

IIGEP

International Independent Group of Eminent Persons

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PUBLIC STATEMENT

THE MEMBERS OF THE IIGEP SUBMIT THEIR CONCLUDING PUBLIC STATEMENT ON THE WORK OF THE COMMISSION OF INQUIRY AND FIND A LACK OF POLITICAL WILL TO SUPPORT A SEARCH FOR THE TRUTH

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1. SUMMARY

The International Independent Group of Eminent Persons ("the IIGEP") concluded at its meeting in Colombo in November 2007 that it should terminate its observation mission at the end of March 2008, and has informed HE the President of Sri Lanka of its decision. It affirmed this intention at its fifth and final plenary meeting held in Colombo on 17-19 February 2008. It did so with profound regret that more could not have been achieved.

The IIGEP was fully formed in February 2007, when the President of Sri Lanka invited 11 persons from a number of countries to observe the work of the Commission of Inquiry to Investigate and Inquire into Alleged Serious Violations of Human Rights ("the Commission"), which was established in November 2006. The 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. 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 pertaining to investigations and inquiries."

The IIGEP has not been able to conclude, as required by the terms of the Presidential invitation, that the proceedings of the Commission have been transparent or have satisfied basic international norms and standards. The particular reasons for forming that opinion and motivating the IIGEP to terminate its mission before the conclusion of the proceedings of the Commission of Inquiry, are the following:

(a) A conflict of interest in the proceedings before the Commission

In the opinion of the IIGEP the Attorney General's Department of Sri Lanka has played an inappropriate and impermissible role in the proceedings of the Commission and in advising the Commission on the conduct of its proceedings. An officer (Deputy Solicitor-General) of the Attorney General's Department has taken a leading role in two of the four cases before the Commission so far, by way of acting as lead counsel in the questioning of the witnesses. At the same time, the Attorney General is the legal adviser to the Government and must protect the interests of the Government when actions by its organs, including the police and the armed forces, are called into question. The presence of the Attorney General, through his officers acting as counsel assisting the Commission, raises a serious issue of conflict of interest. Many of the cases under review by the Commission involve questions of the adequacy of the original police investigations, or allegations against government forces, including the security forces. The Attorney General has powers, and exercised them in some of these cases, to give advice or directions to investigating officials during the original police investigations. The Deputy Solicitor-General in question has been so involved. In the opinion of the IIGEP these considerations present an unacceptable conflict of interest which does not accord with international norms and standards, and to which attention has been drawn by IIGEP right from the commencement without success.

(b) Lack of effective victim and witness protection

There is an absence of a functioning and effective victim and witness protection programme under the laws of Sri Lanka. Although such a programme exists in name within the Commission, it enjoys no statutory basis, it lacks fully trained staff, and it does not have sufficient funds to offer adequate assistance to those in need of protection from possible retaliation for appearing before the Commission. The Commission has not ensured the protection of victims and their families from intimidation and their representation by legal counsel. Moreover, there is no provision to extend the protection arrangements, such as they are, beyond the life of the Commission. It is hardly surprising that, under these conditions, victims and witnesses have not come forward to give evidence. Many vital witnesses have fled abroad, in fear of their lives. Similarly, there is no protection for government officers who are willing to become "whistle blowers" and to give evidence of official misconduct.

(c) Lack of transparency and timeliness in the proceedings

The IIGEP welcomes the Commission's move to the public inquiry phase. Despite this move, the overwhelming majority of the Commission's hearings have thus far been held behind closed doors. The proceedings of the Commission have lacked transparency. They have also been unduly slow and protracted. The hearings have been divided, as a result of amendments to the Commission's rules of procedure, between "investigations" and "inquiries". The investigation hearings have been held *in camera*, that is, in the absence of any public observers (except the IIGEP) or representatives of the victims. They have been slow and tedious, with much repetitive or irrelevant questioning of witnesses, with little evident result, so far as obtaining of new information of significance to the cases under review is concerned. It is difficult to understand the reasons for such closed "investigation" sessions. As a result of its slow progress, the Commission's appointment, which expired in November 2007, was extended for a further year. As of March 2008 only two of the total number of 16 cases listed in the Presidential Warrant have moved to the public inquiry stage: the case of the killing of five youths on the beachfront at Trincomalee ("the Trinco 5 case"), and the case of the massacre of the aid workers belonging to the French NGO *Action Contre la Faim* in Muttur ("the ACF case"). The Commission is, in addition, investigating two other cases: the case of the killing of ten Muslim villagers at Radella in Pottuvil police area on 17th September 2006 ("the Pottuvil case") and the case of the death of fifty-one persons in Naddalamottankulam (Sencholai) in August 2006 ("the Sencholai case"). Because of the absence of an effective witness protection programme, there seems little likelihood that these public hearings will be any more likely than the closed investigations to discover the true facts of the cases.

(d) Lack of full co-operation by State bodies

There has been a refusal by State bodies to comply with the Commission's requests for information and documentation. Additionally, certain officers of the armed forces have refused to give information regarding the presence or absence of certain units at a particular time or in a particular place relevant to the cases so far examined by the Commission. National security has been cited as the basis of such refusal. The legal basis for claiming privilege with regard to information of this nature is not clear. No certificate to this effect has been tendered to the Commission, nor were reasons given why national security might be compromised. The Commission itself has not pursued the witnesses in this regard.

(e) Lack of financial independence of the Commission

The Commission lacks financial autonomy. It does not have an independent budget and depends on the Presidential Secretariat for control of its finances. The IIGEP has expressed its concern about the Commission's lack of financial independence, and has supported the Commission's requests for such independence. The Commission has also complained about the insufficiency of its funding as a constraint to several activities.

Recommendations

Particular recommendations are:

- (a) That the President should ensure that all State bodies comply with international norms and standards and his directive to provide full disclosure of information and cooperation to the Commission.
- (b) The Government should respect and implement 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.
- (c) The Government of Sri Lanka should establish, as a priority, a workable, effective and permanent system of victim and witness protection. The Commission should endeavour to train the staff of its victim and witness protection unit in order to provide the optimum level of security and assistance to potential witnesses. The IIGEP also calls for the establishment of a facility whereby essential witnesses, who have left Sri Lanka, and who can continue to give first hand evidence as to some of the events under examination by the Commission, can give their oral evidence to the Commission by video-links under conditions of complete safety. In this respect, international support to the Commission has proven critical.
- (d) The Commission of Inquiry should include in the course of its inquiries an examination of the reasons for systemic failures and past impunity in relation to the cases under review, and consider the making of recommendations for the eventual appointment of independent special prosecutors in cases in which the security forces have been involved in serious human rights violations.
- (e) The Government of Sri Lanka should provide the immediate and necessary financial resources to the Commission of Inquiry, and place adequate funds at its disposal, to enable it to fulfil its mandate.
- (f) The Government of Sri Lanka should not entrench the role of the Attorney General as counsel assisting the Commission of Inquiry through legislation.

By way of a general recommendation, the IIGEP can only appeal, even at this late stage, to the Commission and relevant government agencies to implement its previous recommendations. In this respect it refers to its previous public statements.

Conclusion

The IIGEP has repeatedly drawn attention to the defects above-mentioned and others in the proceedings of the Commission in its three-monthly interim reports to the President, its public statements, and directly to the Commissioners. These critiques and suggestions have been largely disregarded. The IIGEP noted, however, that the Commission has attempted to limit the role of the Attorney General by employing counsel from the Unofficial Bar as lead counsel in two cases (the Trinco 5 and Pottuvil cases).

This small success, however, has hardly outweighed the atmosphere of confrontation and disagreement towards the IIGEP engendered by organs of Government and – at least in official correspondence – by the Commission. The uncooperative atmosphere has rendered the task of the IIGEP, which approached its work in a spirit of co-operation and, at first, with optimism, disquieting and unpleasant. There seems to the IIGEP to be an absence of political and institutional will on the part of the Government to pursue with vigour 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.

All Members of the IIGEP are keenly aware of the security situation presently prevailing in Sri Lanka. The Government is faced with an insurgency in which the Liberation Tigers of Tamil Eelam (LTTE) conduct their hostilities through ruthless methods, not sparing the civilian population. Sections of popular opinion suggest that human rights and respect for the rule of law should take second place to measures necessary to repel these hostilities. The IIGEP rejects this opinion. There is no conflict or incompatibility between the successful conduct of military and security operations on the one hand, and respect for the rights of citizens on the other. Indeed it should be emphasised that respect for human rights, and the conduct of military operations in strict accordance with international humanitarian law, are powerful weapons in the struggle against dissident forces and terrorism in that they help to earn the trust and support of the civilian population. Moreover, they are essential to morale and promote a culture of professionalism and self-respect within the police and armed forces.

To the extent that emergency conditions may require special state measures derogating from certain peacetime rights, these must be publicly announced, enacted in law, and justified in terms of necessity and proportionality. Summary executions, massacres, disappearances, wanton destruction of property, and forcible transfers of populations can never be justified. No efforts should be spared to uncover responsibility, including recognition of command responsibility, for such actions. The IIGEP has, however, found an absence of will on the part of the Government of Sri Lanka in the present Inquiry to investigate cases with vigour, where the conduct of its own forces has been called into question.

The IIGEP's decision to terminate its mission

For these reasons the IIGEP cannot see that its continued involvement in the work of the Commission could change the situation, and it has decided to withdraw. The IIGEP has decided that it will terminate its observation role at the end of March 2008 and close its operations in Sri Lanka by the end of April 2008. It has taken this decision after due consideration and for fundamental reasons. The President of Sri Lanka invited the IIGEP to observe the proceedings of the Commission of Inquiry, to offer recommendations for corrective action, and to assess the conduct of the Commission's proceedings in the light of international norms and standards. Despite their best efforts, the Eminent Persons have concluded that they have accomplished all that is possible within the constraints of the prevailing situation. They have thus decided, with deep regret, to end their activities. However, the IIGEP hopes that its reports, and this final Public Statement, may stand as a record of experience that could yet have a beneficial influence on the work of the Commission, and on future commissions.

END OF SUMMARY

2. THE IIGEP'S OBSERVATIONS ON THE PROCEEDINGS OF THE COMMISSION OF INQUIRY

The IIGEP has been guided by the norms, standards and principles discussed later in this document, in its observations and evaluation of the work of the Commission.

The IIGEP has been present at all except one of the Commission's sessions, either through the attendance of Eminent Persons, their Assistants, or both. Members of the IIGEP have also had the benefit of full verbatim transcripts of the investigation and public hearing sessions provided to them by the Commission. Even when not present in-country, the Eminent Persons have been informed, in detail, by fortnightly reports, by the IIGEP Secretariat 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.

It is not permissible for the IIGEP in a public statement to comment on the actual cases under review. In accordance with its mandate, the IIGEP has also refrained from including in its reports and statements information that would be prejudicial to national security or to ongoing inquiries. The investigation hearings are confidential. Even in the two cases that have progressed to the stage of public inquiry, which are unfinished, it would be inappropriate for the IIGEP to comment, since it is the task of the Commission, not the IIGEP, to come to conclusions on the evidence. The IIGEP can, however, comment on the actual conduct of the Commission in its investigations and inquiries, since it was specifically mandated to do so.

Most of the sessions of the Commission until very recently have been taken up with investigation (so-called "clause 8") hearings. Only two cases have so far progressed to public inquiries. It is a 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. This has had a great impact on the effectiveness of the work of the Commission. Clause 8 of the Mandate, Organizational Structure and Rules of Procedure of the Commission's Investigation Unit, introduced by way of amendment to the original document, was adopted by the Commission on 8 May 2007. It provides:

Notwithstanding anything to the contrary in these rules, during the course of an investigation into any incident, the Commission may directly interview and record the statement of any person for the purpose of (a) facilitating investigations by the Investigation Unit, (b) arriving at a preliminary view on facts and circumstances pertaining to any matter relevant to the incident being investigated into by the Commission, and (c) considering the nature of investigations conducted into such incident by the routine competent authorities.

Clause 8 was followed by additional amendments adopted on 24 July 2007 providing that investigation committees may be formed from among the Commissioners in order to expedite inquiries (clause 9), and that those committees may report to the whole Commission that, in light of the investigations, there is no necessity in a particular case to conduct an inquiry (clause 10).

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 (a) to take charge of the investigations, (b) to determine whether, in particular cases, there was sufficient evidence to warrant a public inquiry, (c) to determine which witnesses would be most useful before a public inquiry, and (d) to sit in panels, pending a resolution of the doubt regarding the necessity of a quorum of the full membership.

Far from expediting the work of the Commission, these procedures have retarded its progress. Compounding the complication of dividing the work of the Commission artificially between investigations and inquiries has been the necessity for witnesses, whose evidence might be needed for a later prosecution, to be separately interviewed by the police, since statements before the Commission would not, otherwise, be lawfully admissible in criminal proceedings.

Moreover, the holding of clause 8 hearings *in camera* necessarily excludes members of the public, above all the families and representatives of the victims, from attending. 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 or standard for proceedings of this nature.

The IIGEP emphasises that under international norms and standards, commissions of inquiry are fact-finding bodies. While the objective of fact-finding requires commissions to exercise investigatory functions, commissions of inquiry are not appropriate mechanisms to, in effect, undertake police investigations, even when previous investigations appear to have been systematically flawed and ineffective. The IIGEP has been concerned that this is what the Commission thus far has endeavoured to do; to act as a substitute for the police in an effort to solve the crimes. The Commission does not have the expertise, financial or human resources, or time to undertake the comprehensive investigations into each of the 16 cases.

The IIGEP regrets that the Commission has emphasised this aspect of its mandate to the apparent exclusion of its other primary function: to examine the adequacy and propriety of the original investigations together with the factors which may have influenced those investigations. The IIGEP believes that the Commission's greatest contribution would be to examine the cases systemically, not only to combat impunity in the individual cases but to expose its very fabric.

The Commission began the public inquiry into the Trinco 5 case on 5 January 2008 and into the ACF case on 3 March 2008. The IIGEP welcomes this move after a year-long delay. The IIGEP facilitated six video conferencing sessions with witnesses living abroad. 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. Nevertheless, video conferencing sessions were made possible through the joint efforts of the IIGEP and the Commission.

The public inquiries have highlighted a number of deficiencies in the functioning of the Commission that the IIGEP has observed throughout, including the lack of witness protection and assistance, which became even more pronounced after counsel for the Government forces was granted standing. The IIGEP has been concerned that the Commission has not always intervened on behalf of affected witnesses in a way that is sensitive to the needs and trauma of the victims and their families, and is consistent with international norms and standards relating to the protection of vulnerable witnesses. Counsel for the Government forces has often adopted courtroom-styled cross examination tactics, which may intimidate witnesses and discourage them from revealing the truth. This may negatively impact the Commission's ability to fulfil its mandate.

A final observation of the IIGEP is with regards to working relations with the Commission. The Commission had interpreters at all hearings to render into English the replies of witnesses in the Sinhala and Tamil languages. When the IIGEP desired that a particular question, or line of questioning, be put to a witness, the suggestion to that end conveyed to the Chairman of the Commission was always acted upon. These cordial relations contrasted strangely with the tone of official communications from the Commission which seemed almost as though they had been drafted elsewhere. One communication, received by the IIGEP from a governmental source outside the Commission but relating to its work, was judged by an IIGEP Member with long experience in government as the rudest letter he had ever seen in official life.

An unfortunate factor affecting relations between the IIGEP and the Commission (at the official level) and other organs of government was the refusal of the latter to deal with anyone other than the Eminent Persons. Some communications went directly by email to Eminent Persons which were not even copied to the IIGEP Secretariat. This caused not only delays but also, on occasion, misunderstandings. This practice stood in direct contradiction of paragraph 13 of the jointly agreed Working Arrangement between the Commission and the IIGEP, dated 27 March 2007, and Protocols 2 and 3 of the Mission Statement and Internal Protocols of the IIGEP.

3. THE IIGEP'S PRINCIPAL CONCERNS

The IIGEP has had a number of concerns about the proceedings of the Commission, as measured against international norms and standards. Its principal concerns are the independence, transparency, and timeliness of the conduct of the work of the Commission, and issues of witness protection. These may be summarised as follows:

(a) The role of the Attorney General

The IIGEP expressed its concern about the role of the Attorney General from the very beginning of its work. Justice Bhagwati recommended to the Commission to remove members of the Attorney General's Department from the inner workings of the Commission as early as 27 February 2007 by reason of the apparent conflict of interest. The IIGEP's concerns were repeated in all subsequent public statements, and in many other communications, written and oral, with the Commission, Ministers of the Government of Sri Lanka, and with the President himself.

The fundamental conflict of interest, in the opinion of the IIGEP, arises out of the position of the Attorney General 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. In a Commission whose tasks include an inquiry into the efficacy of the original investigations into certain cases, including investigations and inquiry into certain incidents involving the armed and security forces and the police, the Attorney General's staff is thus potentially in the position of being a subject of the inquiry, and is, in any event, not an independent authority.

The Attorney General rejected the charge of conflict of interest. He took the view that his officers had played no role in the investigations of any of the cases under review by the Commission, a view which is not supported by documentation provided to the IIGEP by the Commission. At a later time, the Attorney General offered to remove himself and his officers from the Commission, if any of the Commissioners so requested. No Commissioner did so.

The Commission itself rejected the notion of a conflict of interest and stated that it is the tradition for the Attorney General to play a leading role in commissions of inquiry. A study made of previous commissions of inquiry commissioned by the IIGEP revealed that not all previous commissions of a similar nature have given a role to the Attorney General. In addition, the Commission stated that it did not have the funds to engage independent counsel to act as counsel assisting it. Nevertheless, it did appoint counsel from the Unofficial Bar to assist it in the Trinco 5 and the Pottuvil cases, and the Attorney General's Department did not play a leading role in these cases.

An astonishing event occurred in November 2007 at the joint plenary meeting held between the Commission and the IIGEP. A letter dated 5 November 2007 from the Presidential Secretariat and addressed to the Chairman of the Commission was revealed to the meeting. It stated 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 regard to or in relation to any investigation already conducted by the relevant authorities.

This letter, which also extended the term of office of the Commissioners, was stated to be by way of a "clarification" of the scope of paragraph 5 of the Presidential Warrant establishing the Commission. The IIGEP was deeply disturbed by this communication. Even some of the Commissioners appeared to be taken aback. The IIGEP considered that such a "clarification" from the President could only be viewed as a directive from the highest level, rather than as a suggestion to the Commission to be taken as an advice. It was the single most important event prompting the IIGEP to decide shortly thereafter that it should bring its presence in Sri Lanka to an end.

The IIGEP is of the opinion that this statement, on behalf of the President, constituted a direct interference in the independence of the Commission in two ways. Firstly, the "clarification" not only seeks to restrict, but also transforms, the mandate, thereby impinging on the independence of the Commission. The effect of this clarification is that members of the Attorney General's Department who might legitimately be called to give evidence, are granted immunity. Secondly, it undermines and reduces the Commission's own choices as to which influences and aspects of the original

investigations in the various cases should be further investigated. This fundamentally undermines the ability of the Commission to discharge its mandated goal of ensuring that the original criminal investigation was carried out properly and effectively, and in case of its failure, clarifying what led to such failure, which was a central purpose of the establishment of the Commission. Any such interference or unwarranted influence, in the opinion of the IIGEP, erodes public confidence in the Commission's capacity to function in an independent and transparent manner, and could impede the search for the truth. Moreover, the erosion of public confidence further deters potential witnesses from coming forward.

The IIGEP was greatly strengthened in its opinion on this vital question by the opinion it solicited from two eminent Sri Lankan jurists with long practical experience in the law. This opinion concluded:

The Col is required to examine and comment on the adequacy and propriety of investigations already conducted. Necessarily, therefore the Col must scrutinize the role of the Attorney General and officers of the Attorney General's Department who supervised, instructed and/or gave directions to the investigators. Using the Panel of Counsel, consisting of those very same officers and/or their colleagues, will undoubtedly give rise to a public perception of a conflict of interest and even of an appearance of bias. The public, and especially victims – to use the language of the Disappearances Commission – will be 'very much affected by the awareness that State Officers are investigating into complaints against Officers of the State.' Independent counsel are a sine qua non.¹

An amendment² to the Commissions of Inquiry Act 1948 formalises the role of the Attorney General in all future commissions. The newly enacted Bill goes beyond the right of the Attorney General to be present in Commissions of Inquiry. It gives the Attorney General the right to provide counsel to assist the present Commission of Inquiry as well as all future inquiries under the Act. This confirms the IIGEP's apprehension regarding the absence of political will and the institutional inability of Sri Lanka to conduct human rights inquiries in accordance with international norms and standards.

(b) Victim and witness protection

In the opinion of the IIGEP the victim and witness protection arrangements of the Commission do not meet international norms and standards.

Principle 15 of the Principles on the *Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions* is later quoted in this document, under section 4 (b). "International Norms and Standards". It provides for the protection from violence or intimidation of any complainants or witnesses. This standard was reaffirmed and extended by the UN General Assembly resolution 60/147 which stated two principles relevant to victims and witnesses in cases of gross violations of human rights:

Principle 10. Victims should be treated with humanity and respect for their dignity and human rights, and appropriate measures should be taken to ensure their safety, physical and psychological well-being and privacy, as well as those of their families...

Principle 12(b). [The State should] take measures to minimise the inconvenience to victims and their representatives, protect against unlawful interference with their privacy as appropriate, and ensure their safety from intimidation and retaliation, as well as that of their families and witnesses, before, during and after judicial, administrative, or other proceedings that affect the interests of victims.³

¹ Opinion dated 20 June 2007, on file with the IIGEP.

² Despite repeated requests to the Commission, the IIGEP has never received a copy of the newly enacted Amendments to the 1948 Act. However, both the Commission and the Attorney General affirmed the enhanced role of the Attorney General's Department in commissions of inquiry to the IIGEP.

³ Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law , UNGA resolution 60/147 (16 December 2005).

The IIGEP notes the Commission's efforts to develop a scheme to provide victim and witness protection and assistance, despite the lack of a statutory victim and witness assistance and protection framework. Following the Commission's establishment in November 2006, the Commission constituted a sub-committee to develop a witness protection scheme, which resulted in the adoption, on 27 February 2007, of the *Mandate, Organizational Structure and the Rules of Procedure of the Victim and Witness Assistance and Protection Unit*. That document stated:

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. (para. 1.6)

On 8 May 2007 the Commission adopted the *Scheme for the Providing of Assistance and Protection to Victims and Witnesses* ("the Scheme"). 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 deals primarily with a theoretical approach to protection and assistance to victims and witnesses. It fails to identify how these measures can actually be achieved in practice within the laws and context of Sri Lanka. In practical terms, the Scheme fails to provide basic guidelines for the Commission, such as exhaustive criteria for assessing the protection needs of witnesses prior to their appearance before the Commission, and a comprehensive set of standard operating procedures. It also fails to provide a practical framework for the creation of the necessary witness protection infrastructure, such as safe houses, procedure for the use of pseudonyms for witnesses, provision for in camera evidence, mechanisms for testimony to be provided via video link, and processes for ensuring safe passage of vulnerable witnesses abroad.

Appropriate and independent financing has not been linked to protection measures either, so as to 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 among the first priorities of the Commission. With so much time lost, and the delayed introduction of national legislation on the subject⁴, it is unlikely that a functioning unit and an effective protection scheme can become operational before the expiration of the Commission's renewed mandate, unless urgent measures are taken.

Although the Commission has in place a VWAP Unit, the IIGEP has repeatedly highlighted the lack of adequate training for the VWAP Unit staff. Several senior staff of the Unit visited Australia to observe international practice in witness protection. This visit, however, was more in the nature of awareness-raising than appropriate training in witness protection. An earlier offer of effective training, proposed by the IIGEP, was declined by the Commission. The operational members of the Unit have yet to receive any appropriate or sufficient training that would enable them to become operationally effective and perform their functions at the necessary level of competence. Meanwhile, the Commission has more than once, and despite expressions of concern by the IIGEP, made public announcements inviting the participation of witnesses, implying they have nothing to fear because the Commission can protect them.

⁴ A Draft Bill for the Protection of Victims of Crime and Witnesses was prepared by the Law Commission of Sri Lanka in June 2006. Comments on this draft Bill by the IIGEP in mid-2007 were curtly rejected by the Government as inadmissible interference in its internal affairs. The Bill was, however, amended and, as of February 2008, was still pending before Parliament, although the IIGEP has not been informed of its final wording.

The IIGEP has concluded that the Commission does not presently have a fully operational VWAP Unit or an effective Scheme for witness protection or victim assistance. The IIGEP sees inherent dangers for victims and witnesses if the Government or the Commission overstate the Commission's capacity to protect at-risk witnesses. This undermines the integrity of the Commission.

The Commission and the IIGEP have nevertheless created a historical precedent in Sri Lanka with the recent taking of evidence through video conferencing. Survivors and victims' families who have fled abroad, have been able to testify in the public inquiry into the Trinco 5 case through this medium, in conditions of safety and security. This cooperation between the IIGEP and the Commission has greatly advanced the inquiry into this case.

(c) The slow pace of the Commission's hearings

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.

A major reason for the slowness of the Commission's progress was the introduction of clause 8 hearings, as noted above in section 2. "The IIGEP's observations of the Commission of Inquiry". Most of those hearings have been slow and tedious, with much repetitive or irrelevant questioning of reluctant official witnesses, with little evident result so far as obtaining new information of significance to the cases under review. As of March 2008, only two of the 16 cases listed in the Presidential Warrant have moved to the public inquiry stage. Another two cases are still the subject of clause 8 hearings (the Pottuvil and Sencholai cases).

Another reason for the slow progress of the Commission is that the Commissioners were not appointed on a full-time basis. As a result the Commission has generally sat for a maximum of only two or three days, or half-days, a week, and not in all weeks. This factor was compounded by the interpretation adopted by the Commission of the *Commission of Inquiry Act* that it could sit only if constituted by its full complement of eight members. If any Commissioner were to be absent for any reason, the Commission could not sit. In the view of the IIGEP this interpretation was not based on any express stipulation of the Act or warranted by any other consideration of law. Nevertheless the Commission sought clarification. It was only in January 2008 that an amendment to the Act was passed that allowed the Commission to sit with a quorum of less than its full membership.

The Commission has been slow in adopting a work plan and in communicating the dates of intended hearings to the IIGEP. Frequently the IIGEP has been faced with hearing dates at very short notice, which has made arrangements for the visits of Eminent Persons difficult.

(d) The lack of full co-operation of state organs

Following the IIGEP's requests for progress on the status of disclosure between the Commission and state bodies, and advice on the Commission's willingness to use its powers to compel evidence and information, 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 execute its mandate successfully, the cooperation of all bodies and individuals holding information is vital. Requests for information and materials cannot predict what information and material a body or person holds so as to request a specific document. Similarly, it is not for state officials and other persons to determine what they consider "relevant" to furnish. The Commission should, however, make requests for types of information according to the particular agency involved.

The Commission has been faced on several occasions with refusals of state officers to testify before it, or to answer specific relevant questions. In certain cases it would be of the greatest relevance to establish whether certain units of the armed forces were present at a particular place and at a particular time. National security was cited by those officers as the basis of their refusal to answer questions of this kind.

Again, this raises the issue of transparency that is within the observer mandate of the IIGEP. National security is a concept recognised by state practice where information of a sensitive kind is demanded by a court or tribunal. However, in the view of the IIGEP a claim of national security can be justified only if it imperils the source of confidential information or relates to on-going operational conditions. It is difficult to see how events that occurred 12 months or more previously can relate to present operational concerns. In any event, it should not be the sole prerogative of a witness to plead that reason for refusal to answer certain questions. That should be a question for the highest relevant officer (usually the Minister of Defence) to address in a written communication ("executive certificate") to the Commission, supported by reasons. In the first instance, the legitimacy of the refusal to testify or disclose is to be judged by the Commission itself. If the Commission finds the refusal unjustified, it may charge the person with contempt and send the matter to the Court of Appeal.

The IIGEP considered it disappointing that the Commission did not pursue the witnesses on this point and did not make any further inquiry with a view to satisfying itself that the claim of the witness was justified.

Another example of the lack of full co-operation of state organs with the Commission occurred when a magistrate was summonsed by the Commission to give evidence as to the inquiries he conducted at the scene of a particular incident under review by the Commission. On instructions from the Judicial Services Commission, which is chaired by the Chief Justice of Sri Lanka, he declined to attend the Commission but sent the Court Registrar with his notes. He was thus not available for questioning by counsel or the Commissioners on his observations. The Judicial Services Commission took the view that a magistrate was not subject to summons before another court or a commission. However, this overlooks the dual function of magistrates under the legal system of Sri Lanka. A magistrate exercises both an investigative function and a judicial function. It would, of course, be improper to call a magistrate to give evidence as to why he made a judicial finding or order, but not, in the view of the IIGEP, to give an account of what he observed in his investigative role when called to the scene of a crime.

(e) The lack of financial independence

The IIGEP has observed that the Commission lacks financial independence vis-à-vis the State. The Commission's budget is controlled by the Presidential Secretariat's office. In addition, the Commission has complained, as in its response to the IIGEP's last public statement, of its insufficient budget. The Commission is therefore greatly hampered in its ability and flexibility to make certain decisions that are central to its function.

4. ANNEXES

(a) The creation and mandate of the IIGEP

The IIGEP⁵ was based on a unique concept worked out in discussions between the Government of Sri Lanka and some governments friendly to Sri Lanka and represented diplomatically in Colombo. The idea of a mixed commission of inquiry into certain unresolved cases of human rights abuses was 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 International Independent Group of Eminent Persons consisted of 11 Eminent Persons, assisted by experienced international officers, and by national support staff. The International Office for Migration provided the funding channel and the administrative and logistical framework to the IIGEP. Funding of the IIGEP was 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 Commission and the Inter-Parliamentary Union), and the Government of Sri Lanka.

The biographies of the 11 Eminent Persons appear on the IIGEP's website: www.iigep.org. They came from 11 countries: Australia, Bangladesh, Canada, Cyprus, France, India, Indonesia, Japan, the Netherlands, the United Kingdom, and the United States of America.⁶ The Chairman of the IIGEP, Justice P.N. Bhagwati, was a former Chief Justice of India.

The Assistants to the Eminent Persons, who constituted the professional staff of the IIGEP, were chosen for their qualifications and experience in investigations, war crimes, forensics, criminal law, and international observation missions. They were 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 of Inquiry and the IIGEP, "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".⁷

The IIGEP has been present, and has observed, all except one of the Commission's hearings since sessions began in May 2007, through the presence of Eminent Persons, or their appointed Assistants, or both. Members have visited different locations where alleged violations have occurred. They had access to the transcripts of all sessions. They have also met a large number of people outside the Commission who are active in the field of the protection and promotion of human rights in Sri Lanka.

The IIGEP has held five plenary meetings in Colombo attended by all, or nearly all, of the Eminent Persons. Eminent Persons have also spent periods of time individually in Sri Lanka. In addition, in their absence they have been informed in detail of the Commission's proceedings through the Commission's ad verbatim transcripts of the sessions and through frequent and regular reports by their resident Assistants and the IIGEP Secretariat. They have submitted four Interim Reports to the President, as required every three months by the terms of their appointment. These reports remain confidential until the President chooses to release them at the end of the proceedings of the

⁵ The IIGEP became fully constituted on 10 February 2007 when the invitations to the 11 Eminent Persons were finalised.

⁶ The Eminent Persons were: Justice P.N. Bhagwati, Chairman (India), Mr Marzuki Darusman (Indonesia), Mr. Arthur E. "Gene" Dewey (USA), Professor Cees Fasseur (Netherlands), Dr. Kamal Hossain (Bangladesh), Dr. Bernard Kouchner (France) later replaced by Judge Jean-Pierre Cot (France), Professor Bruce Matthews (Canada), Mr. Andreas Mavrommatis (Cyprus), Professor Sir Nigel Rodley (UK), Professor Ivan Shearer (Australia), and Professor Yozo Yokota (Japan).

⁷ Working arrangement between the Commission of Inquiry (CoI) and the International Independent Group of Eminent Persons (IIGEP), jointly agreed on 27 March 2007, clause 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").

Commission. The IIGEP has issued five previous public statements⁸ that are all available in three languages, on the IIGEP's publicly accessible website.

The mandate of the IIGEP was stated by the letters of Invitation to Serve as a Member of the International Independent Group of Eminent Persons, issued by the President of Sri Lanka as follows:

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 should 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 Commission of Inquiry was appointed by the President of Sri Lanka in November 2006, pursuant to the provisions of the *Commission of Inquiry Act, 1948*. 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 of Inquiry is Justice N.K. Udalagama.⁹ 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 alleged human rights violations, although the Commission has been granted some flexibility to investigate and to inquire into "other incidents amounting to serious violations of human rights violations arising since 1st August 2005"¹⁰. Thus far it has not done so.

(b) "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 a remedy. The International Covenant on Civil and Political Rights, 1966, 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 State parties to respect and ensure to all persons within its territory the rights protected

⁸ On 11 June 2007, 15 June 2007, 19 September 2007, 19 December 2007, and 6 March 2008.

⁹ 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. P.D.L. Premaratne (who replaced the late Upawansa Yapa).

¹⁰ Warrant, paragraph 3 of the Preamble. While the mandate is silent as to the process of selecting additional cases for investigation and inquiry, the Commission's Rules of Procedure state that the officers of the Attorney General's Department, who constitute the Commission's Panel of Counsel, shall be responsible for "suggesting to the Commission further investigations and inquiries to be conducted."

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 continues with these two relevant undertakings from each State party to the present Covenant:

(a) *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;*

(b) *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).¹¹ This document has relevance to the Commission of Inquiry in a number of important respects.

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:

¹¹ Resolution 1989/65, 24 May 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.

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 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. These basic principles are consistent with those to be found also in the legal system of Sri Lanka.

(c) Human rights in a state 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 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.

Sri Lanka has been in a state of formal emergency for some years. 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 International Covenant on Civil and Political Rights (to which Sri Lanka is a party). 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.¹²

Article 4 of the Covenant does not permit, even in an emergency, any derogation from the provisions relating to the right to life, freedom of torture, and certain other fundamental rights. In the case of any derogation, it is incumbent upon the state to justify the measures against the yardsticks of necessity and proportionality. Sri Lanka has not chosen to announce to the States parties to the Covenant any measures of derogation pursuant to article 4 of the Covenant. Nevertheless, the IIGEP stresses the above principles in view of what has been described as the “culture of impunity” that prevails in certain quarters in Sri Lanka, which would lead to a failure to treat these grave human rights violations with the seriousness required, or even justify shielding the perpetrators from accountability, in a time of national emergency.

The current situation in Sri Lanka is to be characterised as a state of armed conflict of a non-international character, covered by Common Article 3 of the four Geneva (Red Cross) Conventions of 1949, to which Sri Lanka is a party. What is the relationship between human rights law and the law applicable in armed conflict (international humanitarian law)? The Human Rights Committee has commented authoritatively on this question also. The Committee stated that the International Covenant on Civil and Political Rights (to which Sri Lanka is a party):

¹² Human Rights Committee, General Comment 29, “States of Emergency (article 4)”, UN Doc. CCPR/C/21/Rev.1/Add.11 (2001), para.4.

...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 especially relevant for the purposes of the interpretation of Covenant rights, both spheres of law are complementary, not mutually exclusive (emphasis added).¹³

An example of such complementarity would be to contrast the killing of a combatant in the ordinary course of a military engagement with the killing of a non-combatant civilian. The latter would be a breach of human rights law (the right to life) unless the killing occurred as the unintended result of the use of necessary and proportionate force against a military target consistently with international humanitarian law. Similarly, the forced evacuation or transfer of civilian populations would be a breach of both international humanitarian law and human rights law, unless justified by military necessity, as measured by the principles of necessity and proportionality.

In the view of the IIGEP, strict adherence to the laws of human rights and international humanitarian law, secured by effective rules of engagement promulgated for the police and each of the armed forces of the state, is not a recipe for weakness in the face of the enemy. To the contrary, respect for human rights and international humanitarian law strengthens the hand of the state in earning the trust and support of all sections of the civilian population, without which it cannot prevail in its efforts to bring lasting peace to the country. Moreover, proper training and strict discipline resulting from adherence to rules of engagement in the conduct of operations are essential to morale and promote a culture of professionalism and self-respect in all members of the police and armed forces.

Command responsibility is a concept that was developed in the law of armed conflict (war) 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 war crimes and other acts contrary to international humanitarian law. It has been developed so as to hold responsible 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, prevent, or punish such acts.¹⁴

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 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, commanders and other officials are subject to laws analogous to command responsibility. In countries such as Sri Lanka there are laws relating to aiding, abetting, instigating, conspiring to commit, and concealing the commission of criminal offences.¹⁵

The doctrine of command responsibility has not yet been clearly developed in the law of Sri Lanka. Reference was made to it in a previous Commission of Inquiry¹⁶, but unfortunately the point was not pursued in later judicial proceedings resulting from that Inquiry before the Ratnapura High Court and the Supreme Court. Further, in the case of *Sanjeewa v. Suraweera*, three Justices of the Supreme Court noted that a prolonged failure to ensure a proper investigation of a breach of human rights “may well justify the inference of acquiescence and condonation if not approval and authorization.”¹⁷ The Commission of Inquiry ought not to stop at a finding of those immediately responsible for the acts under review but should also establish responsibility along the chain of command, wherever it might lead.

END OF PUBLIC STATEMENT

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

¹⁴ See generally Y. Dinstein, *The Conduct of Hostilities under the Law of International Armed Conflict* (Cambridge University Press, 2004).

¹⁵ Penal Code (as amended), 1956, Volume 1, Chapter 19, Legislative Enactments of Sri Lanka (Consolidated).

¹⁶ Report of the Commission of Inquiry into the Western, Southern and Sabaragamuwa Disappearances (1995)

¹⁷ (2003) 1 SriLR 317, per M. Fernando J., (Edussuriya and Wigneswaran JJ. agreeing).