

STUDY REPORT

SRI LANKA

The Muttur massacre :
a struggle for justice

June 2008



In tribute to



R. Arulrajahd
24 years old



M. Narmathan
24 years old



S. Koneswaran
24 years old



T. Pratheeban
24 years old



S. Romila
25 years old



G. Kavitha
27 years old



M. Rishikesan
27 years old



A. Jaseelan
27 years old



K. Kovarthani
28 years old



V. Kokilavathani
29 years old



A.L.M. Jawffar
31 years old



Y. Kodeeswaran
31 years old



S.P. Anantharajah
32 years old



I. Muralitharan
34 years old



G. Sritharan
36 years old

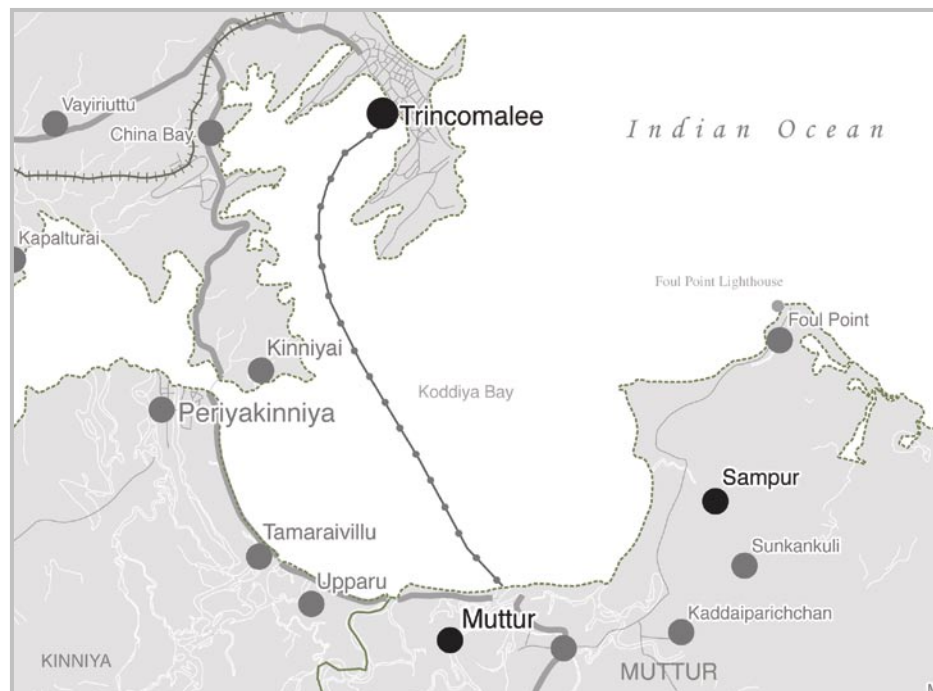


M. Ketheeswaran
36 years old



S. Ganesh
54 years old

SRI LANKA MAP



SUMMARY

On August 4, 2006, 17 employees of our organisation were killed in cold blood while assisting the population suffering from the consequences of the tsunami and the conflict in Sri Lanka. This massacre – amounting to a war crime – is unprecedented in the humanitarian field. At the time of the events, the town of Muttur was the scene of heavy fighting between rebels and government forces, causing dozens of civilian deaths. However, the victims were clearly identified as humanitarian workers.

Since then, we have expressed on several occasions to the Sri Lankan authorities our determination that the whole truth be established about this massacre.

A first investigation was launched on August 15, 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, notably unexplained decisions to transfer the case on several occasions. Furthermore, many irregularities have been observed: 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.

In parallel, ACF lodged a complaint on September 12, 2006, with the National Human Rights Commission in Trincomalee, which has the power to launch investigations into human rights abuses although that only lead to recommendations. Even so, ACF was shocked by the Commission's total ineffectiveness and lack of cooperation, from the months following the complaint right through to the present.

Subsequently, President Mahinda Rajapaksa decided in November 2006 to set up a presidential Commission in order to investigate the ACF case as well as 15 other cases of serious human rights

violations. An international group of experts was called on to act as independent observers of the Commission's work. ACF considered their presence to be one of the key conditions for establishing the truth. But the group of experts recently decided to withdraw, arguing that minimum international standards were not respected. They cited in particular 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 addition, ACF has also noted worrying irregularities in the work of the Commission and that, more than a year and a half after its creation, it is now clear that the commission has not met the needs that led to its appointment.

After following the three Sri Lankan investigations over more than 18 months, ACF observes bitterly that these investigations set up following the Muttur tragedy have little or no chance of establishing officially the persons criminally responsible for this war crime (direct perpetrators and chain of command). In view of the inertia in the procedures, the inadequate guarantees of independence and the repeated lack of respect for international standards, we now consider that these procedures have proved ineffective and unproductive.

ACF cannot accept this denial of the victims' fundamental right to a prompt, detailed, effective and independent inquiry into the circumstances of the massacre. In view of this situation, ACF has taken the decision to end its mission in Sri Lanka and to call resolutely for an international investigation to be launched into the Muttur massacre.

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INTRODUCTION

Among the most heinous and barbaric crimes has been committed against Action contre la Faim (ACF), as well as 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 ; the 17 workers were intentionally executed, most of them execution style - by a gunshot to the head - on the premises of an international non-governmental organization while they were clearly identified as humanitarian workers. The 17 workers were specifically and deliberately targeted, shot in the head, execution style, on the premises of an international non-governmental organisation while they were clearly identified as humanitarian workers. As civilians, the victims should have been protected under international humanitarian law by the Geneva Conventions and their protocols, as well as by customary rules. These killings constitute therefore a war crime.

In the face of the killings and after a decade of delivering aid to the Sri Lankan population, ACF was abruptly forced to question its continued presence in the country. The organisation closed its operational bases in the country maintaining a presence in Sri Lanka in order to support and follow the criminal investigations into the Muttur massacre. While seeking answers to the many questions surrounding the killings, the organisation has committed to contribute to the fight against impunity for war crimes committed against civilians and has worked to obtain a criminal indictment against those responsible for the massacre.

ACF later decided to resume its mission in Sri Lanka to deliver emergency aid to the populations affected by the conflict in the Eastern Province, to better follow the investigation processes

implemented after the killings and to exert pressure on the relevant institutions in charge, in order to ensure date investigations moved forward. Unlike other groups or organisations that have issued reports on the Muttur massacre, ACF decided not to actively investigate the events in order to guarantee the security of our team as well as to ensure our presence in Sri Lanka.

Over the last year and a half, ACF has actively followed, and cooperated with, three 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 (CoI) appointed in October 2006. Several months have gone by since the massacre and these three procedures are obviously failing. Consequently, ACF has decided to withdraw its mission from Sri Lanka, detach itself from the Sri Lankan procedures and firmly request an international investigation into the Muttur massacre.

The rationale behind this decision is explained in the remaining content of this report, which is a critical analysis of the three judicial procedures implemented subsequent to the killings. Through the publication of this information, ACF intends to expose the difficulties the organisation has faced since the onset of the investigations, and to provide some explanations as to the reasons for many of the obvious failures. The ultimate aim is to demonstrate that the various obstacles bound the three Sri Lankan investigation procedures to reach an impasse.

PRELIMINARY PART :

Facts surrounding the killing

On the mornings of July 31 and August 1, 2006, 17 ACF aid workers left the Trincomalee base for Muttur, to carry out projects in the town and surrounding areas. The organisation had a local office in Muttur to facilitate activities and limit unnecessary transportation. On August 1, the team was due to return to Trincomalee on the afternoon ferry, however, rebel troops launched an attack on Muttur before the team was able to leave, and 17 ACF workers were stranded in the town. The ferry service was immediately suspended, and an ongoing battle between the Sri Lankan Army (SLA) and the Liberation Tigers of Tamil Eelam (LTTE) ensued leaving roads around the town unsafe for travel. A decision was taken in Colombo, and then Paris, to request all staff members to remain in the ACF office until the fighting ceased. The whole area fell under intense fire, however regular radio contact was established and maintained with the base in Trincomalee and the decision taken, seemed at the time, to be the safest option.

On August 2, the situation in Muttur deteriorated and evacuation of the aid workers was deemed impossible. Instead, the visibility of the compound was increased, identifying it as an NGO base, and radio contact was taking place every 30 minutes. The following day, the International Committee of the Red Cross (ICRC) tried to organise an evacuation by boat in which the ACF staff could participate. Unfortunately, the ICRC was unable to obtain security guarantees from the fighting parties and was forced to call off the mission. A fall back plan of moving the 17 staff members to an internally displaced persons camp was also considered by ACF, however the stranded staff members told ACF that it would not be possible for them to leave the office due to the constant heavy shelling. Twenty minutes later, the camp was hit and ten civilians were killed.

During this period, ACF contacted the Army, Navy and Police forces to inform them of the presence of the aid workers in the town and provided them with the exact GPS location of the ACF base. The organisation hoped that the information

would help protect their staff members from the possibility of accidental shelling and eventually allow them to be successfully evacuated.

The last contact between ACF and the team in Muttur was made by radio on August 4, at around 7:00 am. However, unconfirmed information has since emerged indicating that the team members might have been seen alive during the day on the 4. On losing radio contact with the team, ACF tried again to organise an evacuation by land, but the mission was aborted at an Army checkpoint, 10 km away from Muttur.

On August 5, several sources circulated information, raising the alarm that 15 people had been executed at the ACF base in Muttur. A second team left Trincomalee on the same day to go to Thoppur, where they meet with the Sri Lanka Monitoring Mission (SLMM), an independent monitoring group that was trying to get into Muttur. Again, teams were forced to turn back by the SLA who refused safe transit preventing them to proceed with the planned evacuation. On that same day, a team of journalists was however allowed to enter Muttur and the SLA escorted them around different areas of the town in an attempt to prove the region was under the control of government authorities.

On August 6, hopes of finding the ACF workers alive in Muttur had greatly decreased. However ACF worked with the ICRC to organise a road expedition into Muttur to assess the situation. Once again, the convoy was forced to turn back after a village mob blocked the road, preventing it from proceeding. A second attempt was made to take the ferry to Muttur as soon as the service was restored, however, shells fell in front of the boat as it attempted to dock and it too was forced to turn back. At the same time, the Consortium of Humanitarian Agencies (CHA) finally succeeded in reaching Muttur by road and went to the ACF base where they discovered the bodies of the 17 slain workers lying in front of the gate. The killings were confirmed to ACF and the first official pictures of the crime scene were taken.

The Muttur massacre : a struggle for justice

Collection of the bodies was organised from the ACF base in Trincomalee using a team that largely consisted of ACF staff members. Upon arriving in Muttur, they headed directly to the police station and informed officers there of their intentions to collect their colleagues' bodies. Five policemen escorted them to the compound gate and warned them not to take pictures or to make phone calls. The policemen filmed the scene but did not help to collect the bodies, nor did they make any efforts to gather evidence. This was an early indication of the lack of interest, from government officers, in ascertaining the truth of what had occurred.

The AFC team found the base had been ransacked and some items were missing including personal items belonging to the victims (e.g. cell phones) as well as two motorbikes. Once the bodies were prepared for transportation, an ACF convoy left Muttur for Trincomalee Hospital. A first autopsy was conducted on August 8, however, the working conditions were of a poor standard, and medical staff could not collect any ballistic evidence. This examination did, however, establish that the victims had died from single, or multiple, firearm injuries. As a result the victims' families were given certificates stating the cause of death.

Although no clear conclusion can be drawn as to who was directly responsible for the savage killings at the ACF base, the facts expose a blatant cover up of the crime. Unfortunately, this tendency continued throughout the investigative procedures, in spite of the public and international community's demand to find the people who were guilty of this horrible crime.

JUDICIAL PROCEDURE AT THE MAGISTRATE COURT

PART I

The first legal procedure undertaken in response to the Muttur massacre was an inquest before the Magistrate Court, which is the primary national 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. With regards to the inquiry, the role of the Magistrate is limited to issuing a verdict on the apparent cause of death of the victims ; procedures usually come to an end after the pronouncement of the verdict.

According to his initial order dated August 15, 2006, the first magistrate in charge of the case requested the police to “conduct a serious and effective investigation of this matter” as well as “to take steps to produce relevant witnesses and evidence in this regard as these are very serious and suspicious deaths under the Act of the Geneva Conventions”. The cooperation and instructions of the Attorney General’s (AG) Department and the Criminal Investigation Department (CID) were also requested¹. Hearings were held on a regular basis to allow the judge to follow the investigation conducted by the CID as well as to authorise, or advise, the police officers on how to proceed in relation to some specific procedures (such as exhumation of the victims’ bodies or ballistic investigation). The court hearings also gave the opportunity to the CID to regularly produce report on the state of the investigation and its developments.

The Magistrate delivered his much delayed verdict on the cause of death in March 2007, also taking the exceptional decision to continue in assisting and monitoring the police investigation. This decision was unusual as there are no legal grounds, in the Sri Lankan legislation, for such an extension of the procedure ; the decision however, was not clearly prohibited by law. The Magistrate reiterated his decision in June 2007 after an objection was made by the CID. As a consequence of this objection, delays between hearings increased and the CID’s activities became more obscure.

Although examples of the inefficiency and failures of the Sri Lankan judicial system are commonplace, and despite the fact that the procedures at the Magistrate Court showed disturbing irregularities, ACF decided to follow this court case and to show the utmost respect for the judicial process. An attorney-at-law, representing the aggrieved parties, was hired and was present alongside an ACF representative, at all stages of the procedures. Months have gone by and the case is still at the initial stages of the investigation. ACF has identified a series of serious flaws and disturbing issues with regard to the legal officials involved in the court proceedings, the criminal investigation as well as the witness protection procedures, all of which have directly undermined the efficiency of the process and its chances of success.

1. Translation of the Court Order, Magistrate Court of Trincomalee, August 15, 2006.

1. INVOLVEMENT OF LEGAL OFFICIALS IN THE COURT PROCEEDINGS

Although, the role and mandate of the different Sri Lankan legal officials are clearly described in the national legislation, 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 AG's representatives.

a. Irregular substitutions of magistrate

The ACF court case has been heard by three different magistrates (in addition to one acting magistrate), who have proceeded with five court transfers. The organisation believes that these conditions have adversely affected 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.

From Trincomalee to Anuradhapura, and to Kantale

The first inquest was rapidly conducted before M. Ganesharajah, Magistrate of Muttur. However, due to the prevailing situation in the town, the court case was immediately transferred to, and heard in, the district of Trincomalee. On the hearing held on September 5, 2006, the Magistrate was supposed to pronounce the verdict on the cause of death as supported by the certificates issued by the Judicial Medical Officer (JMO) on August 8. Instead 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, and this was noted in a journal entry by the Magistrate. ACF's legal counsel appointed to represent the aggrieved parties expressed strong opposition to this seemingly arbitrary decision and requested it was reversed. He used legal argument that stated the decision was in breach of a series of fundamental principles of justice, but the decision was upheld. At the following hearing, held on September 20, 2006 in Anuradhapura, M. Jinadassa, Magistrate of Anuradhapura, informed all parties that he would be handling the case, and that it would be called before the Magistrate Court of Kantale, as specified in his letter of appointment.

The order was unlawful as the secretary to the Ministry of Justice did not have legal authority to order such a transfer. Transfers can only be ordered by the Court of Appeal, the AG, or by written directive from the JSC. This political interference in the court's proceedings fuelled ACF concerns regarding the judicial independence of the institution. By geographically moving this eminently political case, 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 to the new court house was also thought to be an attempt to prevent the victim's families and potential witnesses from participating in the legal proceedings.

The court never recognised this measure as an official relocation of the case, since the Magistrate of Anuradhapura would have been appointed to the case as a substitute for the Magistrate of Muttur². This tortuous explanation came very late in the process, and no justification has ever been given to explain the substitution of Magistrate, opening the door to a succession of unnecessary speculations. Questions as to the objectivity and interest of the Muttur Magistrate in this specific case were raised, but the Court would surely have made a clear statement in this respect, had it been the cause for the substitution and transfer. It is a fact that conflicting statements were given for the transfer at different points in time.

ACF considers this interference as a "de facto transfer of jurisdiction", since the effect of the measure, was equal to that of an official case transfer. Hence ACF believes that the principle of territorial jurisdiction, which is the primary basis of criminal jurisdiction, was breached without legal justification. As outlined above, the effect of the transfer was to reduce the chances of those people directly concerned with the case from following the proceedings, the distance and checkpoints between Kantale and Trincomalee and the change in language of the proceedings from Tamil

2. Reference to the explanation given by the Magistrate of Anuradhapura in his court order, Magistrate Court of Kantale, September 5, 2007.

to Sinhala, are both likely to dissuade people from attending the court hearings. ACF believe that the transfer had more wide ranging implications than a simple substitution of magistrate.

From Kantale to Anuradhapura, and to Muttur

The Magistrate of Anuradhapura (based in Kantale) took responsibility of the case for one year. However, this fragile and artificial arrangement came to an end during a hearing held on September 5, 2007, when the Magistrate announced that the case would be transferred back to Anuradhapura. In his order, the Magistrate also confirmed that in his view, the preliminary investigation into this case should come to an end and he requested that the JSC appoint another judicial officer to complete the proceedings. No further justification or explanation was given with regard to these requests and no indication was given as to why the judge considered that the initial investigation was over as it was evidently failing and the judicial process was nowhere close to revealing the truth behind the killings of the aid workers.

At the next hearing conducted in Anuradhapura on November 28, 2007, ACF learned that the Magistrate of Anuradhapura had been transferred to another location and the JSC had authorised him to transfer the case back to the Magistrate in Muttur (who has changed since September 2006). The parties were consequently unable to make new requests or submissions since the sitting judge was no longer in charge of the case. The next hearing was called on January 23, 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 CID, ACF was prevented from presenting any specific requests to the Magistrate in charge.

Ultimately, this agonising series of transfers put the judicial procedures on hold for over six months. From September 2007 to March 2008, ACF had not little opportunity to be heard by any of the Magistrates presiding over the case. To avoid further delays in the procedures, the organisation did not request the JSC to transfer the case back to Trincomalee, although we had reasons to believe that sending the procedure back to Muttur would not support the course of the proceedings.

b. Ambiguous role of the AG's Department

As part of his duties the AG advises police departments 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 prosecuting in Sri Lanka. Ultimately, he must ensure that criminal offenders are prosecuted in a timely and effective manner.

However, within the opening weeks of the investigation into the Muttur massacre, the legal procedures available to those seeking justice were proving to be inadequate. Unfortunately the role of the AG Department has failed to give consistency and to improve the efficiency of the process.

The AG Department got actively involved in two main aspects of the case ; the exhumation of the victims' bodies and need for a witness protection program. The AG representative was initially opposed to the idea of exhuming the bodies. However, 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 of 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 exhumation process.

ACF approached the AG on the subject of creating a witness protection program specific to this particular case (a sort of *ad hoc* protection scheme in which Sri Lankan and international experts would be involved). 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.

As a background to these discussions, ACF is not aware of the exact instructions given by the AG to the CID. This information remained confidential, and the level of involvement of the AG unclear. The CID claimed before the Magistrate that they were often consulting the AG, and ACF believes that the AG carried an active and leading role in the investigative process. However, there was no official representation of the AG in the procedures before the Magistrate Court.

During the hearing held on September 5, 2007, the Magistrate decided to use an exceptional procedure provided for in the Sri Lankan law, which allows magistrates to refer a particular case to the AG's Department for proper instruction. By transferring the case record to the AG, the Magistrate directly requested him to give direction and advice to the CID, in order to enable the investigation to move forward. This procedure is usually used to take actions against particular suspects. In this case however, as no suspect had been identified, the AG could only give stronger directives as to how the police should obtain evidence. Again, ACF is not aware of any repercussion that this order might have had, as the AG Department has remained officially silent since the transfer of the case record.

To sum it up, ACF is not in a position to directly criticise the level of involvement of the AG Department in the case. However, the organisation expresses strong and serious concerns over the inconsistency of his 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. In short, 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. EVOLUTION OF THE INVESTIGATION LED BY THE CID

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

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. Unfortunately, the involvement of the CID failed to put an end to this damaging approach. Therefore, ACF expresses strong and serious concerns with regard to the manner in which the initial investigation was handled by the Sri Lankan police, with particular regard to the preservation and collection of evidence.

Delayed access to the site and to the victims' bodies

ACF believes that after fighting ended, deliberate attempts were made by the authorities to limit access to Muttur. Concerned groups such as 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 SLA and local police were contacted by ACF on several occasions before the organisation only gained authorisation to enter the town and collect the bodies. Consequently, fundamental information pertaining to the commission of the crime remains unknown. For instance, the absence of a clear estimate of the time of death reveals significant flaws in the process. The last radio contact with the team suggests the time of death was the morning on August 4th, however, developments indicate that the deaths could have occurred in the late afternoon. In this specific case, determining the time of death is of the utmost importance as those responsible are likely to be connected with the forces controlling the town at that time. Therefore, if the time of death had been established with certainty, information could have been gained on the circumstances surrounding the killings. However, it also seemed impossible for the authorities to halt the controversy surrounding the take-over of the town (which is estimated between the 4th and early on the 5th) although this information is necessarily well reported in the army's records.

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, as there is a 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 should have been their responsibility to do so. The authorities clearly had intended to leave the bodies exposed, then to eventually destroy them. Moreover, the local police was openly biased and assumed publicly that the rebel troops were responsible for the killing. Even when the situation in Muttur and the instability in the region are taken into account, the delays as well as the general behaviour of the authorities during the investigation is unacceptable. ACF believes that impartial interventions should have been carried out from the moment the killings were reported to the authorities.

Concerns have also been raised regarding the material evidence the CID presented to court as articles recovered from the crime scene. On October 4, 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 August 8 as well as during a site visit conducted by the CID on August 17. 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 August 7. 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 the pictures of the crime scene taken on prior to the evidence collection do not confirm the presence of the ballistic exhibits. ACF also notes 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. As stated in the CID investigative reports submitted to the Magistrate on September 20 and on October 4, 2006, statements from current and former ACF staff members, from Trincomalee and Muttur, were recorded, together with the testimonies of five Muttur inhabitants. Regrettably, there is no trace of the CID's effort to track down the people who could have given pertinent information as to who was in town when the crime was first discovered ; namely the police officers and servicemen present in Muttur at the time of the killing. 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.

During the same period, the 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, and the organisation has never been able to obtain concrete and credible information as to when and why the motorbikes were stolen. The CID investigation team has confirmed that in their view the two offenders have no link with the killings at the ACF base however ACF has not yet received a plausible explanation as to how the two people in question came into possession of the motorbikes. This unwillingness to ascertain if the two people that entered the ACF base and took the bikes have information pertaining to the massacre is unacceptable.

All matters considered ACF believes 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 at the ACF base. As a result, and in an attempt to see concrete progress in the investigation, the organisation has very early in the process engaged a dialogue with the authorities, requesting the exhumation of the victims' bodies for further examination.

b. Exhumation of the bodies and post mortem examination

Since the beginning of the investigation, confusion has 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 were held on August 8, 2006. Unfortunately, when no government authorisation was given, and having waited a substantial amount of time the experts went back home.

Soon after the departure of the Australian team, authorisation was given and two bodies were exhumed on September 16, 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. This attitude has clearly delayed the collection of critical evidences. The two bodies were kept at the police morgue in Colombo and have finally been autopsied. 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 October 18, 2006. Six bodies have still not been exhumed and autopsied for different reasons ; namely the difficulty for the police to identify with certainty some of the victims’ graves, the absence of family representative and in one case, the lack of family consent.

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. The details of the agreement are specified in a Memorandum of Understanding (MoU) dated September 29, 2006³. An Australian forensic pathologist, Dr. Malcolm Dodd, was therefore present to observe the autopsies conducted by Dr Waidyaratne, JMO of Anuradhapura, on October 24 and 25, 2006 in Colombo. Seven bullets and three metal fragments were recovered during the examination, radio images as well as photographs of this ballistic evidence was taken and the sealed items were kept in the JMO’s custody, waiting for a ballistic investigation to be ordered.

3. Terms of Reference of the Arrangement between the Governments of Sri Lanka and Australia pertaining to the Team of Foreign Experts in relation to the investigation into the deaths of seventeen persons said to be employees of Action Contre la Faim, September 29, 2006.

c. Ballistic investigation

On completion of the second autopsies, 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

In light of the methodology used to seal and produce the 43 ballistic exhibits already on the investigation record, ACF had limited confidence in the authorities’ will and ability to preserve the integrity of the new found evidence. The

organisation requested the ballistic investigation be held in the presence of international experts, as outlined in the MoU signed by the Sri Lankan and Australian authorities. Unfortunately, some major procedural irregularities cast doubt on the integrity of the process.

Firstly, the chain of custody process in place during the second autopsies was broken. The law required that the JMO directly hands sealed items to the Magistrate in charge, who should deliver them to the Government Analyst (GA) for examination. However, neither the JMO nor the GA was present on the November 29th hearing. Instead, the CID officers produced the items to the Court on behalf of the JMO. The consequences of this unethical behaviour are rather severe since it compromises 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 dated November 22, 2006, the elements recovered by the medical officers

during the post mortem investigation were sealed separately. Regrettably, the items presented in court were handed over in a sealed box and were not individually sealed. ACF believes there are two possible explanations for this discrepancy ; 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.

In the absence of the GA, the Magistrate kept the evidence in his custody, requested the GA to come collect the ballistic evidence from his office and to conduct a ballistic examination in Colombo, in the presence of an Australian expert. However, there have been no pro-active steps taken by the authorities to ensure the safe transportation of the elements from Kantale to Colombo. The ballistic evidence was actually 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 compromises the integrity and authenticity of the evidence gathered.

After a long period of silence and inconclusive requests to different authorities, 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 March 7, 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 shows a willingness to breach of court orders to ensure that proceedings can be carried out behind closed doors. Unfortunately 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 April 25, 2007. He reported an item labelled no. 7 to be a "relatively intact 5.56 calibre projectile minimally deformed"⁴. 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"⁵. In light of this conflicting information, suspicion about the integrity and authenticity of the bullets handed over to the GA arose and some concerned groups published articles and reports on the subject.

In early August 2007, Dr. Dodd released an additional report (a letter addressed to the Government of Sri Lanka⁶) in which he joined the position of the Sri Lankan ballistic expert. The document was produced to the Court on September 5, 2007. It is however important to note that Dr Dodd's retraction is based on pictures taken by the GA on May 22, 2007, 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 additional report was publicly discussed in a press conference held by governmental officials at the beginning of August 2007.

During this debate, ACF did not take any position on the controversy though the situation, and its effect on the investigation, was alarming. 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. Given the importance of the ballistic examination, ACF believe that proving the integrity of the ballistic evidence should have been perused considering that photographs and x-ray images were taken during the post mortem examination. Regrettably, the officials did not choose to review this information, but have instead provided doubtful explanations, again showing a troubling lack of transparency and objectivity.

4. *Independent Forensic Investigation of the Muttur Massacre Sri Lanka August 2006*, by Dr Malcolm J Dodd, November 2006.

5. *Results of Ballistic Report (translated from Sinhalese)*, February 19, 2007.

6. *Supplementary Report - Independent Forensic Investigation of the Muttur Massacre Sri Lanka August 2006*, by Dr Malcolm J Dodd, July 20, 2007.

d. Current state of the investigation

More than 18 months have gone by since the beginning of the investigation into the Muttur massacre, and there still appears to be no tangible or credible leads to pursue. However, according to the CID, the investigation was divided in two serious investigative paths ; the examination of what is being called “electronic evidence” and the collection of testimonies.

To ACF’s understanding, the first investigative track pertains to enquiries that were made into the cell phones that were stolen from victims around the time of the attack. In the days and weeks following the killings, it seems that calls were made using the victims SIM cards. Reports were produced by the CID team during the early hearings and efforts were made to get to the bottom of this matter. However, instead of focusing on the calls made immediately following the massacre, the CID officers spent their energy tracking down the SIM card history, since its first subscribe, as well as the various connections to the communication tower in Trincomalee. Although these leads could possibly explain how the victims came into the possession of the cards, ACF has strong doubts on the efficiency of the CID’s investigation in this respect, and believes that it cannot possibly lead to progress in the resolution of this case.

The second investigative track focused on the collection of witness statements from people involved in the events surrounding the killings. ACF counsel has, on numerous occasions, raised

concerns that the police officers and servicemen in the area of the ACF base have not been called as witnesses. The organisation believes that calling these people as potential witnesses would have increased understanding of the overall situation in Muttur during the crucial days. It could have also helped officially identify the different units present in Muttur during the battle, and possibly led to identifying some people linked to the massacre.

Regrettably, the CID failed to obtain this information in the early stages of the investigation and with the passing of time, relevant and reliable information has become hard (if not impossible) to obtain. Although ACF recognises that the Ministry of Defence is surely reluctant to allow CID officers to interview any army personnel that were in Muttur on or around August 4, 2006, this investigative track appears to have failed no matter whose responsibility it ultimately is. Even though the CID has recently interviewed some low-ranking officers, the police and security forces have at no time been subjected to a serious investigation.

In short, the work that has been produced by the CID to date have done little to help develop a better understanding of the events that lead to the killings of ACF staff members. The investigators seem to be lost in irrelevant details and are unable or unwilling to focus their work on the questions the ACF legal representatives believe to be crucial to the case.

3. ABSENCE OF WITNESS PROTECTION

In cases that have failed to gather sufficient material evidence, the burden of providing relevant information for the case is often unjustly transferred to the civilians. When witnesses are also unwilling to testify, cases in Sri Lanka are often closed due to lack of evidence. Such outcomes often clear the investigation unit’s reputation, saving appearances, and facilitating the easy closure of disturbing cases.

In the country, this process is strengthened by the absence of witness protection measures. The absence of a protection scheme has a serious impact on criminal justice as many people are afraid to come forward as witnesses. Many people

are terrified of testifying in open court and are frightened that coercive actions might be initiated against them if they speak out.

Considering the political impact of the ACF case, as well as its extensive publicity, it quickly became obvious that potential witness would not come to the Magistrate to testify. However, to maximise the chances of gathering testimonial evidence and of finding those responsible for the crime, ACF opened a dialogue with the Sri Lankan authorities to explore the possibilities of setting up witness protection program that would be specific to the ACF case.

Failed negotiations on witness protection

ACF addressed its concerns about the absence of witness protection to the AG's Department. After some discussions, ACF proposed that a commission, consisting of international and national judges of high integrity and irreproachable reputation, be constituted to hear anonymous testimonies from those witnesses who, for lack of protection, were unwilling 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. As there is no provision in Sri Lankan criminal law that confers evidentiary value on the findings of a commission of this nature, the judge sitting at the Magistrate Court would have been entitled to refuse to take the findings into consideration. However, the public impact of such testimonies would have helped to highlight the role a lack of effective witness protection scheme was playing in preventing the course of justice in relation to the case. Regrettably, in spite of previous promises, the AG rejected the proposal and the project was never implemented.

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. At the hearing held on November 29, 2006, he requested the Magistrate to take steps in order 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. ACF asked on several occasions for information on the protection measures to be implemented, however 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.

Thus, the different officials involved in the judicial procedures, recognised throughout the process the significance and possible consequences of the absence of witness protection measures. Unfortunately, they have failed to provide a real solution, and reassure witnesses, although concrete propositions were made. This failure had necessarily some major impacts on the case and its chances of success.

Negative impact on the case : the absence of evidence

The direct effect of the failed negotiations, related to witness protection, during the course of the case is eminently important. In the absence of reliable material evidence, the collection of testimonial evidence became crucial and, in the current context, it would not be surprising to see the ACF case follow the many that have passed before it close, due to a lack of evidence.

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. A state that initiates criminal investigations without guaranteeing the protection of people who suffered from, or are traumatized by, major violence is inappropriate. 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.

4. CONCLUSIONS OVER THE JUDICIAL PROCEDURES

In conclusion, ACF believes that the cumulative impact of a flawed police investigation and judicial process has made the identification of those responsible for the killings at the ACF Muttur base nearly impossible. The organisation fears that it will not be possible to initiate prosecutions under the terms of Sri Lanka's applicable laws and standards, based on the findings of the inquest. Having closely followed the court proceedings as well as the CID's investigation for over 18 months, ACF has come to the conclusion that the following fundamental principles of justice have been disregarded.

No appearance of independence and impartiality

The political intrusion into the judicial process has brought into question the independence and impartiality of the judicial officers in charge of the case as well as of the Sri Lankan judicial institutions. Although such practices are not by themselves a proof of guilt, they give the impression that there was a certain interest in influencing the course of the case.

Lack of transparency in the legal process

A series of ambiguous and unexplained decisions were taken by judicial and political officials that affected the transparency of the legal process. This leaves the impression that justice has not been served and shakes the confidence of the concerned groups and people in the process.

Failure to provide an effective investigation

Whether on purpose or by lack of competence or know-how, the Sri Lankan authorities failed to take the appropriate measures to exercise due diligence in investigating and redressing the harm caused to the victims' families. Regrettably, the investigation has proven to be ineffective in many ways and unsuccessful in bringing to justice those responsible for the Muttur massacre.

Under international law, all states have the positive obligation to provide an effective solution to major human rights violations. Regrettably, the flaws and difficulties presented in this report have led to the failure of the state to provide clear answers to the questions that surrounded the killing of ACF staff members. The organisation is convinced that the proceedings in the Magistrate Court will not be taken beyond the current stage, and that no one will be brought to justice for these murders.

COMPLAINT AT THE HUMAN RIGHTS COMMISSION

As set out in its constitutive act, the mandate of HRC has a broad range of functions. Among them, the Commission is mandated to investigate complaints alleging human rights violations. The HRC can conciliate and mediate, but does not have the power to give enforceable recommendations. Ultimately, the findings of the commissioners could be taken into consideration by the AG Department and consequently lead to criminal investigation and prosecution.

Recently, the independence and effectiveness of the HRC has been seriously questioned by members of the Sri Lankan civil society as well as by the international community. The institution has been accused of breaking the Paris Principles, which are widely accepted norms governing national human rights institutions. The most vigorous criticisms came after the appointments made by the President Rajapaksa in May 2006 of commissioners. These nominations disregarded a constitutional requirement concerning the required approval of the Constitutional Council. Since then, the reputation and independence of the institution has been shaken and its status downgraded in late 2007 by the International Coordinating Committee of National Institutions for the Promotion and Protection of Human Rights (the international organ that regulates national human rights commissions), from full participant to observer, which implies a restricted participation in international meetings.

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

1. EXAMINATION OF THE COMPLAINT

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

In a letter dated January 12, 2007, the HRC 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. Subsequently, ACF international staff members

were interviewed by an agent of the Commission. Deplorably, this was the only period during which the Commission showed any sign of activity.

Subsequently, ACF has repeatedly requested information on the state of the HRC investigation. During the course of the winter and spring of 2007, the organisation was told that the Commission's interim report would be made available ; however, more than a year later, ACF is still waiting for the promised reports despite repetitive requests.

In November 14, 2007, ACF was informed that because the matter was before a presidential commission 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. ACF has previously received unofficial information indicating that the HRC dropped the ACF case at

the beginning of the CoI investigation, despite a clear statutory duty of the HRC to inquire into cases inspite of investigation through other mechanisms.

2. OUTCOME OF THE INVESTIGATION

Due to the ongoing difficulty ACF has encountered in following the HRC inquiry process, ACF strongly doubts it will yield any concrete results.

The total lack of transparency of the HRC process with regard to ACF's complaint is extremely disturbing. Although we understand that the Commission is under no obligation to share findings on an on-going investigation, the prolonged and embarrassing silence ACF has faced in response to requests for information, suggests that concerns regarding the status of the investigation may be founded.

It remains unclear whether the HRC received the instruction, or took the initiative, to abandon its investigation into our case. In any event, ACF believes that the HRC had a statutory duty to inquire into our complaint and to share the outcome of its investigation, notwithstanding the appointment of a presidential commission. Moreover, it was clearly stated in the constituting act of the CoI that the appointment of the Commission was made "without prejudice to on-going investigations, inquiries, other legal process and legal proceedings"⁷. Regrettably, ACF feels that the HRC has not seriously proceeded with its complaints process and hence failed in its duty to efficiently address the ACF complaint, nor provide information on findings.

7. Proclamation by the President, November 3, 2006, P.O. No: CSA/10/3/8.

3. CONCLUSION OVER THE PROCEDURE AT THE HUMAN RIGHTS COMMISSION

After a year to follow the examination of the complaint lodged with the HRC, ACF based its conclusion on a single ground : the Sri Lankan national institution have intentionally and systematically failed to examine the ACF complaint.

Working on the assumption that the HRC 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.

Failure to investigate

This administrative mechanism was set out to address the general obligation to investigate allegations of human rights violations thoroughly and effectively. Here, ACF is of the opinion that the HRC has failed in its simple obligation to thoroughly investigate. Although some preliminary steps were taken by the Commission with regard to the case, ACF is of the opinion that the HRC 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 HRC has been blatantly silent, evasive and inactive.

PROCEDURES AT THE PRESIDENTIAL COMMISSION OF INQUIRY

In response to appeals of the international community for international human rights monitoring in Sri Lanka, the President Mahinda Rajapaksa announced an independent commission to probe abductions, enforced disappearances and unlawful killings in Sri Lanka. In order to reach a consensus, it was decided that the new commission would be formed of national and international experts. The CoI was officially appointed on November 3, 2006 by a Presidential Warrant⁸ 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 consists of eight commissioners whose work is observed by the International Independent Group of Eminent Persons (IIGEP), formed by 11 international legal experts. The CoI was initially appointed for a period of one year. However, as the initial mandate of the Commission was far from being completed at the beginning of November 2007, the President granted an extension of the Warrant.

Despite the fact that the reputation and credibility of the Sri Lankan commissions were tarnished by previous failures to address the recurring issue of impunity in the country, ACF welcomed the opportunity for further investigations to be made into the case. Since the beginning of the CoI's activity in early 2007, ACF has collaborated with the Commission 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 Commission.

The preliminary phase of the CoI "investigation" into the ACF case was made a priority ; it started in May and ended in October 2007. This preliminary phase, referred to as the investigation phase, consisted mainly of conducting *in camera* hearings. Unfortunately, access to this procedure has been refused to ACF representatives. Following the end of the *in camera* investigation, ACF requested that the Commission move to the public phase of the process. Soon after, the Commission publicly announced that it would begin the public inquiry into the ACF case and hearings were scheduled to begin on November 20, 2007 but the opening of the public sessions was postponed to an undetermined date. The public inquiry into the ACF case finally started on March 3, 2008.

ACF's concerns over the work of the Commission developed for several reasons pertaining to the mandate of the CoI and IIGEP, its proceedings as well as its witness protection program. It is however important to note that our analysis is not an extensive examination of the overall work of the CoI and focuses exclusively on the investigation related to the killing of the 17 humanitarian workers.

8. Proclamation by the President, November 3, 2006, P.O. No: CSA/10/3/8.

1. HYBRID FORMATION OF THE COMMISSION

The formation of an internationalised inquiry commission was a novelty in Sri Lanka. The two bodies, namely the CoI and the IIGEP, were vested with different mandates : on the one hand, the CoI was given the responsibility to directly inquire into 16 specific incidents and, on the other hand, the IIGEP was created to observe the investigations and inquiries conducted by the CoI and to assess how closely relevant international norms and standards were respected. Although the two mandates were apparently complementary, this mixed formation has not necessarily provided a greater credibility to the institution, and efficiency to its work. As a result of various issues raised in their public reports, the members of the IIGEP decided that their involvement in the work of the Commission had become irrelevant and consequently put an end to their mandate on March 31, 2008. The reasons for this ultimate decision will be explored in the next section of the report.

a. Mandate of the CoI

As stated in the Presidential Warrant establishing the competence of the CoI, 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 CoI has to present its findings and recommendations to the Sri Lankan government authorities.

The mandate of the CoI in the ACF case is therefore extremely broad. The members of the CoI are entitled to conduct a new investigation into the Muttur massacre as well as to examine the prior investigations conducted by the CID and the HRC. However, at the inception of the CoI, ACF had strong reservation regarding two aspects of the Commission’s mandate.

Firstly, the Commission has 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” (curiously, the version of the mandate outlined for the IIGEP specifies only national security and public order as grounds on which objections may be raised regarding the release of their observations). This peculiarity prevents the work of the Commission from being considered with the credibility that comes with open and transparent working practices.

Secondly, the Commission was established as a fact finding body and, as such, it lacks the power to enforce its recommendations and to prosecute. The *Commissions of Inquiry Act* of 1948 was enacted primarily to provide for small local inquiries concerning the administration of any governmental departments, or the conduct of any members of the public services. While it was suitable for that purpose, it was not meant for complex inquiries such as investigations into extra-judicial killings and is inadequate in that regard. On the contrary, the Commission functions purely as a body before which witnesses of crimes can present their versions of the violations in question. Prosecutions do 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. Recommendations from past such commissions in Sri Lanka have made the inadequacy of the process remit abundantly clear.

From the very outset, the chances of success and the credibility of the CoI were consequently affected by its mandate. However, as the investigation into the ACF case remain confidential and has not yet resulted in recommendations, ACF’s initial concerns over the mandate of the CoI were not unfounded. Indeed, much greater deficiencies in the functioning and proceedings of the CoI have affected its capacity to accomplish its mandate.

As it will be presented in the following section, ACF is now coming to the conclusion that, after a year of proceedings, the CoI has not fulfilled its mandate relating to the killing of the

17 ACF aid workers, and is not likely to reach any direct conclusion on the identity of those responsible. However, to clearly understand the

internal mechanics of the CoI, it is important to first examine the exact role carried out by the IIGEP in the functioning of the CoI.

b. Mandate of the IIGEP

The Presidential Warrant as well as the Invitation to the members of the IIGEP⁹ made provision of the IIGEP general mandate in the conduct of the CoI's investigations and inquiries. The main purpose of the Group in observing the work of the CoI 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 CoI and periodically report their observations. The CoI had the obligation to "conduct its investigation and inquiries in a manner that would enable [the IIGEP] to efficiently observe such investigations and inquiries".

An issue concerning the internal organisation of the IIGEP was raised by the Commission in the early stages of the investigation. As the experts chosen to form the Group were highly eminent and reputable (and therefore extremely busy with their respective careers), they could not observe the activities of the CoI from Sri Lanka on a full time basis. Their participation and interest were therefore insured by a team of assistants chosen to represent them. However, the fact that at times not one member of the IIGEP was present in Sri Lanka gave rise to strong criticisms from the members of the Commission. After having shared their concerns, the members of the IIGEP tried to improve their representation and to ensure their presence in Sri Lanka.

From the outset of the CoI activities, ACF deplored the very limited role given to the IIGEP. Ultimately, the mandate of the international experts prevented them from being more than 'mere observers'. More specifically, 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 CoI 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 investigation¹⁰. Given the history of past commission processes in Sri Lanka, which were held in secret whenever they concerned inquiries into particularly controversial extra-judicial killings, it was crucial for this Commission to be mindful of being open and transparent in their sessions. The AG and the CoI frequently released official responses at times countering the IIGEP analysis. Unfortunately, open dissensions arose as soon as the first statement was produced by the IIGEP in June 2007. Although such discussions could have been constructive, they created open tensions between the IIGEP, the CoI, the AG and the authorities, and have visibly reduced cooperation between the different bodies.

ACF believes that the CoI should have made a better use of the IIGEP critiques on the investigation the Muttur massacre. The IIGEP could have played an important role in supporting the CoI investigation by bringing in expertise from the relevant fields. Members of the IIGEP and their assistants were present at all stages of the procedures and have identified a series of crucial issues in the functioning of the CoI and in its proceedings. Regrettably, the Commission failed to seriously address these issues, throwing doubts on the credibility of the institution.

9. Invitation to serve as a Member of an International Independent Group of Eminent Persons, <http://www.iigep.org/mandate.htm>.

10. As provided in paragraph 11 of the Invitation.

2. EVOLUTION OF THE PROCEDURES

Although the procedures relating to the killing of the ACF aid workers was prioritised by the Commission, they started in May 2007, six months after their enactment. ACF made every possible effort to follow the process and collaborate with the Commission in all matters relevant to the fulfillment of its mandate.

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

Early in the process, the CoI 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. In addition, it 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 Commission to efficiently and publicly examine the ACF case.

In reaction to this decision, ACF sought permission from the CoI to attend these hearings held *in camera*. As a party directly affected by the matter under investigation, ACF believed that representatives of the organisation should have been entitled to attend the procedure held by the Commission. Furthermore, considering the organisation's interest in following the development of the case and its involvement in supporting the investigation, ACF understanding of the procedures and its collaboration with the work of the Commission, would have been facilitated. Regrettably, the CoI rejected ACF's request on two occasions.

The progress and development of the investigation was reported to the public by the CoI, the IIGEP and other concerned groups. The information received from these different sources, on the nature and state of the investigation, allowed ACF to follow the process, and draw conclusions on decisions and measures taken by the CoI and the efficiency of the investigation as a whole.

Questionable basis of the hearings

The division of the legal process in two distinct phases, with two different kinds of hearings, became official four days before the start of proceedings. This change was implemented through an amendment to the Rules of Procedure of the Investigation Unit. The modification passed on May 8, 2007 was specifically designed to modify

the previous procedures by adding the following clause (8) ;

"Notwithstanding anything to the contrary in these rules, during the course of an investigation into any incident, the Commission may directly interview and record the statement of any person for the purpose of (a) facilitating investigations by the Investigation Unit, (b) arriving at a preliminary view on facts and circumstances pertaining to any matter relevant to the incident being investigated into by the Commission, and (c) considering the nature of investigations conducted into such incident by the routine competent authorities".

Soon after, ACF learned that these interviews conducted in the context of the "investigation" would not be accessible to the public.

This amendment has impacted proceedings in ways that was not planned when the *Commission of Inquiry Act* was adopted. The Act was not effectively applied to the hearing because the legislation consistently referred to the term "inquiry" rather than "investigation". For example, section 16 of the Act provides that every person "who is in any way implicated or concerned in the matter under inquiry, shall be entitled to be represented by one or more attorney-at-law at the whole of the inquiry". ACF was refused this representation because the hearings held *in camera* were not part of the "inquiry". Similarly, the provision of the Presidential Warrant that states "the sessions of inquiries of the *Commission of Inquiry*, shall be open to the public" was not, according to the CoI, applicable to the investigative phase.

The creation of this phase allowed the authorities, the Commissioners and the commission'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. As a result, this convoluted and difficult process has adversely affected the credibility of the CoI as well as the transparency of the process, to the detriment of justice.

Intrusion of the AG Department in the procedures

The CoI has also raised cause for concern from observers by granting the AG Department a central role in the investigative procedures. The Panel of Counsel was created within the CoI, comprising of six members of the AG Department and two independent counsels. The mandate of the Panel is to give advice, mainly to the CoI Investigation Unit, on how to proceed with the investigation. 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 CoI process is disturbing. In addition, as state officials, the representatives of the AG do not provide the CoI 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 CoI failed to respond and address this lack of independence and impartiality.

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 are clearly in conflict. The intrusive role of the AG has strengthened opinions that the CoI is neither independent nor impartial, and is incapable of providing the neutrality that is required and expected from a Presidential Commission.

To add to the incongruity of the CoI and the authorities' position, the IIGEP reported in a statement dated December 18, 2007, that a Presidential letter was sent to the Group clarifying the mandate of the CoI to investigate the conduct of the AG. The letter confirmed that the CoI does not carry the duty "in any way to consider, scrutinise, monitor, investigate or inquire into the conduct of the Attorney General or any of his officers with regards to or in relation to any investigation already conducted into the relevant incidents" while allowing the Commission to "continue to obtain the assistance of officers of the Attorney General's Department"¹¹. Although the IIGEP later received the assurance that this clarification "does not have the effect of preventing the Commission from examining the Attorney General or his officers on any relevant question arising in the investigations and inquiries", such political interference clearly

impedes the independence of the institution and confuses the roles of relevant parties. It also tends to explain and clarify the reason why the AG's involvement in the different original investigations was not examined by the CoI in the early phases of the process.

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 is therefore in a situation where he has guided the CID in the early stages of the criminal investigation related to the Muttur massacre and is now in charge of leading evidence pertaining to the same crime in front of the CoI. Consequently, his mandate includes investigating his own participation in the original investigation.

Thus, measures have not been taken by the CoI to ensure that the investigation evolves independently from State interference. The role of the IIGEP was to raise the issues pertaining to the non-respect of relevant basic international norms and standards (such as impartiality and independence) and the CoI has failed to react to its critiques and warnings. Instead, the Commission has strengthened its position and rejected the recommendations that could have restored the CoI's credibility and appearance of neutrality.

Efficiency of the investigation process into the ACF case

ACF representatives were not granted access to the hearings by the CoI, and the organisation is not aware of the progresses made by the CoI during this period. The organisation understands that the CoI made several field visits to Muttur and Trincomalee and heard several witnesses ; however ACF is not aware of other steps or initiatives taken by the CoI during the investigative phase of the process. In spite of this lack of information, ACF has reasons to believe that progress made by the Commission during this first investigation phase is limited and carries serious concerns over the efficiency of the process.

The primary concern is based on the fact that the CoI 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

11. Public Statement, Ref. IIGEP-PS-004-2007, December 19, 2007, <http://www.iigep.org/press-releases.htm>.

case after the closing of the *in camera* hearings. Reports have drawn attention to the numerous delays intrinsic to the process and, although there have been an improvement on this specific aspect over the months, the delays have certainly undermined the CoI's credibility and capacity to address the issue in a timely manner.

Furthermore, ACF became gradually 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. From these comments, it clearly appears that the members of the CoI do not have a clear strategy or plan to support and guide the investigation they were mandated to conduct.

As it was confidential, the CoI refused to provide ACF with an investigation strategy or a general work plan. The IIGEP have also reported on the failure of the CoI to provide them with a detailed work plan regarding the investigation into the ACF case. From an ACF perspective it seems clear that the CoI worked on the investigation, held hearings during a six months period and gathered a list of documents related to the affair without previously establishing a case strategy. Considering the months of preparation available before the opening of the investigation in May 2007, the members of the Commission should have established an investigation plan in order to allow them to complete their mandate in a timely manner. For

it to be efficient and potentially successful, the investigation conducted by the CoI should have focused on the CID failures and operated in a way as to fill the numerous gaps left in the original investigation.

Instead, the Commission failed at the same instance as the CID ; it spent a considerable amount of time establishing the context of the crime and following peripheral issues (such as re-questioning the same witnesses several times) likely to sidetrack the investigation. In addition, the members of the CoI 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 gives the CoI'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 battle.

There was no apparent outcome following closing of the investigation into the killing of the ACF aid workers. In an attempt to push the Commission to gain more relevant information pertaining to the case, ACF made two official requests to the CoI asking that they use their remit to conduct a public inquiry into the ACF killings. After much stagnation, the CoI agreed to this request and announced the opening of the inquiry at the end of February 2008.

b. Core of the process : the public inquiry

The CoI gave a series of official reasons for the postponement of the opening of the public inquiry into the ACF case. The Commission alleged that they needed an amendment to the *Commission of Inquiry Act* to proceed, as they wanted to modify the fixed minimum number of commissioners necessary to proceed with the inquiry, and to ratify the two stages inquiry process into law. However, the Act in question does not stipulate rules related to quorum. In addition, the urgent need to demarcate a line between the investigation and the inquiry was in a way, suspicious. ACF is concerned that the CoI was simply not ready to publicly proceed as the Commission seemed in no way able to efficiently address the issues related to such a complex case.

The inquiry finally started on March 3, 2008 and ACF actively followed the proceedings throughout March. The organisation 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 we 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 is however 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 on 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 CoI to provide a solution to the recurrent

victims and witness protection issue (see below), contributed to ACF's decision to bring an end to its involvement in the CoI investigation 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 Commission to efficiently fulfill 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 in order for them to come forward and give evidence.

To favour the process, the VWAPU was formed within the CoI 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. Even if the adoption of such an instrument is a considerable breakthrough in the Sri Lankan context, its content is in no way innovative as it addresses the issue in a broad and general manner. The scheme provides little in the way of the implementation of the general principles of protection as it fails to provide a range of specific protection measures available to potential victims and witnesses.

During the investigative phase, ACF offered collaborative help to the VWAPU as the organisation was in contact with potential witnesses directly linked to the event. Although ACF did advocate for the protection of some of the people who were requested to give information to the CoI, the Unit ignored the organisation's opinion as well as some of the witnesses' requests. Instead, summonses were sent by the Commission to potential witnesses from Muttur and Trincomalee without supporting information, leaving many of them concerned for their safety. The most basic assistance was not provided to those witnesses that were clearly afraid, on serious and reasonable grounds, to give evidence to the CoI. Regrettably, the decisions to provide assistance and protection to a given witness appeared highly subjective and the assessment criterias rather vague. In fact, the

Unit has not persuaded us of its ability to evaluate the risks incurred by a witness, or of its capacity to provide concrete solutions in generally assisting and protecting people involved in the case.

After a series of such problematic events, ACF refused the offer of the Unit to serve as contact point between some witnesses and the CoI as we had no confidence left in the process and were increasingly concerned by the lack of know-how and professionalism of the CoI with regard to the witness protection. Although the organisation has continued to provide the CoI with the information requested (mainly concerning our former staff members), we could not continue to openly support the efforts of the Unit without concrete assurances of protection. 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. ACF understood there were talks with different embassies for extreme protection cases; however, as was the case in the police investigation, neither the CoI nor the VWAPU has been able to explain in concrete terms the assistance and protection available to witnesses. 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 the fact that the CoI has not examined the initial criminal investigation led by the CID, the collection of witness statements became the core of the CoI's activities. In a country where the lives of people testifying in cases of human rights violation are at stake, ACF is of the opinion that no compromise should be taken with regard to protection. Although the activities undertaken by the CoI are undeniably a positive step towards implementation of a national protection scheme, the Commission still has a lot to do before they reach an acceptable level of professionalism and efficiency.

4. DEPARTURE OF THE IIGEP

At the beginning of March 2008, the IIGEP announced that they intended to withdraw from Presidential Commission. In a public statement dated March 6, 2008, 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 organisation 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 Commission¹².”

ACF took note of this decision in a public statement made at the Human Rights Council in Geneva on March 13, 2008.

In light of the departure of the IIGEP, ACF has serious concerns regarding any future possibility of national government identifying those people responsible for the Muttur massacre. The presence of the IIGEP was one of the sole conditions ensuring the appropriate functioning of the CoI and with this layer of international observation gone, ACF no longer believes in the possible success of the Presidential Commission.

5. CONCLUSIONS REGARDING THE WORK OF THE COMMISSION OF INQUIRY

One and a half year after the appointment of the CoI, several questions must be raised regarding the outcome of the investigation and inquiry into the Muttur massacre. The Commission has not fulfilled its mandate efficiently or in a timely manner, neither has it been able to meet the challenges that led to its initial inception. The continuous dissatisfaction of the international observers tasked with observing the Commissions work indicates that the flaws they highlighted are ingrained in the process. Sadly, ACF can only conclude that the CoI is not able to effectively investigate the killings and that the identification of those responsible for the killings by the CoI is nearly impossible. The inquiry is actually likely to fail in the same way as the initial police investigation and the complaint to the HRC.

No appearance of independence

The extensive intrusion of the AG Department in the procedures before the CoI has adversely affected the independence of the institution. By

allowing a state actor to lead evidence and to guide the investigation, the CoI has withdrawn any semblance of independence from the process. Moreover, the CoI has failed to respond to the recommendations regarding independence as outlined by the IIGEP.

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 CoI has tarnished this principle and reduced the public confidence in the process. Again, this behaviour leaves the impression that justice is not being served. succeeded in delivering an investigative procedure that can identify those responsible and redress the harm caused to the victims’ families. The much delayed Inquiry conducted in front of the Commission proved to be ineffective, in part, because of the imbalance of power between the different parties represented in front of the CoI.

12. Public Statement, Ref. IIGEP-PS-005-2008, March 6, 2008, <http://www.iigep.org/press-releases.htm>.

Failure to provide an effective investigation and inquiry

By failing to reduce the delays in the investigation, to summon servicemen and, most importantly, to examine the original investigation conducted by the CID, the CoI has not succeeded in delivering an investigative procedure that can identify those responsible and redress the harm caused to the victims' families. The much delayed inquiry conducted in front of the Commission proved to be ineffective, in part, because of the imbalance of power between the different parties represented in front of the CoI.

Lack of efficient witness protection

Unlike the Magistrate Court, the CoI was given the responsibility of finding a solution to the problems raised by a lack of national protection scheme. In spite of indications of action, the CoI has not been able to implement an effective witness protection program. Witnesses that have been summoned have not been offered assistance and at times the methods used to summons witnesses have triggered fear amongst those due to testify. This has substantially reduced the public confidence in the Commission.

Failure to respect the IIGEP role

Throughout the process, the IIGEP have respected their mandate and given well documented recommendations related to the failure of the CoI to abide by international norms and standards pertaining to investigations and inquiries. However, much of the crucial advice given to the Commission has been ignored, giving rise to questions on the actual usefulness and purpose of the IIGEP in the process. Ultimately, the unwillingness of the CoI to support the work of the IIGEP led to the conclusion of the IIGEP observation and monitoring role.

Participation in the CoI proceedings has become a procedural fight rather than a search for justice, hence, ACF believes it is finally time to refocus the debate on the core of the issue ; the identification of those responsible for the killings at the ACF Muttur base. Notwithstanding the strong criticisms outlined in this report, ACF hopes that the CoI will leave a legacy of international accountability and the work conducted with the IIGEP will contribution to the fight against recurrent human rights violations in the country.

CONCLUSION

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 corroborates this extensive problem. Having followed three domestic remedies available to ACF for over 18 months, the organisation is now convinced that none of these avenues are likely to lead to the truth behind the killings that took place at the base in Muttur.

The Sri Lankan government has failed in its obligations under international human rights laws to conduct a thorough investigation into the Muttur massacre and hence has been unable to hold accountable those responsible. Moreover, the constant interference from the political authorities, in the justice process, has given the impression that those in power have an interest in monitoring and guiding the outcome of the investigation.

The crimes committed against ACF staff are not unique to the wider humanitarian community and so ACF has decided to continue its work to challenge impunity from outside of the country. ACF has taken the decision to close its mission in Sri Lanka, in order to be free to openly address the issues raised throughout this report. Bearing in

mind the interests of the victims of this crime, we rely on the international community to represent their interest in the country. Unveiling the truth about the killing of our employees will remain our utmost priority but we are now convinced that stronger measures need to be taken. First and foremost ACF calls for an international investigation into the Muttur massacre in order to officially identify the person(s) responsible for the commission of this outrageous crime. At the same time, the organisation will continue to support the different initiatives that promote the presence of an international human rights monitoring body in Sri Lanka.

To successfully achieve this aim, and eventually uncover the truth behind the massacre, the organisation will work to mobilise support from the humanitarian and international communities as well as the Sri Lankan civil society. While ACF pursues its fight against the impunity of those responsible for the killing of the 17 humanitarian workers, the organisation hopes that cooperation between the various actors involved in providing humanitarian aid continues to grow. In doing so, state authorities and those involved in armed conflict will understand that the killing of civilians and humanitarian workers will not go unpunished.

ABBREVIATIONS

ACF	Action contre la Faim – Action Against Hunger
AG	Attorney General
CHA	Consortium of Humanitarian Agencies
CID	Criminal Investigation Department
CoI	Presidential Commission of Inquiry
GA	Government Analyst
HRC	Human Rights Commission
ICRC	International Committee of the Red Cross
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
SLA	Sri Lankan Army
SLMM	Sri Lanka Monitoring Mission
VWAPU	Victims and Witnesses Assistance and Protection Unit



www.actioncontrelafaim.org
www.actioncontrelafaim.ca



www.accioncontraelhambre.org



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