions, officers of the Attorney General's Department assisting the Commission who had also taken part in negotiating and settling the mandates of the CoI and the IIGEP, had to bring such excesses to the attention of the CoI and thereby ensure that the Members of the IIGEP as well as their Assistants did not exceed their respective mandates. This was met with resistance by the Members of the IIGEP and their Assistants, and they developed an acrimonious attitude towards those who attempted to restrict their role to that contained in the terms of reference of the IIGEP as reflected in the letter of invitation extended to the IIGEP Members.

(iii) Officers of the Attorney General's Department

Following the establishment of the Secretariat of the Commission of Inquiry, one of the first functions of the CoI was to present a request to the Attorney General to nominate some officers of the Attorney General's Department, to assist the Commission in its activities. In view of the request made by the Commission and the provision of the Warrant of the Commission requiring all public servants to assist the Commission when their services are solicited, the then Attorney General the late Hon. K.C. Kamalabayson, PC nominated a team of five officers of the Attorney General's Department headed by the then Solicitor General to assist the Commission. In making these nominations, the then Attorney General identified the need to nominate senior officers who had assisted in the establishment of the Commission and the IIGEP, officers who possessed experience in assisting Commissions of Inquiry and officers who possessed experience in the conduct of criminal prosecutions. They were also persons who possessed necessary experience and unblemished professional integrity. Upon receiving the nominations, being satisfied

with the nominations received, the Commission of Inquiry appointed the nominated officers as Members of the *'Panel of Counsel'* of the Commission of Inquiry, and were required to report on the affairs of the Commission directly to the Commission itself.

In view of allegations ranging from a 'conflict of interest' to 'competing interest' levelled against the Attorney General and his officers by the current membership of the IIGEP, it becomes imperative to reiterate certain matters of fundamental importance.

- (a) The institution of the Attorney of Sri Lanka is not a political institution. It is a government department with constitutional and statutory functions, in the fields of enactment of legislation, fundamental rights, criminal justice and advising the Head of State, State agencies and public officers.
- (b) The Attorney General of Sri Lanka is appointed by the President, when a vacancy arises in such position. Both the incumbent Attorney General and his predecessor were the senior most officers of the Attorney General's Department and Solicitors General, when they were appointed as Attorney General.
- (c) The Attorney General of Sri Lanka is not a Cabinet Minister and does not sit with the Cabinet of Ministers. He does not and is not required to take political decisions.
- (d) The functions and decisions of the Attorney General are amenable to judicial review.
- (e) When exercising functions within the criminal justice system, the Attorney General is required to function in a quasi-judicial manner.
- (f) Other than with regards to offences amounting to bribery and corruption, the Attorney General is empowered to receive and study notes of investigations for the purpose of considering the institution of criminal proceedings and forward indictment or charges against accused persons. Thereafter, the prosecution of the case is conducted by a representative of the Attorney General. Ordinarily, such notes of investigations are received only after the conduct of criminal investigations.

- (g) The Attorney General does not 'get involved' in the conduct of investigations, or 'direct' the conduct of criminal investigations. Law enforcement officers including the police are not supposed to 'act on the instructions' of the Attorney General or his officers. The Attorney General only 'advices' the conduct of investigations, particularly with regard to matters in respect of which his advice is sought and with regards to matters of law.
- (h) Under the criminal justice system of Sri Lanka, it is necessarily the function of the Attorney General to prosecute persons responsible for having committed criminal offences in the course of committing Human Rights violations. During the last ten years, the Attorney General has instituted criminal proceedings against nearly one thousand security forces and police personnel, in respect of crimes committed by them, including Human Rights violations taking the manifestation of crime.

Following their appointment to the Commission, the officers of the Attorney General's Department assisting the Commission have been performing the following functions:

- (a) Drafting the internal rules of procedure of the Commission.
- (b) Recommending action to be taken with regard to public petitions received by the Commission.
- (c) Participating in certain internal meetings of the Commission and expressing opinion.
- (d) Suggesting avenues of further investigation.
- (e) Participating at visits to scenes of crime.
- (f) Examining witnesses who appear before the Commission at investigations and inquiries.

It is of paramount importance to note that, officers of the Attorney General's Department assisting the Commission have not exercised discretionary authority. They have merely 'assisted' the Commission on the direction of the Commissioners. It is of importance to note that, up to this moment, at all instances, the relevant officers have functioned on directives given by the Commission and on instructions of the Commission. At no instance have these officers acted on their own

volition or exercised any statutory function vested in them by virtue of being representatives of the Attorney General. The primary function entrusted to these officers by the Commission in certain cases being investigated and inquired into by the Commission, is to assist the Commission in the examination of witnesses by putting questions to them. In such instances, the scope and the nature of examination of witnesses are determined by the Commission, and often Commissioners have openly indicated to Counsel the areas to be covered during such examination. At no instance have the counsel violated such directives and have at all times acted in the best interests of the Commission. On no occasion have any of the Commissioners complained of the conduct of the counsel assisting the Commission, and in fact have been complementary of their role. The Commission has concluded and openly commented that the assistance of the Counsel from the Attorney General's Department was indispensable to the functioning of the Commission of Inquiry and has withstood pressures exerted on them by the IIGEP to terminate their services.

Whether or not officers of the Attorney General's Department could come under enquiry by the CoI, has to be determined by an examination of the Warrant establishing the Commission. The Warrant makes no reference to such effect. In addition to inquiring into the incidents proper, the CoI has been mandated to inquire into the sufficiency and propriety of investigations conducted by the routine competent authorities. Therefore, under this second limb of the terms of reference, only those who took part in the original investigations would come under inquiry. That it was never intended by the President to subject the Attorney General or his officers to enquiry by the Commission is evident by the contents of a letter of clarification dated 5th November 2007, sent to the Commission by the Secretary to the President on the occasion of the extension of the term of office of the Commission by another year. Issuing this letter became necessary, in view of certain views expressed by Members of the IIGEP to the President. In the said letter, the intention of the President has been made manifestly clear.

Under the Sri Lankan criminal justice system, there is no 'Special Prosecutor' for criminal cases amounting to Human Rights violations. All prosecutions other than prosecutions for bribery and corruption are at the instance of the Attorney General. Therefore, consequent to the identification of the perpetrators of serious violations of Human Rights