

IIGEP

International Independent Group of Eminent Persons

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Contact: IIGEP Public Information Office
Colombo Hilton Residence, Suite 705
No. 200, Union Place, Colombo 02, Sri Lanka
Tel: +94 (0) 11 2300306/8/9
Email: iigep@iigep.org
Website: [http:// www.iigep.org/](http://www.iigep.org/)

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PUBLIC STATEMENT

THE PRESIDENTIAL COMMISSION'S PUBLIC INQUIRY PROCESS SO FAR FALLS SHORT OF INTERNATIONAL NORMS AND STANDARDS

In November 2006, H.E. the President of Sri Lanka appointed a Commission of Inquiry (the Commission) to investigate and inquire into 16 incidents of alleged serious violations of human rights that arose in Sri Lanka since 1 August 2005. The President subsequently also invited eleven persons of international repute to form the International Independent Group of Eminent Persons (the IIGEP)ⁱ. The IIGEP was called to observe the work of the Commission and to comment on the transparency of its investigations and inquiries, and their conformity with international norms and standards. The President also invited the IIGEP to make recommendations for redress.

The IIGEP was established when the last Member's nomination was approved by the Government of Sri Lanka in February 2007. It held its fifth quarterly plenary meeting in Colombo on 17-19 February 2008, in order to review its Members' observations and conclusions over the period from mid-December 2007 to mid-February 2008.

Observations on the Public Inquiry Phase

The most important development since the IIGEP's last public statement, dated 19 December 2007, is the commencement of the Commission's public inquiry phase on 5 January 2008. The IIGEP welcomes this move by the Commission. During the November 2007 Joint Commission/IIGEP Session, the Commission advised the IIGEP that there would be no public inquiry until Parliament passed the amendments to the *Commissions of Inquiry Act (1948)*. (Subsequently, the "Commissions of Inquiry (Amendment)" Bill was passed on 7 February 2008. The amendments related primarily to the investigative powers of a Commission and the ability of a Commission to sit without its full membership.) In contrast with the *in-camera* investigations the Commission has been carrying out so far, public inquiries are expected to be held in the full view of any interested parties and particularly those most concerned, the surviving victims and the families of victims.

The IIGEP has observed the poor attendance of interested parties, such as the families of victims and civil society, in the sessions of inquiry and questions the level of publicity the Commission has given to the public inquiries. The notices in the newspapers were relatively small in size and need to be recurrent or continuous to achieve sufficient impact. It should be possible for representatives of the Commission to make personal contact with interested parties, particularly the surviving victims and the families of all victims, to ensure that these people are made aware of the intended hearings. The IIGEP has also suggested that the Commission consider holding public inquiries outside Colombo, closer to the areas where the incidents under review took place, in order to improve the accessibility of potential witnesses to the Commission.

The Commission has, as of 17 February 2008, held six public inquiry sessions into the case of the killing of five youths in Trincomalee on 2 January 2006. During these sessions, three witnesses appeared before the Commission.

The Commission summoned the Trincomalee Magistrate to testify in his capacity as the investigating Magistrate who attended the crime scene on 02 January 2006. Following intervention from the Judicial Services Commission, the Registrar of Trincomalee Magistrates Court attended the Commission of Inquiry session in his place and read out the contents of the Magistrate's report. The IIGEP is concerned that this intervention prevented the Commission from hearing direct testimony from the Magistrate regarding police action at the crime scene and his initial evaluation and instructions.

In the sessions of 5 and 7 January 2008, the Police Inspector, responsible for carrying out the original investigation, appeared as a witness and during his testimony made statements about the Police and the Armed Forces present at the scene around the time of the incident. During the inquiry of 10 January 2008, the Judicial Medical Officer testified that, in his opinion, if one of the deceased victims had been brought to the hospital immediately after the attack, he could have been saved.

The IIGEP emphasizes the point that all the issues examined by the Commission should have been considered during the original criminal investigation process. It is clear that the original investigation was flawed and incompetent. Specifically, the quality of statements taken from police and service personnel was inadequate in detail and depth, and reflected negatively on the competence and thoroughness of those in charge of the original police investigation. It appears that little or no effort was put into tracing and identifying eye witnesses from a number of local citizens known to have been in the vicinity on the evening of the incident causing the death of the five youths in Trincomalee. The Commission needs to ask the question: why were the flaws in the original police investigations undetected, ignored, or possibly abetted by the responsible Government authorities?

In the search for truth and justice in this case, it is imperative that the testimony of the security forces personnel and police witnesses heard by the Commission to date is fully and adequately exposed and tested. The general public, surviving victims, family representatives and others must have the opportunity to judge the credibility of some of the witnesses. It is also essential for them to be able to observe the working of the Commission and be encouraged to do so.

The Commission, in response to the IIGEP's last public statement, stated that "no agency or individual shall be excluded from investigation or inquiry if such an investigation or inquiry is merited on the basis of material before the Commission". The Commission has so far failed to implement this assurance in practice with State bodies and agencies.

The public hearing phase was suspended on 14 January 2008 and did not resume until 15 February 2008. The IIGEP is once again concerned about the slow pace of inquiries, considering that the Commission has already heard and gathered testimonies from these same witnesses in its *in-camera* investigation phase.

The IIGEP has informed the Commission about several material witnesses who have approached the IIGEP and expressed their willingness to give evidence to the Commission, from as far back as in August 2007. The IIGEP has urged the Commission to take concrete steps to include these critical witnesses in the current inquiry and is seeking to agree with the Commission on procedures that would permit this to happen, while protecting the safety of witnesses.

The Commission has indicated that the inquiry stage would yield more positive developments. Yet, to date, and notwithstanding the spirited efforts of the Commission's independent legal counsel of the Unofficial Bar in leading the questioning, its inquiries have largely been conducted in the same manner as the Commission's investigation sessions and have, so far, proved largely ineffective in unearthing useful or actionable evidence affecting the current case.

Witness Protection

Protection for witnesses is indispensable for the success of the Commission. The IIGEP observes that sufficient efforts are still not being made to ensure the protection and safety of all those involved with the inquiries and investigations of the Commission. Without a comprehensive system of victim and witness protection, and demonstrated Government competence and willingness to implement such a system, critical witnesses are unlikely to come forward. Perhaps more than any other factor, this impediment inhibits any effective future pursuit of the filing of indictments, convictions, and appropriate accountability for the alleged grave human rights violations under review.

As recently as January 2008, the IIGEP was dismayed to find a newspaper article, citing a source within the Commission, identifying the possible whereabouts of witnesses. The IIGEP has stated in writing to the Commission that, similarly to a previous instance, the publication of such information about witnesses, undermines the purpose of the Commission's work and constitutes a potentially dangerous breach of confidentiality. The cornerstone of all witness protection programs is confidentiality, without which the integrity of the program can be permanently damaged.

Financial Independence

Issues around the Commission's insufficient budget and lack of financial independence have recently re-surfaced in the media. The IIGEP already commented on the Commission's lack of financial independence in its 11 June 2007 public statement. The IIGEP further brought the matter to the attention of the President in a meeting in August 2007. The IIGEP can only reiterate the vital importance that the Commission be sufficiently funded on the one hand, and that it hold its own purse strings on the other. Financial independence is vital for the successful functioning of the Commission and its capacity to provide effective witness protection and assistance.

Conclusion

The IIGEP has decided that it will terminate its operation in Sri Lanka. It has taken this decision after due consideration and for fundamental reasons. The President charged the IIGEP to observe the proceedings of the Commission of Inquiry, to offer suggestions, and to assess the conduct of these proceedings against international norms and standards. The Eminent Persons conclude that they have accomplished all that is possible within the constraints of the prevailing situation. They no longer see how they can contribute further to the protection and enhancement of human rights in Sri Lanka and have regretfully decided to bring to an end their activities in this country.

The Eminent Persons have all come to Sri Lanka a number of times and met a large variety of personalities involved in the process of protection and promotion of human rights. They have visited different locations in the country where alleged violations have taken place and have diligently followed the proceedings of the Commission. The IIGEP representatives, a group of highly qualified Assistants to whom the Eminent Persons have delegated authority, have been following the investigations and inquiries on a full-time basis in Colombo and in the field. The IIGEP is satisfied that the activities and reports of their representatives have met the highest standards of quality and professionalism.

In keeping with both the letter and the spirit of its mandate, the IIGEP has made substantial suggestions and observations - in its Interim Reports to the President and in direct contact with the Commission and with representatives of the Government of Sri Lanka (GoSL). Most of these suggestions have been ignored or rejected. Official correspondence directed to the IIGEP has too often been characterized by a lack of respect and civility. While the IIGEP has repeatedly been accused of going beyond its mandate and of interfering with national decision-making, this has never been its intention or the reality. The Eminent Persons have always respected the authority of their interlocutors, be they commissioners, judiciary, parliamentarians, civil servants or ministers, and the limits of their mandate.

The IIGEP's next and concluding report to the President and subsequent public statement will detail the Eminent Persons' observations and conclusions, substantiated by the evidence available. In

summary, the IIGEP concludes that the proceedings of inquiry and investigation have fallen far short of the transparency and compliance with basic international norms and standards pertaining to investigations and inquiries. The IIGEP has time and again pointed out the major flaws of the process: first and foremost, the conflict of interest at all levels, in particular with regard to the role of the Attorney General's Department. Additional flaws include the restrictions on the operation of the Commission through lack of proper funding and independent support staff; poor organisation of the hearings and lines of questioning; refusal of the State authorities at the highest level to fully cooperate with the investigations and inquiries; and the absence of an effective and comprehensive system of witness protection.

The Eminent Persons are fully aware of the overall context in which the Commission is operating, which makes its activities, however diligent, incapable of eliciting the kind of facts that would be necessary to ensure that justice is seen to be done. Underlying it all was the impunity that had led to the prior fruitless investigations that, in turn, led to the setting up of the Commission. There is a climate of threat, direct and indirect, to the lives of anyone who might identify persons responsible for human rights violations, including those who are likely to have been committed by the security forces. Civilian eye witnesses have not come forward to the Commission. Security forces' witnesses preferred to make themselves look incompetent rather than just telling what they know. Accordingly, it is evident that the Commission is unlikely to be in a position to pursue its mandate effectively.

These inherent and fundamental impediments inevitably lead to the conclusion that there has been and continues to be a lack of political and institutional will to investigate and inquire into the cases before the Commission. The IIGEP is therefore terminating its role in the process not only because of the shortcomings in the Commission's work but primarily because the IIGEP identifies an institutional lack of support for the work of the Commission.

Beyond these considerations, the IIGEP is of the opinion that there has not been the minimum level of trust necessary for the success of the work of the Commission and the IIGEP. The IIGEP model may be unique. However, experiences associating national and international persons and processes in the past, with the view to harmonizing national practice with international norms and standards, have always relied on confidence and trust for their success. The IIGEP does not see how its continued engagement with the process could change this situation. The Eminent Persons hope, nevertheless, that their concluding observations and recommendations will assist the Commission of Inquiry, the Government of Sri Lanka and all the courageous people of Sri Lanka to achieve the full implementation of the rule of law and respect for fundamental human rights.

END

ⁱ The IIGEP consists of the following 11 Eminent Persons: Justice P.N. Bhagwati (India) (Chairman), Judge Jean-Pierre Cot (France), Mr. Marzuki Darusman (Indonesia), Mr. Arthur E. "Gene" Dewey (USA), Prof. Cees Fasseur (Netherlands), Dr. Kamal Hossain (Bangladesh), Prof. Bruce Matthews (Canada), Mr. Andreas Mavrommatis (Cyprus), Prof. Sir Nigel Rodley (UK), Prof. Ivan Shearer (Australia) and Prof. Yozo Yokota (Japan).