

STUDY REPORT

MUTTUR

Six years of Impunity
The failure of justice in Sri Lanka

December 2012





IN TRIBUTE TO



R. Arulrajah
24 years
Water and sanitation
technician



M. Narmathan
23 years
Water and sanitation
technician



S. Koneswaran
24 years
driver



T. Pratheeban
27 years
Water and sanitation
technician



R. Sivapiragasham
25 years
Hygiene promotion
moderator



G. Kavitha
27 years
Hygiene adviser



M. Rishikesan
24 years
Water and sanitation
technician



A. Jaseelan
27 years
Water and sanitation
technician



K. Kovarthani
27 years
Hygiene promotion
moderator



V. Kokilavathani
29 years
Hygiene promotion
moderator



A.L.M. Jawffar
31 years
Water and sanitation
qualified technician



Y. Kodeeswaran
30 years
Food security
technician



S.P. Anantharajah
32 years
Program manager



I. Muralitharan
33 years
driver



G. Sritharan
36 years
Water and sanitation
technician

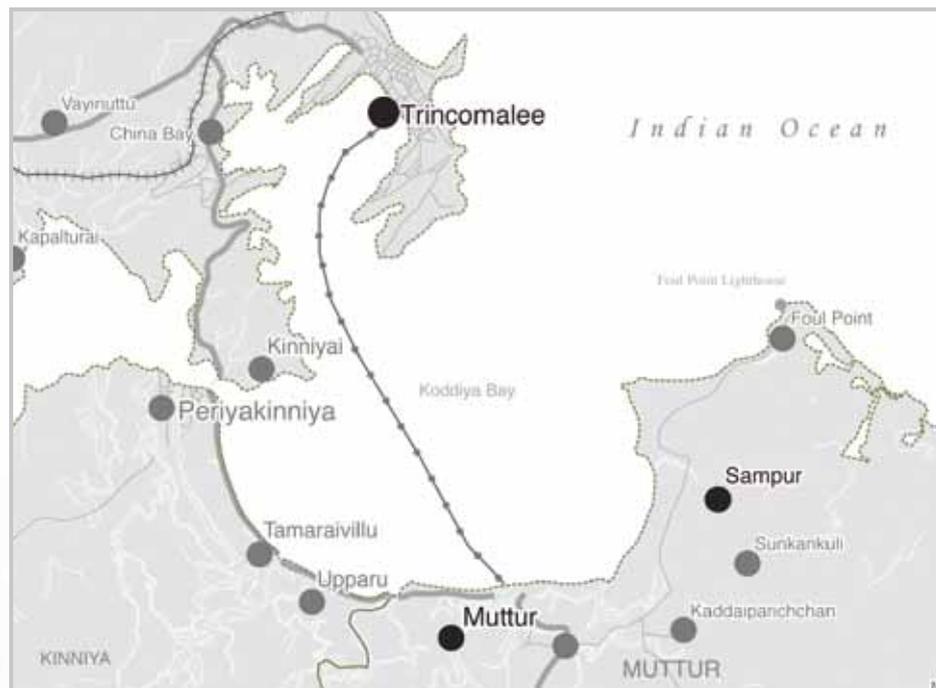


M. Ketheeswaran
36 years
Water and sanitation
technician



S. Ganesh
54 years
driver

SRI LANKA MAP



SUMMARY

On 4th August, 2006, 17 ACF employees were summarily executed, a bullet to the head. Clearly identified as humanitarian workers, they were assisting the population suffering from the consequences of the late 2004 tsunami and from the intensifying conflict in the town of Muttur, Sri Lanka. This massacre – amounting to a war crime – is unprecedented in the humanitarian field. At the time of the events, heavy fighting was taking place in Muttur, between rebels and government forces, causing dozens of civilian casualties.

A first investigation into this crime was launched in 2006, at the Magistrate Court, the primary national jurisdiction. After more than 18 months of inquiry, ACF came to the conclusion that fundamental principles of justice had been disregarded by various parties involved. The requirements of independence and impartiality were not met because of political interference. Furthermore, many irregularities have been observed: delays in obtaining access to the crime scene and the victims; failure to preserve the crime scene; suspicious ballistic analyses; and complete lack of protection for witnesses and incomplete recording of their testimonies, etc.

In parallel to this investigation, ACF lodged a complaint in September 2006, with the National Human Rights Commission in Trincomalee. Despite minimal expectations, ACF was shocked by the Commission's total ineffectiveness and lack of cooperation, from the months following the complaint to the present day.

In November 2006, President Mahinda Rajapaksa decided to set up a Presidential Commission of Inquiry in order to investigate 15 cases of serious human rights violations, including the Muttur massacre. An international group of

experts, International Independent Group of Eminent Persons (IIGEP), was called in to act as independent observers of the Commission's work. But the group of experts decided to withdraw, arguing that minimum international standards were not respected, highlighting a lack of independence linked to the interference of the Attorney General, the lack of respect for the principle of transparency, and the inability to set up an effective witness protection system despite promises made.

In 2010, the government established the Lessons Learnt and Reconciliation Commission to investigate violations perpetrated from the date of the ceasefire agreement of 2002 until the end of the civil war. Although the underlying rationale establishing the LLRC was justified and almost welcoming, the Commission has been severely criticised for its failure to satisfy key principles and norms of international law. The LLRC report published in November 2011, insofar as the Muttur massacre is concerned merely recommended the implementation of the previous Presidential Commission of Enquiry recommendations.

In May 2010, the United Nations Secretary General established a Panel of Experts mandated to advise him on the issue of accountability with regard to any alleged violations of international human rights and humanitarian law during the final stages of the conflict in Sri Lanka. The Panel of Experts expressed their disapproval regarding domestic mechanisms set up to achieve accountability and reconciliation. While the Panel understandably did not specifically investigate the Muttur massacre, it nonetheless questioned the very credibility of various institutions that did, to the extent that any investigations carried out appeared to have been conducted negligently.

In March 2012, the United Nations Human Rights Council (UNHRC) passed a resolution, supported by 24 members of the UNHRC, aimed at 'Promoting Reconciliation and Accountability in Sri Lanka', heralding a new phase in the international community, highlighting that it was no longer naive to the atrocities committed in Sri Lanka during and after the Civil war. The very fact that accountability is mentioned reveals a growing perception that reconciliation without investigation and prosecution is no longer an option. While the resolution could have been admittedly stronger, it nonetheless demonstrates that uncertainties and obscurities in relation to various crimes committed must be addressed and solved.

On the 1st November 2012, the Human Rights Council conducted its second Universal Periodic Review on Sri Lanka. The 2012 session was a follow up of the 2008 recommendations when Sri Lanka underwent its first periodic review. The stakes were high for the 2012 session, as Sri Lanka's human rights record was being assessed for the first time since the end of the civil war and in light of the March 2012 Resolution.

Following the United Nations' Panel of Experts' conclusion that there appears to be an urgent need for the UN to review its own actions in Sri Lanka, another panel was established to investigate further on the issue. The report was published in November 2012, disclosing the grave failures of the UN to protect civilians in Sri Lanka. The Muttur massacre was used as an illustration of absolute impunity; further reinforcing ACF's impression that the Government of Sri Lanka, is, in fact, trying to conceal this terrible crime.

Many different national and international mechanisms have been involved in one way or another on the Muttur massacre. Through this report, ACF is providing a comprehensive view of the many mechanisms which could have resulted in justice in the Muttur massacre but failed to do so. This overview is sadly confirming the only logical conclusion six years after the massacre: that without an international and independent investigation, followed by fair prosecution, justice will never be served.

TABLE OF CONTENTS

SUMMARY	5
INTRODUCTION	9
ETHICS OF JUSTICE	10
PART I - NATIONAL PROCEDURES	11
I. THE MAGISTRATE COURT, 2006 – 2008	11
1. INTERFERENCE : INVOLVEMENT OF LEGAL OFFICIALS IN THE COURT PROCEEDINGS	11
a. Irregular substitutions of magistrates	11
b. Ambiguous role of the Attorney General’s Department	12
2. AN INEFFICIENT INVESTIGATION LED BY THE CRIMINAL INVESTIGATION DEPARTMENT	12
a. Initial investigation	13
b. Exhumation of the bodies and post mortem examination	14
c. Ballistic investigation	14
3. ABSENCE OF WITNESS PROTECTION	15
a. Negative impact on the case: the absence of evidence	15
b. Failed negotiations on witness protection	15
II. THE NATIONAL COMMISSION OF HUMAN RIGHTS, 2006 - 2008	16
1. ABSENCE OF OUTCOME OF THE INVESTIGATION	16
2. CONCLUSION OVER THE PROCEDURE AT THE HUMAN RIGHTS COMMISSION	16
III. THE PRESIDENTIAL COMMISSION OF INQUIRY, 2007 - 2010	17
1. HYBRID FORMATION OF THE COI	17
a. Mandate of the Col	17
b. Mandate of the IIGEP	17
2. LACK OF TRANSPARENCY AND INDEPENDENCE	18
a. Initial phase of the process: the in camera investigation	18
b. The public enquiry	19
3. LACK OF EFFECTIVE WITNESS PROTECTION MEASURES	20
4. RESIGNATION OF THE IIGEP	20

IV. THE LESSONS LEARNT AND RECONCILIATION COMMISSION, 2010 - 2012	21
1. MANDATE OF THE LLRC	21
2. CRITICISMS OF THE LLRC	21
3. THE RECOMMENDATIONS OF THE LLRC	22
4. THE PLAN OF ACTION	22
PART II - THE HUMAN RIGHTS COUNCIL PROCEDURES	23
I. HUMAN RIGHTS COUNCIL UNIVERSAL PERIODIC REVIEW 2008 – 2012	23
1. MECHANISM	23
2. UPR 2008	23
3. UPR 2012	24
II. THE HUMAN RIGHTS COUNCIL RESOLUTION, 2012	24
1. CORE OF THE RESOLUTION: THE RECOMMENDATIONS	24
2. AN HECTIC ADOPTION	25
PART III - INTERNATIONAL AD HOC MECHANISMS	26
I. THE PANEL OF EXPERTS, 2010 – 2011	26
1. MANDATE	26
2. RELEVANT CONCLUSIONS	26
II. THE UN INTERNAL REVIEW REPORT, 2012	27
1. MANDATE	27
2. RELEVANT CONCLUSIONS	27
CONCLUSION: CALL FOR AN INTERNATIONAL AND INDEPENDENT INVESTIGATION	28
ABBREVIATIONS	29

Acknowledgements:

Part I is based on the 2008 ACF Report "Muttur, a struggle for Justice".

INTRODUCTION

One of the most heinous and barbaric crimes has been committed against Action contre la Faim (ACF), as well as against the whole international community, when 17 ACF aid workers were killed in Muttur at the beginning of August 2006. Although the crime was perpetrated within the context of the conflict between government forces and rebels troops (during what is now known as the “Muttur battle”), these deaths cannot be considered collateral damage; 17 workers were intentionally executed, most of them execution style - a gunshot in the head - on the premises of an international non-governmental organization while clearly identified as humanitarian workers. The 17 workers were specifically and deliberately targeted. As civilians, the victims should have been protected under International Humanitarian Law by the Geneva Conventions and their protocols, as well as by customary law. These killings qualify as a war crime.

After a decade of delivering aid to the Sri Lankan population, ACF was abruptly forced to question its continued presence in the country. Until 2008, ACF has actively followed, and cooperated with three national investigation processes: a judicial procedure at the Magistrate Court launched at the end of August 2006; a complaint at the national Human Rights Commission (HRC) instigated in Trincomalee in September 2006; and a procedure at the Presidential Commission of Inquiry (Col) appointed in October 2006. ACF exhausted all judicial avenues and in light of the obvious lack of willingness to actually find and prosecute the perpetrators, ACF decided in 2008 to withdraw its mission from Sri Lanka and detach itself from the Sri Lankan procedures.

Since then, ACF has been calling for an international independent investigation into the

Muttur massacre. 6 years later, the perpetrators are still free. Worst, information surrounding previous and supposedly ongoing investigations remain unavailable. Tellingly, Sri Lanka justifies this unacceptable state of affairs on the basis that according to them, there is a lack of conclusive evidence, due to the difficulty of collecting evidence in relation to this massacre.

With this report, ACF intends to expose the difficulties and obstacles the organisation faced at the onset of the investigations, and to provide some documented illustration as to the reasons of the obvious failures to bring the perpetrators to justice.

The ultimate aim is to demonstrate that despite many national and international procedures and reports, the only solution to unveil the truth and ensure accountability is to have an international and independent investigation.

ETHICS OF JUSTICE

It needs to be recalled and stressed that in order to be just and genuine, any judicial procedure must respect essential requirements. Judicial integrity is based on principles of independence, impartiality, transparency and accountability. These essential principles were blatantly violated during the national procedures in Sri Lanka regarding the Muttur massacre.

Impunity

"Impunity arises from a failure by States to meet their obligations to investigate violations; to take appropriate measures in respect of the perpetrators, particularly in the area of justice, by ensuring that those suspected of criminal responsibility are prosecuted, tried and duly punished; to provide victims with effective remedies and to ensure that they receive reparation for the injuries suffered; to ensure the inalienable right to know the truth about violations; and to take other necessary steps to prevent a recurrence of violations."¹

Independence

Judicial independence is the idea that for justice to be fair, the judiciary needs to be clearly detached from the influence of the other branches of government, or from political interests.

The independence of the judiciary includes both institutional and decisional independence.

Transparency

Transparency of the judiciary involves a number of factors that overlap with both independence and accountability. The judiciary, if transparent, can prevent interference in court operations. Publishing judicial decisions can help to deter rulings based on considerations other than law and facts. Its importance lies in the need to bolster public awareness of the rule of law and trust in the judiciary. This is achieved through clear and open lines of communication between the public on the one hand, and the judiciary and courts on the other. Furthermore, civil society should be able to monitor court proceedings, except in some clearly set out cases.

Impartiality

It is not enough for the judiciary to be independent – it also must be seen to be objective and impartial, non-biased. This principle is enshrined in article 10 of the Universal Declaration of Human Rights and confirmed in article 14 of the International Covenant on Civil and Political Rights (ICCPR). Article 14 states, inter alia, that "...everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law."

Accountability

Accountability covers a broad process that addresses the political, moral and legal responsibility of individuals and institutions for violations of human rights and dignity. Accountability includes the achievement of truth, justice and reparations for victims.²

1 - Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity, principle 1.

2 - Report of the Secretary General's Panel of Experts on accountability in Sri Lanka.

NATIONAL PROCEDURES

The report will expose key structural pitfalls which explain why national and international mechanisms have failed the victims over the last six years and to the present time.

I / THE MAGISTRATE COURT, 2006 - 2008

The first legal procedure undertaken in response to the Muttur massacre was an inquest before the Magistrate Court, which is the primary national jurisdiction and is vested with original criminal jurisdiction. The magistrates are responsible for assisting in the conduct of preliminary investigations into criminal complaints by issuing orders to the Police Department. The aim of this procedure is to ensure the judicial monitoring of all investigations.

The criminal investigation was marred by several flaws affecting the very integrity of the judicial and legal process.

1. INTERFERENCE : INVOLVEMENT OF LEGAL OFFICIALS IN THE COURT PROCEEDINGS

Serious irregularities and ambiguities occurred throughout the case with regards to the appointment of judicial officials by the Judicial Service Commission (JSC) and the involvement of the Attorney General's (AG) representatives.

a. Irregular substitutions of magistrates

- **From Trincomalee to Anuradhapura, and to Kantale**

The first inquest was rapidly conducted before the Magistrate of Muttur, but due to the prevailing situation in the town, the court case was immediately transferred to, and heard in, the district of Trincomalee. Then on 5th September 2006, instead of pronouncing the verdict on the cause of death, the Magistrate informed all parties that the case was to be transferred to the Anuradhapura Magistrate Court where another judge had been appointed. The Magistrate explained that the secretary to the Minister of Justice had directed him by phone to transfer the case, in breach of fundamental principles of

justice. The order was unlawful as the secretary to the Ministry of Justice did not have legal authority to order such a transfer.

More strategically, geographically moving this highly political case meant that the proceedings passed from the hands of a Tamil Magistrate in the area where the crime was committed, to a Sinhala Magistrate appointed in a remote jurisdiction.

The distance and checkpoints between Kantale and Trincomalee and the change in language of the proceedings from Tamil to Sinhala were both likely to dissuade the victim's families and potential witnesses from participating in the legal proceedings.³

- **From Kantale to Anuradhapura, and to Muttur**

The Magistrate of Anuradhapura (based in Kantale) took responsibility of the case for one year. However, on 5th September 2007 the Magistrate announced that the case would be transferred back to Anuradhapura.

3 - For more on the subject, see ICJ, "Authority without accountability: The crisis of impunity in Sri Lanka", November 2012, p.87.

on 28th November 2007, ACF learned that the Magistrate of Anuradhapura had been transferred to another location and the JSC had authorized him to transfer the case back to the Magistrate in Muttur (who had changed since September 2006). The next hearing was called on 23rd January 2008 in Muttur, but the Magistrate appointed to the case was absent. Although an acting magistrate heard the parties and made strong criticisms toward the Criminal Investigation Department (CID), ACF was prevented from presenting any specific requests to the Magistrate in charge.

→ To sum up, the ACF court case has been heard by three different magistrates (in addition to one acting magistrate), who have proceeded with five court transfers, adversely affecting the quality of the follow-up and monitoring of the case. Furthermore, these substitutions and transfers were highly suspicious, raising questions about the independence of the Sri Lankan judicial institutions. Ultimately, this agonising series of transfers put the judicial procedures on hold for over six months.

b. Ambiguous role of the Attorney General's Department

The Attorney General is appointed by the government and as part of his duties he advises the Police Department on procedure, and issues criminal indictments against individuals charged with serious offences. The role of the AG is eminently important, since he is in charge of public prosecution in Sri Lanka. Ultimately, he must ensure that criminal offenders are prosecuted in a timely and effective manner.

The AG Department got actively involved in two main aspects of the case: the exhumation of

the victims' bodies and the witness protection program.

- **Regarding the exhumation**, the AG representative was initially opposed to the idea of exhuming the bodies, despite basic requirements to collect ballistic evidence. He later allowed three exhumations, then eleven. The reasons for the changes of opinion and strategy remain unexplained, but the results were regrettable. In addition, the instructions that the AG gave with regard to the exhumation of the victim's bodies increased confusion about the process as his office lacked consistency and clear direction. The families of the 17 victims have been deeply affected by the uncertainty and unjustified delays that surrounded the distressing exhumation process.

- **Regarding the witness protection**, ACF approached the AG with the idea of creating a witness protection program specific to this particular case. As it stands the Sri Lankan justice system does not grant witnesses or victims with assistance or protection. Despite promises and unofficial agreements, the project was never implemented by the AG or by the authorities involved to the case.

→ ACF expressed strong and serious concerns over the inconsistency of the AG apparent involvement, his erratic decision making as well as the lack of clear direction in his instructions. The involvement of the AG in the case often resulted in confusion for the organisation and for the victims' families. ACF considers that the AG Department has failed to give effective advice and direction to the CID as well as to ensure the investigation was carried out in a way that could eventually lead to criminal prosecution in a timely manner.

2. AN INEFFICIENT INVESTIGATION LED BY THE CRIMINAL INVESTIGATION DEPARTMENT

The Criminal Investigation Department of the Sri Lanka Police Service is responsible for carrying out investigations into serious crimes. It is the principal investigation arm of the Sri Lanka Police Department.

does not pretend to know or understand all the details pertaining to the investigation. However, a series of irregularities have taken place in the investigation process, from the initial investigation to the latest steps in the process.

Since most information related to the case was kept confidential by the police department, ACF

a. Initial investigation

From the early stages of the case, police officers from Muttur and Trincomalee showed a total lack of cooperation, revealing what can only be described as negligence and reckless behaviour in the management of the investigation.

• Delayed access to the site and to the victims' bodies

ACF believes that after the fighting ended, deliberate attempts were made by the authorities to limit access to Muttur. Concerned groups such as the Sri Lanka Monitoring Mission (SLMM), failed to thoroughly investigate the killings as their monitors were refused access to the site. An obstructive attitude was also adopted toward ACF when efforts were made to collect the victims' bodies. Representatives of the Sri Lankan Army (SLA) and local police were contacted by ACF on several occasions before the organisation finally got authorisation to enter the town and collect the bodies. Consequently, fundamental information and evidence pertaining to the commission of the crime remains unknown to date.

• Flawed crime scene investigation

The authorities should have taken the necessary steps to preserve the crime scene in order to ensure a timely and efficient criminal investigation. Neither the military nor the police have taken direct action in this respect and basic evidentiary procedure was not followed (crime scene not secure, gap of two to three days between the killings and the first official intervention on the crime scene).

It became obvious during the collection of the bodies that the authorities never intended to protect the site, or to take the bodies to a hospital for a forensic examination, although it was their responsibility to do so. The authorities clearly had intended to leave the bodies exposed, to then eventually dispose of them. Moreover, the local police was openly biased and assumed publicly that the rebel troops were responsible for the killing.

• So-called collection of ballistic evidence

Concerns have also been raised regarding the material evidence the CID presented to court as articles recovered from the crime scene. On August 4th and 5th 2006, the CID inspector in charge submitted 32 empty cartridges and 11 ammunitions in Court, together with an

investigative report. These ballistic exhibits are alleged to have been recovered at the crime scene on two different occasions; by the Muttur Police on 8th August as well as during a site visit conducted by the CID on 17th August. During the second visit, the officers are said to have examined the ground in more detail and found the items recovered buried about an inch deep in the ground. ACF casts serious doubts on the authenticity and integrity of the items submitted to the Magistrate, as no member of the team present during the collection of the bodies recalled having seen those items on 7th August. Although they surely could have missed one or two details, no-one can reasonably believe that the whole team failed to notice 32 empty cartridges around the victims' bodies. In addition, pictures of the crime scene taken prior to the evidence collection do not confirm the presence of the ballistic exhibits.

ACF also noted with concern that the 43 items were submitted to the Magistrate in a single sealed parcel. However, if these items had been properly sealed by the officers present during the two collection visits, two sealed packages should have been produced separately..

• Incomplete recording of witness statements

During the first few months of the proceedings, the CID recorded statements from potential witnesses. Despite ACF's continuous questions and requests, it appears as though the CID was extremely reluctant to collect statements and evidence from the authorities, governmental troops and local policemen present in Muttur on August 4th and 5th. The CID did not interview any members of the Sri Lanka security forces or any Tamil, apart from the victims' family members.

During the same period, two people found in possession of the motorbikes stolen from the ACF compound were arrested. A court case was opened at the Magistrate Court of Trincomalee but ultimately, no-one was charged. In spite of ACF's requests, these individuals have not testified before the Magistrate in Kantale in relation to the ACF case, although they stole materials on a crime scene after its commission and so could have some crucial information about the killing.

→All matters considered, it seems clear that the local police and the CID have failed to conduct a thorough and efficient investigation in the first few weeks and months following the massacre.

b. Exhumation of the bodies and post mortem examination

Since the beginning of the investigation, confusion prevailed over the exhumation procedures. Given the publicity that surrounded the crime, a team of Australian forensic experts were invited to examine the bodies a few days after the funerals on 8th August 2006. Unfortunately, no government authorisation was given and after having waited a substantial amount of time, the experts went back home. After the departure of the Australian team, authorisation was finally given and two bodies were exhumed on 16th September 2006. This decision was presumably in line with a “step by step” approach of the investigation by the police and the authorities; in the possible event that these bodies could not provide enough evidence for the investigation to progress, they would consider exhuming a number of other bodies. In response to pressure from interested parties, the authorities gave authorisation to proceed with the exhumation of the other bodies, and so nine more exhumations took place on 18th October 2006. Six bodies were never exhumed.

In the meantime, the Sri Lankan and Australian governments officially agreed to allow Australian experts to observe and assist with the investigation into the Muttur massacre. An Australian forensic pathologist, Dr. Malcolm Dodd, was therefore present to observe the autopsies conducted by Dr Waidyaratne, Judicial Medical Officer (JMO) of Anuradhapura, on 24th and 25th October 2006 in Colombo.

c. Ballistic investigation

On completion of the second autopsies, seven bullets and three metal fragments were recovered during the examination. Anecdotal evidence suggested that two different calibre projectiles were retrieved from the bodies; six 7.62mm calibre bullets (commonly used in Sri Lanka with T-56 weapons) and one 5.56 mm calibre bullet (used with M-16 weapons). These are sensitive findings because potential witnesses had previously stated that government Special Forces bearing M-16 automatic rifles were in Muttur at the height of the battle. Hence, the interests at stake in the ballistic investigation initiated a long, and not yet resolved controversy that has been amplified by a series of flaws in the remaining steps of the ballistic investigation.

• The flawed procedures

Firstly, the chain of custody process in place during the second autopsies was broken. On the November 29th hearing, as neither the JMO nor the Government Analyst (GA) was present, CID officers produced the items to the Court on behalf of the JMO, consequently compromising the integrity and authenticity of the evidence. In addition, the items were not sealed in accordance with standard practice. As stated in the CID investigative report, the elements recovered by the medical officers during the post mortem investigation were sealed separately. But the items presented in court were handed over in a sealed box and were not individually sealed; so, either the JMO made a mistake in sealing the elements and the CID omitted this detail from the report, or the initial seals were broken.

The Magistrate kept the evidence in his custody and requested the GA to come collect the ballistic evidence from his office and to conduct a ballistic examination in Colombo, in the presence of the Australian expert. The ballistic evidence was then sent to the GA in Colombo by an officer of the Kantale Court, using a van rented by ACF. The magistrate noted the irregularities in the chain of custody process in the hearing notes.

However, the unethical behaviour compromised the integrity and authenticity of the evidence gathered. ACF learned that a ballistic examination had been carried out in February 2007 in the absence of an Australian observer, contravening the court order and the MoU agreed between the Sri Lankan and Australian governments. This information was given to ACF at a court hearing on 7th March 2007 alongside the submission of a report from the government ballistic expert, Mr. Goonetilleke.

→ The methodology used by the CID, the JMO and the GA throughout the ballistic investigation showed a willingness to breach of court orders to ensure that proceedings can be carried out behind closed doors. This approach has invited much controversy regarding the admission and credibility of the ballistic results and proved the authorities unwillingness for transparency within the process.

• The controversy surrounding the bullet calibres

The anecdotal evidence that suggested two different types of bullets were found in the autopsied

bodies was corroborated in Dr Dodd's forensic report dated November 2006 and produced to the Magistrate Court on 25th April 2007. He reported an item labelled no. 7 to be a "relatively intact 5.56 calibre projectile minimally deformed". The GA did not share this opinion and described item no. 7 as the "core of a standard bullet of a cartridge of a 7.62 mm calibre". In early August 2007, Dr. Dodd released an additional report in which he joined the position of the Sri Lankan ballistic expert. It is however important to note that Dr Dodd's retraction is based on pictures taken by the GA, as well as on the analysis provided by the GA. In his retraction, Dr Dodd seemed to push aside the general consensus reached in the examination room in October 2006, that the item no.7 was a 5.56

calibre projectile. The discrepancies regarding the nature of item 7 were of high concern but its definite nature has never been clarified since the discussions on the ballistic investigation were made behind closed doors between the different Sri Lankan and Australian actors involved.

→ **Proving the integrity of the ballistic evidence should have been essential to the investigation but instead, officials provided doubtful explanations, again showing a troubling lack of transparency and objectivity.**

Six years later, the investigations did not lead to the identification of the perpetrators and *de facto* amounts to a denial of justice.

3. ABSENCE OF WITNESS PROTECTION

a. Negative impact on the case: the absence of evidence

The absence of a protection scheme has a serious impact on criminal justice as many people are afraid to come forward as witnesses. Considering the political impact of the ACF case, as well as its extensive publicity, it quickly became obvious that potential witnesses would not come to the Magistrate Court to testify, consequently preventing important evidence to be considered during the investigation.

In cases of gross human rights violation, genuine efforts to ensure justice must involve the implementation of measures designed to guarantee the protection of witnesses. Indeed, the lack of protection can lead to official impunity and failure to prosecute human rights abuses, as well as violations of international humanitarian law.

b. Failed negotiations on witness protection

Concerned about the absence of witness protection, ACF proposed to the AG's Department that a commission, consisting of international and national judges of high integrity and irreproachable reputation, be constituted to hear anonymous testimonies from those witnesses afraid to testify in public. The group of judges would have been given full discretion to determine how the evidence could be collected from the witnesses. Regrettably, the AG rejected the proposal.

Later in the process, ACF's legal counsel submitted to the Court that the witnesses relevant to the investigation expressed fear of giving evidence in open court and requested the Magistrate to ensure the security of potential witnesses and provide them an opportunity to give evidence in confidence. The request was granted and the Magistrate ordered that witnesses be granted security as well as the possibility to testify in closed sessions. Despite many questions on the protection measures to be implemented, the Magistrate, the AG and the CID officers were evasive and unable to confirm how the process was to be implemented. To ACF, those mere promises were clearly not engaging enough, or concrete enough, to rely on.

II / THE NATIONAL COMMISSION OF HUMAN RIGHTS, 2006 - 2008

The Human Rights Commission (the Commission) has a broad range of functions, including investigating complaints of alleged human rights violations. The Commission can conciliate and mediate, but does not have the power to give enforceable recommendations. Yet the findings of the commissioners could be taken into consideration by the AG Department and consequently lead to criminal investigation and prosecution.

The status of the Commission was downgraded in late 2007 by the International Coordinating Committee of National Institutions for the Promotion and Protection of Human Rights from full participant to observer, following serious questions on its independence and effectiveness.

However, in spite of its tarnished reputation, ACF lodged a complaint to the Commission at the beginning of September 2006. Organizational expectations regarding the outcome of the procedure were low; but ACF has been shocked by the lack of collaboration from the institution in dealing with the complaint.

1. ABSENCE OF OUTCOME OF THE INVESTIGATION

On 4th September 2006, ACF filed a complaint to the regional office of the Commission in Trincomalee. In spite of the information requests sent to a variety of officials at the Commission, the institution has been inactive and silent in their initial response.

In a letter dated 12th January 2007, the Commission finally informed ACF that it had taken necessary actions with regard to the complaint and that a team had been appointed by the Commission's Head Office to investigate the Muttur massacre. The letter stated that they would collect witness statements and request police reports relevant to the investigation. ACF international staff members were interviewed by an agent of the Commission.

This was the only period during which the Commission showed any sign of activity. ACF has

repeatedly requested information on the state of the Commission investigation. During the course of winter and spring 2007, the organisation was told that the Commission's interim report would be made available.

In response to a new request, ACF was informed in November 2007, that because the matter was before a Presidential Commission of Enquiry especially appointed to investigate and inquire into alleged serious violations of human rights, the relevant documents would not be made available for the time being. This information is contradictory with the very mandate of the Commission which can investigate even if some other investigation processes are on-going.

2. CONCLUSION OVER THE PROCEDURE AT THE HUMAN RIGHTS COMMISSION

ACF is convinced that the Commission has not seriously proceeded with its complaint.

In spite of the interest shown by ACF in following the case and cooperating with the investigation, the Commission has been blatantly silent, evasive and inactive. Working on the assumption that the Commission has failed in its duty to investigate the killing of the 17 ACF humanitarian workers, and that its intervention will by no means contribute to reveal the truth that lies behind the massacre, there is no doubt that this domestic remedy has been exhausted.

It remains unclear whether the Commission received the instruction, or took the initiative, to

abandon its investigation into the case, despite statutory duty to inquire into the complaint and to inform on the outcome of its investigation, notwithstanding the appointment of a Presidential Commission. Moreover, it was clearly stated in the constituting act of the Presidential Commission that the appointment of the Commission was made "without prejudice to on-going investigations, inquiries, other legal process and legal proceedings".

→ Regrettably, the Commission has failed in its duty to efficiently address the ACF complaint, nor provide information on findings.

III / THE PRESIDENTIAL COMMISSION OF INQUIRY, 2007 - 2010

In response to appeals of the international community for international human rights monitoring in Sri Lanka, the President Mahinda Rajapaksa announced late 2006 the creation of the Presidential Commission of Inquiry (Col), an independent commission to obtain information, investigate and inquire into 15 (in addition to one case subsequently added to the mandate) alleged serious violations of human rights, including the killing of the 17 ACF aid workers.

This commission consisted of eight commissioners whose work was observed by the International Independent Group of Eminent Persons (IIGEP), formed by 11 international legal experts.

1. HYBRID FORMATION OF THE COI

a. Mandate of the Col

As stated in the Presidential Warrant establishing the competence of the Col, the commissioners are authorised "to obtain information, investigate and inquire into alleged serious violations of human rights arising since 1st August 2005, specifically including the several incidents set out in the Schedule hereto, and inquire into investigations that have been and are being conducted by the relevant competent authorities into such incidents". Ultimately, the Col was to present its findings and recommendations to the Sri Lankan government authorities.

The mandate of the Col in the ACF case was particularly broad. The members of the Col were entitled to conduct a new investigation into the Muttur massacre as well as to examine the prior investigations conducted by the CID and the Human Rights Commission.

The Col had the power to withhold information on all cases from the public if they deem information to be "prejudicial to or necessary for the protection of national security, public safety or wellbeing". These last four words are highly controversial as their meaning is much wider than the commonly used term "public order". This peculiarity prevented the work of the Commission from being considered with the credibility that comes with open and transparent working practices.

The Commission was established as a fact finding body and, as such, it lacked the power to enforce its recommendations and to prosecute. The Commission functioned purely as a body before which witnesses of crimes can present their versions of the violations in question. Prosecutions did not automatically follow as the gathered

evidence may be deemed insufficient to address an issue in the context of a criminal prosecution where legal questions such as burden of proof become crucial.

b. Mandate of the International Independent Group of Eminent Persons

The main purpose of the International Independent Group of Eminent Persons in observing the work of the Col was to evaluate and ensure the transparency of the investigations and inquiries, as well as the respect of relevant basic international norms and standards. While doing so, they were responsible for providing technical advices to the Col and periodically report their observations. The Col had the obligation to "conduct its investigation and inquiries in a manner that would enable [the IIGEP] to efficiently observe such investigations and inquiries". Their involvement in the in camera hearings was very limited. At the same time, whenever they were able to actively counsel the personnel of the Col on particular issues (such as the witness protection), their advice and recommendations were rarely implemented. The IIGEP released public statements outlining their observations on the transparency of the procedures with respect to the international standards governing the conduct of the investigation. The AG and the Col frequently released official responses at times countering the IIGEP analysis.

2. LACK OF TRANSPARENCY AND INDEPENDENCE

From the beginning of the Col's activity in early 2007, ACF has collaborated with the Col by providing information, documents and cooperating with the Victims and Witnesses Assistance and Protection Unit (VWAPU) set up as part of the framework of the Col. Although the procedures relating to the killing of the ACF aid workers was prioritized by the Col, they only started in May 2007, six months after their enactment. ACF made every possible effort to follow the process and collaborate with the Col in all matters relevant to the fulfilment of its mandate.

a. Initial phase of the process: the in camera investigation

Early in the process, the Col decided that the investigation would be conducted in closed sessions. ACF regretted this decision as it excluded the victims' families and their lawyers from the process and prevented ACF from following the progress of the investigation. This decision also cast doubts on the transparency of the process, and the willingness and ability of the Col to efficiently and publicly examine the ACF case.

As a party directly affected by the matter under investigation, ACF sought permission from the Col to attend the hearings held in camera but regrettably, the Col rejected ACF's requests.

• Questionable basis of the hearings

The division of the legal process in two distinct phases, with two different kinds of hearings, was implemented through an amendment to the Rules of Procedure of the Investigation Unit. The interviews conducted in the context of the "investigation" not being accessible to the public, this amendment seriously impacted proceedings, allowing the authorities, the Commissioners and the Col's legal counsels to question and hear a witness in relative privacy, before deciding if this same witness should be allowed to testify in public. This process affected the credibility of the Col as well as the transparency of the process, to the detriment of justice.

• Intrusion of the AG Department in the procedures

The Col has also raised cause for concern from observers by granting the AG Department a central

role in the investigative procedures. A Panel of Counsel was created within the Col, comprising of six members of the AG Department and two independent counsels. As members of the Panel, the AG representatives led the evidence during the in camera hearings, creating an open conflict of interest. Considering the involvement of the AG in the original criminal investigation, its subsequent involvement in the Col process was disturbing.

Additionally, as state officials, the representatives of the AG did not provide the Col process with the required independence needed to investigate cases where Sri Lankan authorities are possible suspects. Although this issue has been reported by the IIGEP and by other concerned groups, the Col failed to respond and address this lack of independence and impartiality.

- Conflict of interest

By giving the AG Department the mandate to guide the investigation into violations that may have been perpetrated by state actors, as well as to investigate into its own actions and advices given during the initial investigations conducted by the police, the different interests of the AG were clearly in conflict. The intrusive role of the AG has strengthened opinions that the Col is neither independent nor impartial, and was incapable of providing the neutrality that was required and expected from a Presidential Commission.

ACF is of the opinion that there is a clear and powerful conflict of interest in this case. The AG Department not only has become actively involved in the two processes but it has also appointed the same person to give guidance to the two different investigations. This person was therefore in a situation where he has guided the CID in the early stages of the criminal investigation related to the Muttur massacre and was now in charge of leading evidence pertaining to the same crime in front of the Col. Consequently and ironically, his mandate included investigating his own participation in the original investigation.

Thus, measures have not been taken by the Col to ensure that the investigation evolved independently from State interference. Instead, the Commission has strengthened its position

and rejected the recommendations of the IIGEP that could have restored the Col's credibility and appearance of neutrality.

- No appearance of independence

The extensive intrusion of the AG Department in the procedures before the Col has adversely affected the independence of the institution. By allowing a state actor to lead evidence and to guide the investigation, the Col has withdrawn any semblance of independence from the process. Moreover, the Col has failed to respond to the recommendations regarding independence as outlined by the IIGEP.

• **Efficiency of the investigation process into the ACF case**

ACF representatives were not granted access to the hearings by the Col, and the organisation was not aware of the progresses made by the Col during this period. The primary concern is based on the fact that the Col started its investigation in May 2007, nine months after the killings; the second is that, once started, the pace of proceedings during the first few months has been embarrassingly slow. In addition, it has taken over four months for the Commission to open the inquiry pertaining to the ACF case after the closing of the in camera hearings.

Furthermore, ACF became increasingly worried by other procedural deficiencies highlighted by the IIGEP throughout the process; such as the lack of collaboration with the members of the IIGEP and the fact that the witnesses were improperly led during the hearings.

In addition, the members of the Col were not able to gather vital evidence in order to fill the large gaps left by the previous investigation (such as information held by members of the SLA). Despite the fact that the Presidential Warrant gave the Col's authority to interview and gather information from state actors, its members were somehow unable to obtain the crucial testimonies of the servicemen and policemen present in Muttur during the civil war .

There was no apparent outcome following closing of the investigation into the killing of the ACF aid workers. In an attempt to push the Col to gain more relevant information pertaining to the case, ACF made two official requests to the Col asking that they use their remit to conduct a public inquiry

into the ACF killings. After much stagnation, the Col agreed to this request and announced the opening of the inquiry at the end of February 2008.

b. The public inquiry

The inquiry finally started on 3rd March 2008. ACF observed a series of recurrent issues similar to the ones observed during the investigation phase, such as an active participation of the AG's representatives, a lack of transparency (by the difficulty ACF had in obtaining the documents pertaining to the previous phase of the investigation in order to prepare the hearings) and a gross lack of efficiency in witness questioning and evidence gathering.

One of the key concerns was the imbalance of power between the different parties represented during the inquiry. The preparation of the members of the official bar (i.e. representatives of the AG) was much more exhaustive and complete than that of the other parties' legal representatives as the former were the only people that had access to the whole investigation file. Therefore, the effective examination of witnesses was very difficult as ACF could not have access to the relevant information about a specific witness in a timely manner.

• **This seemingly deliberate disrespect of a fundamental principle of justice**, the general inefficiency of the whole process, and the failure of the Col to provide a solution to the recurrent victims and witness protection issue, contributed to ACF's decision to bring an end to its involvement in the Col investigation process.

• **Lack of transparency**

The division of the proceedings in two distinct phases has directly hampered the transparency of the process. By providing an extensive non-public investigative phase, the Col has tarnished this principle and reduced the public confidence in the process.

3. LACK OF EFFECTIVE WITNESS PROTECTION MEASURES

In the absence of a national protection scheme for victims and witnesses of crimes, the adoption of an ad hoc witness protection scheme was thought to be indispensable for the Col to efficiently fulfil its mandate.

Considering the different controversies surrounding the Muttur massacre, as well as the different interests involved in this case, efficient assistance and protection measures were an absolute necessity for the witnesses to feel comfortable to come forward and give evidence.

To favour the process, the Victims and Witnesses Assistance and Protection Unit (VWAPU) was formed within the Col to propose a protection scheme as well as to directly assist and protect victims and witnesses. Although the functioning of the Unit was seriously delayed by a blatant lack of organisation in hiring and training the teams, a protection scheme was produced soon after the beginning of the investigation process. The scheme

provided little in the way of the implementation of the general principles of protection as it failed to provide a range of specific protection measures available to potential victims and witnesses.

At no point in the investigative process was the person responsible for the Unit able to provide ACF with a specific protection plan for witnesses who feared for their security. At the same time, the IIGEP has repeatedly raised their own concerns regarding the ineffectiveness of the protection scheme, the absence of adequate training of the members of the VWAPU, and the lack of financial and operational support from the authorities.

→ Considering that the Col has not examined the initial criminal investigation lead by the CID, the collection of witness statements became the core of the Col's activities. But, in the absence of real witness protection measures and considering the context of human rights violations, this could only lead to another failure of the investigations.

4. RESIGNATION OF THE IIGEP

At the beginning of March 2008, the IIGEP announced that they intended to withdraw from the Presidential Commission. In a public statement, the members of the IIGEP explained and clarified their decision: "In summary, the IIGEP concludes that the proceedings of inquiry and investigation have fallen far short of the transparency and compliance with basic international norms and standards pertaining to investigations and inquiries. The IIGEP has time and again pointed out the major flaws of the process: first and foremost, the conflict of interest at all levels, in particular with regard to the role of the Attorney General's Department. Additional flaws include the restrictions on the operation of the Commission through lack of proper funding and independent support staff; poor organization of the hearings and lines of questioning; refusal of the State authorities at the highest level to fully cooperate with the investigations and inquiries; and the absence of an effective and comprehensive system of witness protection. [...] These inherent and fundamental

impediments inevitably lead to the conclusion that there has been and continues to be a lack of political and institutional will to investigate and inquire into the cases before the Commission. The IIGEP is therefore terminating its role in the process not only because of the shortcomings in the Commission's work but primarily because the IIGEP identifies an institutional lack of support for the work of the Commission."

→ ACF can only conclude that the Col was not able to effectively investigate the killings. However, in the LLRC report of December 2011, mentions are made about some Col's recommendations regarding the ACF case. Some outcomes and recommendations might have existed, which ACF is not aware of. Sources mentioned that the report exonerated the Sri Lanka Army and Marine and at the same time that individuals have been identified by name to be prosecuted, but six years after the creation of the Col ACF never got an official result of its work.

IV / THE LESSONS LEARNT AND RECONCILIATION COMMISSION, 2010 - 2012

The last months of the civil war in Sri Lanka led to multiple violations of Human Rights and International Humanitarian Law from both sides of the conflict. UN Secretary General Ban Ki-moon travelled to northern Sri Lanka in May 2009, among international outcry about the alleged mass killings that took place in the last stages of the war.

At the end of that visit, the Secretary General and Sri Lankan President Mahinda Rajapaksa issued a joint communiqué on 23rd May 2009 in which President Rajapaksa promised that the Sri Lankan government would “take measures to address [...] grievances” and reiterated Sri Lanka’s “strongest commitment to the promotion and protection of human rights, in keeping with international human rights standards and Sri Lanka’s international obligations.”⁴

4 - Communiqué available at: <http://www.un.org/News/Press/docs/2009/sg2151.doc.htm>.

1. MANDATE OF THE LLRC

Consequently, in May 2010, President Mahinda Rajapaksa set up a national mechanism of accountability: the Lessons Learnt and Reconciliation Commission (LLRC). The LLRC was established as a means to respond to the mounting international pressure and avert an international investigation into the allegations of war crimes in the last stages of the war. The government had promised that this tool would address international demands for accountability.

The LLRC was mandated to investigate into the facts and circumstances which led to the failure of the 2002 ceasefire agreement, the lessons that should be learnt from those events and the institutional, administrative and legislative measures which needed to be taken in order to prevent any recurrence of such concerns in the future, and to promote further national unity and reconciliation among all communities.

2. CRITICISMS OF THE LLRC

The LLRC has been under much criticism, by international human rights groups, the UN Panel of Experts and others. In particular, its limited mandate, the lack of independence and its failure to meet minimum international standards or offer protection to witnesses have been raised as essential flaws.

Regarding its mandate, the principal criticism was that the commission was primarily set up to examine the failure of the 2002 ceasefire and had no explicit mandate to examine the alleged war crimes committed by both sides during the final months of the civil war and therefore was in no capacity to truly ensure accountability.

Criticisms were also raised about the LLRC independence. Considering its mandate and the context in which it was set up, it was of utmost importance that the LLRC shows balance in its composition. To the contrary, the LLRC consisted of mostly Sinhalese and former government officials, figures known for publicly defending the conduct of the government against allegations of human rights violations. As an example of the patent conflict of interest, the Chair of the LLRC was the same Attorney General who heavily interfered in the Col investigations. This obvious conflict of interest was one of the signs that the LLRC did not meet international standards of law.

3. THE RECOMMENDATIONS OF THE LLRC

After an 18 months inquiry, the LLRC submitted its report to the President Mahinda Rajapaksa on 15th November 2011 and the report was made public in December 2011.

Interestingly, insofar as the Muttur massacre is concerned, the LLRC report “strongly recommends the implementation of the recommendations of the Report of the Presidential Commission of

Inquiry [...] particularly those relating to further investigation and prosecution of offenders involved in the incidents of the death of [...] 17 aid workers of the ACF in August 2006” as “such action would send a strong signal in ensuring respect for the Rule of Law, which in turn tends to contribute to the healing process”. It is worth stressing that the Col report, which recommendation is praised, was never publicly disclosed, and especially not to ACF.

4. THE PLAN OF ACTION

In March 2012, a Human Rights Council (HRC) Resolution⁵ called upon the government of Sri Lanka to present a “comprehensive action plan detailing the steps that the Government has taken and will take to implement the recommendations made in the Commission’s [LLRC] report and also to address alleged violations of international law”. In July 2012, 6 months after the resolution and 8 months after the publication of the LLRC report, the government released the “National Action Plan”⁶, meant as proof of compliance with the HRC Resolution.

In fact however, the National Action Plan has for effective result to weaken the already imperfect LLRC report. Despite recommendations in that regard in the LLRC report, the National Action Plan does not take any steps to initiate independent investigations into any of the alleged violations; and even refer to the very bodies accused of the crimes to solve them.

Regarding the Muttur case, the action plan could not be vaguer or more inappropriate, considering the sensitivity of the matter: the

activities recommended are to “1) Examine recommendations of Committees and 2) Ensure follow up on recommendations are implemented”. The indicators for success of the recommendation are simply its implementation, with no further details or benchmark about the procedure.

Despite the lack of independence and the conflicts of interests already raised, the AG and the Department of Police are to investigate the case, but regarding the personnel actually in charge of follow-up of the investigation, no information is presently available. Consequently, it is impossible for ACF to assess whether previously identified conflicts of interest and irregularities have been addressed; and in what conditions evidence and testimonies would be collected or under which jurisdiction the case would be brought.

The total lack of transparency around this new investigation shows lessons from previous failures have not been learnt and there remains a total lack of willingness from the Government of Sri Lanka to find and prosecute the perpetrators of this crime.

5 - Resolution A/HRC/19/L.2, 8 March 2012, “Promoting reconciliation and accountability in Sri Lanka”.

6 - National Plan of Action to Implement the Recommendations of the LLRC, available at: http://www.priu.gov.lk/news_update/Current_Affairs/ca201207/20120726national_plan_action.htm.

THE HUMAN RIGHTS COUNCIL PROCEDURES

PART II

I / HUMAN RIGHTS COUNCIL UNIVERSAL PERIODIC REVIEW 2008 - 2012

1. MECHANISM

The Universal Periodic Review (UPR) is a mechanism of the Human Rights Council aiming at improving the human rights situation on the ground of each of the 193 United Nations (UN) Member States. Under this mechanism, the human rights practices of all UN Member States are reviewed every four years. The result of each review is reflected in an "outcome report" listing the recommendations the State under review will have to implement before the next review.

The UPR is a state-driven exercise. However, many NGOs seized this forum to broach a whole range of human rights issues and violations in Sri Lanka, as the UPR is mandated to assess the entire human rights record of a member state.

2. UPR 2008

Sri Lanka's human rights practices were first reviewed according to the UPR in 2008. Close to 90 recommendations were submitted by Member States and Sri Lanka accepted to endorse some of them, including the recommendation 15 made by the USA specifically requesting for "the adequate completion of the investigations into the killings of the 17 ACF humanitarian workers".⁷

Sri Lanka also accepted the ones requesting the authorities to investigate, prosecute and punish all allegations of extra judicial, summary or arbitrary killings according to established standards of international law as well as to ensure the implementation of legislative guarantees and programmes for the protection of witnesses and victims.

However all the recommendations linked to the acceptance of an international presence to monitor the Human Rights situation or actively support the follow up of the investigations have been rejected.

By not accepting external support to their accountability mechanism, Sri Lanka was already making clear that there were no willingness to cooperate with international human rights mechanisms. Time demonstrated that, despite agreeing on paper to a proper investigation into the crime, there were no willingness either, to genuinely undertake investigations and prosecute perpetrators.

7 - Report of the Working Group on the review of Sri Lanka (A/HRC/8/46), 5 June 2008.

3. UPR 2012

Four years after the first UPR and three years after the end of the war, both member states and NGOs were expecting Sri Lanka to address pending Human Rights issues and reassure the international community that it shall relentlessly fight impunity. Sri Lanka was fully aware of the importance of the UPR review and the pressing need to restore its credibility internationally. The very fact that 99 states intervened during the interactive part of the session indicated the increasing interest of States to closely monitor the human rights record of Sri Lanka.

Interestingly, prior to the actual review, the local media in Sri Lanka and globally, reported that the UPR 2012 on Sri Lanka would be minutely scrutinized. ACF submitted a joint report in coalition with SPEAK Human Rights and Environmental Initiative on the 26th April 2012 demanding accountability of the yet unaccounted brutal massacre of the 17 aid workers.

Sri Lanka submitted its national report⁸ to the UPR before the session. The national report was criticised by Human Rights groups and NGOs because of inaccuracies, its inability to endorse a neutral perspective, its failure to address widely reported violations of International Humanitarian and Human Rights Law and its evasive explanations provided in respond to queries. Paragraph 31 pertaining to the Muttur massacre of the national report is proof of the absurdity of explanations given by the Government of Sri Lanka. Indeed Sri Lanka, 'explained' that, 'with regard to matters of accountability, inter alia, the cases relating to 17 aid workers [...] were referred to the Attorney-General to ascertain whether a prima facie case exists to launch prosecutions. The Attorney General has advised the Inspector-General of Police to conduct

further investigations.' It is further footnoted in the report that, '[F]or the purpose of facilitating further investigations, the material collected by and the recommendations made by the Commission of Inquiry to investigate and inquire into these two cases, has been submitted to the Inspector-General.'

In conclusion, the same persons who already worked for years on the Muttur case are supposed to evaluate whether there might be a criminal case, then evaluate the quality of evidence collected and then refer to the Police for further investigation. Considering the failures of all these departments, ACF is intrigued to see how the case could be successfully and genuinely prosecuted.

Many countries sent a list of questions in advance of the actual review, including direct questions regarding the Muttur massacre by Germany, USA and Canada.⁹ The review lasted for three hours during which Mr Mahinda Samarasinghe, Minister of Plantations Industries and Special Envoy of the President for Human Rights delivered the statement on behalf of the Government of Sri Lanka. During the opening speech, the Sri Lankan delegation said that they would respond to the advance questions asked by the delegations, to finally fail to either acknowledge or respond to these specific queries. Later, during the interactive debate, France recommended that Sri Lanka "create a credible investigative mechanism into the murders consisting of independent professional investigators leading to the identification, arrest and prosecution of the perpetrators". It is telling that this recommendation was simply rejected by Sri Lanka in the outcome report.¹⁰

8 - National report submitted in accordance with paragraph 5 of the annex to Human Rights Council resolution, 10 August 2012, 16/21A/HRC/WG.6/14/LKA/1.

9 - Advance questions to Sri Lanka – add.1, 2 and 8.

10 - Draft report of the Working Group on the Universal Periodic Review, November 2012, A/HRC/WG.6/14/L.14.

11 - Resolution 8 March 2012, A/HRC/19/L.2.

II / THE HUMAN RIGHTS COUNCIL RESOLUTION, 2012

1. CORE OF THE RESOLUTION: THE RECOMMENDATIONS

Further to the Lesson Learnt and Reconciliation Commission's report, in March 2012 the UN Human Rights Council adopted a resolution "Promoting reconciliation and accountability in Sri Lanka".¹¹

This resolution called upon Sri Lanka to:

- **implement the constructive recommendations** made in the report of the Lessons Learnt and Reconciliation Commission and to take all necessary additional steps to fulfil its relevant

legal obligations and commitment to initiate credible and independent actions to ensure justice, equity, accountability and reconciliation for all Sri Lankans;

- **present, as expeditiously as possible, a comprehensive action plan** detailing the steps that the Government has taken and will take to implement the recommendations made in the Commission's report, and also to address violations of international law;

The resolution also encouraged "the Office of the United Nations High Commissioner for Human Rights and relevant special procedures mandate holders to provide, and the Government of Sri Lanka to accept, advice and technical assistance

on implementing the above-mentioned steps".

Once again, although the Government of Sri Lanka seemingly addressed the first recommendation with the National Action Plan, there has been no concrete step to actually address violations of International Law. Moreover, although the lack of positive action is, in itself, already a proof of the unwillingness of the Sri Lankan government to cooperate, the Government of Sri Lanka in November during the UPR simply rejected calls to strengthen cooperation with the UN human rights mechanisms.

2. AN HECTIC ADOPTION

The HRC resolution has been criticised for not being strong enough as it did not actually condemn the government of Sri Lanka for its failure to fight impunity and address allegations of grave violations of human rights. Yet it is proof of the difficulties faced by States in order to pass one on Sri Lanka, as it was only after intensive lobbying that the adoption of the resolution became a

reality. The fact that 24 states including the United States, UK, Switzerland, Norway, Spain and even India amongst others voted in favour of the HRC resolution is clear indication that Sri Lanka will slowly not be able to escape from its international obligation to fight impunity and promote accountability within its jurisdiction.

INTERNATIONAL AD HOC MECHANISMS

I / THE PANEL OF EXPERTS, 2010 - 2011

In response to widespread and credible allegations that crimes under international law including possible war crimes and crimes against humanity may have been committed by both the LTTE and Sri Lankan forces in the final stages of the armed conflict, and following its visit to Northern Sri Lanka in May 2009, UN Secretary General Ban Ki-moon appointed a Panel of Experts to advise him on accountability issues in Sri Lanka in June 2010.

1. MANDATE

The Panel of Experts (PoE)¹² was mandated to “look into the modalities, applicable international standards and comparative experience with

regard to accountability processes, taking into consideration the nature and scope of any alleged violations in Sri Lanka”, in particular the LLRC.

2. RELEVANT CONCLUSIONS

The Panel highlighted that genuine accountability can only be achieved if the rights to truth, justice and reparation are adequately catered for, with a special emphasis on victim’s rights. Having conducted an in-depth analysis of the domestic measures implemented, including the ineffectiveness of different institutions mandated to combat impunity, the Panel deplored the total absence of accountability in Sri Lanka.

of the armed conflict; not sought to investigate systematically and impartially the allegations of serious violations on both sides of the war; not employed an approach that treats victims with full respect for their dignity and their suffering; and not provided the necessary protection for witnesses [...] In sum, the LLRC is deeply flawed, does not meet international standards for an effective accountability mechanism.”

Although not referring directly to the Muttur massacre, the conclusions of the UN Panel illustrate clearly how national mechanisms, in particular the LLRC, were unable to be accountable: “the LLRC fails to satisfy key international standards of independence and impartiality, as it is compromised by its composition and deep-seated conflicts of interests of some of its members. [...] The work to date demonstrates that the LLRC has: not conducted genuine truth seeking about what happened in the final stages

→ **In the light of the results of its assessment, the Panel recommended to the Government of Sri Lanka and the international community to “immediately proceed to establish an independent international mechanism” to conduct investigations into alleged violations of International Humanitarian and Human Rights Law. Action contre la Faim unequivocally supports this recommendation and regrets that no follow-up has been made to date.**

12 - Report available at: http://www.un.org/News/dh/infocus/Sri_Lanka/POE_Report_Full.pdf.

II / THE UN INTERNAL REVIEW REPORT, 2012

Although meant as an internal review, this condemning report was leaked to the press in November 2012, prompting its publication.¹³

13 - BBC, 13 Nov. 2012, "UN 'failed Sri Lanka civilians'; says internal probe", available at: <http://www.bbc.co.uk/news/world-asia-20308610>.

1. MANDATE

The 2010 PoE had also concluded that there was a need for the UN to review its own actions. In particular, the PoE highlighted the fact that "some agencies and individuals had failed in their mandates to protect people, had under-reported Government violations, and suppressed reporting efforts by their field staff". In response, the Secretary-General established an Internal Review Panel on UN actions in Sri Lanka¹⁴ (the Panel) tasked with: (i) providing an overview and assessment of UN actions during the final stages of the war in Sri Lanka and its aftermath, particularly regarding the implementation of its humanitarian and protection mandates; (ii) assessing the contribution and effectiveness of the UN system in responding to the escalating

fighting and in supporting the Secretary-General's political engagement; (iii) identifying institutional and structural strengths and weaknesses, and providing recommendations for the UN and its Member States in dealing with similar situations; and (iv) making recommendations on UN policies or guidelines pertaining to protection and humanitarian responsibilities, and on strengthening the system of UN Country Teams (UNCTs) and the capacity of the UN as a whole to respond effectively to similar situations of escalated conflict.

The Panel began work in late April 2012 and submitted its report to the Secretary-General in early November 2012.

14 - Report of the Secretary-General's Internal Review Panel on United Nations Action in Sri Lanka, November 2012, available at: http://www.un.org/News/dh/infocus/Sri_Lanka/The_Internal_Review_Panel_report_on_Sri_Lanka.pdf.

2. RELEVANT CONCLUSIONS

Again, this internal mechanism did not specifically focus its work on the Muttur massacre; yet the case was mentioned as an illustration which demanded action against impunity. Attesting what ACF has been saying for years, it pointed to several UN reports raising "serious problems in the domestic legal system", particularly in relation with procedures that directly touched investigations on the Muttur crime. Indeed, as early as "October 2006 an OHCHR internal report" said that considering "the lack of witness protection programs, and prohibition in the military law in utilizing the concept of command responsibility ... it is difficult to see how this Col could be effective in leading to prosecution." The Panel goes on in stating that "the internal report of a second OHCHR mission to Sri Lanka, in February 2007, confirmed the steady deterioration in the human rights situation, and the limited impact that was to be expected of the Presidential Commission of Inquiry".

Considering that the recommendations of the Col are the very foundation of all subsequent national mechanisms regarding the Muttur massacre, it highlights with extreme gravity the urgent need for international involvement.

Beyond the grave failures towards the civilian population, this report also allowed the international community to appreciate how, despite clear evidence of the refusal of the Government of Sri Lanka to bring the perpetrators of grave human rights violations to justice, and of the inadequacy of the different internal accountability processes, no international stakeholder took any significant step to actively push for International Humanitarian Law to be enforced in Sri Lanka.

CONCLUSION: CALL FOR AN INTERNATIONAL AND INDEPENDENT INVESTIGATION

15 - "Sri Lanka seeks fresh probe on NGO massacre", 24 April 2012, available at: http://news.xinhuanet.com/english/world/2012-04/24/c_131547990.htm.
"AG to conclude key cases this year", 29 October 2012, available at: <http://www.dailymirror.lk/news/23022-agto-conclude-key-cases-this-year.html>.

It was reported in the media¹⁵ that the government of Sri Lanka was confident that the investigation would reach an advanced stage prior to the UPR session in November, then before the end of 2012. ACF has no confidence in statements made by officials that new investigations into the killings were in process, as there is no credible information made available. Indeed, it is reasonable to consider that no new investigation is likely to emerge.

The collapse of the rule of law in Sri Lanka is widely reported and ACF's experience in following the different national investigative processes implemented after the killing of the 17 ACF employees, is but one example. The Sri Lankan government has failed in its obligations to conduct a thorough investigation into the Muttur Massacre and to hold accountable those responsible, notwithstanding obligations under International Humanitarian and Human Rights Law. Moreover, constant political interference in the judicial process has given the impression that those in power have an interest in monitoring and guiding the outcome of the investigation, thus compromising judicial independence. Unfortunately, it is also emblematic of the lack of willingness of the Sri Lankan government to be accountable for grave violations of human rights and of its systematic refusal to cooperate with international mechanisms.

ACF will continue its efforts to challenge impunity at the international level, as it is clear accountability will not be achieved relying on the domestic jurisdiction of Sri Lanka. Bearing in mind the interests of the victims of this crime, ACF relies on the international community to represent their interest in the country. Unveiling the truth about the killing of ACF employees is ACF utmost priority, keeping in mind that only international mechanisms can in fact bring results.

First and foremost ACF calls for an international and independent investigation into the Muttur massacre in order to officially identify the person(s) responsible for the commission of this outrageous crime.

The execution of the 17 aid workers in Muttur represents an attack on the humanitarian community as a whole. ACF hopes that cooperation between the various actors involved in providing humanitarian aid will continue to grow, and that fundamental humanitarian principles will be upheld and protected. In so doing, there is greater strength in holding to account state authorities and those involved in armed conflict, finally ensuring justice for the killing of civilians and humanitarian workers.

ABBREVIATIONS

ACF	Action contre la Faim – Action Against Hunger
AG	Attorney General
CID	Criminal Investigation Department
Col	Presidential Commission of Inquiry
GA	Government Analyst
HRC	Human Rights Council
IHL	International Humanitarian Law
IIGEP	International Independent Group of Eminent Persons
JMO	Judicial Medical Officer
JSC	Judicial Service Commission
LTTE	Liberation Tigers of Tamil Eelam
MoU	Memorandum of Understanding
NGO	Non-Governmental Organisation
OHCHR	Office of the High Commissioner for Human Rights
PoE	Panel of Experts
SLA	Sri Lankan Army
SLMM	Sri Lanka Monitoring Mission
UN	United Nations
UPR	Universal Periodic Review
VWAPU	Victims and Witnesses Assistance and Protection Unit





JUSTICE FOR MUTTUR

www.justiceformuttur.org
(#justiceformuttur)

ACF INTERNATIONAL

CANADA

7105 rue St-Hubert, Bureau 105
H2S 2N1 Montréal, QC, Canada
E-mail : info@actioncontrelafaim.ca
Tel : +1 514 279 4876
Fax : +1 514 279 5136
Web : www.actioncontrelafaim.ca

FRANCE

4 rue Niepce
75662 Paris, cedex 14, France
E-mail : info@actioncontrelafaim.org
Tel : +33 (0) 1 43 35 88 88
Fax : +3 (0) 1 43 35 88 00
Web : www.actioncontrelafaim.org

SPAIN

C/ Duque de Sevilla, 3
28002 Madrid, España
E-mail : ach@achesp.org
Tel : +34 91 391 53 00
Fax : +34 91 391 53 01
Web : www.accioncontraelhambre.org

UNITED STATES

247 West 37th, Suite #1201
New York, NY 10018 USA
E-mail : info@actionagainsthunger.org
Tel : +1 212 967 7800
Toll free : +1 877 777 1420
Fax : +1 212 967 5480
Web : www.actionagainsthunger.org

UNITED KINGDOM

First Floor, rear premises,
161-163 Greenwich High Road
London, SE10 8JA, UK
E-mail: info@actionagainsthunger.org.uk
Tel : +44 208 293 6190
Fax : +44 208 858 8372
Web : www.actionagainsthunger.org.uk

