

# REPORT OF THE COMMISSION OF INQUIRY APPOINTED TO INVESTIGATE AND INQUIRE INTO ALLEGED SERIOUS VIOLATIONS OF HUMAN RIGHTS SINCE FIRST AUGUST 2005

## PART I - INTRODUCTION

### **1. Appointment of the Commission**

This Commission of Inquiry was appointed (COI) under section 2 of the Commissions of Inquiry Act No.17 of 1948 and subsequent amendments thereto, by a warrant under Presidential Seal, on the Third day of November 2006, with the following mandate:

- (a) To cause independent and comprehensive investigations into incidents involving serious violations of human rights arising since 1<sup>st</sup> August 2005, specifically including serious violations of human rights specified in the schedule to the warrant,
- (b) To examine the adequacy and propriety of the investigations already conducted pertaining to such incidents amounting to serious violations of human rights,
- (c) To ensure the transparency of such investigations and inquiries in order to satisfy the interested parties that such investigations and inquiries have been conducted comprehensively and in conformity with relevant basic international norms and standards, in a manner that would enable a panel of non Sri- Lankan eminent persons of international repute appointed and referred to as the " International Independent Group of Eminent Persons" to efficaciously observe the investigations and inquiries of the COI.

The warrant also specified the areas that should be covered by the recommendations based on the findings of the investigations and inquiries of the COI. These are:

- (1) The facts and circumstances pertaining to each of the incidents investigated and inquired by the COI,
- (2) The descriptions, nature backgrounds of persons who have directly suffered death, injury or any other physical harm as a result of the incidents investigated and inquired into by the COI,
- (3) The circumstances that may have led to or resulted in those persons referred to suffering such death, injury or physical harm,
- (4) The identities, descriptions and backgrounds of persons and groups of persons, who are responsible under the applicable laws and legal principles of Sri Lanka, for the commission of deaths, injury or physical harm to any person during, in the course of, or as a result of any of the incidents investigated and inquired into by the COI,
- (5) Having regard to relevant circumstances and possible reasons that may have influenced or been relevant to the conduct of investigations, examine and comment on the nature, propriety and efficacy of the investigations conducted into the incidents,
- (6) Recommend measures that should be taken in accordance with the laws of Sri Lanka, against those persons identified,

- (7) Recommend appropriate measures of reparation to be provided to the victims of serious violations of human rights investigated and inquired into by the COI and to their next of kin,
- (8) Recommend measures that should be taken by the government of Sri Lanka in order to prevent the occurrence of the incidents in the nature of those investigated and inquired into by the COI,
- (9) Any other recommendations considered by the COI as being relevant on its findings in terms of the warrant.

The Proclamation of the appointment of the COI by His Excellency was published in the Gazette Extraordinary No.1471/6 of 13<sup>th</sup> November 2006

His Excellency appointed the following as members of the COI.

- (1) Hon.Nissanka Kumara Udalagama Esquire - Chairman
- (2) Upawansa Yapa Esquire
- (3) Dr. Devanesan Nesiah
- (4) Kanapathipillai C. Logeswaran Esquire
- (5) Madam Manouri Kokila Muttetuwegama
- (6) Madam Jezima Ismail
- (7) S.S. Wijeratne Esquire
- (8) Ahamad Javid Yusuf Esquire

The late Mr. Upawansa Yapa resigned with effect from 31<sup>st</sup> January 2007 due to ill health and Mr. Douglas Premaratne P.C. was appointed in his place with effect from 16<sup>th</sup> May 2008. Mr. K.C. Logeswaran resigned on personal grounds with effect from 31.3.2007 and was re-appointed with effect from 5. 9. 2007. Finally he resigned on 23.11.2008. Dr. Devanesan Nesiah resigned with effect from 7<sup>th</sup> July 2008. Mr. Javid Yusuf resigned with effect from 30. July 2008 and Mr. Faizal Razeen was appointed in his place with effect from 4<sup>th</sup> November 2008. Mrs. Manouri Muttetuwegama resigned with effect from 17. 11. 2008.and Mr. Denzil Gunaratne P.C. was appointed in her place with effect from 30<sup>th</sup> November 2008.

His Excellency required the COI to present a Report or such Interim Reports as may be appropriate, within one year of the date of appointment or within such extended period of time which His Excellency may by warrant prescribe. Accordingly His Excellency extended the period of the COI by one year with effect from 3<sup>rd</sup> November 2007, further six months from 3<sup>rd</sup> November 2008 and furthermore 1, 1/2 months from 3<sup>rd</sup> May 2009.

In addition to the 15 cases named in the schedule to the warrant the assassination of late Mr. Nadaraja Raviraj M.P. which took place shortly after the appointment of the COI was included in the schedule as the 16<sup>th</sup> case.

## **2. Establishment of the COI and its structure**

The office of the COI was established at the Bandaranaike Memorial International Conference Hall (BMICH) on 15<sup>th</sup> November 2006 on which day it had its first meeting. It commenced its work with a skeleton staff which was expanded subsequently depending on the requirements.

In keeping with the practice followed by Commissions of Inquiry in the past, the COI requested the Attorney General to nominate a few officers from the official bar to assist the Commission and the COI selected the following Counsel.

- Mr. C. R. de Silva, the then Solicitor General, who later withdrew on being appointed Attorney General.
- Mr. Shavindra Fernando, Deputy Solicitor General, who resigned to take up an assignment in the Ministry of Foreign Affairs.
- Mr. Yasantha Kodagoda, Deputy Solicitor General.
- Mr. Duleep Jayakody, Senior State Counsel.
- Mr. A.N.R. Pulle, Senior State Counsel, who withdrew later for personal reasons.
- Ms. Lakmali Karunanayake, State Counsel.

In order to ensure the transparency of the proceedings of the COI, two eminent lawyers from the private bar, namely Dr. R.K.W. Gunasekara and Mr. Ranjith Abesuriya P.C. were invited to be members of the panel of counsel assisting the COI.

Prior to commencing investigations the COI had to study what the international norms and standards are and how best procedures be designed to adhere to such standards. With the assistance of the panel of counsel the members of the COI acquainted themselves with the guidelines available in the public domain in regard to the international norms and standards in the conduct of investigations into human rights violations, in particular those of Amnesty International laid down for the guidance of National Human Rights Institutions. These in summary form are given below.

- Investigations have to be conducted by independent investigators other than those involved earlier,
- Victims and witnesses have to be assured and afforded protection and assistance,
- Civil society and non-governmental organizations should be consulted in the process of investigation,
- Investigations should take into account all sources of information such as statements of victims and witnesses, medical reports and police investigation files, court files, media reports, information from NGOs etc,
- Investigators should be provided with expert assistance of independent professionals other than those involved earlier, in areas of forensic medicine, ballistics etc, In order to meet these requirements in the absence of legislation enacted by the government the COI decided to carry out the following actions.
- Draw up an appropriate organizational structure for the COI and formulate rules of procedure (Organizational Structure of COI and Rules of Procedure is given in Annex (I))

- Establish an independent Investigation Unit (IU) to conduct the investigations, draw up a set of guidelines, staff the unit with selected officers and train them (Mandate, Organizational structure and rules of procedure of IU is given in Annex ( 11))
- Establish a Victim and Witness Assistance and Protection Unit (VWAPU) to take care of the victims and witnesses, draw up a set of guidelines, staff the unit with selected officers and train them and formulate a scheme of assistance and protection. (Mandate, Organizational structure and rules of procedure of VWAPU is given in Annex (III))
- Initiate a dialogue with civil society and non-governmental organizations, meet with them periodically and establish formal and informal links with them.
- Establish independent panels of experts to assist and advise COI where necessary.
- Draw up a working arrangement for interactions with International Observers.

These preliminary arrangements were completed within the first three months of the establishment of the COI.

### **3. Invitation to International Independent Group of Eminent Persons (IIGEP'S)**

By letter dated January 12<sup>th</sup> 2007 His Excellency invited an International Independent Group of Eminent Persons (IIGEP) to observe the investigations and inquiries in order to ensure the transparency of such investigations and inquiries and that they are conducted in accordance with basic international norms and standards (Invitation to serve as IIGEP's given in Annex IV). The International Independent Group of Eminent Persons (IIGEPS) arrived in early February 2007. This group comprised:

- (1) Justice P.N.Bhagwati
- (2) Mr. .Andreas Movromatis
- (3) Dr. Kamal Hossain
- (4) Mr. Marzuki Darusman
- (5) Prof. Yozo Yokota
- (6) Pro. C. Fasseur
- (7) Sir Nigel Rodley KSE
- (8) Mr. Arthur E. Dewey
- (9) Prof .Ivan Shearer
- (10) Dr. Bruce Matthews
- (11) Dr. Bernard Kouchner

Dr. Kouchner was replaced by Judge Pierre Cot on his being appointed as a minister in the cabinet of the government of France.

At the first meeting with the IIGEP's held on 11<sup>th</sup> and 12<sup>th</sup> of February 2007 the Chairman briefed them on the establishment of the COI, enrolment of Counsel from the Attorney General's Department, the Organizational structure and rules of procedure of the COI, Establishment of the IU, its structure and procedures, the establishment of VWAPU and the need to develop its structure and procedures, calling for information from the public, the NGOs and other relevant parties, calling for reports of investigations and documents, and the constraint faced by the COI in not prescribing a quorum for sessions in the Commissions of Inquiry Act.

His Excellency's invitation to IIGEPS provided for the appointment of an Assistant by the Eminent Persons solely for the purpose of assisting in their work and they were to function at the IIGEP Secretariat.

#### **4. Victim and Witness Protection**

The concept of victim and witness protection is new to this country, although the need for such a scheme has been recognized in legal circles and the judicial establishment. In the absence of a law on this subject the COI had to launch an advocacy programme to expedite the enactment of legislation. As a result a bill was submitted to Parliament on 6<sup>th</sup> June 2008 but is not yet approved.

Under these circumstances the COI had to make its own arrangements for the protection and assistance to victims and witnesses involved in the cases that would be inquired into. The COI set up a Victim and Witness Assistance and Protection Unit (VWAPU) under a sub-committee of the Commission which met regularly to provide direction and guidance to the officers of the unit. The unit is headed by a retired Deputy Inspector General of Police (DIG) and a number of either serving or retired police officers who have been handpicked by the Commission. A Deputy Solicitor General functions as advisor to the unit and there are a couple of legal officers to assist in the work of the unit.

The scheme for Victim and Witness Assistance was announced to the general public in the first week of June 2007 through a newspaper advertisement as well as through the publication of notices at Divisional Secretariat Offices in the areas where the incidents took place. The scheme provided for the provision of necessary material assistance to victims and witnesses who provide information, ensuring strict confidentiality and anonymity, protection by independent security staff, establishment of safe houses, use of pseudonyms for witnesses, relocation, provision of transport facilities, accommodation and subsistence, compensation for loss of income, legal assistance and counseling and medical treatment where necessary.

Another important area of work for the implementation of a successful programme of Victim and Witness Protection is the training of staff. Several training programmes were organized with the limited resources available for the Commission of Inquiry (COI). These were:

- A one day witness retreat organized by the Senior Human Rights Advisor of the UN Country team for the members of the COI and the senior staff was held on 17<sup>th</sup> May 2007 at the Cinnamon Grand Hotel. Mr. Arthur Dewey, a member of IIGEP and three assistants were also present.
- A two day training workshop for staff of the VWAPU was held at BMICH on 20<sup>th</sup> and 21<sup>st</sup> of July 2007.
- Mr. Sarath Jayamanne, DSG and Mr. S.P.K.Warnasuriya Chief Inspector were sent on a two week training programme to New South Wales, Australia. Mr.J.Thangavelu DIG participated in this programme on his own account. These officers conducted a three day training programme for the other officers.
- Ms. Ramani Thotagamuwa was able to observe the features of the Japanese Victim and Witness Protection scheme through the good offices of Prof. Yokoto , IIGEP member when she visited Japan on another assignment. The Assistants of IIGEPs also assisted the VWAPU by sharing their experiences.

## 5. The Investigation Phase

After setting up the required structures as described above the COI commenced its investigations into selected cases out of those given in the schedule to the mandate. The IU functioning under Mr. Gamini Navaratne Senior DIG gathered the documentation available at the relevant police stations, the inquiry proceedings of local police and the Criminal Investigation Department. Under the guidance of the Sub-committee on Investigations of the COI the Plans of Investigations were prepared on the basis of the material gathered. The COI along with the counsel and the senior staff undertook visits to examine the scenes of crime in Trincomalee, Muttur and Pottuvil.

Although the COI wished to commence the Public Inquiry phase as soon as possible a requirement in the Commissions of Inquiry Act, namely, the fact that all eight members of the COI had to be present at the Inquiry prevented it from starting Public Inquiry immediately. IIGEPs were of the opinion that it was not necessary for all members to be present, but the Attorney General as well as the members of the unofficial bar engaged by the COI held contrary views. The COI brought this to the notice of the authorities and action was initiated to amend the relevant section of the Commissions of Inquiry Act. The amendment was passed in Parliament only in January 2008 and the Hon. Speaker's assent given in March that year, more than one year after the establishment of the COI.

In the meantime the COI decided to conduct investigations under clause eight of the rules of procedure. The COI was of opinion that such investigations would encourage witnesses to come out with new facts which were not disclosed at police inquiries. This proved to be correct.

The order in which the cases to be taken up for investigation was determined on the basis of availability of evidence and witnesses.

### Case No 1- The assassination of the Foreign Minister of Sri Lanka Hon. Lakshman Kadirgamar, P.C.

The COI requested the IGP to hand over the police files of this case to the Commission but as the case was proceeding in the Colombo Chief Magistrate's, Court the Magistrate had directed the police not to hand over the files. However on submissions made on behalf of the Commission the Magistrate agreed to release the documents. Now an indictment is filed in the High Court and the case is proceeding. As such the COI did not proceed with the public inquiry.

### Case No.2- The killing of seventeen (17) aid workers of the international non-governmental organization Action Contra La Faime (ACF) in early August 2006

The investigation sessions commenced on the 14<sup>th</sup> of May and continued till 11th November 2007, 59 sessions were held and 35 witnesses were examined. Mr. Yasantha Kodagoda DSG, Mr. Duleep Jayakody Senior State Counsel and Ms. Lakmali Karunanayake State Counsel and Dr. R.K.W.Gunasekara P.C. assisted the commission in investigation procedure. The IIGEPs were present on a few occasions and at least one of their Assistants was present on all occasions.

Case No. 3 - The alleged execution of Muslim Villagers in Muttur in early August 2006 and the execution at Welikanda of 14 persons from Muttur who were being transported in ambulances.

No investigations under clause 8 were held and the COI conducted and concluded public inquiries directly.

Case No. 4 - The assassination of Mr. Joseph Pararajasingham, Member of Parliament on 25<sup>th</sup> December 2005.

Records of police investigations were obtained but the COI could not carryout investigations, due to non availability of witnesses and time constraints.

Case No. 5 – Killing of Five (5) Youths in Trincomalee on or about 2<sup>nd</sup> January 2006.

The investigation sessions commenced on 23<sup>rd</sup> August and continued till 11<sup>th</sup> October 2007. Mr. Ranjith Abeyesuriya P.C. and Ms. Thanuja Rodrigo from the un-official bar assisted the Commission in leading evidence. Some of the IIGEPs were present on certain occasions and at least one of their assistants was present on all occasions.

Case No. 6 – The assassination of the Deputy Director General of the Sri Lanka Peace Secretariat Mr. Ketheesh Loganathan on 12<sup>th</sup> August 2006.

COI could not carryout investigations due to non availability of witnesses and constraints of time.

Case No. 7 – The death of 51 persons in Naddalamottankulam (Sencholai) in August 2006.

This incident has taken place in the un-cleared area. Two of the survivors were presented before the Commission and their evidence was recorded

Case 8 – Disappearance of Rev. Nihal Jim Brown of Philip Neri's Church at Allaipidi on 28<sup>th</sup> August 2006.

COI could not carryout investigations due to lack of evidence, importantly the inability to find the body of the alleged deceased.

Case No. 9 – Killing of five (5) fishermen and another at Pesalai beach and at the Pesalai Church on 17<sup>th</sup> June 2006.

The COI could not carryout investigations due to non availability of evidence and constraints of time.

Case No. 10 – Killing of thirteen (13) persons in Kayts Police area on 13<sup>th</sup> May 2006.

COI could not carryout investigations due to the non availability of time.



Case NO. 11 – Killing of 10 Muslim villagers in Radella, Pottuvil Police area on 17<sup>th</sup> September 2006.

The Plan of Investigation was prepared. Statement of the only surviving victim was recorded. The investigation proceedings were stopped after recording the statements of 3 witnesses in order to commence public inquiries.

Case NO. 12 – Killing of 68 persons at Kebbitigollawa on 15<sup>th</sup> June 2006

No preliminary investigations were held, but the COI held public inquiry directly

Case No. 13 – Incident relating to the finding of five (5) headless bodies in Avissawella on 29<sup>th</sup> April 2006.

The COI could not carryout investigations due to lack of time.

Case No. 14 – Killing of thirteen (13) persons at Welikanda on 29<sup>th</sup> May 2005.

The COI could not carryout investigations due to lack of time.

Case No. 15 – Killing of 98 Navy Personnel at Digampathaha on 16<sup>th</sup> October 2006.

No preliminary Investigations were held, but the COI conducted the public inquiry directly.

Case No. 16 - The assassination of Mr. Nadarajah Raviraj MP

COI could not carryout investigations due to lack of time.

## **6. The Public Inquiry Phase**

With the enactment of the amendment to the Commissions of Inquiry Act fixing a quorum for inquiry sessions, the COI commenced Public Inquiries on 5<sup>th</sup> January 2008.

- (1) The first case taken up for public inquiry was case No.5, killing of five youths in Trincomalee on or about 2<sup>nd</sup> January 2008. Altogether 62 sessions were held and 35 witnesses were examined. As some of the witnesses were living in foreign countries, their evidence had to be recorded through video link without disclosing their place of residence. Six video conferencing sessions were conducted at the Distance Learning Center of the Sri Lanka Institute of Development Administration (SLIDA). At the remote end the arrangements were coordinated by the IIGEPs. However, on a directive from His Excellency the COI was informed by letter dated 30 May 2008. not to proceed with the video conferencing until the Bill presented in Parliament is approved. (Copy of this letter is annexed as Annex V) Accordingly video conferencing had to be suspended. As a result the evidence of Yoganathan Pooncalalon one of the victims who survived could not be recorded. His evidence is crucial in the determination of this case.

Mr. Ranjith Abeysuriya P.C with Attorney at Law Ms. Thanuja Rodrigo from the un-official bar and Ms. Lakmali Karunanayake State Counsel from the official bar assisted the COI.

The following Sri Lankan civil society organizations made a request for full standing before the Commission which was granted.

- (i) Centre for Policy Alternatives 24/2, 28<sup>th</sup> Lane, Off Flower Road, Colombo 7
- (ii) Home for Human Rights, 14, Pentrive Gardens, Colombo 3
- (iii) INFORM, 5 Jayaratne Avenue, Colombo 5
- (iv) Law and Society Trust, 3 Kynsey Terrace, Colombo, 8
- (v) Mother's and Daughters of Lanka, 19 1/1 Sri Dhamma Road, Colombo, 10
- (vi) Rights Now – Collective for Democracy, 237/22, Vijaya Kumarathunga Mawatha, Colombo, 5
- (vii) Sri Lanka National Commission of Jurists, 26 Charles Place, Colombo 3.

These organizations were represented by the following Counsel.

Mr. Desmond Fernando P.C  
Dr. Jayantha de Almeida P.C.  
Mr. Chandra Kumarage  
Mr. J.C. Weliamuna  
Mr. M.S. Sumanthiran  
Mr. V.S. Ganeshalingam  
Ms. Nimalka Fernando

Mr. B.N. Thmboo  
Mr. Kishali Pinto Jayawardane  
Ms. Bhavani Fonseka  
Ms. G.C. Ranitha  
Mr. Sandamal Rajapakse  
Mr. K. S. Ratnavel, Mr. S.M.M. Samsudeen and Ms. Shelrene Ahilan appeared for Dr. K. Manoharan, father of one of the victims.

Mr. Priyantha Gamage subsequently appeared for Law and Society Trust. These counsel were present from 24<sup>th</sup> March to 15<sup>th</sup> September 2008.

Ms. Sonali Jayasuriya, Mr. H.A.A. Prasanna, Mr. Suren De Silva, Mr. Prasanna Jayawardene and Mr. S. L. Gunasekare of D.L. & F. De Saram appeared for the Special Task Force (STF).

- (2) The next case taken up for inquiry was Case No. 2 killing of 17 aid workers of the international non-governmental organization Action Contra La Faime in early August 2006 in Muttur. The inquiry was conducted parallel to the case No. 5 above and commencing from 3<sup>rd</sup> March 2008. Altogether 100 sessions were held and 80 witnesses were examined.

Mr. Yasantha Kodagoda, DSG, Mr. Dulip Jayakody Senior State Counsel and Ms. Lakmali Karunanayake State Counsel assisted the COI. Dr. R.K.W.Gunasekara from the unofficial bar was present during certain sessions.

The same Civil Society Organizations which requested for full standing in Case No. 2 made the same request and it was granted. The same lawyers appeared on their behalf.

Mr. K.S. Ratnavel, Mr. S.M.M. Samsudeen and Ms. Shelrene Ahilan appeared initially for the ACF organization and later on behalf of Mr. Ponnudurai Yogarajah father of one of the victims. These counsels were present from 24<sup>th</sup> March to 15<sup>th</sup> September 2008.

Mr. Gomin Dayasri, Mrs. Manoli Jinadasa, Mr. W.P.U. Weerasinghe and Mr. C. Karunadasa appeared for the Army.

- (3) The third case taken up for inquiry was case no.12 killing of 68 persons at Kebithigollewa on 15th June 2006. The inquiry commenced on 22<sup>nd</sup> September 2008 and concluded on 07.10 2008. Four sessions were held and 10 witnesses were examined. Mr. Mahinda Ekanayake and Mrs. Sharmane Guneratne Attorneys at Law assisted as counsel to the Commission.
- (4) The fourth case taken up for inquiry was case No.15 killing of 98 security forces personnel in Digampathaha, Sigiriya on 16<sup>th</sup> October 2006. The inquiry commenced on 20.10.2008 and concluded on 01.12.2008. Nine sessions were held and 17 witnesses were examined. Mr. Mahinda Ekanayake assisted as counsel to the Commission.

- (5) The fifth Case taken up for inquiry was case No.11 killing of 10 Muslim villagers at Radella in Pottuvil police area on 17<sup>th</sup> September 2006. The inquiry commenced on January 5<sup>th</sup> 2009 and concluded on 6<sup>th</sup> March 2009. During 16 sessions 29 witnesses were examined. Miss Lakmali Karunanayake assisted as Counsel to the COI.
- (6) The sixth case taken up was case No. 7 Death of 51 persons in Naddala Mottankulam (Senchola) in August 2006. The inquiry commenced on 5<sup>th</sup> March and concluded on 31<sup>st</sup> March 2009. Three witnesses were examined. Mr. Mahinda Ekanayake assisted the COI as Counsel.
- (7) The seventh Case taken up was Case No. 3 the execution of Muslim Villagers in Muttur in early August 2006 and the execution at Welikanda of 14 persons from Muttur who were transported in Ambulances. The inquiry commenced on 5<sup>th</sup> March and concluded on 26<sup>th</sup> March 2009. Six witnesses were examined during 3 sessions. Mr. Mahinda Ekanayake assisted the COI as Counsel.

Case Numbers 1, 4, 6, 8, 9, 10, 13, 14, and 16 could not be taken up for public inquiry.

## **7. The factors that led to the delay in proceedings**

The IIGEPs as well as the civil society organizations including their counsel have commented on the long time taken by the Commission in conducting the inquiries. Therefore it is necessary to explain the factors that have caused these delays.

Firstly unlike other Commissions appointed under the Commissions of Inquiry Act this Commission had to investigate and inquire into the cases referred to in the mandate. The investigations conducted by the local police as well as the Criminal Investigation Department were incomplete and superficial, particularly in the two prominent cases, case no. 2 the Killing of 17 aid workers of the ACF organization and case no. 5 the Killing of Five Youth in Trincomalee. The Investigation Unit (IU) of the COI had to collect all documents from the respective police stations and other government agencies, study them and prepare the plans of investigations. The witnesses were reluctant to come forward and give evidence due to the fear of reprisals from the perpetrators of the crimes. Some witnesses have left the country and are living in undisclosed locations abroad.

Secondly the work of the COI is being observed by a group of eminent persons from different countries in order to ensure that the inquiries are conducted efficaciously in terms of accepted international norms. Thus the COI had to spend some time to study and formulate the rules of procedure to be adopted. In fact the delay in the arrival of IIGEPs made it mandatory for the COI to delay its work. The IIGEPs arrived in the island on the 12<sup>th</sup> of February 2007, more than three months after the appointment of the Commission.

Thirdly, according to the provisions of the Commissions of Inquiry Act all members had to sit at all sessions of the inquiry and even if one member was away due to illness or any unavoidable circumstance the proceedings would become null and void. Although the IIGEPs and the counsel representing the civil society organizations had a different view the eminent lawyers from the un-official bar assisting the COI and the A.G were of the view that it is mandatory that all members should be present. There was also a precedent in the form of a Supreme Court judgment. Accordingly the COI requested the government to amend the Act to provide for a quorum. The draft bill was presented in parliament in June 2007 but approved only in January 2008. Speaker's assent was given in March 2008. The COI commenced public inquiries on 5<sup>th</sup> January 2008 immediately after the bill was approved by parliament. Until then the COI proceeded with investigations under clause 8 of the rules of procedure. During this investigation stage the Commission was able to unearth very valuable evidence which were not available from police investigations.

Fourthly, the international norms which the COI had to adhere to required a comprehensive scheme of witness assistance and witness protection. Such a scheme was not available in the country and even the concept of witness protection was new to the legal fraternity. In the circumstances the COI had to launch an advocacy campaign in collaboration with the National Centre for Victims of Crime (NCVC) to explain the need for enactment of legislation on the subject. A draft bill was submitted to parliament on 6<sup>th</sup> June 2008 as an urgent bill certified by the Supreme Court, but it has not been passed as yet. The Commission had to proceed with its own scheme of witness assistance and witness protection with limited resources. This arrangement was no substitute for a national witness assistance and witness protection programme.

Fifthly, all documents which were either in Sinhalese or in Tamil had to be translated to English for the benefit of IIGEPs and the private counsel. The process of simultaneous translations of proceedings was time consuming. In addition most records at police stations were in Sinhalese or Tamil and were handwritten documents. When typing these documents at times the officer who made the original entry had to come and decipher the handwriting.

The place where the COI functioned, the BMICH itself was a cause of delay as very often sessions had to be cancelled due to security reasons whenever a VIP arrived as the Chief Guest for a function organized at the premises or when public exhibitions like Dayata Kirula were held for a period of 14 days or more.

## **8. The role of International Independent Group of Eminent Persons (IIGEP)**

A unique feature of this Commission of Inquiry is the invitation to a group of Eminent Persons to observe the proceedings of the COI in order to ensure transparency and that the investigations and inquiries are conducted in accordance with basic international standards and norms. The terms of reference of IIGEPs are given in His Excellency's letter of invitation which is reproduced in Annexe IV. Based on this Terms of Reference (TOR) the working arrangement between the COI and the IIGEPS was adopted on 23<sup>rd</sup> April 2007.

Personally the members of the COI and the IIGEPs had excellent relations in their interactions. The Commissioners as well as the staff of the commission did their utmost to oblige the requests made by the IIGEPs as well as their Assistants. In particular all documents pertaining to the investigations and inquiries written in national languages were translated into English and transmitted, though at times there were delays due to unavoidable reasons.



Justice Udalagama Chairman of the Commission and Justice Bhagwati Chairman of the IIGEP at a discussion

However, from the beginning IIGEPS for reasons best known to themselves displayed a critical attitude which was not conducive to the maintenance of harmonious relations with the COI and this was reflected in their public statements. The issues raised in the Public Statements of the IIGEPs and the response of the COI are given below:

### **(i) The conflict of interest arising from the engagement of counsel from the Attorney General's Department.**

It has been the practice in this country for all Commissions of Inquiry to engage counsel from the Attorney General's Department (A.G) to assist in the proceedings. Accordingly the COI invited the A.G to nominate a few officers to assist the commission. Following the nominations that were sent the COI carefully perused them and selected five officers who had the necessary academic and professional qualifications, experience and expertise to serve as members of the Commission's Panel of Counsel. The COI was satisfied with

their professional abilities and integrity. These officers do not possess any prerogative power when functioning in the Commission in any particular manner, nor would they have any reason to not to act in the best interests of justice and fair play. The officers of the A.Gs Department do not take part in criminal investigations as it is a statutory function of the police officers. Under the Sri Lankan law and practice, during the course of an investigation the A.G and his officers only provide legal advice to criminal investigators. The professional function of the A.G commences only upon the completion of criminal investigations, for the purpose of instituting criminal proceedings. In the COI the officers of the A.G's Department function in accordance with the directions of the Commission and under its supervision. In view of the terms of reference of the COI, we do not see any need to summon officers of the A.Gs Department as witnesses. A situation of a conflict of interest has not arisen in the course of the inquiries conducted. The Commission also engaged the services of two eminent counsels from the un-official bar to assist the Commission.

Another reason as to why the COI thought of engaging the services of officers from the A.Gs Department is the fact that according to the mandate it is A.G who will finally decide whether to launch prosecutions based on the recommendations of the COI and the association of counsel at this early stage would facilitate their subsequent role.

The COI had a discussion with the Solicitor General on this matter and he made it clear that in relation to criminal prosecutions the A.G is totally independent and cited even instances of such independence. Further A.G was willing to withdraw his officers if the COI feels it is necessary. The COI after a lengthy discussion unanimously agreed that the A.Gs officers would continue to assist the Commission in its work. However counsel from the unofficial bar too would be present and the hybrid model was accepted.

The IIGEPs continued to highlight this issue even in their subsequent Public Statements which shows that they have not properly understood the position of the A.G in the legal structure of this country.

## **(ii) Lack of effective victim and witness protection**

It is true that there is no functioning and effective victim and witness protection programme under the law in Sri Lanka. IIGEPs were aware of this situation when they agreed to the terms of the mandate and also that it will take time to enact new legislation. The Commission on its part brought to the notice of the authorities the need to enact legislation and a Bill was presented to parliament on 6<sup>th</sup> June 2008. However it has not been approved yet and while recognizing that there had been a long delay the COI is not in a position to take any action. Meanwhile the COI had taken certain steps to provide some degree of protection and assistance to witnesses which are described in the foregoing section on victim and witness protection. The COI had met all the traveling and per diem expenses of all witnesses and some of them were maintained in safe houses in Colombo for a considerable length of time. It also has met the expenses incurred in arranging video conferences at this end. Long term training of officers can be undertaken only when



permanent staff is recruited for a national victim and witness protection authority after the enactment of legislation.

**(iii) Lack of transparency and timeliness of the proceedings.**

The IIGEPs alleged lack of transparency because the public had no access to the preliminary investigations. As stated earlier the COI commenced investigations under clause 8 of the rules of procedure for two reasons. First under the mandate the COI was required to investigate and inquire into the cases as the earlier investigations by the police were inadequate and secondly according to the provisions of the Commission's of Inquiry Act all the members had to be present at the inquiry. Although the IIGEPs thought otherwise the A.G, as well as the independent counsel assisting the COI were of opinion that all members should be present at public inquiries as the law stood. Further there is a Supreme Court judgment to the same effect. So the COI decided to await till the law is amended to commence public inquiries. The amendment to the Commissions of Inquiry Act was approved by parliament in only January 2008 and immediately after the COI commenced public inquiries which were fully transparent and lawyers from civil society appeared on behalf of the affected parties. Even after several explanations the IIGEPs have failed to comprehend the legal constraint faced by the COI.

The delay in proceeding with the inquiry was also due to other reasons which have been explained in detail in the foregoing section.

**(iv) Lack of full co-operation by State bodies**

Most state organizations have readily responded to the requests made by the COI. There have been delays in one or two instances due to misunderstandings. However when the COI explained matters they responded positively. In case of clause 8 investigations there were delays in getting information, but with the commencement of public inquiries the army had cooperated fully in sending witnesses and providing information. Had the IIGEPs been there during the latter part of the Inquiry into the killing of 17 Aid workers of the ACF organization they would have seen how army officers came from the battle front to oblige the summons of the Commission. There are two instances where Magistrates have not answered the summons due to instructions laid down by the Judicial Services Commission. The matter has been referred to the relevant authorities for necessary action.

**(v) Lack of Financial independence of the Commission.**

It is true that the COI did not have financial independence and funds were channeled through the Presidential Secretariat. The creation of COI being an ad hoc arrangement it was not possible to allocate a separate vote head under the government budget. It has to be mentioned to the credit of the Secretary to the President who is the chief accounting officer at the presidential secretariat that he always accommodated the requests of the Commission, but at lower levels there were delays and unnecessary queries due to their strict adherence to the financial regulations of the government.

Some of the misunderstandings of the IIGEPs and the COI are mainly due to the fact that the IIGEPs were not present during a majority of the sessions and they had to depend mostly on the reports made by their Assistants. In fact on one occasion the Chairman of the COI had to make a request to Justice Bhagwathi that at least one of the Eminent Persons should be present when sessions are held. Some of the Assistants were no doubt very capable persons in their own fields but they were unaware of the local conditions and depended on unconfirmed extraneous information gathered through unprofessional means. In case of one public statement it transpired that the Assistants released it to the press even before the Eminent Persons could have deliberated on the comments made by the COI. The impact of the IIGEP's public criticisms of the COI is the erosion of public confidence in the Commission. It has been alleged by the A.G that these public statements were deliberately issued to coincide with the Sessions of the UN Human Rights Commission in Geneva.

The observation of the proceedings of a National Commission of this nature by an International Group of Eminent Persons is an unprecedented experiment in the annals of international law. Carrying out such a task without the necessary infrastructure such as an effective victim and witness protection mechanism is a challenging exercise. Had the IIGEPs tried to understand the constraints under which the Commission functioned and worked consensually the hands of the Commission would have been strengthened. Instead they adopted a hostile attitude and left prematurely probably misled by the advice of their Assistants.

## **9. Recommendations**

The matters on which the COI was required to report as specified in the warrant are given in detail in the reports of cases where the inquiries have been completed. However there are a few general recommendations which the Commission wishes to bring to His Excellency's notice.

It has to be borne in mind that all these incidents have taken place during a war situation. But it does not exculpate anybody for committing violations of international humanitarian law. It is essential that all security forces personnel be given a comprehensive training in legal provisions for the protection of civilians in times of armed conflict. The IIGEPs as well as the counsel for civil society organizations have suggested that the principle of "command responsibility" be invoked with respect to these cases where applicable. The Commission is of opinion that it should not be done after the event, but government should amend the relevant regulations to apply it in the future so that it will act as a deterrent.

The way the police have conducted the initial investigations lacks professionalism. It is necessary to incorporate a comprehensive component on human rights and international humanitarian law in all police and armed forces training schemes.

Witness protection and witness assistance is another area that needs strengthening. The Bill that is before the parliament once enacted will provide the legal basis for a witness protection and witness assistance programme. But the proposed authority should be provided with adequate resources if it is to function effectively. The COI was constrained by lack of finances to reimburse the expenses incurred by witnesses in coming before the Commission to give evidence. They have to be paid not only their traveling and subsistence but also an allowance to compensate for the deprivation earnings.

Payment of compensations to victims had been made in an ad hoc manner. The rates of compensation for victims of serious disasters is laid down in the circular issued by the Secretary Ministry of Rehabilitation and Re-development, dated 26<sup>th</sup> September 1988. According to this circular the rates are determined for the death of a person based on his or her civil status. The maximum payable for a death of a married person is Rs. 50,000, and an unmarried person Rs. 25,000. This amount has been increased to Rs 100,000 and Rs. 50,000 respectively for the victims of the Kebbitigolawa claymore bomb explosion by a decision of the Cabinet dated October 11<sup>th</sup> 2006. Considering the present price escalations these rates are inadequate and it is recommended that at least a 25% increase of the rates determined by the Cabinet be paid to all victims of cases that have been inquired into by the Commission.

## **10. Conclusion**

Out of the 16 Cases mandated to be inquired into by the Commission proceedings in 7 Cases have been concluded. With regard to the balance 9 cases the COI is not in a position to conduct the inquiries during the mandated period. Two of the cases namely the Killing of 17 Aid workers of ACF and the Killing of 5 Youths in Trincomalee attracted the attention of many parties including International organizations and foreign governments. Proceedings of these two cases took most of the time of the Commission.

The impact of the inquiries into some of these cases and the publicity that it generated has had positive results in minimizing if not eliminating any allegations true or not of violations of human rights.

Finally the COI wish to propose the necessity to establish a permanent independent Commission on serious violations of human rights as a deterrent to such acts in the country. The existing structures are burdened with other matters and do not have the time to inquire exhaustively into serious violations of human rights. Backed by an effective victim assistance and protection authority such an institution would go a long way to strengthen the image of the country as a model democracy in this part of the world.