

# **Reflections One Year On: The Commission of Inquiry and the International Independent Group of Eminent Persons**

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## **Introduction**

It is more than one year since the appointment of the Commission of Inquiry (CoI). The warrant for the CoI dates to 3 November 2006. The updated TOR for the International Independent Group of Eminent Persons (IIGEP) dates to 12th January 2007. On 13 November the CoI and IIGEP were informed of their mandate being renewed. The renewed mandate is valid till 2 November 2008.

The CoI and IIGEP were appointed by the Government of Sri Lanka in response to calls for international monitoring on human rights. The warrant mandates the CoI to investigate and inquire into 16 past cases. Therefore it is clear that the CoI only has the power to investigate and inquire into past cases and do not have a role in addressing present and future violations. The TOR for the IIGEP states that they are to observe investigations and inquiries conducted by the CoI. One year after the appointment of the CoI, several questions need to be examined including the progress made, whether they have satisfied the needs that resulted in their appointment and what their legacy and contribution would be in the legal and human rights spheres.

## **Context into the appointment of the CoI**

The CoI and IIGEP was established in a context where there is an increase in grievous human rights violations throughout Sri Lanka and the delays and interferences experienced with inquiries resulting in a culture of impunity. In addition, appointments to local institutions have been questioned, raising issues of standing, capacity and public confidence in such bodies. The non constitution of the Constitutional Council under the 17th Amendment to the Constitution, followed by the President's unilateral and arbitrary appointment of members to the independent commissions including the Human Rights Commission (HRC), the Attorney General (AG), the Inspector General of Police (IGP), Justices of the Supreme Court and Court of Appeal, have not only called into question the independence and impartiality of such bodies, but also increasing politicization of such actors and institutions. Such developments have resulted in large numbers of human rights violations being either unreported, not investigated in an independent manner or in delays in instituting criminal prosecutions.

One year after the appointment of the CoI and with an extension of another year, there is no tangible improvement in the human rights situation in Sri Lanka. If at all, there is an increase in the number and nature of violations, with limited progress in investigations, indictments and convictions exacerbating the prevailing culture of impunity.

With unprecedented human rights violations and the deteriorating humanitarian crisis, there is a greater need and urgency for an independent international monitoring mechanism and field based presence for human rights protection. Such sentiments were also stressed in the first public statement issued by the IIGEP on 11 June 2007. The IIGEP stated that the CoI and IIGEP should not be used as a substitute for national and international monitoring. The statement by the High Commissioner for Human Rights Ms Louise Arbour at the conclusion to her visit to Sri Lanka on 13 October 2007, also raised concern with the process and several limitations with the CoI.

**Role of the State in the investigations: Is it interference?**

Public statements issued by the IIGEP and the policy briefs by the Centre for Policy Alternatives (CPA) discuss the role of the AG's department in the investigations and inquiries and raise concerns regarding independence and conflict of interest. The Chairman and the AG have responded to the IIGEP statements by stating that the officers of the AG's Department are not involved in criminal investigations or in directing the conduct of criminal investigations and are only involved in providing legal advice to investigators.

There is also concern as to when the AG's Department is to be officially involved in the process since the Chairman has stated that 'the professional function of the AG's department commences only upon the completion of criminal investigations'. Such uncertainty raises concern whether there would be a conflict of interest at a subsequent state. State counsel who are privy to information at the investigation stage could be the same state counsel who initiate criminal proceedings, thereby raising the issue of a conflict of interest and of the independence of counsel.

It is reported that the renewed warrant includes new conditions on the role of the AG's department in the present process. The conditions state that the CoI is not required to consider, scrutinize, monitor, investigate or inquire into the conduct of the AG or his officers with regards to or in relation to any investigation already conducted into the relevant incidents. This raises several concerns. Why is the involvement of the AG's department in relation to the investigations and inquiries beyond the consideration of the CoI? Why is there no transparency in the role of the AG's department in the investigations and inquiries? The Warrant issued in 2006 does not preclude the CoI from examining the role of the AG's department and therefore why has this new condition been brought at this juncture? Is this an indicator that the AG's department is above the law and beyond the scrutiny of an independent body investigating and inquiring into 16 cases of human rights violations?

Further, involvement of the AG's Department will also question the independence of the CoI and whether the process is in actual fact independent of the State. A CoI which is to be independent and impartial, hallmarks of any neutral investigation and inquiry, need to demonstrate to all stakeholders that they are not influenced by the State or its actors. At a time when public confidence is dismal in relation to investigations and inquiries and holding perpetrators accountable, every effort must be made by the CoI to ensure an independent and transparent process.

### **Panel of Counsel**

The CoI is to have a Panel of Counsel, comprising of six members of the AG's department and two independent counsel. It is imperative that there is an independent panel of counsel, reinforcing the notion of impartiality and neutrality that is required in investigations and inquiries. The Panel of Counsel should not have any state actors involved including counsel from the AG's department. Having an independent Panel of Counsel would give confidence to victims, witnesses and the public to come forward with evidence and information.

### **Is it a Smooth Process? Delays and Obstacles in the Investigations and Inquiries**

The last year has witnessed several reasons for the delay and sluggishness in the investigations and inquiries. There is concern raised on the issue of finances of the CoI. It has been reported that finances are managed by the Presidential Secretariat and the CoI does not have financial independence. Financial independence is crucial for the functioning of an independent commission, demonstrating their ability to act independently and not be dependent on an external actor. By imposing various restrictions and delaying funding to the CoI, the Government is in reality controlling the functioning of the CoI and the investigations and inquiries.

Reports have highlighted the delays inherent in the investigations and inquiries. The IIGEP states that the CoI only commenced preliminary investigations and inquiries in May 2007, despite the warrant being issued in November 2006- six months earlier. The processes followed by the CoI has also been questioned. The lack of transparency in internal processes, the failure to announce a detailed work plan, in recruiting essential staff and in sharing evidence and information in the possession of the government with the IIGEP as well as the non functioning of the investigative and witness protection units have been raised. The IIGEP goes on to state that such delays "undermine public confidence in the ability of the Commission to carry out its mandate in a timely manner".

It is imperative that information on the 16 cases specified in the Warrant and other relevant information is made available. This involves the sharing of information collected by government actors in the investigations and inquiries into the 16 cases, and other information that is requested by members of the CoI. An ongoing problem faced by the CoI is obtaining information pertaining to cases within their mandate. According to media reports, the CoI has had difficulties obtaining government records of investigations conducted. In the case of the assassination of the former foreign minister Lakshman Kadirgamar the CoI was refused these records by the Colombo Magistrate. The refusal sends a clear message to the CoI, the IIGEP and the public, on the unwillingness of the State to assist with the investigations and inquiries, and of the extent of its commitment to bring to justice the perpetrators of human rights violations.

### **The Importance of Witness and Victim Protection Framework**

Another major obstacle to the investigations and inquiries is that witnesses are reluctant to make representations as they lack the confidence that they will be protected from reprisals. This is due to a variety of reasons including a lack of trust in key government institutions. There is also no witness and victim protection legislation in Sri Lanka. These

factors have hindered many people from coming forward with information and evidence. As a result of the fear experienced by many to come forward with information, only 12 representations have been made to the CoI, as stated by the secretary to the CoI, Mr Piyadasa. There were also instances where witnesses who did come forward received threatening calls and were discouraged from providing information to the CoI, raising concern over the security of witnesses and the limitations in providing protection.

There has been considerable attention in introducing a law protecting victims and witnesses. It must be kept in mind that a law can do so much. Full implementation of the law is important. It is also vital that laws and structures take on board situations where human rights violators could be government security forces, with people having the perception that protectors are the perpetrators. The Government need to take on board the human rights situation and the realities on the ground and ensure that a witness and victim protection framework that is introduced is effective in its implementation and provides protection and confidence to the people.

### **Consistent and regular visits and meetings**

It is important that the CoI and IIGEP visit the sites of the violations under investigation and speak to as many people as possible related to the cases. Such visits and meetings must be conducted in manner that takes on board the difficulties faced by victims, witnesses and communities in the areas and without jeopardizing the security of persons that the CoI and/or IIGEP meet.

There should also be regular meetings of the CoI and the IIGEP, jointly and individually, with civil society and other relevant actors to obtain new information and to inform the relevant groups on the progress in investigations and inquiries. Further, measures should be taken to ensure that such consultations are conducted in a manner that ensures the security and confidence of witnesses and communities in the areas. Creating such information channels will not only keep all actors informed and provide transparency to the process, but also build public confidence.

### **Conclusion**

One year since the appointment of the CoI and the subsequent appointment of the IIGEP there seems to be limited progress made with the 16 cases. There has been no public hearing to date, with limited information available to the public on the process and the progress of the investigations and inquiries. By renewing the mandate of the CoI, the government has given them a lifeline of another year. It is yet to be seen what this one year would be able to achieve, if anything is possible to achieve in a situation where independence of the CoI is questioned, politicization and interference remains, there is lack of progress in witness and victim protection and obtaining of information to name but a few obstacles faced in the present process.

November also sees the IIGEP having their quarterly meeting to discuss the role of the IIGEP and ways forward. At such a time, it is time for the IIGEP, civil society, international community and others to question whether the present process will make any difference or whether it would be yet another CoI following a long list of previous

commissions in the recent history of Sri Lanka. In one year considerable time, energy and resources were spent but has it achieved anything? Can another year make a difference? Can justice be served to the human rights violations in question and bring respite to the victims and their loved ones?