

Establishing a commission of inquiry into serious violations of human rights law and international humanitarian law in Sri Lanka:

Amnesty International's recommendations

Amnesty International welcomes the announcement by the Government of Sri Lanka on 4 September 2006 to invite an international independent Commission to inquire into abductions, enforced disappearances and unlawful killings in all areas of the country. If implemented effectively such a Commission could be an important step towards ending impunity for serious past human rights abuses in Sri Lanka. Members of the body conducting the inquiry should be drawn from international experts, chosen for their impartiality, integrity and competence, and should be independent, and be seen to be independent, of any institution, agency or individual that may be the subject of, or otherwise involved in, the inquiry. In order to help ensure the credibility and independence of the Commission of Inquiry its members should be chosen in consultation with the Office of the High Commissioner for Human Rights and Sri Lankans as well as international civil society. The mandate of the Commission must be well-defined. The Commission should be mandated to fully investigate the most serious violations of international human rights and humanitarian law whether by government forces, LTTE, Karuna Group or any other armed group or individuals operating on their behalf.

Amnesty International believes that the establishment of an international independent Commission of Inquiry is potentially an important step in addressing impunity for past abuses, which could help to reduce the current escalating violence in the country. However, the organisation notes that it will not replace the urgent need for effective and on-going measures to protect the civilian population, including an international monitoring presence which it hopes the government will fully support. Below are Amnesty International's recommendations to the Government of Sri Lanka on the establishment of a Commission of Inquiry.

I. Establishment: Competence, independence and impartiality

The membership of commissions of inquiry is particularly important, indeed vital, for their effective functioning. As the actions and personal qualities of the commissioners frequently set the tone for the activities of the commission as a whole, commissions of inquiry require particularly strong, independent and effective members.

Members of the commission of inquiry should be chosen for their recognized impartiality and competence as individuals and should be independent of any institution, agency or person that may be the subject of, or otherwise involved in, the inquiry.

The commission includes members with proven expertise, knowledge and experience in the promotion and protection of human rights, including expertise of international human rights and humanitarian law.

Civil society organizations as well as non-governmental organizations involved in the promotion and protection of human rights, victims' groups, women's groups and other minority groups within the country should fully participate in the selection and appointment process.

Similar criteria to those ensuring the competence, impartiality and independence of the commissioners must be used for the appointment of professional administrative staff.

For impartiality and independence to be ensured, the commission should also be guaranteed financial independence.

II. Mandate

A. Subject-matter mandate: types of violations to be investigated

The commission of inquiry should be mandated to fully investigate the most serious violations of international human rights and humanitarian law including cases of unlawful killings, abductions, enforced disappearances and related abuses (for example the torture of those forcibly disappeared) during the period of the Ceasefire Agreement, from February 2002 until the date the Commission is expected to complete its report. It should 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.

The commission should investigate all unlawful killings, abductions and enforced disappearances, whether committed by government forces, by the LTTE, the Karuna group or by other armed groups. The commission should also investigate the involvement of commanders and military and civilian superiors, including in planning, ordering.

The commission should have the mandate to recommend further investigations into unlawful killings, abductions and enforced disappearances that it has not had the time to inquire into, and to make other recommendations for future inquiry and investigation as necessary.

Amnesty International recommends that the Commission includes in its investigations a critical analysis of all factors which have led to or facilitated these violations of international human rights law and international humanitarian law, such as institutional structures, policies and practices, and other factors.

B. Period of operation

Although it is important to indicate a time limit for commissions of inquiry to end their operations and report on their findings, it is equally important to make that time limit a realistic one. Laying down a particularly short time limit for reporting makes the work of commissions of inquiry more vulnerable to changes in political climate. It could also make witnesses more hesitant to come forward as they may have doubts about the process being able to reach its final conclusion. At the same time, an extended period of operation risks losing the public's attention and political momentum.

To some extent, the problem of length of time can be addressed by frequent public reporting and interim conclusions and recommendations. Considering the length and complexity of its investigation, Amnesty International recommends that the commission publishes regular and frequent interim reports outlining progress made and obstacles encountered. This would help establish and maintain effective communication with the Sri Lanka authorities, civil society organizations and the general public.

III. Powers

A. Broad investigatory powers

The commission of inquiry should have the power to obtain all the information necessary to the inquiry. This would include the power to compel attendance and co-operation of witnesses, including state officials, while fully safeguarding their rights, as detailed below [sec. IV (B)] and to order the production of documents, including government and other records. The commission should also have the power to impose penalties for non-compliance with such orders.

The government of Sri Lanka and the LTTE should ensure that all information that the commission considers to be relevant is provided to it, including archives, other records and testimony of government officials and LTTE members.

The commission of inquiry should be granted access to both government-controlled and LTTE-controlled territory.

B. Ensuring accountability and the prohibition of amnesty under international law

All states have an obligation to prosecute and punish perpetrators of crimes under international law, including extra-judicial executions and enforced disappearances. Amnesties for these crimes deny the right of victims to truth, justice and reparation and are prohibited under international law. Amnesty International has consistently opposed, without exception, amnesties, pardons and similar measures of impunity that prevent the emergence of truth, a final judicial determination of guilt and innocence and full reparation to victims and their families.

The commission should reaffirm Sri Lanka's obligation under international law to combat impunity. This obligation includes investigating crimes under international law, including extra-judicial executions and enforced disappearances, and, where there is sufficient evidence, prosecuting suspected perpetrators in trials that meet international standards of fairness, without the death penalty or other cruel, inhuman or degrading punishment. As required by international law, the commission should not recommend amnesties or similar measures of impunity with respect to crimes under international law.

IV. Operations and procedures

A. An open and public inquiry

As a matter of principle, all aspects of the work of a commission of inquiry should be made public. So far as possible, the media and public should be given access to the proceedings and to the evidence on which the commission bases its findings.

However, the openness of the investigation and of the information it obtains needs to be balanced against the confidentiality of personal information. The media and public may be excluded from all or part of the proceedings, the identities of victims and witnesses may be withheld, and material may be omitted from the commission's report at the request of individual victims or witnesses, or if the commission considers that such measures are necessary to protect them.

The commission of inquiry may gather information by taking written or oral statements and by conducting hearings. It may conduct both public and confidential hearings. As a general rule, the hearings should be opened to the public. However, the commission may decide to hold a hearing *in camera* (i.e., to make it confidential) or to prevent one or more individuals to be present if the security of alleged perpetrators, victims or witnesses is deemed to be threatened. In this case, it may also decide to keep confidential any information relating to the proceedings. The commission must, however, permit any victim who has an interest in the proceedings concerned to be present.

B. A victim-centred approach

International standards on the treatment of victims of crimes under international law and other serious crimes focus on three key state responsibilities: to treat victims with humanity; to provide effective protection mechanisms; to ensure effective support. In addition, states have specific responsibilities in relation to child victims and victims of sexual violence.

The Declaration of basic principles of Justice for victims of crime and abuse of power states that victims "should be treated with compassion and respect for their dignity" and that:

"[T]he responsiveness of judicial and administrative processes to the needs of victims shall be facilitated by taking measures to minimize inconvenience to victims, protect their privacy, when necessary, and ensure their safety, as well as that of their families and witnesses on their behalf, from intimidation and retaliation."¹

Principle 10 of the Basic principles on the right to a remedy and reparation states:

"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. The State should ensure that its domestic laws, to the extent possible, provide that a victim who has suffered violence or trauma should benefit from special consideration and care to avoid his or her re-traumatization in the course of legal and administrative procedures designed to provide justice and reparation."

¹ Declaration of basic principles of justice for victims of crime and abuse of power, adopted by the UN General Assembly in Resolution 40/34 of 29 November 1985, Principle 4 and Principle 6(d).

Complainants, witnesses, those conducting the investigation and other involved in any way should be protected from violence, threats of violence and any other form of intimidation. The commission of inquiry should be granted all the necessary human and material resources to devise and implement a victims and witnesses protection program. Protection measures should be available for all witnesses, victims and their families, staff and others associated with the investigation. In determining which protection measures to take, the commission should take into account the views of the victims and witnesses on which measures they require and whether the protection measures are proportionate to the seriousness of the risk. The Commissioners should be responsible for overseeing the implementation of all protection measures and a procedure should be established whereby a victim who is not satisfied with protection measures may apply to the Commissioners to address the issue.

Interim reports should include an assessment of the witness protection mechanisms. If victims or witnesses whose cases were detailed in the interim report are subsequently subject to threats, intimidation or violence, action must be taken immediately against perpetrators and the security of the victim/witness ensured.

Protection measures should not be restricted to concealing the identities of victims and witnesses who request it. They may include seeking restraining orders against anyone who poses a threat to the victim or witness or to their family, organizing police protection, safeguarding the whereabouts of the victim or witness and their family from disclosure and providing them with medical and psychological treatment and support. In some cases, such protection measures will need to be long-term and can require relocation and new identities for the victim or witness and their families.

The commission of inquiry should have the power to require the relevant authorities to suspend from duty officials and others allegedly involved in cases of unlawful killings, abductions and enforced disappearances under investigation, or to transfer them to other duties where they would have no power over victims or witnesses, without prejudice pending completion of the investigations, if there is reason to believe that they may interfere with victims or witnesses or otherwise interfere with the investigation. The Sri Lanka government and the LTTE should make an explicit undertaking that it will comply and ensure compliance with the commission's requests to that effect.

C. A fair procedure

Amnesty International believes that all witnesses, alleged perpetrators and other individuals involved should be guaranteed the following rights, among others, at all stages of the procedure before the commission:

- The right not to be discriminated against;
- The right to a fair and public hearing by a competent, independent and impartial body;
- The right not to be compelled to testify against themselves or to confess guilt;
- The right not to be subjected to any form of coercion, duress or threat, to torture or to any other cruel, inhuman or degrading treatment or punishment;
- The right to have the free assistance of an interpreter if they cannot understand or speak the language used;
- The right to be informed promptly and in detail of any allegations made against them;

- The right to defend themselves and where appropriate the right to have legal assistance;
- The right to be presumed innocent until proved guilty according to law;
- If adversely affected by a commission's decision, the right to seek judicial review;
- In the case of juveniles below 18 years of age, the procedure should take account of their age and the desirability of promoting their rehabilitation.

D. Collection of evidence and statement- taking

In collecting information, the commission of inquiry should seek the cooperation of the widest possible range of sectors of society, paying special attention to information and testimonies provided by victims and their families (both inside and outside the country), national and international human rights organizations and previous research projects. It should pursue all available sources of information, including: statements from victims, witnesses and alleged perpetrators; material evidence from sources such as government records, medical records or reports, and police investigation files; court files; media reports; and information from NGOs, UN human rights monitoring bodies and mechanisms, families of victims, and lawyers.

As a first step in gathering evidence, the commission should invite people to testify or submit written statements. All interested parties should have an opportunity to submit evidence. Evidence can be submitted to the inquiry in writing, at least initially. The commission should consider written submissions from, or arrange special interviews with, witnesses who are unable to attend because they are abroad, because they are afraid of retaliations, or for other valid reasons. It should be flexible about the manner of questioning witnesses and adapt its method to the circumstances of the case and the individual interviewees, so as to gather an optimal amount of evidence.

Commissions of inquiry are not bound by such strict rules of evidence as a court, and can consider reliable evidence of any kind, including, for example, hearsay (secondary) evidence. All information received, especially if provided by any individuals or groups which might attempt to use the commission as an instrument for their own purposes, should be evaluated with caution. The commission will need to assess all information and evidence it receives to determine its relevance, veracity, reliability and probative value. The reliability of hearsay evidence, in particular, must be considered carefully and must normally be corroborated before it can be accepted as fact. On no account may the commission admit statements obtained by torture or other cruel, inhuman or degrading treatment or punishment, unless as evidence that such torture or ill-treatment has been inflicted. Legal counsels should assist the commission by bringing relevant evidence to its attention and ensuring that evidence produced by the inquiry is admissible in later criminal proceedings.

The commission should be able to count on the services of experts in the field of psychology, pathology, forensic anthropology, and ballistics. In particular, forensic expertise should be on hand at short notice so that effective investigation and recording of, for example, injuries caused by torture or sexual violence, or post mortem investigations, can be done efficiently, increasing the likelihood of bringing perpetrators to justice. The methodology to be employed in exhumations, autopsies and analyses of bone remains should conform to the United Nations Principles relating to the effective prevention and investigation of extrajudicial, arbitrary or

summary executions.² Where the investigation is dealing with unlawful killing, the Commission should have the authority to prevent burial or other disposal of the body or bodies until an adequate post-mortem examination has been carried out.

E. Public information and education campaign

A comprehensive outreach policy is essential to the commission's impact.

- The commission should establish contact with representatives of non-governmental organizations, other relevant non-state institutions and the media, to publicize its work and obtain relevant information.
- The establishment of the commission and the matters it will look into should be notified to the public by all appropriate media. This notice should include an invitation to submit information and guidance for doing so.

Special attention should be paid to notifying victims of the violations investigated, or those who otherwise may have an interest. Live broadcasting of the hearings in the media should be considered, subject to evaluations regarding the protection of victims, witnesses and alleged perpetrators (outlined above).

V. Reporting, reparation and prosecution

A. Reporting, recommendations and dissemination

The final report is the most visible outcome of the work of a commission of inquiry. The report must provide details of all aspects of the commission's work, including investigations, hearings, findings and recommendations for prosecution. The final report should set out:

- the commission's mandate and terms of reference;
- its procedures and methods for evaluating evidence, as well as the law upon which it relied;
- the background to the investigation, including relevant social, political and economic conditions and information on whether the commission received the necessary cooperation by the government and other public institutions;
- its findings of fact and a list of documents and other evidence upon which such findings are based;
- its conclusions based upon applicable law and findings of fact, including a critical analysis of institutional structures, policies and practices, and other factors which allowed the unlawful killings, abductions and enforced disappearances to take place;
- a list of victims (except those whose identities are withheld for protection); and
- its recommendations.

² United Nations Principles relating to the effective prevention and investigation of extralegal, arbitrary or summary executions, endorsed by the General Assembly in December 1989 and approved by the Economic and Social Council in 24 May 1990.

Amnesty International recommends that the commission's final report should be made public and widely circulated without undue delay, and presented to the UN Human Rights Council for response and action. The report should be presented to the government, the LTTE and other relevant parties.

The commission of inquiry should have the power to make recommendations to the head of state with regard to: reparations to victims and their families; the enactment of specific legal, institutional and other reforms that would prevent repetition of past violations; any necessary government actions to be taken in furtherance of its findings. For example, the commission's recommendations may include: reforming laws, administrative procedures and practices; strengthening the justice system; promoting human rights education; organizing training for the police and security forces, continuing investigations or inquiries into particular matters and prosecutions in particular cases. Recommendations should also include the establishment or enablement of a future monitoring body, be it international, national or combined, to ensure that all future unlawful killings, abductions and enforced disappearances are promptly and thoroughly investigated, that perpetrators are brought to justice and that victims are ensured full reparation.

The government and the LTTE must publicly announce their commitment to implement the Commission's recommendations. The establishing law should clearly specify which bodies the Sri Lanka authorities will report to about the implementation of the Commission's final recommendations.

B. Providing full reparation to the victims and their families

Victims of gross violations of international human rights law and serious violations of international humanitarian law, such as those within the remit of the Commission have the right to full and effective reparation in its five forms: restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition. Reparation should be proportional to the gravity of the violations and the harm suffered.³ It should be provided even if the perpetrator has not been identified.

Throughout the inquiry, the commission should collect views from victims about what forms of reparation they require to rebuild their lives. Commissioners should consider recommending a broad range of other reparations for victims, including measures that would prevent repetition of past violations as detailed above. Any recommendation made for reparation should never be seen as a substitute for bringing those responsible to justice or preclude victims also seeking compensation through the courts.

C. Preserving evidence for future prosecutions

The work of a commission of inquiry should assist and should not prejudice current or future criminal proceedings. If a commission of inquiry obtains information indicating that identified individuals may have been responsible for committing, ordering, encouraging or permitting unlawful killings, abductions and enforced disappearances, that information should be passed to the relevant judicial or law enforcement bodies for investigation without delay, with a view

³ Basic principles on the right to a remedy and reparation, principles 15, 18.

to bringing those individuals to justice. Principle 8(e) of the updated Set of Principles to Combat Impunity states:

“Commissions of inquiry shall endeavour to safeguard evidence for later use in the administration of justice”.

In carrying out their mandate, commissions of inquiry should bear in mind the rules and conditions for the admissibility of evidence in the criminal process and should ensure that they produce admissible evidence for later criminal proceedings.

The government should ensure that persons identified by the investigation as having participated in the unlawful killings, abductions and enforced disappearances investigated are brought to justice. The Commission should recommend modalities of bringing to justice alleged perpetrators from both sides.

D. Archives

The UN Commission on Human Rights has declared that

“... states should preserve archives and other evidence concerning gross violations of human rights and serious violations of international humanitarian law to facilitate knowledge of such violations, to investigate allegations and to provide victims with access to an effective remedy in accordance with international law”.⁴

In particular, commissions of inquiry should establish at the outset of their work the conditions that will govern access to their documents, including conditions aimed at preventing disclosure of confidential information while facilitating public access to their archives.⁵

⁴ Commission on Human Rights, Resolution 2005/66, Right to the truth, 20 April 2005.

⁵ Updated Set of principles to combat impunity, Principle 8(f).