



Action Contre la Faim

In coalition with

SPEAK Human Rights & Environmental Initiative

Joint Submission to the United Nations
Universal Periodic Review

Fourteenth Session of the Working Group on the UPR
Human Rights Council
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I. EXECUTIVE SUMMARY

1. Internationally condemned as one of the most atrocious acts perpetrated against humanitarian aid workers, the brutal execution of 17 employees of Action Contre la Faim (ACF) in Muttur, in August 2006, attests to the state of impunity prevailing in Sri Lanka. The Muttur massacre bears testimony to Sri Lanka's unwillingness to uphold accountability. This submission is premised solely on information known by ACF while being mindful that key material have never been disclosed by the Government of Sri Lanka.
2. The notion of human rights as recognised by the Universal Declarations of Human Rights (UDHR), the International Covenant on Civil and Political Rights (ICCPR) and other sources of international law, encompasses primary elements that include justice, transparency, fairness, equality, dignity and truth. These key principles are the cornerstones of an effective judiciary system to ensure that perpetrators of gross human rights violations are aptly prosecuted.
3. Sri Lanka has a duty to provide for an effective remedy for allegations of human rights violations. The above duty includes thorough investigations, access to court, fair and impartial hearings and the successful prosecution of the perpetrators. The failure of Sri Lanka to abide by its obligations under article 2(3) of the ICCPR cannot be justified. The duty to provide for a prompt and adequate remedy to all victims of human rights violations is non-derogable.
4. The investigations carried out by the Government of Sri Lanka were fraught with irregularities and in effect amounts to no investigation. In light of the systematic inconsistencies that became perennial features of the investigations, ACF submits that the United Nations and the international community must adequately address Sri Lanka's utter failure to fulfil its international obligations. Impunity in Sri Lanka will prevail unless respect for the rule of law and sound administration of justice is upheld. The very dignity of victims can only be preserved if their intrinsic right to a prompt and effective remedy is safeguarded. Consequently, when contraventions of human rights provisions are compounded with violations of International Humanitarian Law, upholding accountability is indispensable, if justice is to conquer impunity.

II. SRI LANKA NATIONAL CONTEXT WITH REGARDS TO INTERNATIONAL LAW

5. International Humanitarian Law is applicable in this case as the hostilities between Sri Lanka and the rebel troops fulfilled the essential prerequisites to be characterised as an internal armed conflict.¹ Sri Lanka is party to the four Geneva Conventions of 1949 and its obligations are derived from common article 3 of the Geneva Conventions that is applicable to conflicts not of an

¹ *Prosecutor v Tadic, Case No. IT-94-1 (ICTY APPEAL Chamber) Decision on the Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995 at para70*, 'whenever there is a resort to armed force between states or protracted armed violence between governmental authorities and organized armed groups or between such groups within the State.'

international character. Human Rights Law remain applicable during armed conflicts.²

6. International Humanitarian Law imposes an obligation on all parties to a conflict to respect and protect all humanitarian personnel. The Muttur massacre is proof of the complete disregard of International Humanitarian law by both parties involved in the civil war. Worst, the Muttur massacre amounts to a war crime because it constitutes a serious violation of common article 3 of the Geneva Conventions that is now accepted as customary international law.
7. Action Contre la Faim (ACF), a leading global humanitarian organization mandated to fight against hunger, began its operation in Sri Lanka in 1997. The ACF workers were executed in August 2006 on the premise of the organisation, heavily labelled, and were easily identifiable as humanitarian workers by their ACF T-Shirt. Therefore, there can be no doubt that the ACF workers were deliberately executed; reinforcing the assertion that common article 3 was intentionally and knowingly infringed. Consequently, the execution of the ACF workers were acts materially outside the realm of accepted conduct during warfare.³
8. Although Sri Lanka has a legitimate right to defend its interests during an ongoing attack, it neither absolves the State from its obligations under International Humanitarian and Human Rights Law nor justifies its derogations from numerous ICCPR articles.⁴

III. DOMESTIC JUDICIAL AND HUMAN RIGHTS MECHANISMS

9. ACF has exhausted all legal avenues in its quest to seek the truth and ensure that justice is rendered to the families of the victims. Unfortunately, the presence of different judicial mechanisms does not guarantee justice *per se* and the Muttur massacre is quintessence of absolute impunity. The sound administration of justice cannot be preserved unless the officials chosen are independent and the mandates of the institutions are tailored to ascertain that all necessary measures needed to combat impunity are provided for. It is submitted that the institutions set up to uphold justice and accountability in Sri Lanka neither provided remedies to victims nor ensured successful prosecutions of perpetrators because the structure upon which they are founded was inherently flawed and therefore the necessary impartiality was absent.

² Confirmed by State practise and re-affirmed by the International Court of Justice in *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion I.C.R Report 2004, p136 at paras104-106.

³ The ICTY, stated that; 'Principles and rules of humanitarian law reflect elementary considerations of humanity widely recognized as the mandatory minimum for conduct in armed conflicts of any kind. No one can doubt the gravity of the acts at issue, nor the interest of the international community in their prohibition.' *ibid* Prosecutor v Tadic.

⁴ 9(3), 12(1),14(3), 17(1),19(2), 21, 22.

Magistrate Court

10. The first investigation began on the 15th of August 2006 at the Magistrate Court. The manifest abstraction to fundamental principles of justice including, 'delays in obtaining access to the scene and the victims, failure to preserve the crime scene, suspect ballistic analyses, complete lack of protection for witnesses and incomplete recording of their testimonies, etc.'⁵ indicate that the willingness to conduct a genuine investigation was absent.
11. No efforts were made to preserve the integrity of the crime scene by the authorities and it appears that had ACF not collected the bodies, these would have been conveniently disposed of.
12. The fact that the case has been heard by three different magistrates (excluding one acting magistrate) and was arbitrarily transferred five times is telling. The first transfer was effectuated at the behest of the Secretary of the Ministry of Justice in contravention of the procedural regulations. As per the domestic national legislation, only the Court of Appeal, the Attorney General (AG) and officials from the Judicial Services Commission (JSC) have the authority to order for a transfer. Thus the transfer was unlawful and attests to the politicised character of the Court and its resulting compromised independence.
13. Upon request from ACF and in absence of the necessary instructions from Sri Lankan authorities, a basic series of autopsies were carried out on the 8th of August 2006 during which no ballistic evidence could be collected. These primary autopsies, despite the appalling conditions in which they were conducted, could nonetheless conclude that the deaths were due to a deliberate execution and could not be considered accidental. It was later necessary to proceed to the exhumation of the bodies in order to undertake second autopsies, crucial to further the conclusions and obtain key evidence regarding the execution. The directions issued by the AG pertaining to the exhumation and autopsies were filled with discrepancies and created confusion. Authorisation was not initially granted and when finally the AG agreed after acute pressure from ACF, to the exhumations, the approach endorsed was ambiguous. Unjustified delays, inconsistency and complete uncertainties surrounded these procedures. While initially opposed to the exhumations, the AG finally adopted a 'step by step' approach that was intriguing: two bodies were first exhumed and only if these could not provide the necessary ballistic evidence would the AG accept to exhume others. It was therefore only after ACF insisted, that the AG 'surrendered' and accepted to exhume nine other bodies. Clearly, the role of the representatives of the Attorney General and his representatives remained questionable.
14. The second autopsies revealed that two different calibre projectiles were utilized; six 7.62mm calibre bullet and one 5.56 mm calibre bullet. It is common knowledge that M-16 automatic rifles were frequently used by the Special Forces of Sri Lanka and therefore of crucial importance. The discovery of the 5.56 mm calibre bullet was a contentious issue. The

⁵ ACF Study Report, 'Sri Lanka, The Muttur Massacre: A Struggle for Justice' p5.

November 2006 forensic report that was submitted to the Magistrate Court on the 25th of April 2007 clearly stated that the item labelled 7 was a '5.56 calibre projectile'. Interestingly, the Government Analyst [GA] described item 7 as the 'core of a standard bullet of a cartridge of 7.62 mm calibre'. Startlingly, the forensic expert, after having examined pictures taken by the GA on the 22nd of May 2007 and the GA report, retracted from his former statement and concluded that item 7 was a 7.62 mm calibre. The fact that his secondary assessment of item 7 has taken precedence over and superseded the conclusion drawn by him in his own examination room in October 2006 is disturbing. The controversy has not yet been solved. ACF deprecates the fact that all discussions were not carried out openly. The organization finds it inconceivable that the expert changed its opinion despite the fact that he was the same person who conducted the initial assessment and came to a different finding.

15. Implementation of effective witness protection programmes was essential in light of the political context of the case and the intense media scrutiny, to ensure testimony is independent and given willingly. The reluctance of witnesses to testify for fear of political reprisals has further hindered access to justice.
16. In light of the above, ACF proposed the setting up of a commission with focus on the Muttur massacre to allow anonymous testimonies that would be heard by a panel of both international and national judges of high integrity. The findings of the commission would neither be binding nor of any evidentiary value and thus the magistrate could have, without infringing any procedural rules, simply disregarded it. Yet, these testimonies would have highlighted the urgent need to implement these protection programmes. Although, the Magistrate was instructed to ascertain that witnesses are given the opportunity to testify without fear for their own safety (including closed session), no concrete measures were endorsed. Despite various requests made by ACF regarding the protection programmes, the magistrate, AG and the Central Investigation Department (CID) officers could not [would not] provide further clarity on the grounds for such decision.
17. The aforementioned obstacles are proof of Sri Lanka's lack of willingness to conduct a thorough investigation in compliance with international standards and of the systematic political interference during the legal proceedings thereby leading to the complete failure of Sri Lanka to protect humanitarian aid workers and seek justice for the families.

National Human Rights Commission

18. The powers of the National Human Rights Commission (NHRC) are circumscribed to making recommendations. ACF nonetheless lodged a complaint to this body mandated to investigate into violations of human rights while the inquiries being conducted at the Magistrate Court were ongoing.

19. In January 2007, ACF was notified by the NHRC that necessary measures were being adopted and a team was investigating the Muttur massacre. Despite requests from ACF, the Commission interim report was never disclosed.
20. ACF was informed (by unofficial sources) that the NHRC had ceased its inquiry, once the Presidential Commission of Inquiry (COI) began its examination of the Muttur massacre. This was stated in utter contradiction to the provisions of the Presidential Commission of Inquiry Act No 17 of 1948 emphasizing that the establishment of the COI was 'without prejudice to on-going investigations, inquiries, other legal process and legal proceedings.'⁶ In November 2007, ACF was informed that the Commission could not produce the requested documents because the matter was under the scrutiny of the Presidential Commission.

Presidential Commission of Inquiry

21. The competence of the Presidential Commission of Inquiry (COI) was 'to obtain information, investigate and inquire into alleged serious violations of human rights arising since 1st of August 2005'. The most interesting feature of that commission was the role of the International Independent Group of Eminent Persons (IIGEP) who was to oversee and monitor the work of Commission and ensure it is in accordance with international standards. The IIGEP was a group of individuals who were selected by international donor countries and the government of Sri Lanka. The chosen individuals were of high calibre and experts in their respective field. For instance, Bernard Kouchner, a French politician, diplomat and Doctor who co-founded MSF, Yozo Yokota, Professor of Law who acted as Special Rapporteur to the United Nations on the situations of human rights in Myanmar, and Jean Pierre Cot, Professor in International Law were among the 12 people selected.
22. All hearings at the COI were held *in camera* thus excluding the family of the victims and ACF from this process. Consequently, the transparency of the COI cannot be vouchsafed.
23. The Attorney General Department was mandated to guide and advise the COI despite the AG's role during the initial criminal investigation conducted by the magistrate court. The COI was not in the capacity to investigate fully the probability that the Muttur massacre was an act perpetrated by agents of the State and arguably be construed as extra judicial killing. The AG's involvement at the COI illustrates the lack of independence of the Institution.
24. A Presidential letter sent to the IIGEP emphasized that the COI could not, 'in any way [...] consider, scrutinise, monitor, investigate or inquire into the conduct of the AG or any of his officers with regards to or in relation to any investigation already conducted into the relevant incidents'.⁷ Therefore, the Presidential letter confirmed the prohibition that the COI could not interrogate the AG about his own role during the initial criminal investigation.

⁶ Presidential Letter to IIGEP, December 18, 2007.

⁷ IIGEP-PS-004-2007, December 19, 2007.

25. Despite reassurance being given to the IIGEP that these instructions, ‘do[...] not have the effect of preventing the Commission from examining the Attorney General or his officers on any relevant questions arising in the investigations and inquiries,’⁸ it nonetheless obfuscated the mandate of the office of the AG.
26. The IIGEP’s withdrawal from the Commission and their public statement denouncing that ‘the investigation and inquiry process [...] fail[ed] to comply effectively with international norms and standards,’⁹ reinforced the conclusion that this mechanism was not independent.

Lesson Learnt Reconciliation Commission (LLRC)

27. Set up to investigate into events which occurred from February 2002 to May 2009, the Lesson Learnt Reconciliation Commission (LLRC) has been exposed to acute opprobrium and many high level organisations decided not to cooperate or participate in the process.
28. In September 2010, the United Nations Panel of Experts 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’, including the LLRC. Despite not being an investigative or a fact-finding body but solely advisory, the UN Panel unequivocally concluded that the ‘Government’s notion of accountability is not in accordance with international standards.’ The UN Panel severely reprimanded the ‘deeply flawed’¹⁰ LLRC and deplored the ‘current structure’¹¹ of the domestic judicial mechanisms.
29. The LLRC was rebuked by the UN Panel because ‘missing from the Government’s two-pronged conception is any notion of accountability for its own conduct in the prosecution of the war, especially during the final stages.’¹²
30. The effectiveness of the LLRC has been further castigated because the independence of that Commission was seriously compromised. The fact that both the Chair of the LLRC and the former Attorney General who occupied the post in 2007, were involved during the initial Muttur investigation phase as well as at the NHRC is telling. This evident conflict of interests rendered the whole procedure incompatible with standards of International Law.
31. Finally, the LLRC report strongly urged that the recommendations in the Report of the Presidential Commission of Inquiry be implemented especially in relation to the Muttur massacre, as ‘such action would send a strong signal in ensuring respect for the Rule of Law, which in turns contribute to the healing process.’¹³ ACF believes that the stance endorsed by the LLRC is

⁸ *IIGEP-PS-004-2007, December 19, 2007.*

⁹ *Ref. IIGEP-PS-004-2007, December 19, 2007.*

¹⁰ *Report of the Secretary General’s Panel of Experts on Accountability in Sri Lanka p iv.*

¹¹ *Ibid p v.*

¹² *Ibid p 78.*

¹³ *Report of the Commission of Inquiry on Lessons Learnt and Reconciliation, November 2011, p 199.*

important, the more so, as the COI never disclosed the content of their report to the relevant parties.

32. The UN Panel concluded that accountability in Sri Lanka is presently fanciful and that ‘this is due more to a lack of political will than to lack of capacity.’¹⁴ The UN Panel conclusion in effect concurs with ACF stance that there is no willingness in Sri Lanka to uphold accountability even in cases of gross violation of International Humanitarian Law.

IV. INTERNATIONAL OBSERVATIONS AND CRITICISMS

33. The United Nations Panel mandated to assess and review the approach endorsed by Sri Lanka to uphold accountability, concluded that the government has failed to fulfil its duty under International Human Rights and Humanitarian Law. The Panel highlighted that genuine accountability can only be achieved if the rights to truth, to justice and to reparation are adequately catered for. Having conducted an in-depth analysis of the domestic measures implemented including the effectiveness of different institutions mandated to combat impunity, the Panel deplored the total absence of accountability in Sri Lanka. It boldly asserted that accountability is not restricted to ensuring the investigation and prosecution of serious crimes but it must attend to the victims’ rights.
34. The UN Panel further rejected the belief that restorative justice at the expense of retributive justice will suffice in upholding accountability. Fundamentally, it condemned the government’s notion of restorative justice as it is not victim-centred. The personal dignity of the victims can only be preserved if all required efforts are made to alleviate their sufferings. Furthermore, the UN Panel reaffirmed the fact that by excluding investigation pertaining to the culpability of the officials of the government, justice will not be achieved.
35. As a result of Sri Lanka’s failure to fight impunity and uphold accountability, the Human Rights Council through the Universal Periodic Review (UPR) procedure, has repeatedly called upon Sri Lanka not to abdicate from its international obligations. Therefore, the UPR recommendations are concrete proof that Sri Lanka must enact the necessary measures to address impunity. While Sri Lanka has officially expressed its commitment to implement these recommendations during the numerous UPR sessions, impunity currently triumphs over accountability.
36. ACF recognises and reinforces the importance and high value of the UPR recommendations and urges all parties to respect and implement them. It is submitted that the UPR recommendations should be given global recognition. In this light, it will be recalled that the 2008 UPR recommendations, especially A-1, A-2, A-3, A-4, A-6, A-7, A-15, A-16, A-18, A-26, A-27 and A-28, although endorsed by Sri Lanka, appear not to have been implemented.

¹⁴ *Ibid* p v.

V. VIOLATIONS OF INTERNATIONAL LAW

37. The fundamentally flawed investigations are stark indicators that the government of Sri Lanka has no intention to bring either the offenders or those who have ordered for the commission of the massacre, to justice.
38. The United Nations Human Rights Committee has repeatedly reiterated the need for Sri Lanka to adhere to its obligations under the ICCPR, to investigate, prosecute and to provide an effective remedy to all allegations of human rights abuses under its jurisdictions.¹⁵ A report endorsed by the Human Rights Council stated that an investigation must satisfy the essential prerequisites that include thoroughness, independence, impartiality, effectiveness and promptness.¹⁶
39. The United Nations General Assembly in its resolution 60/147¹⁷ further affirms the duty to investigate.¹⁸ The obvious reluctance of the authorities in Sri Lanka to conduct a genuine investigation is in contravention of the 2005 Set of Principles for the Protection and Promotion of Human Rights Through Action to combat Impunity that unequivocally state that victims of crimes under international law have the right to truth, to justice and to reparation.
40. Fundamentally, the Muttur massacre is in violation of the United Nations Security Council resolution 1502 that clearly prohibits attacks, ‘knowingly and intentionally directed against personnel involved in a humanitarian assistance or peacekeeping mission undertaken in accordance with the Charter of the United Nations which in situation of armed conflicts constitute war crimes, and recalling the need for States to end impunity for such criminal acts’. As the resolution was adopted in 2003, it is applicable.
41. Despite the 2009 joint statement made by the United Nations Secretary General and Sri Lanka, which ‘reiterated its strongest commitment to the promotion and protection of human rights, in keeping with international human rights standards and Sri Lanka’s international obligations’,¹⁹ the government has clearly not fulfilled its obligations.

VI. RECOMMENDATIONS

42. Alarmed by the Muttur massacre that depicts a total disregard of International Human Rights and Humanitarian Law; deeply concerned by the inefficiency of the purported investigations; recalling the principles of the Universal Declaration on Human Rights, bearing in mind the ICCPR, the Geneva Conventions and international customary law; recognising that Security Council resolution 1502 is binding; recalling the findings of the United

¹⁵ *Sundara Arachige Rajapakse v Sri Lanka* CCPR/C/87/D/1250/2004.

¹⁶ A/HRC/RES/15/6 6 October 2010.

¹⁷ General Assembly 2006 Resolution 60/147, *Basic Principles and Guidelines on the Right to a Remedy and Reparations for Victims of Violations of International Human Rights and Humanitarian Laws*.

¹⁸ Rule 158 of the ICRC was formulated after an intensive study of state practice that clearly revealed that the duty to investigate and prosecute crimes of serious gravity under international law is customary international law.

¹⁹ Joint Statement made by United Nations Secretary General and Sri Lanka, 29th of May 2009.

Nations Panel of Experts that criticized the LLRC, COI, NHRC and the lack of independence of the courts; taking into consideration the 2008 UPR Report more specifically recommendations A-1, A-2, A-3, A-4, A-6, A-7, A-15, A-16, A-18, A-26, A-27, A-28; welcoming the Human Rights Council Resolution²⁰ during its nineteenth session on ‘Promoting Reconciliation and Accountability in Sri Lanka’;

The following recommendations are submitted to the government of Sri Lanka:

1. Demand the publication of the full interim report of the COI;
2. Review all procedural, legal regulations and national legislations to ensure that independent as well as impartial investigations are carried out, prosecutions are conducted in compliance with international human rights standards and the rights of victims to timely, prompt and effective remedies are respected and strengthened;
3. Ensure that all members of the police force and the military officials are appropriately trained and aware of relevant principles and rules of International Human Rights and Humanitarian Law to the extent that these are necessary for them to carry out their obligations efficiently;
4. Endorse all necessary measures including the implementation of the 17th Amendment of the Constitution and transform the NHRC into an institution that is in accordance with well-established Paris principles and request the immediate ratification of the second optional protocol of the ICCPR;
5. Agree to the request of the OHCHR for the establishment of a regional office in Sri Lanka and commit to provide all necessary support to the OHCHR for it to fulfil its mandate effectively.

The following recommendations are submitted to the International Community:

1. Conduct a thorough investigation of the Muttur massacre and to this end, set up an independent body of international experts having the necessary expertise to investigate into violations of human rights and international humanitarian laws. The investigation must be carried out in absolute transparency. A succinct set of rules on procedure and evidence in compliance with standards of international human rights laws must be drafted and adopted to ensure clarity. The international body must have the competence to prosecute the perpetrators and provide remedies to all victims, or to monitor the national prosecution of the perpetrators;
2. Ensure and ascertain effective prosecution of crimes of serious gravity under International Humanitarian Law and make sure that it reflects international human rights standards, through support, training and monitoring of Sri Lanka judiciary authorities;

²⁰ A/HRC/19/L.2, 8 March 2012.

3. Support the request of the Commissioner of the OHCHR for the presence of an independent OHCHR office in Sri Lanka.