CONTENTS

Executive Summary

The International Group of Eminent Persons (IIGEP) was created by His Excellency, the President of Sri Lanka, to observe The Commission of Inquiry Appointed to Investigate and Inquire into Serious Violations of Human Rights which are alleged to have arisen in Sri Lanka since 1st August 2005 (the Commission). The Commission was established in November 2006. The IIGEP was fully formed in February 2007.

The serious violations referred to in the Warrant establishing the Commission were 15 cases dating from 1 August 2005 until 16 October 2006. A sixteenth case was later added. The Mandate of the Commission outlined two core functions: (1) to undertake independent and comprehensive investigations into the cases, and (2) to examine the adequacy and propriety of the original investigations into those cases.

The principal directive of the mandate given to Members of the IIGEP was to observe the work of the Commission "with a view to satisfying that such inquiries are conducted in a transparent manner and in accordance with basic international norms and standards". The observations of the IIGEP have been recorded in its three prior Interim Reports to the President and six Public Statements. This is the IIGEP's Concluding Report, including its Fourth Interim Report.

The IIGEP terminated its observation mission as of 31 March 2007. The Members of the IIGEP unanimously made this decision after due consideration and for fundamental reasons, which have been set forth in this report. While the IIGEP cannot pre-empt the final conclusions of the Commission, it nevertheless has been able to conclude, in relation to the IIGEP's mandate, that, thus far, the conduct of the proceedings has not been transparent and has fallen short of international norms and standards. The IIGEP does note, however, that the Commission has moved in the direction of increased transparency with the commencement, in January and March 2008, of public inquiries into two of the Commission's 16 cases.

Despite this progress, the IIGEP has found a lack of political and institutional will on the part of the Government to pursue with vigour all the cases under review with the intention of identifying the perpetrators or at least uncovering the systemic failures and obstructions to justice that rendered the original investigations ineffective. While the IIGEP notes that it was unlikely that the Commission could fulfil the terms of the Warrant relating to 16 cases within just one year, it has also observed that, at times, the Commission has seemed to undermine its own efforts.

The IIGEP has repeatedly raised its concern regarding the actual and perceived independence of the Commission, which the IIGEP has observed to be impaired by a number of key factors. Primary among these concerns has been the role of the Attorney General in the work of the Commission, which has raised a serious and continuing conflict of interest in breach of national and international norms and standards. In addition, the failure of the Government to provide the Commission with adequate and independent financial resources has seriously impeded its progress.

The IIGEP has expressed its concern that the work of the Commission has been undermined by the lack of cooperation extended to the Commission by State bodies, particularly in regard to the release of information and materials of relevance to the work of the Commission.

A further and very serious impediment to the work of the Commission has been the climate of fear and intimidation in which the Commission operates, which seriously limits its capacity to undertake its truth seeking function. The IIGEP has continuously expressed its serious concern with the lack of a functional victim and witness protection scheme. The prevailing climate of fear and intimidation would seem not only to discourage witnesses from coming forward to assist the Commission, but also to discourage the Commission, itself, from vigorously exercising its functions.

The IIGEP encourages the Commission in its efforts, and sincerely hopes that the findings and recommendations of the Commission will contribute to the successful prosecution of responsible parties in the 16 cases under the Commission's Mandate. The IIGEP further hopes that this and its prior Reports may stand as a record of experience that could yet have a beneficial influence on the work of the Commission, and on future commissions.

I. Background to the Concluding Observations of the IIGEP

The Concluding Report, including the Fourth Interim Report, of the International Independent Group of Eminent Persons (IIGEP) builds on the prior reports of the IIGEP. As there will be no future report, this report records the IIGEP's observations of the entire process to date. The IIGEP has endeavoured to place its observations in the relevant legal and political contexts in order to observe the way in which "The Commission of Inquiry Appointed to Investigate and Inquire into Serious Violations of Human Rights which are alleged to have arisen in Sri Lanka since 1st August 2005" (the Commission) functions in relation to the systemic failings of the criminal justice system; failings that apparently compelled, in the first instance, His Excellency the President to create the Commission. The IIGEP has compiled this report with the hope that it will serve as a historical record of the work of the Commission and the IIGEP to date. In the interests of transparency and to further the work of the Commission, the IIGEP would encourage the President to convey this and its three Interim Reports to the Commission and to release them to the public.

The IIGEP believes that it has achieved all that is possible in the current political context. While the Members of the IIGEP welcomed the Presidential Invitations to serve in the capacity set out therein, they have observed a manifest lack of political will to give meaning and effect to the work of the Commission and the IIGEP. The President and his administration have demonstrated a lack of commitment to ensuring the success of the Commission and preventing further grave human rights violations. The members of the IIGEP believe that it would be antithetical to the interests of justice and human rights to continue to function as the IIGEP and bear witness to continuing violations and injustice.

The IIGEP regrets the absence of a healthy and constructive relationship between the national authorities and the international component of the operation. The IIGEP was here to help, not to hinder the inquiry and, more generally, the advancement of human rights in Sri Lanka. Most of the IIGEP's proposals have been rejected out of hand, considered as undue interferences and proof that the IIGEP was "acting beyond its mandate". The necessary confidence between the national and international parties to the process did not break down; it never existed. Thus, it is with profound regret that the IIGEP conveys its Concluding Report, including its Fourth Interim Report, to His Excellency, the President.

A. The IIGEP: Mandate and Methodology

The IIGEP was based on a unique concept worked out in discussions between certain foreign governments friendly to Sri Lanka and represented diplomatically in Colombo, and the Government of Sri Lanka. The Government's original idea of an international body was rejected in favour of a mixed national and international commission of inquiry into certain unresolved cases of human rights abuses. This was subsequently also rejected in favour of a purely national commission of inquiry to be observed by an international group of persons having stature and experience in fields relevant to the

inquiry. The Commission was created by President Warrant dated 3 November 2006.[1] (*See* Appendix 1)

The IIGEP consisted of 11 Eminent Persons, assisted by a team of experienced international officers and by local support staff. The Members of the IIGEP came from 11 countries: Australia, Bangladesh, Canada, Cyprus, France, India, Indonesia, Japan, the Netherlands, the United Kingdom, and the United States of America.[2] The Chairman of the IIGEP was a former Chief Justice of India, Justice P.N. Bhagwati.

The IIGEP was appointed by the President of Sri Lanka through individual Letters of Invitation to each of the Members. (*See* Appendix 2) The principal directive of the mandate, as contained in the Letters of Invitation, was to:

> *Observe jointly or severally the investigations and inquiries conducted by the Commission of Inquiry, with the view to satisfying that such inquiries are conducted in a transparent manner and in accordance with basic international norms and standards.*

The Letters of Invitation also stated that:

> *If any corrective action is required to be taken by the Commission of Inquiry with the view to ensuring that investigations and inquiries required to be conducted by the Commission are conducted in a transparent manner and in accordance with basic international norms and standards, Members of the IIGEP shall promptly bring such matters to the attention of the Chairman of the Commission of Inquiry. Members of the IIGEP shall at the same time keep the Attorney-General notified of such corrective action to be taken by the Commission of Inquiry.*

The IIGEP is an independent body (*See* Appendix 3), with funding provided by a combination of donor country contributions (Australia, Canada, the Netherlands, the United Kingdom and the United States), direct contributors (Japan and Cyprus), institutional contributors (the European Union and the Inter-Parliamentary Union), and the Government of Sri Lanka. The donors have not attempted to influence the IIGEP during its work in Sri Lanka, and have not been involved in the decision of the IIGEP to terminate its activities.

The Assistants to the Eminent Persons, who constituted the professional staff of the IIGEP, were chosen for their qualifications and experience in investigations, prosecutions, witness protection and forensics relating to war crimes, serious violations of human rights, murder and torture and/or international observation missions. They were

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[1] Government of Sri Lanka, Gazette Extraordinary No. 1471/6 of 13 November 2006.

[2] The Eminent Persons were: Justice P.N. Bhagwati, Chairman (India), Judge Jean-Pierre Cot (France), Mr Marzuki Darusman (Indonesia), Mr. Arthur E. "Gene" Dewey (USA), Professor Cees Fasseur (Netherlands), Dr. Kamal Hossain (Bangladesh), Professor Bruce Matthews (Canada), Mr. Andreas Mavrommatis (Cyprus), Professor Sir Nigel Rodley (UK), Professor Ivan Shearer (Australia), and Professor Yozo Yokota (Japan). Judge Jean-Pierre Cot replaced Dr. Bernard Kouchner, who resigned as Member of the IIGEP in June 2007 after he was appointed Foreign Minister of France.

funded from the same sources as the Eminent Persons. Since the designation "Assistant" led later to difficulty in relations between the IIGEP, the Commission and other organs of government regarding the right of Assistants to represent the IIGEP, it should be stressed that all Assistants are experts in their own fields, and are of proven ability, experience, and integrity. Moreover, the role and powers of the Assistants were clearly established under the governing instruments. According to the Working Arrangement between the Commission and the IIGEP (*See* Appendix 4), "the Members of the IIGEP shall be entitled to exercise their powers and functions under this working arrangement directly or through their duly authorised representatives, who shall be the Assistants appointed by the IIGEP Members".[3]

The full title of the Commission is "The Commission of Inquiry Appointed to Investigate and Inquire into Serious Violations of Human Rights which are alleged to have arisen in Sri Lanka since 1st August 2005". The Chairman of the Commission is Justice N.K. Udalagama.[4] Fifteen particular cases for investigation and inquiry were listed in the Schedule to the Warrant appointing the Commission, to which a 16th case was later added. However, it is to be stressed that the Commission does not have a mandate to monitor ongoing human rights violations, even though the Commission's mandate has granted it some flexibility to investigate and inquire into "other incidents amounting to serious violations of human rights arising since 1st August 2005".

With full faith and confidence, the IIGEP assumed the duties entrusted to it by the President on 10 February 2007, after the 11th IIGEP member was invited and accepted by the President. The IIGEP undertook its observation and reporting functions in good faith, with the expectation that the exchange between the Commission and the IIGEP would emerge out of a dynamic and constructive relationship based on the pursuit of common goals, i.e., the protection and promotion of human rights and the pursuit of justice. While this was sometimes the case, the IIGEP was disappointed that the relationship between the Commission and the IIGEP was often unnecessarily antagonistic and eroded to a point where constructive engagement seemed unlikely.

The IIGEP conducted its observations from February 2007 until March 2008. The IIGEP has been present at all except one of the Commission's sessions[5] either through the attendance of Eminent Persons, their Assistants, or both, and has observed other functions of the Commission when duly informed and notified of the Commission's activities. The Members of the IIGEP have also had the benefit of full verbatim

[3] Working Arrangement between the Commission of Inquiry (CoI) and the International Independent Group of Eminent Persons (IIGEP), jointly agreed on 27 March 2007 and 23 April 2007, para. 13. The role of the Assistants is also set out in the Mission Statement and Internal Protocols of the IIGEP, Protocol 2 ("Delegation of authority by Eminent Persons to Assistants and Role of Assistants").

[4] The other Members of the Commission of Inquiry are Dr. D. Nesiah, Mr. K.C. Logeswaran, Madam Manouri Muttetuwegama, Madam Jezima Ismail, Mr. S.S.S. Wijeratne, Mr. A.D. Yusuf, and Mr. D. Premaratne. Mr. Premaratne joined the Commission in May 2007 as a replacement for Mr. Upawansa Yapa, who resigned in due to ill health. The IIGEP was never officially notified of the replacement, but noted Mr. Premaratne's presence at the Clause 8 session of 21 May 2007.

[5] The IIGEP regrets that it missed one public inquiry on 18th February 2008, which conflicted with the IIGEP's fifth and final Plenary in Colombo.

transcripts of all investigative and public hearing sessions provided to them from the Commission. Even when not present in-country, the Members have been informed by fortnightly reports by the IIGEP Secretariat and, in detail, of the proceedings of the Commission, and have been kept abreast of developments in each of the cases so far reviewed. The facility of email has enabled all Members of the IIGEP to exchange views on an on-going basis, in addition to their gathering in Colombo on five occasions for plenary meetings. Eminent Persons have endeavoured to spend as much additional time in-country as their other work allowed in order to observe the work of the Commission. The IIGEP was disappointed that prior notification of the Commission's activities was not always forthcoming, impeding the IIGEP's observation function on several important occasions.[6]

In accordance with paragraph 7 of the Presidential Invitations, the IIGEP provided the President with Interim Reports of its observations every three months. The IIGEP's Interim Reports to the President were submitted on 1 June 2007, 17 September 2007, and 17 December 2007 (*See* Appendix 5). The IIGEP also issued six Public Statements on 11 June 2007, 15 June 2007, 19 September 2007, 19 December 2007, 6 March 2008, and 11 April 2008. (*See* Appendix 6) The reports and public statements of the IIGEP detailed its observations on the ongoing work of the Commission to ascertain whether the Commission's work was conducted in a transparent manner and in accordance with international norms and standards. The IIGEP's observations of the Commission's shortcomings fell into four primary categories: (l) factors undermining the independence of the Commission of Inquiry; (2) shortcomings in the investigations and inquiries; (3) inadequate disclosure of information to the Commission by State bodies; and (4) the absence of effective witness protection.

As per paragraph 11 of the Presidential Invitations, the IIGEP provided the Chairman of the Commission and the Attorney General two weeks to review each of the IIGEP's public statements and raise relevant objections. According to the Presidential Letters, the basis of legitimate objections was limited and was allowed only if the Chairman of the Commission and/or the Attorney General found that information contained within the IIGEP statement would be "prejudicial to ongoing investigations and inquiries of the Commission… or [if it] may be prejudicial to, or absolutely necessary, for the protection of national security and public order". In response to such objections, and in accordance with the Presidential Invitation, the IIGEP, the Chairman of the Commission and the Attorney General "endeavoured to reach an agreement" about the content of each of the IIGEP's public statements through discussions, and, failing such agreement, attached the objections to the IIGEP's statements prior to publication of the same. Although the IIGEP notes that the objections were hardly, if at all, confined to the issues specified in the mandate – i.e., potential prejudice of the ongoing investigations and inquiries of the Commission or national security – the IIGEP nonetheless attached the responses of the Commission and the AG to its public statements as a matter of courtesy and to uphold transparency. (*See* Appendix 7)

[6] *See* Section IV(A) of this Report on "Transparency" for a discussion of this issue.

The IIGEP was instructed by paragraph 5 of the Presidential Invitations to promptly bring necessary corrective action to the attention of the Commission. The IIGEP recommended corrective action in the context of its ongoing dialogue with the Commission, both formally and informally, through meetings, discussions, and written communications. It has reiterated the need for corrective action in its reports to the President and in its public statements. These suggestions for corrective action have been largely disregarded. The atmosphere of confrontation and disrespect towards the IIGEP, engendered by organs of Government and – at least in official correspondence – by the Commission, prevailed throughout the IIGEP's operation. The hostile atmosphere has rendered the task of the IIGEP, which approached its work in a spirit of cooperation and, at first, with optimism, dispiriting and unpleasant. The IIGEP has noted what it perceives to be a lack of political and institutional will on the part of the Government to pursue with vigour all the cases under review with the intention of identifying the perpetrators and uncovering the systemic failures and obstructions to justice that rendered the original investigations ineffective and blocked prosecutions.

The IIGEP has appreciated the enormity of the task entrusted to the Commission and notes that the Commission could not possibly fulfil the terms of the Warrant relating to 16 cases within just one year. The IIGEP's observations have been made in an attempt to assist the Commission to more effectively execute its mandate, with the belief that rigorous observation and critical engagement are vital for the full functioning of transparent and independent institutions, including the Commission. In this context, the IIGEP notes that the relationship need not have been dictated solely by the IIGEP's observer role. In accordance with paragraph 6 of the Presidential Invitations, Members of the IIGEP were empowered to provide "technical or other advice" if requested to do so by the Commission. Although the IIGEP did provide occasional technical advice on witness protection, investigative procedures and forensic methods, this function was not utilized as extensively as it could have been.

B. Commission of Inquiry into Alleged Serious Violations of Human Rights

Following a sharp rise in 2005 of cases of serious violations of human rights, and failing effective investigations and prosecutions of such cases, on 2 November 2006, the President created "The Commission of Inquiry Appointed to Investigate and Inquire into Serious Violations of Human Rights which are alleged to have arisen in Sri Lanka since 1st August 2005". The Commission is tasked with undertaking investigations and inquiries into 16 cases of serious violations of human rights, most of which are cases warranting attention by special mechanisms under international norms and standards[7]. First, the original investigations into each case were found to be ineffective. Second, most of the cases relate to human rights violations of the most serious kind. Third, the 16 cases, when viewed as a whole, suggest certain patterns of abuse.

[7] UN *Principles on the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions*, ECOSOC Res. 1989/65, annex, 1989 U.N. ESCOR Supp. (No. 1) at 52, U.N. Doc. E/1989/89 (1989).

Thus, the act of creating the Commission seemed, on its face, to conform to international norms and standards. However, the mere act of creating a commission of inquiry does not, in itself, satisfy Sri Lanka's obligations under international norms and standards. Commissions of inquiry are intended to serve as tools. If constituted with a strong mandate and the requisite autonomy, expertise and resources, a commission of inquiry can provide a strong, albeit temporary, mechanism of official non-judicial fact-finding. The success of a commission is unlikely, however, if that commission is constituted in the midst of ongoing grave violations, and is not provided with the requisite independence and resources. In a situation of persistent human rights violations, in which there has been no meaningful changes to the structures of governance and systems of accountability, the creations of commissions of inquiry may serve merely to add a veneer of legitimacy to a deeply flawed and rights abusing regime.

The mandate of the Commission, contained within the Presidential Warrant empowers the Commission to do the following.

> *Caus[e] independent and comprehensive investigations into incidents involving alleged serious violations of human rights arising since 1st August 2005 specifically including serious violations of human rights specified in the Schedule hereto; and*
>
> *Examin[e] the adequacy and propriety of the investigations already conducted pertaining to such incidents amounting to serious violations of human rights.*
>
> *And, within one year:*
>
> *Present a Report(s) of findings and recommendations relating to the following issues:*
>
> 1. *The facts and circumstances of each incident;*
> 2. *The descriptions, nature and background of persons who have directly suffered death, injury or any other physical harm as a result of the incidents;*
> 3. *The circumstances that may have led to or resulted in death, injury or physical harm;*
> 4. *The identities, descriptions and backgrounds of persons and groups of persons responsible;*
> 5. *The nature propriety and efficacy of the original investigations conducted into the incidents;*
> 6. *Measures that should be taken in accordance with the laws of Sri Lanka against those persons identified as responsible;*
> 7. *Measures of reparation to victims;*
> 8. *Preventative measures; and*
> 9. *Any other recommendations considered to be relevant.*

Thus, the two core substantive functions of the Commission are: (1) to undertake fresh investigations of the 16 cases, with a view to identify perpetrators and recommend accountability measures; and (2) to examine the original investigations of the cases.

The Schedule of Cases to the Warrant of the Commission of Inquiry, as well as the subsequently added Case 16[8], is as follows:

Case 1:	The Assassination of the Foreign Minister of Sri Lanka Hon. Lakshman Kadirgamar, PC.
Case 2:	The killing of seventeen (17) aid workers of the international non-governmental organization *Action Contre la Faim (ACF)*, in early August 2006.
Case 3:	The alleged execution of Muslim villagers in Mutur in early August 2006 and the execution at Welikanda of 14 persons from Muttur who were being transported in ambulances.
Case 4:	The assassination of Mr. Joseph Pararajasingham, Member of Parliament on 25th December 2005.
Case 5:	The killing of (five) 5 youths in Trincomalee on or about 2nd January 2006.
Case 6:	The Assassination of the Deputy Director General of the Sri Lanka Peace Secretariat Mr. Ketheesh Loganathan on 12th August 2006.
Case 7:	Death of fifty one (51) persons in Naddalamottankulam (Sencholai) in August 2006.
Case 8:	Disappearance of Rev. Nihal Jim Brown of Philip Neri's Church at Allaipidi on 28th August 2006.
Case 9:	Killing of five (5) fishermen and another at Pesalai beach and at the Pesalai Church on 17th June 2006.
Case 10:	Killing of thirteen (13) persons in Kayts Police area on 13th May 2006.
Case 11:	Killing of ten (10) Muslim villagers at Radella in Pottuvil police area on 17th September 2006.
Case 12:	Killing of sixty eight (68) persons at Kebithigollewa on 15th June 2006.
Case 13:	Incident relating to the finding of five (5) headless bodies in Avissawella on 29th April 2006.
Case 14:	Killing of thirteen (13) persons at Welikanda on 29th May 2005.
Case 15:	Killing of ninety eight (98) security forces personnel in Digampathana, Sigiriya, on l6th October 2006.
Case 16:	Killing of Mr Nadarajah Raviraj MP, 10 Nov 2006

[8] According to communications of the Commission, it was the President who added a 16th case to the original 15 cases listed in the Schedule of Cases attached to the Warrant. The 16th Case, the killing of parliamentarian Mr. Nadarajah Raviraj, was reportedly added on 31st January 2007, prior to the creation of the IIGEP. Nonetheless, the IIGEP was never officially notified of the inclusion of Case 16 or the rationale for the inclusion of this case and the exclusion of other important cases.

The separation of the Commission's mandated duties into two categories – investigations and inquiries – and the failure of the mandate to define and distinguish between investigations and inquiries confused the objectives of the Commission and undermined the capacity of the Commission for public inquiry. The *1948 Act* refers only to inquiries. It is silent on the issue of investigations. The distinction between investigations and inquiries seems to have compelled the Commission to create a slow, complicated and unnecessarily repetitive two-tier process for each case. The rules of procedure adopted by the Commission to give effect to its mandate, and subsequent amendments to the rules of procedure, provided further limitations on the public inquiry stage of the Commission's work.

The Commission's mandate must be read in context of the *1948 Commissions of Inquiry* Act, under which it was created. The *1948 Act* reserves a considerable amount of power for the President, thereby further undermining the real and perceived independence of any Commission. Further, recent amendments to the act may further have eroded even the possibility of independence.

C. The 1948 Commissions of Inquiry Act

The *1948 Commissions of Inquiry Act* (*See* Appendix 8) under which the current Commission was created, was not drafted to address human rights violations. The original intent of the Act was to provide a mechanism of oversight for public administration and the acts of public servants.[9] Issues addressed by early commissions included irregular tenders, bribery, corruption, and other abuses of power. The Act's general public safety and welfare clause[10] provides the necessary flexibility within the Act for the creation of commissions to address human rights violations.

The 1948 Act retains substantial power for the President, which includes the power to: (1) unilaterally define the terms of reference and appoint members of a commission[11]; (2) decide whether the inquiries, or any part thereof, are held in public[12]; (3) change the composition of a commission by adding new members at any time[13]; (4) revoke the warrant at any time[14]; (5) appoint the Commission's secretary[15]; and (6) decide whether any reports and/or recommendations are made public. These powers have been criticized

[9] According to Section 2(1) of the 1948 Act, the President may appoint a Commission of Inquiry to inquire into (a) the administration of any government department of Government or of any public or local authority or institution; or (b) the conduct of any member of the public service; or (c) any matter in respect of which an inquiry will, in his opinion, be in the interests of public safety or welfare. *Commissions of Inquiry Act* No. 17 of 1948.
[10] *Ibid*, at Section 2(1)(c) provides the President with the power to appoint a Commission to inquire into "any matter in respect of which an inquiry will, in his opinion, be in the interests of public safety or welfare."
[11] *Ibid*, at Section 2.
[12] *Ibid*, at Section 2(2)(d).
[13] *Ibid*, at Section 3(1).
[14] *Ibid*, at Section 4.
[15] *Ibid*, at Section 19(1).

as being antithetical to the independence and impartiality required of a commission of inquiry.

The use of the Act for purported human rights objectives began only in 1977 when the general public safety and welfare clause was invoked to create the first commission on ethnic violence.[16] Since the early 1990s, the Act has been used by successive Presidents to pursue purported human rights objectives. In 1991, then President Ranasinghe Premadasa created the first commission of inquiry into "involuntary removals of persons".[17] Since that time, there have been eight commissions on disappearances, as well as commissions on other human rights abuses, including reprisal killings, massacres, torture, and ethnic violence.[18] These Commissions have served some limited fact-finding functions. However, they have failed to lead to prosecutions for human rights violations and have failed to prevent future violations from occurring.

At the time of writing this Concluding Report (March 2008), the IIGEP had been informed that a forthcoming amendment to the *Commissions of Inquiry Act 1948* will propose that the role of the Attorney General be formalised in all future commissions. The provisions of the draft Bill are not presently available. Should the terms of the Bill, if enacted, provide for more than merely acknowledging the right of the Attorney General to be present in commissions of inquiry, and give the Attorney General the right to provide counsel to assist the Commission, then the IIGEP concludes that the serious stumbling block already erected against fulfilment of the requirement of transparency and international norms and standards will be entrenched, not only in the present Commission of Inquiry but in all future inquiries under the Act. This would indeed confirm the IIGEP's apprehension regarding the absence of political will and the institutional inability of Sri Lanka to investigate itself, to address the entrenched impunity and to comply with international standards for independent investigations.

It is within this context that the President created the Commission of Inquiry into Serious Violations of Human Rights and the International Independent Group of Eminent Persons.

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[16] Presidential Commission of Inquiry into the Incidents which took Place between 13 August and 15th September, 1977 (Sansoni Commission), created by Warrant No. P.O. No. N. 143/77 on 9th November 1977. *See* Report of the Presidential Commission of Inquiry into Incidents which Took Place between 13th August and 15th September, 1977, July 1980.

[17] The Commission of Inquiry into Involuntary Removals of Persons, *see* Gazette of the Democratic Socialist Republic of Sri Lanka, Extraordinary, No. 644/27 of January 11, 1991.

[18] Three Commissions of Inquiry into Involuntary Removals of Persons under President Ranasinghe Premadasa (1991, 1992, 1993); One Commission of Inquiry into Involuntary Removals of Persons under President D.B. Wijetunga (1993); Three Zonal Commissions of Inquiry into Involuntary Removals and Disappearances (1994); All Island Commission of Inquiry into Involuntary Removals and Disappearances of Certain Persons (All Island) (1998); the Establishment and Maintenance of Places of Unlawful Detention and Torture at the Batalanda Housing Scheme (1995); Commission of Inquiry into the incidents that took place at Bindunuwewa Rehabilitation Centre on 25 October 2000 (2001); and Presidential Truth Commission on Ethnic Violence (1981 - 1984) (2001).

D. International Norms and Standards

The IIGEP was directed to observe the proceedings of the Commission of Inquiry with a view to satisfying itself that they were conducted in accordance with "basic international norms and standards." These norms and standards were not defined in the mandate or in any other related documents.

The IIGEP understood that "basic international norms and standards" were those to be found in (a) international conventions binding on Sri Lanka, (b) declarations or statements by the United Nations or associated bodies adopted by consensus and regarded by states and commentators as authentic expressions of such norms and standards, and (c) general state practice.

International conventions binding on Sri Lanka prescribe duties to investigate abuses of human rights and to grant remedies. The 1966 International Covenant on Civil and Political Rights ("ICCPR") to which Sri Lanka became a party in 1980, is the most important and comprehensive of the human rights conventions, adhered to by more than 160 states. It prohibits, among other violations of human rights, the arbitrary deprivation of human life (article 6), torture or cruel, inhuman or degrading treatment or punishment (article 7), arbitrary arrest or detention (article 9), and protects against arbitrary interference with privacy, family and home (article 17). Article 2 of the Covenant obliges States parties to respect and ensure to all persons within its territory the rights protected under the Covenant, without discrimination on the basis of race, language, religion, or other grounds, and to ensure that any person whose rights are violated shall have an effective remedy, "notwithstanding that the violation has been committed by a person acting in an official capacity". The article further directs each State party:

> *To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy;*
>
> *To ensure that the competent authorities shall enforce such remedies when granted.*

Specific standard setting in connection with inquiries into violations of human rights is to be found in a resolution of the Economic and Social Council (ECOSOC) of the United Nations entitled "Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions" (1989).[19] This instrument has relevance to the Commission of Inquiry in a number of important respects.

[19] UN *Principles on the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions*, ECOSOC Res. 1989/65, annex, 1989 U.N. ESCOR Supp. (No. 1) at 52, U.N. Doc. E/1989/89 (1989). *See also* the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1984). Although none of the cases in the Warrant related to torture, the Convention against Torture provides useful guidance as to the international norms and standards relating to the requirement for prompt and impartial investigations, in general, as well as to the heightened obligations of States relating to non derogable rights, including the right to life and the right to be free from torture.

In brief, the ECOSOC Principles provide, as to investigation:

- There shall be thorough, prompt and impartial investigation of all suspected cases of extra-legal, arbitrary and summary executions;

- The purpose of the investigation shall be to determine the cause, manner and time of death, the person responsible, and any pattern or practice which may have brought about that death;

- The persons conducting the investigation shall have at their disposal all the necessary budgetary and technical resources for effective investigations;

- The persons conducting the investigation shall have the power to oblige officials allegedly involved to appear and testify.

Regarding cases of inadequate investigation, the Principles provided valuable guidance to the IIGEP in the case of the present Commission. Principle 11 states:

> *In cases where the established investigative procedures are inadequate because of lack of expertise or impartiality, because of the importance of the matter or because of the apparent existence of a pattern of abuse, and in cases where there are complaints from the family of the victim about these inadequacies or other substantial reasons, Governments shall pursue investigations through an independent commission of inquiry or similar procedure. Members of such a commission shall be chosen for their recognized impartiality, competence and independence as individuals.* ***In particular, they shall be independent of any institution, agency or person that may be the subject of the inquiry.*** *The commission shall have the authority to obtain all information necessary to the inquiry and shall conduct the inquiry as provided for under these Principles.* (emphasis added)

Regarding witness protection, Principle 15 provides:

> *Complainants, witnesses, those conducting the investigation and their families shall be protected from violence, threats of violence or any other form of intimidation. Those potentially implicated in extra-legal, arbitrary or summary executions shall be removed from any position of control or power, whether direct or indirect, over complainants, witnesses and their families, as well as over those conducting investigations.*

Regarding command responsibility and states of emergency, Principle 19 provides:

> *Without prejudice to principle 3 above, an order from a superior officer or a public authority may not be invoked as a justification for extra-legal, arbitrary or summary executions. Superiors, officers or other public officials may be held*

> *responsible for acts committed by officials under their authority if they had a reasonable opportunity to prevent such acts. In no circumstances, including a state of war, siege or other public emergency, shall blanket immunity from prosecution be granted to any person allegedly involved in extra-legal, arbitrary or summary executions.*

General state practice provides a broad source of principles to which the IIGEP has also turned for guidance. These include general principles of procedural fairness, transparency of procedures and hearings, openness to the public except for serious reasons, the avoidance of conflicts of interest, the protection of witnesses, and the responsiveness of state officials to the lawful summons of a court, tribunal or commission, which are found in the major legal systems of the international community. The IIGEP understands that these basic principles are consistent with those to be found also in the legal system of Sri Lanka.

E. Human Rights in States of Emergency and in Armed Conflict

The Members of the IIGEP are keenly aware of the existence for many years of an insurgency in the north and parts of the east of Sri Lanka, the effects and sometimes manifestations of which are felt throughout the country. The Liberation Tigers of Tamil Eelam (LTTE) pursue their operations with ferocity and ruthlessness, not sparing the civilian population. In many parts of the world the LTTE has been recognised as a terrorist organisation. It has been suggested by certain sections of public opinion that in combating the LTTE human rights should take second place to measures directed towards the defeat of enemies of the state. The IIGEP rejects these opinions as contrary to international law and as counter-productive in practice.

This can be characterised as a civil war or, to use the terminology adopted by the Geneva Conventions of 1949 and their Additional Protocols, as a "non-international armed conflict". Certain important aspects of laws designed to protect combatants and civilians are contained in common article 3 of the Geneva Conventions. Sri Lanka is a party to those Conventions.

In times of armed conflict both international humanitarian law and human rights law apply. In particular, the ICCPR, which contains the most comprehensive statement of internationally accepted human rights, and to which Sri Lanka is a party,

> *…applies also in situations of armed conflict to which the rules of international humanitarian law are applicable. While, in respect of certain Covenant rights, more specific rules of international humanitarian law may be specially relevant for the purposes of the interpretation of Covenant rights, both spheres of law are complementary, not mutually exclusive.*[20]

[20] Human Rights Committee, General Comment 31, "Nature of the General Legal Obligation on States Parties to the Covenant", UN Doc. CCPR/C/21/Rev.1/Add.13 (2004), para. 11.

F. States of Emergency

Internal armed conflict is an example of a state of emergency which may, under certain conditions, justify derogation from some – but not all – internationally accepted human rights. For parties to the International Covenant on Civil and Political Rights the right to derogate is regulated by article 4 of that instrument which states that:

> *1. In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin.*
>
> *2. No derogation from articles 6 [right to life], 7 [torture], 8, paragraphs 1 and 2 [slavery], 11 [imprisonment for debt], 15 [non-retroactivity of criminal laws], 16 [recognition as a person] and 18 [freedom of thought, conscience and religion] may be made under this provision.*
>
> *3. Any State party to the present Covenant availing itself of the right of derogation shall immediately inform the other States parties to the present Covenant, through the intermediary of the Secretary-General of the United Nations, of the provisions from which it has derogated and of the reasons by which it was actuated. A further communication shall be made, through the same intermediary, on the date on which it terminates such derogation."*

The most recent state of emergency was introduced in 2005 and was most recently extended on 9th April 2008. The relationship between the international law of human rights and national laws applicable in times of emergency has been explained by the Human Rights Committee, established under the ICCPR. In its General Comment on the scope and meaning of the right of states to derogate from their obligations under the Covenant in times of national emergency, the Human Rights Committee stated:

> *A fundamental requirement for any measures derogating from the Covenant, as set forth in article 4, paragraph 1, is that such measures are limited to the extent strictly required by the exigencies of the situation. This requirement relates to the duration, geographical coverage and material scope of the emergency, and any measures of derogation resorted to because of the emergency.*[21]

Sri Lanka has not formally notified the Secretary-General of the United Nations of the existence of a state of emergency, or of any specific derogations which it has made to provisions of the Covenant. Although states parties to the Covenant are obliged to notify

[21] Human Rights Committee, General Comment 29, "States of Emergency (article 4)", UN Doc. CCPR/C/21/Rev.1/Add.11 (2001), para.4.

an emergency and measures of derogation, failure to do so does not render those measures illegal. Whether notified or not, states invoking measures of derogation from their human rights obligations must be able to justify these in terms of necessity and proportionality. As has been stated authoritatively by the (UN) Human Rights Committee:

> *It is clear, therefore, that a state of emergency does not of itself justify breaches of the human rights applicable in normal times, but only to the extent strictly necessary and proportionate to the circumstances and in conformity with article 4 of the International Covenant on Civil and Political Rights. In particular, the rights to life, not to be subjected to torture, and to recognition as a person before the law are never derogable.*

G. Command Responsibility

Command responsibility is a concept that was developed in the law of armed conflict and finds a prominent place in contemporary international humanitarian law. In general it attaches criminal responsibility to all who plan or order the commission of acts contrary to international humanitarian law. It has been developed so as to incriminate those who knew, or ought to have known, of the commission of such acts by persons under their command and who failed to inquire into, to prevent, or to stop such acts.

The counterpart to the doctrine of command responsibility is the rejection of the defence of superior orders. Persons who carry out orders that they know, or ought to know, are unlawful are themselves also guilty of crimes under international humanitarian law, although – unlike their superiors – their subjection to superior orders may be taken into account in assessing the appropriate penalty.

Under the ordinary criminal law police officers and other officials are subject to similar laws analogous to command responsibility. In Sri Lanka there are provisions relating to aiding, abetting, instigating, conspiring to commit, and concealing the commission of criminal offences, all of which provide grounds for legal claims of command responsibility.[22]

The issue of command responsibility, although not explicitly reflected in Sri Lankan statute law, has been the subject of judicial consideration in the past. The Commission of Inquiry into the Western, Southern and Sabaragamuwa Disappearances submitted a report to President Chandrika Kumaratunga on 29 November 1995. The Report recommended prosecution of a number of Army officers implicated in the disappearance of 53 schoolboys from Embilipitya, and considered also the cases of 11 other disappearances. In particular it found that Colonel R.P. Liyanage was Coordinating Officer, Ratnapura, at the relevant time and thus holding command responsibility. Subsequently, however, the Ratnapura High Court acquitted the now Brigadier Liyanage

[22] Penal Code (as amended), 1956, Volume 1, Chapter 19, Legislative Enactments of Sri Lanka (Consolidated).

of conspiracy to abduct the boys on the ground that there was no evidence linking him to the disappearances. The question of command responsibility was not dealt with by the Court. In later proceedings before the Supreme Court, in which Brigadier Liyanage protested against his failure to be promoted to the rank of Major-General, the Court acknowledged his position in the chain of command in relation to the Embilipitya incident but stated that this did not, of itself, justify his non-promotion. The fact that the Commission of Inquiry into disappearances had made a finding of culpable inaction on his part was not adverted to by the Supreme Court.

In a case involving the police, an important statement was made by three Supreme Court judges in *Sanjeewa v. Suraweera,* [2003] 1 Sri LR 317, which dealt with a serious assault on a dockworker by police. No disciplinary action was taken against the officers responsible. The Court found a violation of his fundamental rights under article 11 of the Constitution. Justice Mark Fernando (Justices Edussuriya and Wigneswaran agreeing) stated that :

> *A prolonged failure to give effective directions designed to prevent violations of article 11, and to ensure the proper investigation of those which nevertheless take place followed by disciplinary or criminal proceedings, may well justify the inference of acquiescence and condonation if not also of approval and authorization.*

The same victim was due to testify a year later in a prosecution against the same officers under the Torture Act, but he was shot and killed before he could do so.

H. Serious Violations of Human Rights

A sharp rise in serious human rights violations in 2005, including extrajudicial killings and disappearances by all parties to the conflict, caused increasing alarm nationally and internationally. National and international pressure to address violations of human rights and the prevailing culture of impunity mounted, as calls for international human rights monitoring and an international commission to probe allegations of human rights violations increased. In response, on 4 September 2006, the President announced his intent to invite an international commission to inquire into abductions, disappearances and extra-judicial killings. He reversed his decision two days later and announced his decision on 6 September 2006 to create a national commission of inquiry and invite an international independent group of eminent persons to observe the work of the Commission. Two months later, on 6 November 2006, the President announced the appointment of eight commissioners to serve as the Commission of Inquiry into Alleged Serious Human Rights Violations. The IIGEP was subsequently created in February 2007 to observe the investigations and inquiries to satisfy that they are conducted in a transparent manner, and in accordance with basic international norms and standards pertaining to investigations and inquiries

The alleged serious violations referred to in the Warrant establishing the Commission were 15 cases dating from 1 August 2005 until 16 October 2006. A 16th case was later added. To date, the Commission has commenced formal *in camera* investigations into the following cases[23], all of which relate to the deprivation of the right to life:

> Case 2. The Killing of seventeen (17) aid workers of the international non-government organization *Action Contre la Faim*, in early August 2006
>
> Case 5. The killing of five (5) youths in Trincomalee on or about 2nd January 2006.
>
> Case 11. Killing of ten (10) Muslim villagers at Radella in Pottuvil police area on 17th September 2006
>
> Case 7. Death of fifty one (51) persons at Naddalamottankulam (Sencholai) in August 2006

To date, the Commission has commenced public inquiries into the following two cases.

> Case 2. The Killing of seventeen (17) aid workers of the international non-government organization *Action Contre la Faim*, in early August 2006
>
> Case 5. The killing of five (5) youths in Trincomalee on or about 2nd January 2006

I. Prior Commissions of Inquiry

The IIGEP notes that there have been a number of prior commissions of inquiry into human rights violations appointed by successive Presidents under the 1948 Act, as well as numerous commissions unrelated to human rights violations. The experience of, and example set by, prior commissions of inquiry provide the backdrop for understanding the current Commission.

After a review of prior Commissions of Inquiry and their reports, the IIGEP has found that commissions have failed to serve as effective mechanisms to counter impunity. Many commissions have served important fact-finding functions and most have facilitated the grant of compensation to victims of violations. However, while many commissions have assisted in the identification of alleged perpetrators, very few prosecutions for human rights violations have resulted from the findings of commissions despite the numerous and repeated recommendations for the prosecution of the responsible parties at every level. For example, the four Commissions on Disappearances

[23] The IIGEP notes that the Commission has visited the crime scenes of at lease some of the other cases, and has received evidence and information from the original investigations of some cases. However, the Commission has not commenced formal investigations into those cases even at the level of Clause 8 proceedings. (*see* Section IV(A)(1) for a discussion of the Commission's Clause 8 investigations).

established by President Chandrika Kumaratunga made a total of 23 recommendations regarding prosecutions generally, and an unknown number of confidential recommendations calling for further investigations and the commencement of legal action in relation to the named perpetrators in individual cases. Despite such recommendations, a mere 12 prosecutions resulted from the Disappearance Commission's findings of more than 27,000 verified disappearances.

Commissions of inquiry are, by their very nature, *ad hoc* mechanisms, time bound and reactive. However, the way in which commissions have been established have served to heighten some of the limitations inherent in *ad hoc* mechanisms. There is a pattern that emerges that suggests that many commissions of inquiry in Sri Lanka may, in fact, be doomed from the start. Appointed with little or no consultative process, with scant reference to the work of prior commissions, and overwhelmingly with insufficient funding, facilities and independence, these mechanisms are left to determine the ways and means of fulfilling their mandates, many of which are substantively overbroad and unrealistically time-limited, resulting in dependence on the President for funding and continuous extensions and reliance on the personality, initiative, expertise and commitment of individual commissioners.

II. The Work of the Commission

The IIGEP has been guided by the norms, standards and principles discussed above in its observations and evaluation of the work of the Commission. It has based its concluding observations on its observations of the Commission's sessions, of which it has observed all but one, as well as full verbatim transcripts of all investigation and public hearing sessions, documents disclosed to it by the Commission, site visits, discussions with the Commission and with other relevant parties. Even when not present in-country, the Eminent Persons have been informed of the proceedings of the Commission and have been kept abreast of developments in each of the cases so far reviewed.

A. The Core Functions of the Commission of Inquiry

The persistent failure of the State to fulfil its duties to protect human rights and punish violations of human rights compelled the President to create a Commission of Inquiry into alleged serious human rights violations arising since 1 August 2005 "to pursue investigations through an independent commission of inquiry". The Commission was tasked with two primary functions[24]:

(a) causing independent and comprehensive investigations into incidents involving alleged serious violations of human rights arising since 1st August 2005 specifically including serious violations of human rights specified in the Schedule hereto; and

[24] *See* Government of Sri Lanka, Gazette Extraordinary No. 1471/6 of 13 November 2006, Preamble, Para. 2.

(b) examining the adequacy and propriety of the investigations already conducted pertaining to such incidents amounting to serious violations of human rights.

Thus, the Commission is mandated to undertake fresh investigations of the cases set forth in the warrant while simultaneously examining the systematic failure of the responsible organs of the State to solve the crimes.

The IIGEP highlights that under relevant international norms and standards, commissions of inquiry are fact finding or truth seeking bodies. While the fact finding imperative requires commissions to exercise investigatory functions, commissions of inquiry are not appropriate mechanisms to effectively undertake police investigations, even when such investigations are systematically flawed and ineffective. Thus far, this seems to be the emphasis of the Commission's work; to act as a substitute for the police in an effort to solve the crimes. While the IIGEP recognizes the Commission's commitment to identifying the perpetrators in some of the cases, the IIGEP does not feel that the Commission has been granted the necessary resources and independence to fulfil this function. The Commission does not have the expertise, financial or human resources, or time to undertake comprehensive investigations into each of the 16 cases.

The IIGEP recognizes that the mandate emphasizes the investigatory function. It regrets that the Commission thus far has emphasised this aspect of its mandate over its other primary function; examining the adequacy and propriety of the original investigations. The IIGEP notes that the Commission also has recognized "the need to examine the adequacy of investigations done earlier"[25] and, in so doing, the need to ensure the Commission is independent from those involved in the original investigations.[26] The IIGEP believes that the Commission's greatest contribution would be to examine the cases systemically, not only to unveil the cloak of impunity, but also to unravel its very fabric.

The repeated failure of the original investigations suggests complicity at the highest levels of Government. While the investigations have been marred by incompetence and irresponsibility, causing further loss to life in at least one case,[27] the repeated failure of the investigations can not be passed off purely as a lack of capacity. The capacity does exist in Sri Lanka,[28] and efforts are ongoing to further strengthen the capacity of

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[25] Booklet of Materials provided by the Commission to the IIGEP on 16 August 2007, Chapter 2, Investigations, page 11.

[26] *Ibid.,* According to the Commission:

> *In order to conform to international norms and standards, investigations into human rights violations in particular have to satisfy the following conditions:*
>
> - *Investigations have to be conducted by Independent Investigators,* ***other than those involved earlier.***
>
> *[. . .]*
>
> - *Investigators should be provided with expert assistance of independent professionals* ***other than those involved earlier****.... [emphasis added]*

[27] According to information provided by the JMO in his testimony in the Public Inquiry into the Trincomalee Case, one victim likely could have been saved if he had received immediate medical attention.

[28] Publicly available information about the original investigations into the assassination of former Foreign Minister Lakshman Kadirgamar suggests that the capacity and resources to undertake effective

investigative authorities. Despite this capacity it has consistently failed to resolve the most urgent and egregious cases, such as the extrajudicial killings of 17 humanitarian workers of the NGO Action Contre la Faim (ACF) in Mutur in August 2006[29], or the arbitrary execution of five Tamil youth and the attempted murder of three others in Trincomalee on 2 August 2006[30], or the extrajudicial killings of ten unarmed villagers at Radella in Pottuvil on 17 September 2006[31]. The failures of the original investigations in each of these cases suggest a pattern of obstruction and cover up.

Whereas the IIGEP has observed that Sri Lanka generally has a strong legal tradition and framework, it has also observed a conspiracy of legal[32], institutional[33] and practical[34] obstructions that create a situation that gives rise to impunity. The IIGEP understands that it is within this context that the Commission has been created and within this context that it must function. As such, the IIGEP notes the urgent need for the Commission to move from an *ad hoc*, case specific, approach, to a systemic approach whereby the systems and institutions of governance responsible for the creation and maintenance of impunity are dissected and exposed.

III. Impediments to the Work of the Commission

The IIGEP cannot pre-empt the final conclusions of the Commission. Nevertheless, the IIGEP has been able to conclude, in relation to the IIGEP's mandate, that, thus far, the conduct of the proceedings has not been transparent and has fallen short of international norms and standards. The IIGEP does note, however, that with the commencement of public inquiries into two of the Commission's 16 cases, the Commission has moved in the direction of increased transparency.

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investigations is available in Sri Lanka and can be mobilized when the will exists to ensure that effective investigations are undertaken. As of March 2008, the Kadirgamar Case, Case 1 of the Schedule of Cases to the Warrant of the Commission, is the only one of the Commission's 16 cases in which charges have been filed against alleged accused. The IIGEP notes the Government's reliance on the principle of command responsibility in charging LTTE leader, Velupillai Prabhakaran, and five others for conspiring, aiding and abetting the murder of former Foreign Minister, Lakshman Kadirgamar.

[29] Case 2 of the Schedule of Cases to the Warrant of the Commission.

[30] Case 5 of the Schedule of Cases to the Warrant of the Commission.

[31] Case 11 of the Schedule of Cases to the Warrant of the Commission.

[32] Despite Sri Lanka's strong legal tradition, the IIGEP has observed a number of legal impediments that help maintain the prevailing climate of impunity. These include the lack of effective implementation of the laws that do exist, including the penal code, as well as the lack of specific laws on witness protection, enforced disappearances, and command responsibility, which would each contribute significantly to combating impunity. The Emergency Regulations have been used to erode the rule of law in Sri Lanka. Lastly, the Government's failure to give effect to the 17th Amendment by constituting the Constitutional Counsel serves as a further impediment.

[33] Institutional safety nets traditionally provided by the State through an independent Supreme Court, Attorney General, and National Human Rights Commission have been undermined by politicization, as has the Sri Lankan police.

[34] Practical impediments compound legal and institutional deficiencies. These include the lack of adequate training for those responsible for criminal investigations, the lack of operational independence and accountability mechanisms for those responsible for criminal investigations, and the lack of effective witness protection resources and technical capacity.

The greatest impediment to the work of the Commission has been the lack of will on the part of the Government to provide the Commission with necessary independence, resources and assistance to enable the Commission to effectively fulfil the terms of its mandate. The IIGEP has observed the Commission's efforts to continue its work despite these constraints; efforts that have been repeatedly highlighted by the Commission. A further and very serious impediment to the work of the Commission has been the climate of fear and intimidation in which the Commission operates, which seriously limits its capacity to undertake its truth seeking function. The climate of fear and intimidation would seem not only to discourage witnesses from coming forward to assist the Commission, but also to discourage the Commission, itself, from vigorously exercising its functions.

A. Independence

The IIGEP has repeatedly raised its profound concern regarding the actual and perceived independence of the Commission, which the IIGEP has observed to be impaired by a number of key factors. Primary among these concerns has been the role of the Attorney General in the Commission's Panel of Counsel, which has raised a serious and continuing conflict of interest in breach of national and international norms and standards. Additionally, the IIGEP expresses is continuing concern about the lack of financial independence and questions the role of the Secretariat for Coordinating of the Peace Process (SCOPP) in the work of the Commission.

The IIGEP was alarmed and deeply troubled by the President's Clarification of November 2007 (*See* Appendix 9), which limited the scope of the Commission's investigations and inquiries by exempting the Attorney General and his officers from scrutiny. The Clarification was conveyed by way of a letter from the Presidential Secretary to the Commission, dated 5 November 2007, which was delivered to the Commission and disclosed to the IIGEP at the November joint meeting between the Commission and the IIGEP. The letter extended the mandate of the Commission. However, the President directed the Presidential Secretariat to take the opportunity to include a "clarification" on the scope of paragraph 5 of the Presidential Warrant. The letter informed the Commission that:

> *…the President did not require the Commission to in any way consider, scrutinize, monitor, investigate or inquire into the conduct of the Attorney General or any of his officers with regards to or in relation to any investigation already conducted into the relevant incidents.*

Such a "clarification" from the Head of State can only be viewed as a directive from the highest level, rather than a suggestion to take under consideration. This clarification was followed by a further "clarification", which was made on behalf of the President by the Secretary to the President by way of a letter to the Commission dated 30 November 2007. The Commission was advised that the President "does not see any basis in which officers of the Attorney General's Department could be subject to inquiry…". The

Commission was also advised in that letter that the President concurs with the Commission's rejection of the IIGEP's request to have the members of the Attorney General's Department removed from the inner workings of the Commission.

The IIGEP is of the opinion that these statements, on behalf of the President, constitute a direct interference in the independence of the Commission in two ways: firstly the "clarification" seeks to restrict the mandate, thereby impinging on the independence of the Commission without prior notification to, or consultation with, the Commission; and secondly, it undermines and reduces the Commission's own choices as to which influences and aspects of the original investigation should be further investigated. This fundamentally undermines the ability of the Commission to discharge one of its core functions, an inquiry into the original criminal investigations. Any such interference or unwarranted influence can only erode public confidence in the Commission's capacity to function in an independent and transparent manner, and may impede the search for the truth.

The IIGEP has viewed the Clarification as confirmation of its observations, set out below, that the Commission suffers from a lack of actual independence, which has been impeded at the highest level.

1. Conflict of Interest: The Role of the Attorney General

The IIGEP has repeatedly raised its concern over the role of the Attorney General in the Commission as contrary to national and international principles of independence and impartiality. The IIGEP has called for the removal of officers of the Attorney General's Department from the Commission. The IIGEP renews its objections to the role of the Attorney General in the work of the Commission and the presence of officers of the Attorney General's Department on the Commission's Panel of Counsel. As set out below, the IIGEP believes that the role of the Attorney General not only represents a potential conflict of interest, but also an actual conflict of interest, in contravention of Sri Lanka's obligations under international norms and standards.

1. The Attorney General is the first law officer of Sri Lanka and is the legal advisor to all arms of Government, including the armed forces and the President, and therefore advises and represents all interests of the Government.
2. In exercising the above function, the Attorney General's Department has advised the police on the original investigations into cases that are now under consideration by the Commission.
3. One of the Commission's two core functions is to examine the failure of the original investigation, as specified in the Warrant and included as paragraph 5 of the Commission's terms of reference in the Warrant.
4. By virtue of its role in the original investigation, the Attorney General and members of the Attorney General's Department are material witnesses to the failure of the original investigation, into which the Commission has been mandated to investigate and inquire.

5. The Commission has appointed members of the Attorney General's Department to serve as its Panel of Counsel, despite the apparent conflict of interest caused by the Attorney General Department's role in the original investigation and then in the Commission.
6. The conflict of interest has been confirmed by documents transmitted to the Commission by the Criminal Investigation Department (CID), which revealed that the Deputy Solicitor General, who acts as lead counsel on the Commission's panel of counsel, advised the CID on the original investigation of the ACF Case.
7. Since appointing members of the Attorney General's Department to its Panel of Counsel, further conflicts have arisen due to members of the Commission's Panel of Counsel simultaneously playing dual roles, firstly, as counsel to what should be an independent Commission of Inquiry; and, secondly, as legal adviser to the Government, including the President, particularly in relation to the Commission and discussions of the public statements of the IIGEP, as well as in relation to their regular case loads in the Attorney General's Department.
8. Therefore, the conflict of interest is: (1) because of the role of the Attorney General's Department in the original investigation and the Commission's mandate to inquire into the failings of the original investigation; (2) because of the role of the Deputy Solicitor General, who advised the original police investigation of the ACF Case and now leads the Commission's investigation and inquiry into the ACF Case; and (3) because of the dual role played by members of the Commission's Panel of Counsel, who continue to undertake their responsibilities as members of the Attorney General's Department, i.e., in prosecuting cases and advising the Government (including in relation to the Commission), while simultaneously undertaking their responsibilities for the Commission.

(a) The Role of the Attorney General in Sri Lanka

The Attorney General serves as the first law officer of Sri Lanka and chief legal adviser to the Government. The Attorney General is legal adviser to all levels of the national Government, including the armed and security forces, and the police, as well as the President, who is Commander in Chief and Minister of Defence.

The appointment of the current Attorney General was in contravention of the 17th Amendment of the Constitution, which prohibits direct appointments by the President unless such an appointment has been pursuant to the approval of, and a recommendation by, the Constitutional Council.[35] The current Attorney General was appointed directly by the President in April 2007 without the approval or recommendation of the Constitutional Council, thereby casting doubt on the validity and propriety of his appointment. Questions of the Attorney General's independence have prevailed, making it all the more important that his detachment, independence and impartiality should be beyond the slightest suspicion.[36]

[35] Legal Opinion of two eminent Sri Lankan Jurists, dated 20 June 2007, on file with the IIGEP.
[36] *Ibid*

In the investigation into any serious crime, the Attorney General, through his Department, advises police investigations. Members of the Attorney General's Department have the power and the discretion to direct or order[37] the police or a magistrate to take further investigative steps or do it themselves[38]. In practical terms 'advice' from the Attorney General to the police, in Sri Lankan criminal justice culture and parlance, means a direction, an order, or instructions[39].

The IIGEP has observed that the Attorney General has advised the police in the conduct of the original investigations into some of the cases now under review by the Commission. The Deputy Solicitor General has advised the original investigation into one case and leads the Commission's investigation and inquiry into the same case. Scrutinizing the acts or omissions of the Attorney General and his Department in advising, instructing or influencing the police and government analysts in these investigations is a task of the Commission[40].

International standards call for a separation between commissions of inquiry and those agencies or persons who may be the subject of such investigations or inquiries.[41] Officers of the Attorney General's Department who played a role advising the original police investigation could be called as material witnesses when the Commission examines the "possible reasons that may have influenced or been relevant to the conduct of investigations", and "the nature, propriety and efficacy"[42] of those investigations. The IIGEP has expressed its concern that the apparent conflict of interest jeopardizes the actual and perceived independence of the Commission and is in breach of international norms and standards.

(b) The Role of the Attorney General's Department in the Panel of Counsel

The Attorney General, through his Department, has played a critical role in the inner workings of the Commission. The terms of the Warrant did not indicate that there would be a role for the Attorney General's department to play until after the Commission had concluded its work[43]. However, the Commission created a Panel of Counsel comprised

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[37] Legal Opinion of eminent member of the Sri Lankan Criminal Bar, dated 21 December 2007, on file with the IIGEP.
[38] S. 397(1)(2), 398 (2), and 399, Sri Lanka Code of Criminal Procedure.
[39] Legal Opinion of eminent member of the Sri Lankan Criminal Bar, dated 21 December 2007, on file with the IIGEP.
[40] Legal Opinion of two eminent Sri Lankan Jurists, dated 20 June 2007, on file with the IIGEP.
[41] UN *Principles on the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions*, ECOSOC Res. 1989/65, annex, 1989 U.N. ESCOR Supp. (No. 1) at 52, U.N. Doc. E/1989/89 (1989), Principle 11.
[42] Government of Sri Lanka, Gazette Extraordinary No. 1471/6 of 13 November 2006, Item 5 of the Terms of Reference.
[43] In the Preamble of the Warrant, the President states:

> *I am of the opinion that the afore-said investigations and inquiries conducted by the Commission of Inquiry …would facilitate and enable me to present the relevant material to …the Attorney*

of four members of the Attorney General's Department to guide the conduct of investigations, present evidence to the sessions, advise on questions of law, and suggest further investigations and inquiries to be conducted by the Commission.

The Attorney General nominated, and the Commission appointed, an Additional Solicitor General, a Deputy Solicitor General, a Senior State Counsel and a State Counsel to serve as the Commission's Panel of Counsel of the Official Bar.[44] Subsequently, and in apparent response to the issue of conflict of interest raised by the IIGEP, the Commission also appointed a parallel Panel of Counsel of the Unofficial Bar.[45]

The IIGEP has observed that the Attorney General's Department has played an active role in almost every facet of the workings of the Commission. Pursuant to Rule 1.3 of the *Commission's Organizational Structure and Rules of Procedure* (*See* Appendix 10), it is the duty of the Panel of Counsel to perform the following functions:

1. Assist the Commission in supervising, guiding and advising the conduct of investigations.
2. Assist the Commission in presenting evidence in public sessions of inquiry.
3. Assist the Commission in advising on questions of law.
4. Suggest to the Commission further investigations and inquiries to be conducted.
5. Any other matters assigned to the Panel of Counsel by the Commission.

Additional duties were given to members of the Attorney General's Department through the *Mandate, Structure and Rules of Procedure of the Investigation Unit*. (*See* Appendix 11) Rule 4(iv) of the Investigation Unit Rules requires the Chief Investigator to prepare a plan of investigation, "on the advice of the Panel of Counsel", prior to commencing an investigation. It also provides that "in the preparation of the said plan... the Chief Investigator shall consider investigations already conducted by the police into the relevant incident."

> *General enabling the institution of appropriate legal action including the consideration of the institution of criminal proceedings…*

Further:

> *I do hereby declare and state my intention to, within two months of the receipt by me, forward the Reports of the Commission of Inquiry…and any other material referred to and presented to me…to the relevant competent authorities of the Government of Sri Lanka including the Attorney General, for their consideration of the initiation of necessary action to implement the recommendations of the Commission of Inquiry including the consideration of the institution of criminal proceedings. Upon receipt of such material the Attorney General shall as soon as possible consider and if required take further action, and where appropriate institute necessary criminal proceedings.*

[44] The Commission's Panel of Counsel of the Official Bar is comprised of Mr. Palitha Fernando, Additional Solicitor General; Mr. Yasantha Kodagoda, Deputy Solicitor General; Mr. D.H. Jayakoddy, Senior State Counsel; and Ms. L. Karunanayake, State Counsel.

[45] The Panel of Counsel of the Unofficial Bar is comprised of Mr. Ranjit Abeysuriya, Mr. R.K.W. Gunasekera, Mr. Nuwan Pieris, and Ms. M.M.T.K. Rodrigo.

(c) The Role of the Attorney General's Department in the Original Investigation

The Attorney General's Department has advised the original investigations into cases that are now, due to the failed original investigations, subject to the Commission's investigations and inquiries. Of particular concern is the conflicting role of the Attorney General's Department in the ACF Case.

The involvement in the original investigation of the Attorney General's Department, in general, and the Deputy Solicitor General, in particular, is well established from the investigation notes of the Criminal Investigations Department (CID)[46] (*See* Appendix 12) These notes are in the possession of the Commission. The IIGEP has brought to the attention of the Commission, the relevant portions of these notes. The Commission has failed to remove any members of the Attorney General's Department from its Panel of Counsel although they have known, since at least June 2007[47], of the active role of one member of the Attorney General's Department in advising the original investigation of the ACF Case.

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[46] According to the CID investigation notes:

1. By 31 August 2006, the Deputy Solicitor General had been given the ACF police investigation file by CID investigators. On that date, discussions took place between them relating to the direction of the case. (*see* ACF File Notes of police investigator A.S.P. Athurkorala, CID, p. 22)
2. On 20 September 2006 the attorney-at-law for the ACF requested an order from the investigating magistrate in Anuradhapura for the exhumation of eight bodies of the ACF aid workers. Despite the consent of the families, the Deputy Solicitor General initially resisted the application. (*See* ACF representative's Minutes of Anuradhapura Magistrate Court hearing into the ACF case on 20 September 2006) He subsequently consented and the bodies were exhumed.
3. On 6 December 2006, updated CID investigative extracts were referred to the Deputy Solicitor General "for instructions concerning the investigations". (ACF File Notes of police investigator A.S.P. Athurkorala, CID, p. 233)
4. On 18 April 2007, CID investigators were ordered to provide the Deputy Solicitor General with a copy of the post mortem report of Dr. Malcolm Dodd, an Australian expert assisting the investigation on the invitation of the Government, and "to obtain instructions whether there is a legal basis to include the report in the case". (*See* ACF File Notes of police investigator A.S.P. Athurkorala, CID, p. 80)
5. On 23 April 2007, CID investigators met with the Deputy Solicitor General and received "instructions" on what to do with the two autopsy reports. (*see* ACF File Notes of police investigator A.S.P. Athurkorala, CID, p. 88)
6. On 25 April 2007, the Deputy Solicitor General was directed by the Secretary of the Ministry of Disaster Management and Human Rights to take action regarding a request for a second ballistics test on bullets used in the killings to be carried out jointly by the Government Analyst Department and Australian experts. (Letter to Deputy Inspector General, CID from Secretary Ministry of Disaster Management dated 25 April 2007)

[47] In a joint meeting on 9 June 2007, the Commission informed the IIGEP that the members of the Panel of Counsel of the Official Bar had assured the Commission that none of them had been involved in any of the prior investigations under review by the Commission, including the ACF investigations. The IIGEP provided the Commission documentation clearly establishing that the Deputy Solicitor General, in fact, had been actively involved in the original investigation of the ACF Case (Case 2), advising, directing and instructing the police, the investigating magistrate and experts soon after the 17 killings took place in early August 2006. (Minutes of the meeting between the IIGEP Chairman, Justice Bhagwati and the Commission on 9 June 2007)

Members of the Attorney General's Department who have been involved in the original investigations into these cases have relevant and material evidence relating to the conduct of the original investigations. They are potential witnesses and may be summonsed by the Commission pursuant to Section 7(b) of the *Commissions of Inquiry Act*[48].

Despite the incontrovertible evidence of the involvement of the Deputy Solicitor General in the original investigation, the Commission has failed to remove him. His continuing role in the work of the Commission erodes the Commission's real and perceived independence, and thus has undermined the credibility of the Commission.

(d) The Dual and Conflicting Roles of the Attorney General's Department

Members of the Commission's Panel of Counsel have continued to function as active members of the Attorney General's Department and have continued to represent the Government while on the Commission's Panel of Counsel.

Although the Commission has argued that the members of Panel of Counsel from the Attorney General's Department are 'seconded' to the Commission and independent of the Government[49], the IIGEP has observed that the four members of the Attorney General's Department who comprise the Panel of Counsel from the Official Bar are not, in fact, seconded on a full time basis to the Commission and work for and report to the Attorney General.

In particular, the IIGEP has observed that the Deputy Solicitor General has often functioned as Lead or Senior Counsel for the Commission. His professional obligations in that capacity included providing legal advice to the Commission, drafting legal documents and leading evidence before the Commission in 60 *in camera* ACF investigative sessions, as well as in many *in camera* investigative sessions for the Trincomalee and Sencholai cases. While serving in the capacity as counsel for the independent Commission he has continued to act for the Government on human rights issues generally and specifically as a State prosecutor in the ongoing ACF police investigation, as well as exercising other functions for the Attorney General relating to the work of the Commission[50]. Another member of the Panel of Counsel on occasion has

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[48] *Commissions of Inquiry Act No. 17 of 1948*, Section 7(b).

[49] Minutes of meeting between the IIGEP Chairman, Justice Bhagwati and the Commission on 9 June 2007.

[50] Specific instances that highlight the inappropriate dual functions of he Panel of Counsel of the official bar include:

- In March 2007, the Deputy Solicitor General was part of the Government's delegation to the Human Rights Council in Geneva. The purpose of this delegation, which also consisted of the Attorney General and the Minister of Disaster Management and Human Rights, was to defend the Government's human rights record and to have an intended Resolution against the Government deferred. (*see The Nation,* 8 April 2007).
- On 27 June 2007, the Deputy Solicitor General represented the Attorney General at a Government Press Conference relating to the ACF case (the Commission's Case 2). In that press conference, he criticized the conclusions of the report of the International Commission of Jurists alleging the State had tampered with ballistics evidence in the ACF case.

been absent from Commission sessions in order to conduct prosecutions for the Attorney General in the Kandy Courts[51].

(e) Professional Ethics

All members of the Attorney General's Department, who instruct, advise or direct police investigations are attorneys-at-law and, by virtue of their professional and legal ethics, cannot have divided loyalty[52]. National and international norms and standards require attorneys-at-law to avoid conflicts of interest in the exercise of their professional responsibilities. *The Supreme Court (Conduct of and Etiquette for Attorneys-at-Law) Rules* (1988) prohibit any attorney-at-law in Sri Lanka from acting in a conflict of interest and from acting in any matter where the attorney has reason to believe he or she would be required as a witness[53]. Thus, a member of the Attorney General's Department who continues to act as an advocate in a case in which he or she is a material witness, acts contrary to international norms[54], and to his or her legal, professional and ethical obligations under the *Supreme Court Rules* and is not only in a perceived conflict of interest but also in an actual conflict of interest[55].

(f) Conclusion

The role of the Attorney General, and his Department, in the inner workings of the Commission is in breach of international norms and standards relating to the independence of investigations of serious human rights violations and of commissions of inquiry. The role of the Attorney General may undermine the Commission's attempts to generate the information necessary to solve the cases and resolve the institutional flaws tending to impunity, which are all the more pronounced in cases in which the Government has been implicated.

- The Deputy Solicitor General has acted on behalf of the Attorney General in carrying out work with the Commission. He has represented the Attorney General in meetings between the IIGEP and the Government, and has signed letters from the Attorney General, including letters relating to the Commission's work, which were signed as "Deputy Solicitor General, for the Attorney General". *(see e.g.,* letter to Justice Bhagwati in response to public statements 1 & 2 dated 8 June 2007 and letter to Justice Bhagwati of 11 June 2007 in response to public statements 1 & 2)
- On 4th March 2008, the Deputy Solicitor General was clearly acting in his role as Deputy Solicitor General when he spoke on behalf the Attorney General and expressed the views of the Attorney General regarding IIGEP's Public Statement No. 05.

[51] Discussions between the IIGEP and the relevant member of Panel of Counsel, ACF Investigation Sessions, BMICH.

[52] Legal Opinion of two eminent Sri Lankan Jurists, dated 20 June 2007, on file with the IIGEP. Rules 8 and 12, *Supreme Court (Conduct of and Etiquette for Attorneys-at-Law) Rules (1988).*

[53] Rule 8 and 12, *Supreme Court (Conduct of and Etiquette for Attorneys-at-Law) Rules (1988).*

[54] The *International Code of Ethics*, first adopted in 1956, as amended in 1988…

[55] Legal Opinion of two eminent Sri Lankan Jurists, dated 20 June 2007, on file with the IIGEP.

2. Financial Independence

The Commission has no financial autonomy and, thus, the IIGEP questions whether it can function as an independent body. The Presidential Secretariat controls the Commission's budget. Prior to undertaking any actions that require funds, the Commission must request the tacit approval for such action through the process of requesting funds. Thus, the Commission's decision making power is effectively usurped by the Presidential Secretariat.

The IIGEP has repeatedly expressed its concern about the Commission's lack of financial independence and has supported the Commission's requests for such independence. Budgetary issues, pay scales and other resource constraints have been cited by the Commission as the reason for many delays, including delays in the recruitment of staff, insufficient translation services and lack of office equipment. These recommendations and requests have gone unheeded. Financial control provides the President, through the Presidential Secretariat, *de facto* control over the effectiveness of the Commission.

(a) Staffing

The financial control by the Presidential Secretariat has impacted the staffing decisions relating to the Commission.

The IIGEP was concerned to note the recent and sudden reduction of the salaries of members of the Commission. Although the salaries have now been restored, this seemingly arbitrary exercise of power, followed by the subsequent denials by the Presidential Secretariat, is a reminder of the control the Presidential Secretariat effectively exercises over the Commission.

The IIGEP understands that it is difficult for the Commission to recruit experienced investigators. It is unclear whether the Commission has explored alternative possibilities, such as recruiting retired police officers or requesting international advisers to the Investigation Unit. The Commission, although asked to do so many times, has never provided information about criteria and norms used in hiring and the vetting process.

(b) Panel of Counsel

The Commission has repeatedly pointed to the lack of financial autonomy as undermining its ability to make free choices in a timely manner. In particular, the Commission has cited the lack of resources among other things for its decision to rely on members of the Attorney General's Department as their panel of counsel. For example, in his letter of 11 April 2007 the Chairman of the Commission, stated that the recruitment of private counsel to the Panel of Counsel would "require a substantive amount of resources which… the Government has not budgeted for". Nonetheless, the Commission was able to mobilize resources to employ independent legal counsel in addition to Counsel from the Attorney General's Department.

(c) Witness Protection

Witness protection, by its nature, requires secure funding and special procedures for the disbursement and acquittal of funds to ensure that details of funding do not disclose the methodology of protection, or the identity or location of witnesses. Funds need to be available to react rapidly to protection needs and events as they occur. Exposure to Government processes and officers could breach the security and integrity of the Victim and Witness Assistance and Protection Scheme and Unit, and even put at risk the lives of the participants.

(d) Conclusion

The failure of the Government to provide adequate and independent financial resources to the Commission undermines the independence of the Commission and limits the Commission's capacity to fulfil its mandate, and is, thus, in contravention of international norms and standards relating to independent investigations of grave violations of human rights and to independent commissions of inquiry.

3. SCOPP Involvement in the Work of the Commission

The IIGEP has not understood the role played by the Secretariat for Coordinating the Peace Process (SCOPP)[56] in the Commission. The SCOPP is a unit of the Presidential Secretariat. Not only has the SCOPP been represented at a number of meetings called by the Minister of Disaster Management and Human Rights to discuss the Commission, but also the SCOPP has played a role in the Commission, particularly in relation to witness protection. As a part of the Presidential Secretariat, the role of the SCOPP in the functioning of the Commission in general and in relation to witness protection in particular, presents the perception of a conflict of interest, if not an actual conflict of interest.

The SCOPP Director-Legal, while having no practical expertise in witness protection, was appointed by the Commission as an advisor on witness protection. Through SCOPP, the Director-Legal stopped the Commission's Victim and Witness Assistance and Protection Unit (VWAP Unit) from receiving much need training through the Australian Federal Police National Witness Protection Program. Instead, SCOPP arranged an awareness-raising programme through the New South Wales Department of Public Prosecutions (DPP). While the NSW DPP did provide an introduction to victim protection and assistance issues, no training was provided. At a seminar held after the SCOPP-facilitated visit, those who had participated in the seminar, as well as Commissioner S.S. Wijeratne, reported that the VWAP Unit still needed training to ensure it could carry out its tasks. To date, the VWAP Unit has not received adequate training.

[56] The Secretariat for Coordinating of the Peace Process (SCOPP) was established on 6 February 2002 with the approval of the Cabinet of Ministers of the Government of Sri Lanka. The SCOPP was initially under the purview of the Prime Minister, but now comes under the President through the Presidential Secretariat.

At a Clause 8 session into the Commission's Case No. 7, the alleged aerial bombing of Sencholai by Government forces, the IIGEP was disturbed to observe that it was not the VWAP Unit, but rather the SCOPP Director-Legal who escorted an at-risk witness to and from the closed sessions.[57] Although the Commission had determined that the witness was at-risk, it failed to comply with international norms and standards or basic practices[58] to ensure the witness's protection. Of particular concern was the fact that a member of the Presidential Secretariat was in control of a witness in a case that implicated Government forces.

The IIGEP has been concerned by the role the SCOPP has played in the workings of the Commission. The IIGEP notes that the Presidential Secretariat, neither independently nor through the SCOPP, should have a role to play in the substantive work of the Commission. The IIGEP further notes that the assistance provided by the SCOPP has been, at times, contrary to the effective functioning of the Commission. As a part of the Presidential Secretariat, the involvement of SCOPP raises the perception of a conflict of interest, if not an actual one.

B. Lack of Cooperation by State Bodies

The IIGEP notes a lack of political and institutional will on the part of the Government to pursue with vigour all the cases under review with the intention of identifying the perpetrators or at least uncovering the systemic failures and obstructions to justice that rendered the original investigations ineffective.

1. Failure of State Bodies to Disclose Information to the Commission

The work of the Commission, and by extension the IIGEP, has been frustrated by the lack of cooperation extended to the Commission by State bodies, particularly in regard to the release of information and materials of relevance to the work of the Commission. International norms and standards entitle an investigative body to summon witnesses, including the officials allegedly involved in the incident, and to demand the production of

[57] Two young female survivors of the Sencholai bombing, although seriously injured, were placed under the custody of the State and later interrogated by the Terrorism Investigation Division (TID). For an unknown reason, the SCOPP Director-Legal has been involved in the case.

[58] The SCOPP Director-Legal, and other unknown parties, escorted these at-risk witnesses to and from the Commission. The escorts were unarmed and travelling in a civilian vehicle, following a vehicle with a police sign in the front window. The witnesses were brought through open areas of the BMICH where members of the public and other Government security forces were waiting on an unrelated matter. There were no precautions taken to protect the witnesses or their identities. Further, even though it was a closed session, there were numerous persons in the session, including technical staff, caterers and non- relevant Commission staff. These are not practices consistent with international witness protection norms and standards or best practices.

evidence[59]. Given the Commission's truth seeking mandate, the direction, contained in the Warrant, to government officials to provide information, and the powers granted the Commission under the *1948 Act,* the Commission has a duty to seek and secure all relevant information in a timely fashion.

The Commission has several powers at its disposal to gather information, including the power to summon information. Under section 7(1) of the *1948 Act*, the Commission is empowered to:

> *procure and receive all such evidence, written or oral, and to examine all such persons as witnesses, as the commission may think it necessary or desirable to procure or examine.*
>
> *[and]*
>
> *to summon any person…to attend any meeting of the commission to give evidence or produce any document or other thing in his possession, and to examine him as a witness or require him to produce any document or other thing in his possession.*

The Warrant echoes this power where the President directs all State officials and other persons to comply with requests from the Commission for information or materials for the purpose of necessary investigations and inquiries. The Commission may use its powers under section 12 of the *1948 Act* to take action against any persons refusing or failing to produce evidence for contempt of court before the Court of Appeal. The IIGEP is not aware of these powers being used by the Commission to gather information on the cases before it.

2. The Response of State Organs to Requests for Information

State bodies, with critical information about the cases, including the security forces, the Attorney General's Department, the Criminal Investigation Department, and the National Human Rights Commission, have failed to provide such information to the Commission. This is particularly concerning considering the involvement of members of the State's security forces, not only in the violations, but also in the subsequent cover ups of the violations.

State security forces do keep records, including situation reports, troop movement reports, ammunition expenditures, casualty reports, troop weapon assignments, radio and telephone logs, and missing equipment reports[60], all of which was revealed by evidence

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[59] UN *Principles on the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions*, ECOSOC Res. 1989/65, annex, 1989 U.N. ESCOR Supp. (No. 1) at 52, U.N. Doc. E/1989/89 (1989), Principle 10.

[60] Transcripts of Proceedings of the Commission of Inquiry in the ACF case dated 4, 9 and 11 September 2007 and 11, 15 and 16 October 2007.

heard by the Commission, Further, there are other sources of material evidence or information which could lead the Commission to the identity of the perpetrators and/or help reveal why the original investigations have failed to lead to prosecutions. Those sources would include the complete files of the Criminal Investigation Department, which investigated the crimes and continue to do so; the complete files of the Attorney General's Department, which advised, instructed and directed the investigations, continue to do so and have an independent power to collect evidence; and the complete files of the Human Rights Commission of Sri Lanka, whose members investigated many of these cases. Further, individuals from those institutions who had control of the files could be material witnesses in the inquiries.

The IIGEP has repeatedly requested full disclosure of information and material provided to the Commission by Government bodies and officials. Due to the lack of disclosure generally, the IIGEP has been unclear what information and material is in possession of the Commission.

By letters dated 4 May 2007, the Commission requested information from the Attorney General, the Inspector General of Police, the Commanders of the Army, Navy and Air Force, and the Human Rights Commission. For more than one month, no response was forthcoming. The IIGEP has sought clarification about the delays.[61]

A letter to the Commission from the Army dated 2 August 2007 stated that the Army did not conduct any investigation into the killing of civilians in the Mutur area[62]. Further, immediately prior to the Commission's session into the ACF case on 9th August, the Secretary of the Commission announced that he had received a letter from the Army which stated that a named person, identified by investigators as being the commander of a security force unit which was in Mutur town centre at a material time, "was, according to the Army, not in Mutur at the material time"[63]. The IIGEP is not aware of what, if any, action was taken by the Commission to confront this information, which stands in glaring contrast to other evidence in the possession of the Commission.

On 3 August 2007 the Commission informed the IIGEP that:

> *The authorities from whom we have requested information have furnished documents that they consider relevant, and we are unable to call for specific documents unless such documents transpire in the course of witnesses' statements. However, if any specific documents are requested by name, we will not hesitate to call for them.*

For the Commission to successfully execute its mandate, the cooperation of all bodies and individuals holding information is vital. Effective and comprehensive investigations and inquiries can not rely on partial information, and requests for information and evidence can not predict what information and evidence a body or person holds.

[61] Letter from IIGEP to the Commission dated 16 June 2007.
[62] Letter to the Commission from M.A.M. Peiris, Major General, dated 2 August 2007.
[63] Transcripts of Proceedings of the Commission of Inquiry, in ACF Case, 9 August 2007.

Similarly, it is not for State officials and other persons to determine what they "consider relevant". In this light, the IIGEP is concerned that the Commission has not been operating with sufficient levels of information and evidence.

On 10 August 2007, the Chairman of the Commission responded to the IIGEP's repeated requests for disclosure of information and material in the hands of the Attorney General, CID, State security forces, and Human Rights Commission. A summary of the relevant responses in regard to each is as follows.

(1) The Attorney General has not forwarded any files and since their files will record the decision making process, the Commission does not believe such information is required.

(2) The CID has disclosed information that the CID "considers relevant".

(3) The Army and Air Force have not forwarded any files, and the Navy has forwarded some files.

(4) The Human Rights Commission has sent some materials, which have been sent to the IIGEP.

The IIGEP is of the opinion that the President should take immediate steps to compel all State bodies to provide full disclosure of information and cooperation to the Commission.

3. Lack of Cooperation and National Security

During the course of the *in camera* Clause 8 investigation sessions[64], and in meetings with the Commission, the IIGEP has observed evidence of a lack of cooperation by state bodies in the original investigation, as well as by State bodies with the Commission. This seems to be particularly true of the Army. In some instances, the original police investigators have sought information from security forces without success. When government officials, including security forces, have provided information to the Commission, they often have failed to disclose the full extent of their information and involvement.

In particular, the IIGEP is concerned that certain members of the Army, summoned to appear before the Commission, have refused to answer certain questions or produce records which could help in the identification of the perpetrators in cases that allege involvement by State security forces. Claims of national security have been raised, but have not been supported by fact or law. It is not clear how the mere fact of releasing the names of those who were at a material place at a material time one-and-a-half to two years before could affect current national security.

[64] *See* Section IV(A)(1) on Clause 8 Investigation Sessions.

Where national security is invoked as a reason for refusal to give evidence, a proper certificate to that effect must be given by the responsible Minister in a manner and form acceptable to a court or the Commission. Thus, the Commission's access to relevant evidence cannot be denied on grounds of national security unless, in exceptional circumstances, it is necessary in a democratic society to protect a legitimate national security interest and the denial is subject to independent judicial review[65]. The onus of substantiation lies on the responsible Minister. To date, the IIGEP is not aware of any attempts made by the Commission to require such officers to substantiate the reasons as to why cooperation would prejudice national security. Thus far, the Commission has not sought to summon superior officers, including those exercising political authority over them.

4. Conclusion

The Government's failure to ensure cooperation and full disclosure from State bodies is incompatible with international norms and standards and seriously impedes the Commission's capacity to fulfil its truth seeking mandate.

IV. The Limitations of the Commission's Investigations and Inquiries

The IIGEP has observed a number of internal and external factors that have resulted in a failure by the Commission to act in a timely manner commensurate with the nature and gravity of the cases. While the IIGEP notes that the Commission could not possibly fulfil the terms of the Warrant relating to 16 cases within just one year, it has also noted that the Commission seems, at times, to have worked against its own efforts by failing to develop, and keep to, a work plan and by creating unnecessary and time consuming procedures and methods.

Until the public inquiries commenced on 5th January (Trincomalee Case) and 3rd March (ACF Case), all of the sessions of the Commission had been taken up with secret investigation (so-called "Clause 8") hearings. It has been an ongoing matter of concern to the IIGEP that the Commission has been proceeding on the basis of separate "investigation" and "inquiry" hearings, the former being held *in camera*, only the latter in public. The IIGEP welcomes, as long overdue, the move to public inquiries.

A. Transparency

Transparency in the workings of a fact finding body such as the Commission of Inquiry is critical in the search for truth and in order that victims and the public can have confidence

[65] Principle 16, *Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity,* UN Economic and Social Council Report, 8 February 2005.

in the independence, impartiality and the comprehensiveness of the work of the Commission.

1. Clause 8 Investigations Sessions

On 8th May 2007, the Commission amended its internal rules and procedures by introducing Clause 8[66] (*See* Appendix 13), which allows the Commission to directly interview and record witness statements for the purposes of investigations. Clause 8 was subsequently used to justify *in camera* investigation proceedings. The rationale for Clause 8, given by the Commission to the IIGEP at their joint plenary meeting on 18 August 2007, was fourfold. It enabled the Commissioners: (1) to take charge of the investigations; (2) to determine whether, in particular cases, there was sufficient evidence to warrant a public inquiry; (3) to determine which witnesses would be most useful before a public inquiry; and (4) to sit in panels, pending a resolution of the doubt regarding the necessity of a quorum of the full membership. Clause 8 became the grounds for the introduction of a cumbersome and time consuming process that lasted for over nine months which led to the Commissioners, with assistance from the Panel of Counsel, to interview numerous witnesses in over 80 *in-camera* investigation sessions.

The IIGEP has attended all *in-camera* sessions and is, therefore, uniquely placed to make observations on the progress of such investigations. It is the assessment of the IIGEP that no substantial evidence has been gathered during these sessions. In no case has the agency or individual(s) responsible for these crimes been firmly identified. Further, the process has failed to exclude any plausible suspect. Most of the witnesses who have testified in the Clause 8 sessions had previously provided at least one written statement to police investigators.

The IIGEP has questioned the benefits of pursuing Clause 8 investigations rather than moving straight to a public inquiry process, letting the Commission's Investigation Unit take statements from proposed witnesses who have not previously given statements and clarifying certain points with others who have provided statements. The IIGEP is concerned that the repeated examination of witnesses runs the risk of corrupting the evidence being sought and could lead to "witness fatigue", which may impede eventual prosecutions. Of further concern is the role of the Attorney General's Department in Clause 8 sessions, as these *in camera* sessions give the Attorney General, the legal advisor to the State security forces, who are alleged to have committed many of the violations in the cases under review, access to sensitive information such as the identity of witnesses and the import of their testimony or statements[67].

It is the opinion of the IIGEP that the unnecessary delay in holding public inquiries has also undermined the transparency of the Commission. The unnecessarily time-consuming

[66] *Mandates, Organizational Structures and Rules of Procedure of the Investigation Unit*, Commission of Inquiry, amendment adopted on 8 May 2007.
[67] *Commission of Inquiry and the International Independent Group of Eminent Persons: Commentary on Development January – April 2007*, Centre for Policy Alternatives Police Brief No. 2, May 2007.

Clause 8 sessions have also reduced the Commission's capacity to search for the truth in most of the other 16 cases, thereby potentially denying victims in the other cases of their right to know and their right to an effective remedy.

2. Public Inquiries

The IIGEP welcomed the commencement, on 5th January and 3rd March, 2008, of public inquiries into two of the Commission's 16 cases, the Trincomalee Case and the ACF Case, respectively. The IIGEP had encouraged the Commission to move to the public inquiry stage of its proceedings and regrets the delay of more than one year in commencing public sittings. It notes that it was only after announcing its intention to leave to the Commission and the Government that the inquiries began, with very little notice to the IIGEP or to the public. The IIGEP encourages the Commission in its efforts to conduct public inquiries and urges it to ensure such inquiries are conducted in accordance with international norms and standards, which includes protection of witnesses. The Government must ensure the safety of all witnesses and must enable the Commission to give effect to its victim and witness assistance and protection scheme.

Public inquiries have significantly increased the transparency of the Commission and have generated high levels of interest by the media and members of civil society. Thus far, the Commission has held 20 public sessions in the Trincomalee Case, including six video conference sessions with at-risk witnesses living abroad, and seven public sessions in the ACF Case. Interest in the Commission was raised, in particular, by the video conferencing sessions of the Trincomalee Case, during which witnesses testified from abroad via video link.

The IIGEP welcomed the opportunity to observe the public sessions held thus far, as well as to facilitate six video conferencing sessions. It is regrettable that the Commission was not in a position earlier to seek the IIGEP's assistance to contact witnesses abroad and facilitate video conferencing, and notes that the Commission was in possession of at least one statement from a witness abroad as early as August 2007. Nevertheless, video conferencing sessions were made possible through the joint efforts of the IIGEP and the Commission, who worked in close cooperation in a prompt and flexible manner to ensure the sessions took place.

The public inquiries have highlighted a number of deficiencies in the functioning of the Commission that the IIGEP has observed throughout its tenure, including, most significantly, the lack of witness protection and assistance, which became even more pronounced after counsel for the alleged perpetrators, i.e. the Government forces, were granted standing. Areas of particular concern also include disparities in legal representation, the failure to treat witnesses in a manner compatible with the nature of the proceedings, and inadequate and, at times, improper translations. Additionally, the lines of questioning put to the witnesses thus far have not pursued one of the Commission's two mandated functions, i.e., the propriety and efficacy of the original investigations.

On the first day of the public inquiry into the ACF case, counsel for the Army Commander, comprised of private counsel and counsel from the military in active service, applied for, and was granted, standing before the Commission. Subsequently, during the video conferencing sessions in the Trincomalee Case, for the first time private counsel appeared on behalf of the Commander of the Special Task Force and applied for, and was granted, standing. The IIGEP recognizes the right under the 1948 Act of "every person … who is any way implicated or concerned in the matter under inquiry…" to be represented by counsel. However, the IIGEP has been concerned by the disparity created by the participation of counsel for the security forces, particularly when victims and their families are not similarly represented. Although two families of victims have now secured counsel, the imbalance persists, in particular due to the courtroom-styled cross examination tactics used by Counsel. The Commission's limited role as a fact-finding body with no judicial functions renders the approach of counsel for the Commanders of the Army and STF inappropriate. The IIGEP has been deeply concerned to note that the Commission has not independently intervened on behalf of affected witnesses. The Commission must act in the interests of the rights of all concerned, and must be sensitive to the needs and trauma of the victims and their families. The intimidation of witnesses through aggressive questioning may discourage witnesses from revealing the truth and may negatively impact the Commission's ability to fulfil its mandate.

The IIGEP was encouraged to observe that the Commission granted standing to counsel representing others with an interest in the ACF and Trincomalee Cases. In particular, lawyers representing one affected family in the ACF Case and one affected family in the Trincomalee case, as well as lawyers representing a group of civil society organisations in both cases and counsel for the ACF, each applied for, and was granted, standing before the Commission. There applications included, among other things, the right to full disclosure, the right to question witnesses and the right to raise objections. While the IIGEP maintains that it is the responsibility of the Commission to protect both the safety and rights of witnesses, it nonetheless hopes that the Commission will be assisted in their efforts by counsel.

The IIGEP has been troubled by the Commission's failure to treat witnesses in a manner compatible with the nature of the proceedings; proceedings intended to serve a non judicial truth seeking function in cases of grave violations of human rights. The lack of concern and respect for affected witnesses shown at times by the Commission and by its Victim and Witness Protection and Assistance Unit has been of concern. In one example, the IIGEP observed that a mother of a victim was left sitting in the witness box while Commissioners and the Head of Witness Assistance went for tea. The witness was not offered assistance; she was neither offered tea nor taken to a private room where she could compose herself out of public view. This is but one of many examples of what the IIGEP has perceived to be lack of consideration for the emotional and psychological well being of vulnerable witnesses. Other examples have included Commissioners talking on their cell phones, talking loudly or laughing to each other, sleeping, and walking out of sessions while witnesses are testifying; failing to express condolences to surviving family members; failing to thank witnesses for their testimony; and at times abrupt and unrelated

questioning; etc. The IIGEP was encouraged to observe some improvement in the conduct of Commission after the increased public and media attention.

The Commission's translation facilities are of continuing concern. Translations during the public sessions have, at times, misrepresented witness testimony. In some cases, the translation conveyed the opposite meaning of what the witness actually said. Parts of statements were, in some cases, not conveyed and, in others, important nuances were lost. Also, the tone of translations was, at times, aggressive and not always reflective of the tone of the original language question or answer. Resources must be provided to the Commission so that they may secure qualified and experienced translators, failing which the Commission must intervene to ensure accurate translations.

3. Dual Purpose Investigations

In September 2007, the Commission commenced a phase of investigation using members of its Investigation Unit, who are seconded on a full time basis to the Commission and released from their respective police departments[68]. Simply put, this phase entails members of that Unit, in the absence of the Commissioners, retaking statements from all those who have already testified in the *in camera* sessions of investigation, as well as from those who have yet to give a statement before the Commission. The members of the Unit take the statements for use by the Commission, as independent investigators of the Commission, but at the same time, as police officers for the State. The reasoning advanced by the Commission was that statements taken by the Commission investigators would not be admissible in any subsequent criminal proceeding which may arise. The IIGEP has not been allowed to observe these investigations.

In addition to the IIGEP's concern about "witness fatigue" mentioned above, the IIGEP has further concerns over the Commission's dual purpose investigations. With respect to 'fresh investigations' the Commission candidly admits that "…this is purely for the purpose of possible criminal proceedings, and has nothing to do with the work of the Commission"[69]; a purpose inconsistent with its independent fact-finding role and outside its mandate. (See Appendix 14)

Criminal prosecutions in Sri Lanka are within the exclusive domain of the Attorney General. Criminal investigations are conducted by police officers of the State. The Warrant authorizes the Commission to present its finding and recommendations to the State at the conclusion of its inquiries. Not only should the Commission be independent of the State, but also the members of its Investigation Unit should be as well. The Commission is indivisible and the Investigation Unit is simply a component of the Commission acting under the guidance and instructions of the Commission. The Commission has recognized the necessity for the independence of its investigators, not only by requiring them to be "released by the Police Department on a full time basis to

[68] Rule Mandates, Organizational Structures and Rules of Procedure of the Investigation Unit, Commission of Inquiry, adopted 27 March and 8 May 2007.
[69] Discussion Paper on Clause 8 Investigations, presented to the IIGEP on 18 August 2007.

work for the Commission" but as stated in clause 6 (ii) of the Commission's Rules and Procedures of the Investigation Unit:

> *The Chief Investigator and the Panel of Investigators shall conduct investigations only into matters directed to be investigated into by the Commission of Inquiry, and the conduct of such investigations shall be done independently, impartially and comprehensively.*(Emphasis added)

Accordingly, the IIGEP is concerned that this process, which requires its independent investigators to work for the Commission on the one hand and for the State on the other, creates a conflict of interest for the Commission as a whole and for the investigators in particular. Such a practice would cause the Commission to discourage victims and other potential witnesses from coming forward, and potentially mislead or violate the rights of some witnesses who may be perpetrators, as well as prevent the IIGEP from performing its responsibilities under its own mandate to observe the investigations of the Commission.

Since implementing this process, the Investigation Unit has taken at least 36 such statements[70]. The IIGEP has not been notified of the schedule for such investigative procedures and accordingly has been unable to observe the procedures.

4. Failure to Disclose Information to the IIGEP

Transparency is central to IIGEP's ability and responsibility to effectively observe the workings of the Commission and make recommendations for corrective action to the Commission. Timely disclosure of information and materials in the possession of the Commission is essential to ensure that the proceedings are transparent. The Presidential Warrant recognizes the importance of transparency, which was reaffirmed through the creation of the IIGEP and in the Letters of Invitation. The IIGEP is entitled to:

- *have access to all information and material that the Commission not only possesses but also to which it has access (paragraph 1);.*
- *with the concurrence of the Commission, to have access to witnesses when they are called upon to testified… (paragraph 1);*
- *observe all proceedings of the Commission (paragraph 2); and*
- *have all documents translated into the English language (paragraph 3).*

The Commission has formally recognized the need for timely disclosure to the IIGEP in the joint working arrangement between the Commission and the IIGEP. [71] The heart of that agreement is set out in paragraph 3 as follows:

[70] The IIGEP Minutes of the IIGEP Meeting with the Commission, dated 2 and 7 December 2007.
[71] Working arrangement between the Commission of Inquiry (CoI) and the International Independent Group of Eminent Persons (IIGEP), jointly agreed on 27 March 2007 and 23 April 2007.

The CoI shall make arrangements to provide in a timely manner… all information and material which the CoI or its Commissioners have obtained during investigations and inquiries conducted by the CoI, to members of the IIGEP….

Although the Commission has disclosed some information and materials, it has failed to provide full disclosure of all relevant information and materials in its possession.

During Clause 8 investigation sessions of the Commission, the issue became pronounced. The IIGEP generally was provided with witness exhibits only after the witness concluded testifying, despite the fact that they were in the possession of the Commission's Investigation Unit and the Panel of Counsel prior to the tendering of exhibits. This evidence was rarely translated into English, as envisioned in the Warrant, and, in many cases, was handwritten and illegible.

The IIGEP is concerned about the delay in the translations of documents provided to the IIGEP. It is noted that the Presidential Letters of Invitation guarantee translation and interpretation services to the IIGEP. The joint working agreement between the Commission and the IIGEP echoes this guarantee[72]. The Commission's deficiency in disclosing translated documents can best be exemplified in the ACF case. Since the Commission commenced its investigative sessions in May 2007, 87 Sinhala document exhibits have been tendered as exhibits, some of which are voluminous. Of these, only three English translations of the documents have been disclosed to the IIGEP. While the IIGEP appreciates the demands on the Commission's translation services, the IIGEP notes that sufficient resources should have been allocated to ensure that the IIGEP was able to perform its observer functions.

The IIGEP has identified specific documents, such as relevant police record books, that have not been made available to the IIGEP, although utilized by the Commission, and referred to by witnesses during their testimony. The IIGEP has observed that complete CID files have not been disclosed to the IIGEP. Further, on 26 April 2007, the IIGEP met with members of the Human Rights Commission of Sri Lanka and was shown a voluminous file of the field investigation into the ACF case of the Human Rights Commission[73]. The Commission has only disclosed a brief 22 page report of the Human Rights Commission, which reveals that the national Commission interviewed and took statements from many witnesses in the Mutur area.

Subsequent to the joint plenary of August 2007, wherein the IIGEP continued to express its concern over the Commission's lack of transparency through failure of full and timely disclosure, the Commission appointed a Deputy Secretary with the specific function to act as a liaison with the IIGEP and facilitate disclosure. At a meeting with the Deputy Secretary on 2 November, the IIGEP again provided a list of all documents not yet disclosed, including some, however, that the IIGEP understands were not in possession of the Commission, including the Attorney General and the Government security forces[74].

[72] *Ibid*, para 7.
[73] The IIGEP's Minutes of meeting, 26 April 2007.
[74] Minutes of the Meeting between the IIGEP and the Commission, dated 2 November 2007.

Instead of receiving full disclosure, the IIGEP received a letter from the Commission on 1 December 2007 stating, "[w]ith regard to the documents you have listed under State Officials and other bodies (CID, Army, Navy) the Commission wishes to know the relevance of all this to the ongoing investigation/inquiry".[75] Prior to this occasion, the IIGEP had highlighted the importance of these documents in discussions and through writing. The IIGEP finds it of particular concern that the relevance of such information is not apparent to the Commission. In a final attempt to secure full disclosure of all evidence the IIGEP once again met with the Commission's Secretariat, including the Secretary and the specially appointed Deputy Secretary on 7 December 2007[76]. At that meeting the Commission indicated that it would provide immediate disclosure of the majority of documents, which it had in its possession. However, the Commission failed to do so.

Efforts by the IIGEP to overcome this impasse have been unsuccessful. Repeated requests have been made in writing, the matter has been raised at every opportunity in meetings, and an agreement was reached in the joint Working Arrangements reached between the Commission and the IIGEP to share all information and materials pertaining to the cases. The lack of disclosure of information and material, particularly disclosure which may implicate the State security forces or the Attorney General, breaches a core responsibility of the Commission to the IIGEP. The result of the Commission's failure to disclose has seriously undermined the IIGEP's ability to fulfil its mandate.

5. Conclusion

Transparency of the proceedings was not only an express objective stated in the Presidential Invitation to the IIGEP Members, but is also an important international norm for commissions of inquiry into grave violations of human rights. Transparency enables victims and their families to satisfy their right to know. While the IIGEP welcomes the commencement of public inquiries, it nonetheless notes that for more than one year the Commission has failed to comply with international norms and standards on transparency, which has irreversibly tainted the process. Further, the Commission's failure to provide the IIGEP with full disclosure has undermined the IIGEP's capacity to fulfil the terms of the Letters of Invitation.

V. Victim and Witness Assistance and Protection

Serious violations of human rights, including extrajudicial killings, disappearances, and torture, present particularly grave witness protection concerns, as it is often the very persons entrusted with the prevention of crime and the protection of citizens who are responsible for or implicated in such violations. Likewise, grave crimes, including serious violations of human rights, by non-state belligerents present critical protection issues due to the intransigence of the non-state actors.

[75] Letter from the Commission to the IIGEP, dated 01.12.07
[76] Minutes of the Meeting between the IIGEP and the Commission, dated 7 December 2007.

Witness[77] protection and victim and witness assistance are separate but complementary processes that generally require distinct institutional frameworks, unique skill sets, and specialized personnel and training.[78] Both witness protection and victim and witness assistance are integral components of a fully operational and effective criminal justice system. Successful prosecutions often depend on them. The Commission has combined these two concepts in its approach.

A. The Key Factors of Witness Protection

The principle of witness protection recognizes the critical role witnesses play in effective investigations and prosecutions. Witnesses who have, and/or provide, evidence in criminal cases are often at risk of further victimization. Thus, witness protection is essential not only to protect witnesses from harm, but also to enable effective investigations and prosecutions, by encouraging witnesses to come forward.

The guiding consideration of witness protection is witness safety; protecting witnesses against all known, foreseeable or potential risks through maintaining secrecy about the identity and whereabouts of vulnerable witnesses, as well as secrecy about the program, itself, and its methodology.

The key factors of witness protection are: (1) confidentiality; (2) independence; and (3) permanence. First, confidentiality is required to ensure information is compartmentalized from other areas of the law enforcement department, especially in cases where State bodies may be implicated in the offences. Second, the independence of the programme includes financial independence, to ensure flexibility to administer funds to enable the programme to respond effectively and immediately to witness protection needs, coupled with special accounting procedures to prevent information on witness methodology or locations being disclosed to persons who do not *need to know*. Third, witness protection must be enduring and must last for as long as there is a threat to the witness, irrespective of whether the case results in successful prosecution.

The success of witness protection programmes thus depends on the integrity of those entrusted with witness protection. Information must be treated with the utmost secrecy and confidentiality. Any breaches of confidentiality will threaten the safety of witnesses, as well as the integrity of the program, thereby undermining future attempts to secure witness cooperation. Thus, there can be no protection without strict adherence to these basic principles. State practice does not recognize partial witness protection regimes. By misleading witnesses about the capacity of the State to provide protection, incomplete witness protection or witness protection undertaken without strict adherence to confidentiality, may do more harm than no witness protection.

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[77] The term witness protection refers to both victim and witnesses, as victims are also witnesses by the nature of their involvement in the crime.

[78] At the international level, however, witness protection and victim and witness assistance have often been collapsed and addressed by one unit due to the ad hoc, and thus time limited, nature of the mechanisms, the lack of resources, and the lack of support from an enduring national domestic system.

At an operational level, witness protection may include measures such as relocation either within one's country or overseas, change of identity, provision of accommodation, ongoing financial support, and secure transportation to and from courts, hearings, meetings, etc. Successful witness protection measures should be designed to have the minimum negative impact upon the life of the witness and other associated persons.

In practice, some standard witness protection measures are not possible in jurisdictions like Sri Lanka where cultural difference has been exaggerated by prolonged ethnic conflict, eroding trust within and between communities. Suspicion and intolerance of those outside established family, neighbourhood or ethnic groups, make it difficult, if not impossible, to maintain secrecy about previous identities and locations. This is especially relevant in human rights cases where the suspected perpetrators may have 'eyes and ears' throughout the community. Thus, in such cases, few measures apart from re-identification and re-location outside of Sri Lanka would be effective.

Witness protection programmes are strengthened by a strong legislative framework, which ensures cooperation from all arms of the criminal justice system and the judiciary. In addition to specific legislation on witness protection, other related legislation is often needed. In particular, amendments to criminal procedure codes are often required, to allow witnesses to give evidence by video-link, and to prohibit questioning about the location or new identity of the witness, or other sensitive information, and to legally and securely provide new identities for witnesses and their families.

B. The Key Factors of Victim and Witness Assistance

Victims and witnesses of serious crimes, including human rights violations, face numerous physical, psychological, financial and practical problems as a consequence of their experiences as victims and witnesses. Assistance to victims and witnesses, including measures to address the impact of crime on the individual and to ensure the welfare of individual victims and witnesses, is common State practice. Such assistance encourages witness cooperation, without which the chances of effective investigations and prosecutions are understandably reduced.

Effective victim and witness assistance is tailored to the particular needs of individual victims and witnesses, and may include specialized medical attention, psychological support and counselling, advocacy, court accompaniment, financial support, language interpretation, travel assistance, etc. Survivors of gender crimes, war crimes and crimes against humanity often require additional assistance due to the increased potential for re-traumatization by the criminal justice system. Victim and witness assistance generally is undertaken by special sections of the police and/or the courts, both of which usually have specially trained victim and witness assistance units.

C. National Legal Framework

Effective witness protection depends on both the will and the tools. Within the prevailing climate of impunity in Sri Lanka, effective protection poses serious challenges. Although the need has been officially recognized, the Government is yet to pass a law governing the protection of victims and witnesses. The Commission of Inquiry has helped raise awareness about the absence of sufficient domestic technical skills and knowledge in relation to victim and witness protection and assistance, which both the Commission and the Government have acknowledged.

The IIGEP is concerned by the apparent lack of urgency with which these problems are being addressed. A *Draft Bill for the Assistance and Protection of Victims of Crime and Witnesses* (hereinafter Draft Bill) was prepared by the Law Commission of Sri Lanka in June 2006. (*See* Appendix 15)

Strong national legislation would bolster the Commission's ability to protect and assist potential witnesses, which is currently limited to the duration of the Commission's mandate. In support of the work of the Commission's efforts to protect witnesses, and at the invitation of the Law Commission of Sri Lanka, the IIGEP prepared observations and recommendations on the Draft Bill. (*See* Appendix 16) The IIGEP's comments were based on the premise that the essence of any comprehensive and effective protection legislation is the reduction or management of risk to, or intimidation of, witnesses and their families, and the building of confidence in protection measures, not only by the legislation, but also by those who have been entrusted with their safety under it.

The IIGEP is concerned that the version of the Draft Bill on which it commented did not provide an adequate framework for protection. Gaps must be addressed prior to passage of the Draft Bill. Poor or inadequate laws on witness protection are worse than no laws and would urge against the Government or civil society accepting or settling for weak and/or ineffective laws on witness protection. Laws may encourage witnesses to come forward in the expectation that they will be protected. Weak laws may place vulnerable witnesses in danger if their protection needs cannot be met.

D. Witness Protection under the Commission

The IIGEP is deeply concerned that, after more than one year, the Commission's own witness protection scheme has not been effectively implemented. The IIGEP has repeatedly raised its concerns about the Commission's failure to give effect to its witness protection and assistance scheme, and has repeatedly offered its technical assistance toward this end. Neither the Commission nor the Government have fully availed themselves of the opportunity.

The IIGEP notes the Commission's efforts to develop a scheme to provide victim and witness protection and assistance. Following the Commission's establishment in November 2006, the Commission constituted a sub-committee to develop a witness

protection scheme, which developed the *Mandate, Organizational Structure and the Rules of Procedure of the Victim and Witness Assistance and Protection Unit*, adopted on the 27 February 2007, (*See* Appendix 17) which states:

> *On the direction of the Commission, the Victim and Witness Protection Unit will provide necessary protection and assistance to victims and witnesses. On the directions of the Commission, the Unit shall be responsible for protecting victims and witnesses from possible intimidation, harassment and retaliation. The Unit shall provide necessary protection and other assistance to victims and witnesses, with the view to ensuring that such victims and witnesses have a conducive environment in which they could appear before the Commission and provide testimony to the Commission without fear of possible intimidation, harassment, or retaliation.*[79]

On 8 May 2007, the Commission adopted the *Scheme for the Providing of Assistance and Protection to Victims and Witnesses* (The Scheme). (*See* Appendix 18) The Head of the Victim and Witness Protection Unit (VWAP Unit) was not formally appointed until 19 June 2007. Following his appointment, a part-time Deputy, three part-time advisers, and 13 full-time officers joined the VWAP Unit.

The Scheme primarily presents a theoretical approach to protection and assistance to victims and witnesses.[80] It fails to identify how these measures can actually be achieved in practice within the context and laws of Sri Lanka. In practical terms, the Scheme fails to provide basic guidelines for the Commission, such as exhaustive criteria for assessing the witness's needs for protection prior to a witness appearing before the Commission, and fails to provide realistic witness protection measures. Further, appropriate and independent financing has not been linked to protection measures, which would enable the Scheme to operate with the confidentiality and integrity necessary to encourage witnesses to come forward. In addition, the issue of disbursing funds for witness protection and assistance matters, such as travel and accommodation, has not been adequately addressed by the scheme and remains problematic and unresolved.

The creation of the Scheme and the staffing and training of the VWAP Unit should have been amongst the first priorities of the Commission. Owing to the complexities of witness protection, the IIGEP has observed that after over a year, it is unlikely that a functioning unit and an effective protection Scheme can be operational before the expiry of the Commission's extended mandate unless urgent measures are taken.

E. Victim and Witness Assistance and Protection Unit

Due to the absence of any established mechanism for either witness protection or victim and witness assistance, the Commission established one unit to do both; the Victim and

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[79] *Commission of Inquiry to investigate and inquire into serious violations of Human Rights, Organizational Structure and Rules of Procedure,* para. 1.6

[80] The preamble to the Scheme presents a somewhat ambivalent picture of protection, and is framed in terms of the rights of victims and the accused rather than a protection imperative for witnesses.

Witness Assistance and Protection Unit (VWAP Unit). The VWAP Unit operates under the Commission's Victim and Witness Assistance and Protection Scheme, both to facilitate assistance to victims and witnesses and to provide protection for at-risk witnesses. The Scheme was created exclusively for the current Commission, and, thus, expires at the end of the Commission's mandate.

The VWAP Unit is comprised of a committed group of individuals, who have worked with the IIGEP in a spirit of mutual cooperation in pursuit of common goals. The VWAP Unit, however, has not been given the requisite resources, autonomy, training or supervision to adequately fulfil its duties. The result is a Victim and Witness Assistance and Protection response in name only, supervised by Commissioners who seem to lack a meaningful appreciation of witness protection.

1. Training

Although the Commission has in place a VWAP Unit, the IIGEP has repeatedly highlighted the lack of adequate training for the VWAP staff. Several senior staff of the VWAP Unit visited Australia to observe an example of international practice on witness protection. The visit consisted of awareness raising and not training in witness protection. The operational members of the Unit have yet to receive any appropriate and sufficient training that would enable them to become operationally effective and perform their functions at an appropriate skill level.

2. Standard Operating Procedures

There is a critical need to have set procedures known internationally as Standard Operating Procedures (SOP's), which set out the manner in which the unit operates. This ensures consistency, safety and the efficient and effective performance of roles and functions. The VWAP Unit does not have any SOP's therefore its operations are conducted in an *ad hoc* manner.

3. Threat Assessments

Consistent with international norms and state practice, the Commission has a duty to conduct a threat assessment of all those victims and witnesses who are involved in the 16 cases under the purview of the Commission. In so doing, the Commission should have sought out the survivors and the families of the victims of these cases, assessed their protection needs and, where appropriate, offered protection. An analysis of the cases reveals serious threats in many of the cases, and would reveal that many of the victims and witnesses and their families remain at risk. A thorough assessment of the threats may also encourage witnesses to come forward. Very few witnesses have come forward independently.

4. Handling Sensitive Information

There is no system and little understanding of the need for information security. The need to compartmentalize information on a *need to know* basis is standard practice internationally when providing witness protection or dealing with sensitive information. Without information security, witness safety and confidentiality cannot be guaranteed.

5. Public Trust

The VWAP Unit has failed to develop necessary relationships with the community and with victims and witnesses in need of assistance and protection, and have failed to overcome the general mistrust of the police and state bodies. As a consequence, witnesses have repeatedly failed to come forward, even when summonsed. The VWAP Unit has conducted much of its outreach and communications with witnesses via telephone, which is an unreliable mode of communication that is likely to scare witnesses who are unable to assess who is actually on the other end of the phone.[81]

6. Resources

The VWAP Unit has been provided with a minimum amount of resources to carry out its functions. The Unit should have its own accessible funds to ensure that the funds can be accessed and used as required. Witness protection, by its nature, requires secure and independent funding and special procedures for the disbursement and acquittal of funds to ensure the security of participants in the scheme. Internationally, it is recognized that the finances of witness protection units have to be securely safeguarded to prevent the scheme's money trail disclosing both the methodology of the units, and the identity and location of the witnesses. In addition, funds need to be available to rapidly react to protection needs and events as they occur and must be subject to special accounting procedures. Exposure of sensitive information to standard Government processes and personnel involved in these processes would potentially breach the security and integrity of the Victim and Witness Assistance and Protection Scheme, and expose the participants and their families to the very risks the Scheme is designed to avoid.

7. Equipment

The VWAP Unit has not been properly equipped, even though the Commission recognized the need to procure general and specialist equipment to enable the VWAP Unit to function effectively. The IIGEP, which assisted the Commission finalize a list of necessary equipment in May 2007, is concerned that the VWAP Unit has not received any of the equipment to date.

[81]Lack of experience and understanding of the Witness Protection processes, coupled with a lack of funds and resources, have necessitated such an approach by the VWAP Unit.

F. Representing the Commission's Capacity to Provide Protection

In light of the status of the Commission's witness protection capabilities, the IIGEP is concerned that, on numerous occasions, the Commission has overstated its witness protection capacity. Statements made by the Commission about witness protection and assistance have not provided an accurate picture of the Commission's capacity to provide witness protection and assistance. As the IIGEP believes that the Commission does not have an effective and fully operational VWAP Unit or effective Scheme for witness protection or victim assistance, the IIGEP is of the view that the following public announcements have grossly overstated the Commission's capacity to protect witnesses.

> On 30th December 2006 and the 5th and 7th of January 2007, full page advertisements were placed in ten newspapers providing notice to the public of the Commission and its mandate, and inviting witnesses to contact the Commission in order to testify before it. The advertisements included a one-month deadline for witnesses to come forward, which was subsequently extended. The Commission, however, had no witness protection procedures in place and had no functioning witness protection unit. (*See* Appendix 19)
>
> According to the 14 May 2007 speech of the Commission Chairman, Justice Udalagama, during the inauguration of the Commission's first public hearing:
>
> *The Commission wishes to assure all those who possess information or evidence pertaining to any incident required to be investigated and inquired into by the Commission, to freely come forward and volunteer to provide such evidence and information, without fear of repercussions. The Commission would ensure that, there exists suitably conducive environment in which you could provide information, make statements and testify without any fear of retaliation, threat, or inducement. That nature of the protection that you receive would be such that it would not be possible for any person or group to inflict any harm on you or other person whose safety you would be concerned with. Officers of the Victim and Witness Assistance and Protection Unit will provide all necessary assistance and protection to witnesses and victims, before, during and after investigations and inquiries….*[82]
>
> On 6 June 2007, a full page advertisement in Daily Mirror stated the following. (*See* Appendix 20)
>
> *… The above mentioned Presidential Commission of Inquiry would like to inform the general public that a special assistance, protection and awareness programme has been established for the benefit of victims and potential witness of the under mentioned human rights violations: [list 16 cases]….*

[82] Transcript of Commission session, 14 May 2007.

The Presidential Commission has established a Victims and Witnesses Assistance and Protection Unit to steer the programme.

This programme would maintain strict confidentiality, anonymity and provide necessary material assistance to the victims and witness who wish to provide any information to the Commission.

The programme would include provision of protection by independent security personnel, availability of safe houses, use of pseudonyms for the witnesses, evidence given in camera and evidence given via video link by residence outside Sri Lanka, relocation of witnesses including the possibility of relation outside Sri Lanka…

On 14 June 2007, at a meeting between the Commission and NGOs, the Commission explained the Witness and Victim Assistance and Protection Unit. The Commission emphasized the need to protect witnesses and, if necessary, give asylum, despite admitting shortcomings in the process, including challenges in providing compensation, counselling and legal support. The Commission said that in particularly sensitive cases, the VWAP Unit might be able to use video-recording or video-conferencing to obtain testimony. Some members of the Commission admitted that not all "aspects" of the witness protection unit were in place.

On 5th January 2008, during the first day of the public inquiry into the Trinco Case, the member of the Unofficial Bar leading evidence pursued questions and made statements relating to witness protection and overstating the Commission's capacity to provide protection to a witness prior to questioning him.

Despite the Commission's assurances, a number of incidents have highlighted the incapacity of the Commission and its VWAP Unit to address witness protection. On one occasion, a witness who was called to appear for a Clause 8 investigation session stated he had not received threats until he was actually summonsed to appear. Within three hours of receiving his summons, he received telephone threats. After appearing before the Commission, the witness stated he wanted protection. However the Commission did not respond and the witness did not receive protection. Another witness summoned before the Commission was reportedly instructed not to give his full testimony to the Commission and threatened by the police in the offices of the Commission at the BMICH.

The Commission also has proven incapable of providing basic assistance to witnesses. Another witness who responded to a summons sent by the Commission to appear in a Clause 8 Investigation Session sought reimbursement for his travel costs from Mutur to Colombo and back. He was informed that there were no procedures in place to reimburse the costs of travel and accommodation. Another civilian witness had no resources to pay for his accommodation or to purchase food. The Secretary of the Commission informed

him that the Commission did not have any cash to pay him as the process of obtaining money from the Presidential Secretariat was very time consuming and uncertain.

G. Failure to Appreciate the Gravity of Protection Issues

Witness protection and victim and witness assistance require highly specialized skills and expertise. The IIGEP understands that the requisite expertise does not yet exist in Sri Lanka. While the IIGEP has welcomed steps by the Commission to develop and implement a witness protection scheme, the IIGEP nonetheless has been concerned by statements and perspectives of the Commission that has led the IIGEP to conclude that the Commission, as a whole, lacks a fundamental understanding of witness protection and assistance.

When discussing with the Commission the need to keep sensitive information on a *need to know* basis, Commissioners assured the IIGEP that they had each signed the *oath of confidentiality,* thereby implying that the mere signing of the oath was sufficient grounds for having access to sensitive information. Despite requests, the IIGEP has not been granted access to information about whether and/or how the staff of the Commission has been vetted. The IIGEP knows that at least one of the Commission's investigators is from the CID, despite the fact that the CID is a subject of the Commission's investigations and inquiries. Further, the CID has been implicated in threatening at-risk witnesses and may be liable to be charged with conspiracy to pervert the cause of justice.

The IIGEP notes its meeting with the Commission of 23 October 2007, during which witness protection was discussed. In this meeting the Commission made the following assertions, which stand in stark contrast to their earlier pronouncements on "the necessity to provide assistance and protection to victims and witnesses…".[83]

1. Witnesses before the Commission can be protected by their family and by their community;
2. The public nature of the forthcoming public session, in itself, will provide witnesses with additional protection; and
3. The only effective protection is the relocation of witnesses to a foreign country.

While the IIGEP notes that witness protection may vary slightly based on the political, economic and cultural context in which such protection must be applied, the IIGEP is nonetheless troubled by the lack of seriousness reflected in suggestion that vulnerable witnesses can be protected by their communities and their families, or that the public nature of sessions will provide *de facto* protection. The Commission's perspective is of grave concern as it indicates abject failure to understand or appreciate the seriousness of protection issues.

[83] Mandate, Organizational Structure & Rules of Procedure of the Victim and Witness Assistance and Protection Unit, 27 February 2007, para. 1.

H. Conclusion

The Government has failed in its duty to provide protection and assistance to victims and witnesses of serious crimes. This failing is particularly acute in situations in which Government forces are allegedly responsible. The IIGEP is aware of serious threats and intimidation against victims and witnesses to the cases under review by the Commission. In the prevailing climate of fear and intimidation, it is unlikely that witnesses will come forward to aid the Commission in its work unless they are guaranteed safe passage abroad. The Commission cannot effectively carry out its duties in this climate, particularly if it does not have an effective and enduring witness protection regime. The IIGEP would like to caution against a purely legislative response. Although a strong legislative framework helps to enable and ensure the effectiveness of a witness protection regime, there can be no effective witness protection, irrespective of whether there are laws in place, if there is impunity for grave violations of human rights.

VI. Conclusions and Recommendations

As set forth in this, the IIGEP's Concluding Report, including its Fourth Interim Report, the Members of the IIGEP have unanimously concluded that they have achieved all that is possible in the current political context. The Members of the IIGEP encourage the Commission of Inquiry in its efforts, and sincerely hope that the findings and recommendations of the Commission will contribute to the successful prosecution of responsible parties in the 16 cases under the Commission's Mandate. The IIGEP has never underestimated the scope or import of the task entrusted to the Commission. The IIGEP undertook its observations in good faith, with the hope and expectation that it would make a meaningful contribution to the work of the Commission, and, through such support, to the protection of human rights more generally in Sri Lanka. It also aspired to pioneer what could have been a model for comparable situations elsewhere.

As has been reflected in all of its Reports to the President, the IIGEP believes that responsibility for many of the shortcomings of the Commission of Inquiry rests at the highest level. Through its observations of the Commission, the IIGEP has observed a lack of commitment on the part of the Government to ensuring the success of the Commission and preventing further grave violations of human rights. From the start, the work of the Commission has been hampered by a lack of independence, insufficient financial resources, and the failure of State bodies to cooperate with the Commission. These obstacles have exacerbated the limitations of the Commission itself. It is the lack of will on the part of the Government that prompted the IIGEP to reassess its role and to decide, ultimately, to prematurely conclude its mandate.

A. Conclusions

The IIGEP does not wish to pre-empt the final conclusions of the Commission and emphasizes that its findings arise out of the work of the Commission to date. Thus, the conclusions reached by the IIGEP are based on its observations of the Commission

between 10 February 2007 and 31 March 2008. The IIGEP hopes that this and its prior Reports may stand as a record of experience that could yet have a beneficial influence on the work of the Commission, and on future commissions.

Independence

The role of the Attorney General, and his Department, in the inner workings of the Commission is in breach of international norms and standards relating to the independence of investigations of serious human rights violations and of commissions of inquiry. The role of the Attorney General may undermine the Commission's attempts to generate the information necessary to solve the cases and resolve the institutional flaws tending to impunity, which are all the more pronounced in cases in which the Government has been implicated.

The failure of the Government to provide adequate and independent financial resources to the Commission undermines the independence of the Commission and limits the Commission's capacity to fulfil its mandate, and is, thus, in contravention of international norms and standards relating to independent investigations of grave violations of human rights and to independent commissions of inquiry.

Cooperation of State Bodies

The Government's failure to ensure cooperation and full disclosure from State bodies is incompatible with international norms and standards and seriously impedes the Commission's capacity to fulfil its truth seeking mandate.

Transparency

Transparency of the proceedings was not only an express objective stated in the Presidential Invitation to the IIGEP Members, but is also an important international norm for commissions of inquiry into grave violations of human rights. Transparency enables victims and their families to satisfy their right to know. While the IIGEP welcomes the commencement of public inquiries, it nonetheless notes that for more than one year the Commission has failed to comply with international norms and standards on transparency, which has irreversibly tainted the process. Further, the Commission's failure to provide the IIGEP with full disclosure has undermined the IIGEP's capacity to fulfil the terms of the Letters of Invitation.

Victim and Witness Protection and Assistance

The Government has failed in its duty to provide protection and assistance to victims and witnesses of serious crimes. This failing is particularly acute in situations in which Government forces are allegedly responsible. The IIGEP is aware of serious threats and intimidation against victims and witnesses to the cases under review by the Commission. In the prevailing climate of fear and intimidation, it is unlikely that witnesses will come forward to aid the Commission in its work unless they are guaranteed safe passage

abroad. The Commission cannot effectively carry out its duties in this climate, particularly if it does not have an effective and enduring witness protection regime. The IIGEP would like to caution against a purely legislative response. Although a strong legislative framework helps to enable and ensure the effectiveness of a witness protection regime, there can be no effective witness protection, irrespective of whether there are laws in place, if there is impunity for grave violations of human rights.

B. Recommendations

The President should take all steps to create an enabling environment for the Commission of Inquiry to fulfil its mandate including the following:

- Make all of the Reports of the IIGEP immediately available to the Commission in order to support the work of the Commission and promote transparency, and release the Reports of the IIGEP to the public.

- Create a fund to provide legal representation for victims and their families in the proceedings of the Commission of Inquiry, as well as in future prosecutions.

- Consider appointing, under section 393(4) of the Code of Criminal Procedure, special prosecutors in current or future cases in which the Government forces have been implicated in serious human rights violations.

- Ensure that the Government respects and implements the internationally agreed doctrine of command responsibility as part of the law of Sri Lanka, whereby superiors of those who have committed criminal acts may also be held responsible.

- Consider authorising an international monitoring mechanism to address ongoing human rights violations that do not fall within the mandate of the Commission of Inquiry, so that the limited role of the Commission is understood.

The President should ensure that an effective and permanent system of victim and witness protection is immediately established, including, but not limited to, the following:

- A facility whereby essential witnesses, who have left Sri Lanka and who can continue to give essential evidence as to events under examination by the Commission of Inquiry, can give their oral evidence to the Commission or to future prosecutions by video-link under conditions of complete safety, and the financial resources to support such a facility.

- Strong and appropriate witness protection legislation based on international norms and standards to provide legal and enforceable victim and witness protection measures.

- A State structure for witness protection that has adequate and independent resources and accounting structures, and incorporates witness protection for the Commission of Inquiry.

- Adequate and ongoing training in the practical application of measures for witness protection for all persons working in the area of witness protection, including adequate funding for the Commission of Inquiry so that it can ensure sustainable training for all members of its VWAP Unit.

Other areas of concern:

- **Cooperation of State Bodies**: The President should ensure that all State bodies comply with his directive to provide full disclosure of information and cooperation to the Commission of Inquiry.

- **Independent Financial Resources**: The President should ensure the provision of the immediate and necessary financial resources to the Commission of Inquiry to enable it to fulfil its mandate. Any financial arrangement should enable the witness protection scheme to function without being compromised by disclosure of specific protection measures to State officials.

- **Role of the Attorney General**: The President should withdraw his direction to the Commission of Inquiry that it is not required "to consider, scrutinize, monitor, investigate or inquire into the conduct of the Attorney General or any of his officers". Further, the President should invite the Commission of Inquiry to rescind the request to the Official Bar to provide the Panel of Counsel and assure the Commission that the necessary funds will be made available to permit the Commission to secure comparably qualified counsel from the Unofficial Bar. Lastly, the Government of Sri Lanka should not entrench the role of the Attorney General as counsel assisting the Commission of Inquiry, and future commissions, through legislation.

- **Invoking National Security**: The President should ensure that a clear policy on grounds for invoking national security before the Commission of Inquiry is established and that State bodies substantiate any such grounds in terms of necessity and proportionality when invoking national security as the reason for withholding evidence.

- **Public Inquiries**: The President may wish to consider the implications of any decision by the Commission of Inquiry not to hold an inquiry under the Presidential Warrant and the 1948 Act, taking into consideration public interest, transparency, and the rights of surviving victims and their families, as well as public accountability.