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ICJ Condemns Misuse of Anti-Terrorism Laws to Prosecute Sri Lankan Journalist, J. S. Tissainayagam

11 September 2009

Today the International Commission of Jurists (ICJ) released its *Trial Observation Report* (http://www.icj.org/IMG/ICJ_Tissa_Trial_Observation_Report_11_Sept_09.pdf) regarding proceedings before the Colombo High Court in the prosecution of J.S. Tissainayagam, a Tamil journalist. On 31 August 2009, Mr Tissainayagam was convicted under anti-terrorism laws and sentenced by Judge Deepali Wijesundara to 20 years "rigorous imprisonment."

This is the first time that anti-terrorism laws have been used in Sri Lanka to prosecute and convict a journalist for exercising freedom of expression, despite these laws being on the books for decades.

The ICJ appreciates the cooperation of the Government of Sri Lanka and the presiding judicial officer in enabling the Observers to attend the trial, meet with the Attorney General and with Mr Tissainayagam and his counsel, and generally conduct their work without interference.

The *Trial Observation Report* focuses on describing the procedural aspects of the case and does not include a substantive assessment of the anti-terrorism laws. It raises a number of concerns regarding fair trial standards, including the judge's interlocutory decision to allow into evidence what counsel for Mr Tissainayagam described as a forced confession, and subsequent denial of the accused's right to appeal this decision. The Observers also expressed concern that Judge Wijesundara is the sister of the officer who signed the Indictment against Mr. Tissainayagam.

While outside the general scope of this report, the Observers raised broader concerns about the Government's unprecedented decision to prosecute Mr Tissainayagam on terrorism charges, especially in the context of attacks and threats of attacks against journalists and critics of Government policy, including public accusations by persons associated with the Government that equate such critics, and the lawyers representing them, as terrorists and traitors, for example, in commentaries posted on an official website of the Ministry of Defence, Public Security, Law and Order.

The ICJ has previously highlighted the dangers to rule of law posed by Sri Lanka's broad array of draconian emergency laws (see *Briefing Paper: Sri Lanka's Emergency Laws* (March 2009), http://www.icj.org/news.php?id_article=4475&lang=en). These laws give sweeping powers to the Government to criminalize dissent and paint otherwise lawful speech as terrorism, potentially undermining the foundations of rule of law and democratic governance in the nation. The case of Mr Tissainayagam illustrates this danger.

"The real damage of the Tissainayagam case does not lie only in one judge's interpretation of the law, but in the fact that the legal system is now seen as carrying out a political agenda of criminalizing anti-Government speech," stated Roger Normand, ICJ Asia-Pacific Director. "That the Government has chosen to aggressively pursue this case against a prominent Tamil journalist even after the conclusion of the military conflict sends a chilling message of political intolerance and casts doubt on its commitment to justice and national reconciliation."

The ICJ is an international non-governmental organisation comprising sixty of the world's most eminent jurists and has a worldwide network of national sections and affiliated organisations

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Mr. Tissainayagam was arrested by police from the Terrorism Investigation Division on 7 March 2008. Three months later, on 25 August, he was charged with three counts under the *Prevention of Terrorism Act 1979* (PTA) and the *Emergency Regulations 2006* (ER 2006), in relation to his criticism of the Sri Lankan Army's treatment of civilians in two articles published in *North Eastern Monthly* magazine in June 2006. Following High Court proceedings observed by the ICJ in 2008 and 2009, Mr. Tissainayagam was found guilty on 31 August 2009 of two counts of intending to "cause communal disharmony" (PTA, s.2), with mandatory minimum sentence of five years each, and one count of receipt of monies "in the furtherance of any act of terrorism" (ER 2006, reg.6), with mandatory minimum sentence of 10 years. In total he was sentenced to 20 years rigorous imprisonment.

"The protection of national security and public order is a legitimate aim, but the Government in this case relies on emergency and anti-terrorism laws that are vague and over-reaching, when international law requires that they be precise and strictly necessary," emphasized Wilder Tayler, Acting Secretary-General of the ICJ. "Where the Government's intent is to punish expression, as in the case of Mr. Tissainayagam, there must be a direct and immediate connection between the expression and likely violence and the intent to cause such violence."

Sri Lanka is a state party to the International Covenant on Civil and Political Rights. Restrictions on the right to freedom of expression on the ground of national security, as contained in Article 19 (3) ICCPR, must be:

- provided by law, with sufficient precision to enable citizens to comply with the law;
- necessary to protect a legitimate national security interest;
- the least restrictive means possible to protect that interest; and,
- compatible with democratic principles.

The ICJ is deeply concerned that the case of Mr. Tissainayagam indicates that the integrity of Sri Lanka's legal system is at risk of being undermined through an unwarranted reliance on emergency laws. Criminalizing written expression without evidence of resulting violence, equating terrorism with an intention to cause feelings of ill will, stripping accused persons of basic rights, admitting into evidence confessions while in police custody and shifting the burden to the accused to prove coercion, mandating harsh minimum sentences – all of these factors pose a threat to the rights of citizens to express controversial views, a pillar of a law-based democratic society.

"The independence and professionalism that has characterized the Sri Lankan judiciary for decades is being undermined by reliance on overbroad security laws that threaten fundamental rights," stated Roger Normand, ICJ Asia-Pacific Director. "At the heart of this case is whether the Government of Sri Lanka will abide by the rule 'of' law or choose to rule 'by' law through unjust measures exemplified in the PTA and Emergency Regulations 2006."

During the brutal decades-long war, the Liberation Tigers of Tamil Eelam practiced violent suppression of dissent. To effect genuine national reconciliation, the ICJ calls on the Government to reverse the attitudes of distrust between communities by relying on rule of law to uphold basic freedoms on an equal basis for all citizens, rather than using emergency laws to cast a wider anti-terrorism net.

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Legal background:

The ICJ is concerned that Sri Lanka's emergency laws are so broad and vague as to leave people uncertain whether their acts might be considered criminal. This creates a climate of fear and uncertainty for citizens in their relations with each other and the Government, and violates the fundamental principle of legality.

For example, the *PTA* criminalizes as a terrorist activity any speech that can be construed as intending to "cause communal disharmony or feelings of ill-will or hostility" (*PTA*, s.2(1)(h)) without requiring that the speech be reasonably expected to incite or result in violence or acts of terrorism. Mandatory minimum sentences of five years are imposed for each separate instance of speech leading to conviction on these grounds (*PTA*, s. 2(2)(ii)). It is evident that in a bitter civil conflict as has occurred in Sri Lanka, many forms of speech can result in feelings of ill will.

Contrary to Sri Lankan law of evidence, the *PTA* also allows confessions given under police custody to be admitted into evidence, and shifts the burden to the accused to prove that the confession was given involuntarily – an extremely difficult burden to meet without corroborating evidence (*PTA*, s. 16).

Vague and sweeping powers, such as those contained in the *PTA* and the *Emergency Regulations 2006*, undermine legitimate political dissent and media discussion. The media and individual expression should not be suppressed because of perceived dangers that are abstract, remote or hypothetical. Even in times of crisis, freedom of expression, and of the media, are vital to allow open, informed and critical reflection in a democratic society.

According to the *Johannesburg Principles*, an authoritative interpretation of international law on free speech, where laws purport to punish expression as a threat to national security, the Government must show a "direct and immediate connection" between an expression that is "intended to incite imminent violence" and the "likelihood or occurrence of such violence" (*Principle 6*).

Even in a lawfully proclaimed state of emergency that threatens the life of the nation, a state may impose restrictions on freedom of expression only to the extent strictly required by the exigencies of the situation, and only so long as they are not inconsistent with other obligations under international law.

One danger of relying on emergency laws is the pernicious effect of these laws coming to influence the regular criminal justice system. This was highlighted in a survey of global responses to terrorism by panel of eminent jurists convened by the ICJ. The report, *Assessing Damage, Urging Action* (16 February 2009) (http://www.icj.org/news.php3?id_article=4536&lang=en), noted the "risk of seepage of special laws into normal procedures and practices" and warned that "special counter-terrorist legislation, introduced for a short term emergency, all too easily becomes entrenched and has an insidious impact on the rule of law more generally" (p 7).