



**PRESIDENTIAL COMMISSION OF INQUIRY TO INVESTIGATE  
AND INQUIRE INTO ALLEGED SERIOUS VIOLATIONS OF HUMAN RIGHTS**

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**RESPONSE OF THE COMMISSION OF INQUIRY  
TO THE PUBLIC STATEMENT NO. 06 OF THE IIGEP**

Part 1 of the Public IIGEP Statement includes a summary incorporating the following:

- 05 reasons for concluding that the proceedings of the Commission lack transparency and have not met basic international norms and standards
- 06 recommendations for the guidance of the government and the Commission
- 03 reasons for their decision to withdraw from the Commission as observers.

Part 02 describes in detail the above reasons and recommendations and includes a reference to norms and standards by which the work of the Commission has been assessed.

The Commission rejects the conclusion that its proceedings lack transparency and do not meet international norms and standards.

**Transparency**

Proceedings in courts of law are held to be transparent because they are open to the public.

The Commission is conducting inquiries into two cases at present and these proceedings are and will continue to be open to the public, unless there are exceptional circumstances. The proceedings are being observed by the IIGEP and are therefore under international scrutiny. The IIGEP has been provided with copies of all investigation files, court records, documents, transcripts of proceedings etc in English, except translations of some transcripts of proceedings, due to resource constraints. The lawyers watching the interests of the parties are being provided with all relevant documents. The rules and procedures of the Commission are in any event in the public domain.

These are the criteria for judging whether the proceedings are transparent or not. Therefore the conclusion of the IIGEP that the inquiry proceedings of the Commission lack transparency has no basis or merit.

Reference has been made to the investigations carried out by the Commission in camera as opposed to public inquiries. The process has been made clear to the IIGEP several times and yet they continue to make the claim that the proceedings lack transparency because the investigations were not open to the public. The Commission's investigations involved recording of statements from witnesses who could shed light on the incidents under investigation. This process was carried out to decide whether :

- there is an identifiable suspect or group;
- there is evidence which points to the suspect or group;
- the evidence, if believed, would result in the suspect or group being held responsible for the incident.

In other words, whether there is a prima facie case against anyone.

This process became necessary because in almost all the cases referred to the Commission, the investigations conducted by the Police were far from adequate to proceed directly to hold public inquiries.

In the view of the Commission, this is a process which is not open to the public and the question of transparency at such investigations, as far as it is known, has never been raised anywhere in the world.

The Commission's inquiry stage, which is open to the public, is aimed at:

- testing the credibility of witnesses, who give evidence on oath or affirmation before the Commission ;
- providing an opportunity to the public to become aware of the nature of the evidence given before the Commission and of witnesses who do not respond positively when giving evidence;
- determining the person or persons responsible for the incidents alleged;
- considering what steps are required to prevent a recurrence;
- examining the adequacy of investigations done earlier and identifying lapses.

Unfortunately, at this crucial stage in important cases, namely, the killing of seventeen (17) aid workers of the international non-governmental organization *Action Contre La Faim*, in early August 2006 and the killing of five (5) youths in Trincomalee on or about 2<sup>nd</sup> January 2006, the IIGEP is withdrawing from the Commission.

### **International norms and standards**

The IIGEP in its final statement have identified these as follows:

- international conventions binding on Sri Lanka
- UN declarations or statements
- basic state practice

#### International conventions/UN declarations

It is significant that under the first two categories the IIGEP has only referred to the absence of command responsibility and witness protection. These have not yet entered our statute books. However the criminal law provides a basis to hold senior officers accountable for the acts of subordinates, and the law on victim and witness protection will soon become a reality.

It is patently clear that all other norms and standards have been complied with. All of their other comments relate to alleged shortcomings under the third category,

#### Basic state practice

- *Conflict of interest*

The IIGEP refers to the role played by the Official Bar in the proceedings of the Commission. The IIGEP has characterized it as inappropriate and impermissible.

The Official Bar has no role in the proceedings but it is correct that some counsel assisting the Commission are members of the Attorney General's Department. They were co-opted to the Commission at its request and act under the directions of the Commission in so far as their work in the Commission is concerned.

The IIGEP statement to the effect that "the Attorney General is the legal adviser to the Government and must protect the interests of the Government when actions by its organs, including the police and the armed forces, are called into question." is a complete misreading of the role of the Attorney General in Sri Lanka. It is in making this assumption that the

IIGEP has erred in concluding that there is a conflict of interest. The IIGEP cannot be unaware that the Attorney General in the past has prosecuted police and armed personnel who have violated the laws of the land in the course of their duties.

It must be reiterated that the Attorney General is not involved in police investigations and gives advice only if it is sought and such advice is always based on the facts presented and not on any other considerations.

Members of the Commission, which comprises of 05 senior lawyers and 03 senior administrators, are conversant with the manner in which the Attorney General functions, and that is the reason why the Commission has rejected the argument of the IIGEP that there is a conflict of interest.

- *Lack of victim and witness protection*

The need to provide victim and witness protection in Sri Lanka was first realized in 2002 and since then various steps have been taken to bring in legislation. In fact the bill is now before Parliament. The wheels of new legislation move slowly, as in any other country.

The Commission commenced formulating its own scheme even before the members of IIGEP were appointed. It is not denied that it is not fully functional due to various constraints.

However, even now, with the assistance of IIGEP, evidence of witnesses who are living abroad is being successfully recorded via video conferencing. The Commission records its appreciation of the efforts and assistance of the IIGEP in making these arrangements.

In many of the cases, there are no eye witnesses to the crime itself, other than the perpetrators. The lack of victim and witness protection is not a bar to collecting circumstantial evidence which is likely to throw light on the perpetrators.

- *Investigations and Inquiries*

The IIGEP has taken the view, quoting the Shorter Oxford dictionary, that the terms “investigations” and “inquiries” are synonymous and faults the Commission for conducting investigations and inquiries separately.

The Commission, however, makes a distinction between “investigations” and “inquiries” and this has been adequately clarified earlier under the paragraph titled “Transparency”.

In support of this view, the Commission refers to the following :

- paragraph 02 of the mandate stating that His Excellency was of the view that comprehensive investigations should be carried out into these incidents and that the adequacy and propriety of the investigations already conducted, should be examined;
- paragraph 04 requires the IIGEP to efficaciously observe investigations and inquiries
- paragraph 06 directs the Commission to obtain information, investigate and inquire into the alleged incidents.

In the circumstances, the Commission rejects the contention of the IIGEP that the terms are synonymous in so far as the mandate of the Commission is concerned, particularly in the light of the inadequacy of the original investigations carried out by the police.

- *Slow pace of the Commission proceedings*

The IIGEP claims that the investigation process was slow, tedious, repetitive and included irrelevant questioning.

An investigation is a slow and painstaking process. An investigator is on a voyage of discovery to find and examine facts about a crime. There is no way to fast track an investigation unless there are eye witnesses. In the cases under review, the purported perpetrators are probably members of the armed forces or armed groups and witnesses are slow to respond to questions through fear. There is no alternative but to examine the witnesses carefully at length to make them divulge what they know.

- *Lack of full co-operation by State bodies*

There has been only one instance during the investigations, when security considerations were relied upon to withhold information from the Commission. This sensitive matter is being handled carefully by the Commission, and will be resolved during the public inquiry stage.

Another related matter is the absence of a Magistrate to make a statement during an investigation, although summons had been served on him. Action has been taken in terms of Sections 10, 11 and 12 of the Commissions of Inquiry Act No. 17 of 1948 in this regard.

In yet another instance, the IIGEP claimed that a file in the possession of the Human Rights Commission had not been obtained by the Commission. The file in question was finally obtained. It contained the court proceedings relating to the incident in question, which the Commission already had in its possession, and which had been shared with the IIGEP.

- *Lack of financial independence of the Commission*

This position is not denied.

However, the Commission is mindful of the fact that it is not a permanent institution, and the rules of government do not provide for the grant of full autonomy to Commissions of Inquiry, as in the case of international tribunals set up for similar purposes.

Nevertheless, the Commission is making a serious endeavour to work within the resource limitations.

### **Other Matters**

The IIGEP has also referred to the following matters in the course of their Public Statement:

- *communications being addressed directly to the IIGEP ignoring the presence of Assistants*

No comment is required by the Commission except to state that in April 2007, the Chairman of IIGEP, Justice Bhagwati himself, invited the Commission to deal directly with members of IIGEP.

- *failure to record the statements of some witnesses living abroad for several months*

As referred to earlier, their evidence is now being recorded. The public inquiry into the case in question commenced recently, and this is the appropriate time for recording their evidence.

- *appointment of Commissioners on a part time basis*

The Commission is a temporary institution and the Commissioners were engaged in their normal vocations at the time of the appointment of the Commission.

The Commissioners have endeavoured to devote as much time as possible to the work of the Commission.

It was never the intention to work 05 days in a week.

- *delay due to the Commission seeking an amendment to the Commission of Inquiry Act*

The IIGEP refers to it as follows:

... the interpretation adopted by the Commission of Inquiry Act that it could sit only if constituted by its full complement of eight members. If any Commissioner were to be absent for any reason, the Commission could not sit. In the view of IIGEP this interpretation was not based on any express stipulation of the Act or warranted by any other consideration of law.

This is a clear illustration of the manner in which the IIGEP has formed their opinions about the work of the Commission.

Within one month of their appointment, the Commissioners raised this matter with the then Attorney General, who expressed the opinion in writing that all Commissioners must be present at every sitting. The Commission initiated action at that very early stage to amend the Act to provide for a quorum for the sittings. In the course of its work several other amendments became necessary, and these have now been incorporated into the Act, but it is a fact that the process took some time.

The Commission was anxious that its proceedings would not be vitiated due to a lacuna in the law, and raised this matter out of an abundance of caution.

The Commission regrets the reference made by the IIGEP to this matter.

- *direction made by His Excellency regarding the role of the Attorney General*

The direction complained of is as follows:

The President did not require the Commission to in any way to consider, scrutinize, monitor, investigate or inquire into the conduct of the Attorney General or any of his officers with regard to or in relation to any investigation already conducted by the relevant authorities

The IIGEP has dealt with this matter in detail and contend that this is one of the reasons for their withdrawal from the Commission.

The Commission's mandate is to ascertain who was responsible for the tragic incidents that have taken place.

The Commission fails to understand how this task could be accomplished by investigating or inquiring into the role of the Attorney General.

The Commission and the IIGEP have had access to all the evidentiary material in relation to these incidents.

The Commission does not see any basis to look into the role of the Attorney General in any of these cases.

- *Lack of a work plan*

The IIGEP has referred to the lack of a work plan to guide the work of the Commission.

The Commission, till recently, was conducting investigations into three of the high profile cases entrusted to it. The process of investigation is necessarily a voyage of discovery and one statement could lead to many other statements or to none at all. In these circumstances, it was not possible to prepare a work plan as desired by the IIGEP.

Had such a plan been prepared, it too would have been the subject of criticism, because no one can foresee the course an investigation is likely to take.

## **Conclusion**

The IIGEP was invited by His Excellency the President to efficaciously observe the work of the Commission. They were required not merely to observe investigations and inquiries but to ensure that the desired result is achieved.

The public inquiries commenced only this year, and by that time the IIGEP had already announced their intention to leave. Most of their comments relate to the investigation stage of the Commission.

It is unfortunate that having efficaciously observed the work of the Commission, the IIGEP has found it necessary to make, mostly, negative comments in relation to its work.

If the Commission has failed as implied by the IIGEP, the Commission needs to question what contribution they have made by their efficacious observations.

Having perused all the documents made available to them in each of the cases falling under the purview of the Commission, could they not have given any guidance to the Commission on how to proceed in each of these cases?

The Commission is of the view that the IIGEP has mainly concentrated on the areas of disagreement in their report, and failed to see the positive aspects, to which they themselves contributed. They have not taken into consideration the constraints that exist in this country like in any other developing country. .

Recommendations made by the IIGEP are focused mainly on the Government of Sri Lanka. For example, developing the doctrine of command responsibility, introducing a victim and witnesses protection law, financial independence of the Commission, the role of the Attorney General and the appointment of a special prosecutor are matters which require a thorough study of the legal system of Sri Lanka before any recommendations are made. . Although the Commission can make recommendations on such matters, their implementation will not help the functions of this Commission in anyway.

The Commission of Inquiry has to function within the available resources and within the existing legal system of the country. The Commission is therefore unable to agree with the assessment of the work of the Commission by the IIGEP.

Notwithstanding the complaints of the IIGEP, it is necessary to place on record the major activities the Commission was engaged in and the progress made, thus far, by the Commission in association with the IIGEP:

- Established the structure of the Commission and formulated the rules of procedure of the Commission, the Investigation Unit and the Victim and Witness Assistance and Protection Unit (these rules are to be gazetted in terms of one of the new amendments to the Commissions of Inquiry Act and will become part of the law);
- Recruited staff to man the various units, including translators, interpreters, stenographers, typists etc.;
- Formulated a scheme of Victim and Witness Assistance and Protection;
- Collected material relevant to the 16 cases from the routine investigation authorities, courts, concerned parties, media etc , translated them into English, where necessary, and made copies available to the IIGEP and others;

- Held 77 meetings of the Commission, 35 meetings of the Investigation Committee and 32 meetings of the Victim & Witness Assistance and Protection Committee;
- Enrolled counsel from the Official and Unofficial Bar ;
- Held 82 investigation sessions in 04 important cases in addition to investigations conducted by the Investigation Unit;
- Held 20 public inquiry sittings in 02 of the cases;
- Recorded evidence via video link of 04 witnesses living abroad in 01 of the cases;
- Made field visits to the sites of 06 incidents and met civil society representatives, non governmental organization representatives, government officials etc.;
- Held 03 formal and several informal meetings with non governmental organizations on matters related to the cases;
- Held 05 plenary sessions with IIGEP at which progress was reviewed and matters of concern to both parties were discussed in a cordial and friendly atmosphere;
- Held numerous meetings on matters related to ongoing work of the Commission with members of IIGEP and their Assistants;
- Took steps to expedite the draft Law on Victim and Witness Protection;
- Took steps to expedite the amendments to the Commission of Inquiry Act No. 17 of 1948, to facilitate the work of the Commission;
- Conducted 03 training programmes on Victim and Witness Assistance and Protection and 02 training programmes on the conduct of Investigations;
- Arranged a two week training programme in Australia in Victim and Witness Protection for 03 senior officers;

It is also necessary to thank the IIGEP for their contribution in most of the above matters in which they were associated with the Commission. In spite of disagreements on a few matters, there has been a high level of cooperation between the Commission and the IIGEP and they did make a valuable contribution by their presence at sittings of the Commission.

Justice N. K. Udalgama  
Chairman  
Commission of Inquiry

