

Sri Lanka: Observations on a Proposed Commission of Inquiry and International Independent Group of Eminent Persons

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On 4 September 2006 the President of Sri Lanka announced that the government would invite an international independent commission to probe abductions, disappearances and extra-judicial killings in all areas of the country. Amnesty International welcomed the Government of Sri Lanka's commitment to address past human rights violations. On 6 September 2006 the President, instead announced that he would invite an International Independent Group of Eminent Persons (IIGEP) to act as observers of the activities of the Commission which will investigate alleged abductions, disappearances and extra judicial killings. The eight Sri Lankan commissioners were formally announced on 6 November with a mandate to inquire into fifteen specific incidents that have occurred since August 2005 and the possibility of broadening their investigations to include cases arising during their inquiries and complaints received by the commission on other serious violations.

Amnesty International has benefited from having been in dialogue with the Government of Sri Lanka on its proposal and has welcomed the opportunity to provide recommendations on establishing a commission of inquiry into serious violations of human rights law and international humanitarian law in Sri Lanka.⁽¹⁾ The following are Amnesty International's observations on the proposals. Amnesty International's comments are made on the basis of dialogue with the Government of Sri Lanka in Colombo, London and Geneva and documents produced by the Government of Sri Lanka preparatory for the Commission of Inquiry(Col) and International Independent Group of Eminent Persons. AI has also benefited from meetings with civil society actors and Sri Lankan human rights defenders in Colombo and Geneva. Amnesty International has confirmed to the Government of Sri Lanka, in response to their request, that it is not in a position to nominate anyone to stand as candidate for the International Group of Eminent Persons.

In light of decades of impunity for perpetrators of violations of international human rights and humanitarian law in Sri Lanka, characterised by the failure of the authorities to investigate and prosecute such perpetrators effectively, only an international and independent Commission would have the credibility and confidence of all parties to the conflict and sections of society to be able to conduct meaningful investigations, obtain critical testimony or information from witnesses and gain the acceptance of its recommendations by all relevant parties. To this end, members of the body conducting the inquiry should be international experts, chosen for their recognised impartiality, integrity and competence. Crucially, they should be, and be seen to be, independent of any institution, agency or individual that may be the subject of, or otherwise involved in, the inquiry, including the Government of Sri Lanka. Amnesty International does not believe that an independent group of eminent persons observing an essentially national inquiry can serve as a substitute for the independence, real and perceived, of the Commission of Inquiry itself. Amnesty International therefore calls on the President of Sri Lanka to:

- Add independent, impartial and competent international experts to the proposed Col;
- Ensure that the Col's work is developed in consultation with a representative profile of civil society, including NGOs;
- Ensure that the Col will assess the information collected in light of relevant provisions of international human rights law and international humanitarian law, as well as relevant Sri Lankan laws;

Ensure the safeguarding of the Col's independence, access to all relevant persons and information, accessibility to the public, protection of witnesses, and full discretion as to its mode of operation and publication of interim and other reports;
Ensure that the Col's recommendations are carefully considered with a view to their full implementation.

Unless the Col is established and allowed to function under these standards, the organization believes that the Col will not be able to function as an investigative body that would address violations of international law in a meaningful way, as required by international standards.

Further, Amnesty International is concerned that the current terms of reference for the IIGEP would undermine its independence, effectiveness and ability to publish its reports at its own discretion, as detailed below.

Amnesty International has requested to see the terms of reference for the Col itself but this has not yet been provided by the Government of Sri Lanka. However the organisation understands that the Col has been established under the Commissions of Inquiry Act No. 17 of 1948. Amnesty International has significant concerns about the ability of the Commission of Inquiry to attract the degree of public confidence and cooperation necessary for it to carry out meaningful investigations and for its recommendations to be accepted by all relevant parties. These concerns in large part arise from the broad powers granted to the President under the Commissions of Inquiry Act No. 17 of 1948 and the absence of a process to involve all relevant sectors of Sri Lankan society, including members of Sri Lankan civil society, and all relevant parties, including the Liberation Tigers of Tamil Eelam (LTTE), in providing input to the establishment of the Commission, the appointment of its members, and the development of its terms of reference.

The Commissions of Inquiry Act No. 17 of 1948 grants the President the power to set the terms of reference of the Col and appoint all its members (sec.2); add new members at his/her discretion (sec. 3); revoke the warrant establishing the Col at any time (sec. 4); and appoint the Commission's secretary (sec. 19) without needing to consult the Commission or its chairperson. The decision as to whether the inquiry – "or any part thereof" is to be public also rests solely with the President (sec. 2(2)(d)). In addition, there are no provisions in the Act requiring that the reports or recommendations of the Col are made public. Amnesty International is concerned that these and other provisions, which grant the President a wide discretion, may undermine the independence and impartiality of the Col,(2) as well as the Commission's ability to inspire public confidence and interact freely with the public(3). Accordingly these factors may undermine the willingness of the public to engage with the Col and to come forward with evidence.

Amnesty International is deeply concerned that there does not appear to have been an adequate consultation process to solicit and take into account the views of Sri Lankan civil society, during the preparations for the establishment of the Col and IIGEP. In establishing a commission of inquiry, it is essential that, before being finalised, the draft terms of reference are circulated among civil society for their input, and that civil society's views are also taken account of in selecting the members of the commission. However, AI is concerned that in this instance civil society groups, including those involved in the promotion and protection of human rights, may not have participated in the selection and appointment process of the Commissioners, or the selection of incidents to be investigated by the Commission. If this is the case, the Col may lack the perception of credibility and independence which are essential for its acceptance by all parties to the conflict and sections of society throughout the country. A commission appointed without such consultation and support runs the risk of being perceived to be partial.

Amnesty International takes the view that the Col and the IIGEP should be free to issue interim reports throughout the duration of their work. The interim and final reports of each of these bodies should be presented to the government, the LTTE and other relevant parties, and must be made public without undue delay and in their entirety, except where witness protection or

the need to avoid prejudicing future legal proceedings requires certain elements to be withheld.(4) Beyond these reasons there should be no restrictions placed on either of these bodies to prevent them from speaking or reporting publicly.

Amnesty International is concerned that the publication of the IIGEP's final report will, according to its present Terms of Reference, be subject to the exclusion by the President of "any material which in His Excellency's opinion may be prejudicial to, or absolutely necessary for the protection of, national security and public order".(5) While Amnesty International recognizes that in certain instances issues of this kind may arise, the organization is concerned that this proviso may be used by the Executive as a way of censoring the IIGEP's report or parts of it. Amnesty International believes that concerns of this nature regarding the IIGEP's final report should be treated in the same way as are public statements by the IIGEP "during and after the completion of investigations and inquiries of the Commission of Inquiry". In the present Terms of Reference(6) such statements are first to be provided to the "Chairman of the Commission of Inquiry" and the Attorney General, who may object to a statement's release, but the final decision as to publication rests with the IIGEP (with the objections being published alongside the statement).

Amnesty International emphasises that protection for complainants, witnesses, those conducting the investigation and others involved in any way, will be a critical element for the success of the Col and the IIGEP. Efforts must be made to ensure at all times the protection of all those involved with these bodies and this should form part of their terms of reference. The practical implementation of such measures of protection will need to be the subject of serious and detailed discussions between the government and these bodies prior to beginning investigations.

Amnesty International understands that the access of the IIGEP to witnesses is subject to the agreement of the Commission. Amnesty International believes that this is an unnecessary constraint on the IIGEP's work and has the potential to limit its ability to perform its functions effectively. Amnesty International emphasises that, if it is to be effective in performing its task of monitoring the work of the Commission, it must have powers which enable it to observe all aspects of the work of the Commission without limitations.

Amnesty International is also concerned that the IIGEP's Terms of Reference state that "[T]he Secretary to the Ministry of Justice will be the Head of the Secretariat of the IIGEP" and similarly that "representatives of His Excellency the President, Minister of Disaster Management and Human Rights, the Attorney General and Secretary to the Ministry of Foreign Affairs, will be attached to the Secretariat of the IIGEP."(7) Amnesty International is deeply concerned that these provisions, which give the government control of the administrative functions of the IIGEP, will undermine the independence of the IIGEP and accordingly of the Commission, and create the impression, if not the reality, that its movements and actions are closely monitored by, if not under the supervision of, government officials. While the government must ensure the provision of all necessary technical and administrative assistance, including staff, that independent investigatory bodies may require, any such assistance must be an option for them to take, not be imposed upon them, and it should be made explicitly clear that the administrative staff are responsible and accountable only to the independent body in respect of all functions they perform with regard to the work of the independent body.

In the present circumstances, with the armed conflict escalating and the failure of the recent Peace Talks in Geneva, Amnesty International wishes to reiterate its strong preference for a commission of inquiry comprising international experts, as suggested by the President in his statement of 4 September 2006. In the alternative, the Col should be composed of both Sri Lankan and international members. Amnesty International understands that the government takes the view that it would not be possible to do this because, Sri Lankan law prohibits international participation on a commission, and because the Commission exercises (quasi) judicial power. In this regard Amnesty International notes that it has not identified any provision in the Commission of Inquiry Act No. 17 of 1948 which would preclude the appointment of a commission composed of, or including, international members. Were such members to be appointed to the Commission,

it would remain a national body, established under Sri Lankan law. Indeed, precedents exist in Sri Lanka where Commissions of Inquiry have been of a mixed or wholly international nature, such as the inquiry into the killing of Denzel Kodbekaduwa which was initiated under the Commissions of Inquiry Act of 1948 in 1993, and comprised of international judges from Ghana, New Zealand and Nigeria.

Moreover, the Commission of Inquiry Act No. 17 of 1948 does not grant a commission appointed under this Act any judicial or similar powers such as powers to arrest, detain, charge, try, convict or impose punishment. A commission of inquiry established under the 1948 Act and composed of or including international members, as by the President in his statement of 4 September 2006, could in this regard make only recommendations for prosecution, which would be taken up for consideration by prosecutorial authorities through their regular procedures. Recommendations for changes in laws and policies would similarly be taken up by the relevant legislative and executive authorities. In neither case would the powers granted by the Constitution to these authorities be in any way compromised by the recommendations of the Commission of Inquiry.

Amnesty International wishes to emphasise that while the establishment of an international independent Commission of Inquiry has the potential to be an important step in addressing impunity and reducing the violence which has prevailed for many years and intensified sharply in recent months, it will not address the need for effective and on-going international monitoring and investigation of human rights abuses in Sri Lanka. Amnesty International has therefore, in addition, urged the Government of Sri Lanka to consider putting in place effective measures to address this need in the near future, and will continue to do so.

- (1) See "Establishing a commission of inquiry into serious violations of human rights law and international humanitarian law in Sri Lanka: Amnesty International's recommendations" (ASA 37/031/2006).
- (2) See *ibid* point II
- (3) See *ibid.*, point IV(A).
- (4) See *ibid.*, point V(A).
- (5) The Terms of Reference of the International Independent Group of Eminent Persons, version of 31 October 2006, para. 13.
- (6) *Ibid.*, para. 11.
- (7) *Ibid.*, para. 13.

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