



INTERNATIONAL
COMMISSION
OF JURISTS

**TRIAL OBSERVATION REPORT
REGARDING PROCEEDING
BEFORE THE HIGH COURT OF COLOMBO,
SRI LANKA
BROUGHT AGAINST
MR J.S. TISSAINAYAGAM**

11 September 2009

OBSERVATION MISSION TO SRI LANKA, 2008 and 2009
TO THE PROCEEDINGS BEFORE THE HIGH COURT OF SRI LANKA BROUGHT AGAINST
THE DEFENDANT MR JAYAPRAKASH SITTAMPALAM TISSAINAYAGAM

TRIAL OBSERVATION REPORT
3 SEPTEMBER 2009
(WITH ANNEXURE A)

This is a summary to the International Commission of Jurists of reports of a number of the Observers appointed by the ICJ for the Observation Mission to Sri Lanka in 2008 and 2009 to observe the High Court Trial. However, none of the individual Observers ought to be considered as the author of this Trial Observation Report.

Observation Mission Commissioned

1. The International Commission of Jurists in 2008 and 2009 commissioned lawyers resident in Australia (the “**Observers**”) to travel to Sri Lanka to observe the trial conducted in the High Court of Sri Lanka Case Number 4425/2008 (the “**High Court Trial**”) brought against the defendant Mr Jayaprakash Sittampalam TISSAINAYAGAM (“**Mr Tissainayagam**”), a Sri Lankan national and journalist. The High Court Trial commenced in September and October 2008, the hearing having been expedited. The Observers¹ attended the High Court Trial on the following dates:
 - (a) 5-7 November 2008;
 - (b) 23, 26 and 27 January 2009;
 - (c) 23, 24 and 27 March 2009;
 - (d) 6-7 May 2009; and
 - (e) 15 June 2009.
2. On 31 August 2009, for the first time in Sri Lanka’s history, a journalist was convicted and sentenced under terrorism laws directly on the basis of his published writing. Two of Mr. Tissainayagam’s 2006 articles were critical of the Government’s alleged treatment of civilians. The High Court of Colombo gave Mr. Tissainayagam a sentence of 20 years of “rigorous imprisonment.”
3. This report focuses exclusively on proceedings and procedures of the High Court and does not analyse the legality of anti-terrorism laws that are the subject of an ICJ report release in March 2009.²
4. The Observers note, however, that the substantive provisions used to prosecute Mr. Tissainayagam raise rule of law and human rights issues that are outside the scope of

¹ The Observers attended the High Court Trial:

- (a) on 5-7 November 2008 (Murugan Thangaraj, Barrister and Member of the New South Wales’ Bar, Sydney Australia);
- (b) on 23, 26 and 27 January 2009 (Harry G. Shore, Senior Counsel and Member of the New South Wales’ Bar, Sydney Australia);
- (c) on 23, 24 and 27 March 2009 (Robert Dubler, Senior Counsel and Member of the New South Wales’ Bar, Sydney Australia);
- (d) on 6-7 May 2009 (Robert White, Barrister (England & Wales) and Solicitor of the Supreme Court of New South Wales, Australia); and
- (e) on 15 June 2009 (Catherine Mathews, Solicitor of the Supreme Court of New South Wales, the High Court of Australia and the Supreme Court of Bermuda).

² *Sri Lanka Briefing Paper: Emergency Laws and International Standards*, ICJ, March 2009.
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this report, in particular whether laws intending for “terrorism” and security issues ought be invoked by the government to prosecute journalists for written expression.

The High Court Trial in Sri Lanka

5. The High Court Trial was concluded on 31 August 2009 with the determination of the Court (in summary) as follows:
 - (i) Mr Tissainayagam found guilty of Charge 1 and sentenced to five (5) years’ imprisonment;
 - (ii) Mr Tissainayagam found guilty of Charge 2 and sentenced to five (5) years’ imprisonment; and
 - (iii) Mr Tissainayagam found guilty of Charge 3 and sentenced to ten (10) years’ imprisonment.
6. The terms of imprisonment are to be served under Sri Lankan law as “Rigorous Imprisonment” and are not to be served concurrently, with the effect that Mr Tissainayagam has been sentenced to serve twenty (20) years Rigorous Imprisonment. The terms of imprisonment imposed at sentencing on 31 August 2009 is the punishment intended by the Court to reflect the charges successfully made by the prosecution.
7. It has also been reported³ that the term of imprisonment was the minimum sentence available to the Court. Without an opportunity to review the judgment of the Court, it is not known whether the sentence is the minimum available according to Sri Lankan law.
8. The length of the sentence arises from the successful prosecution Mr Tissainayagam not under Sri Lankan criminal law but pursuant to the Sri Lankan laws against terrorism, in this case arising out of the publication by Mr Tissainayagam between June 2006 and June 2007 of magazine articles in his role as a journalist and the contributing or collecting or obtaining of information relating to or donating funds for the purpose of terrorism.
9. A copy of a written judgment of the Court for the judgment delivered 31 August 2009 is not presently available.
10. It is not presently known if Mr Tissainayagam is to lodge an appeal, but an appeal seems likely. A number of reports have stated that an appeal is to be lodged. It is understood that by Mr Tissainayagam is entitled to appeal the outcome of the High Court Trial in addition to judgments delivered during the High Court Trial. It is also understood that by Mr Tissainayagam is entitled to make a request to the President of Sri Lanka for a pardon.
11. During their stay in Colombo, each of the Observers attended meetings variously with defence counsel representing Mr Tissainayagam, senior state counsel (including the Attorney-General) from the Sri Lankan Attorney-General’s Department, other members of the Sri Lankan legal profession (appearing in matters unrelated to the High Court Trial), representatives of government and non-government organisations in Sri Lanka and members of the public.

³ See media report of Reuters Agency published 31 August 2009, found at <http://www.reuters.com/article/topNews/idUSTRE57U15U20090831>

12. Documents obtained by the Observers and in particular English translations of the Indictment and the magazine articles written by Mr Tissainayagam and reproduced in the Indictment are assumed to be accurate.
13. This summary of the Observers' reports (the "**Summary Report**") to the International Commission of Jurists is intended as a summary of the observations made when attending the High Court Trial, the factual circumstances and the proceedings before the Court.

The Proceedings in the High Court Trial

14. The High Court Trial arose from charges laid on or about 25 August 2008 against Mr Tissainayagam for offences under the Sri Lankan Prevention of Terrorism Act 1979, alleged to have occurred from June 2006 (with the publication of two articles) and thereafter for the receipt of monies.
15. Mr Tissainayagam was detained by the Police in Sri Lanka on about 7 March 2008 and has remained in custody since that time.
16. It is reported that the High Court Trial commenced in September or October 2008 and, after hearings conducted over a range of days since that time, was concluded on 31 August 2009, the result of which was the conviction of Mr Tissainayagam on each of Charge 1, Charge 2 and Charge 3, for which he has been sentenced to a total of twenty (20) year's Rigorous Imprisonment. As noted above, it is not presently known whether any appeal shall be lodged by Mr Tissainayagam, nor the likely time frame for any appeal.
17. A number of the Observers in separate conferences met with Mr Vettivel Jasikaran ("**Mr Jasikaran**"), a man also charged with offences in Sri Lanka who, with his wife Vadivel Valarmathi, has been in custody since 6 March 2008. Charges brought against Mr Jasikaran and his wife are pending in Court proceedings in Sri Lanka (the "**Jasikaran Trial**") and, in consideration of matters of *sub judice*, are not intended to be addressed in any detail in this Summary Report. It is noted however, that the Jasikaran Trial has not proceeded at the same pace as the High Court Trial and it seems likely to be some time before the Jasikaran Trial is concluded, during which time Mr Jasikaran and his wife Vadivel Valarmathi remain in custody.

Rule of Law Issues related to Procedures, Proceedings and the Environment of the Trial

18. In summary, some elements of the High Court Trial give rise to the following Rule of Law issues:
 - (a) the procedure and proceedings in the High Court Trial, including the unavailability of the Interlocutory Judgment before the expiration of the 14 day appeal period;
 - (b) criticism of the presiding judicial officer in the High Court Trial, including that she is the sister of the officer who signed the Indictment against Mr Tissainayagam (and that the officer who signed the Indictment against Mr Tissainayagam is the prosecutor in the Jasikaran Trial, being conducted before a different judicial officer);
 - (c) criticism of the Sri Lankan government concerning the prosecution of Mr Tissainayagam in the High Court Trial (particularly the question of the care taken in deciding to prosecute under terrorism laws, which laws offer procedural

- advantages to the prosecution by reducing or reversing the onus of proof required to meet elements of the charge);
- (d) the prosecution of Mr Tissainayagam in the High Court Trial for allegedly obtaining information to be used by or provided to a “war crimes tribunal”;
 - (e) the gaol conditions for Mr Tissainayagam, including access to legal representation;
 - (f) reporting of the High Court Trial (including web publications of the Sri Lankan Department of Defence, Public Security and Law and Order during the course of the High Court Trial);
 - (g) attacks and threats of attacks on journalists in Sri Lanka, in breach of the Sri Lankan constitutional right to free speech;
 - (h) the proceedings in the Jasikaran Trial; and
 - (i) the gaol conditions for Mr Jasikaran and his wife Vadivel Valarmathi, including access to legal representation.
19. There is a Sri Lankan newspaper report published on 31 August 2009⁴ that the Power Minister of Sri Lanka Mahindananda Aluthgamage announced on 30 August 2009 that the Presidential election shall be conducted at the end of 2009.

Background

20. In summary, the individual Observers became aware of some or all of the following:
- 20.1 Mr Tissainayagam is an experienced Sri Lankan journalist of Tamil ethnicity. He is married and has lived and worked in Sri Lanka, including as a journalist for English language newspapers in Sri Lanka and internationally.
 - 20.2 Mr Tissainayagam’s father was a public servant for 40 years and served at the Sri Lankan Department of Information, retiring as its Director. He thereafter worked in the Prime Minister’s office as an Assistant Secretary and was the speech writer to Prime Minister Premadasa.
 - 20.3 After high school, Mr Tissainayagam went to Peradeniya University and studied English. His contemporaries there were from different ethnic background. Whilst a Tamil, his first language is English. Although he can speak Tamil, Mr Tissainayagam is not fluent in that language. Mr Tissainayagam is not fluent in the Sinhala language.
 - 20.4 In 1987 Mr Tissainayagam joined *The Sunday Times* from university, and later worked as a journalist in a few English language national newspapers.

Charges Against Mr Tissainayagam

- 20.5 Mr Tissainayagam was arrested on about 7 March 2008 by the Sri Lankan Terrorist Investigation Division (“**TID**”) and has been held in custody since that time. Mr Tissainayagam was first charged on about 25 August 2008, with three counts or charges. The first two charges relate to two articles written in 2006 (the “**2006 Articles**”) and published in the *North Eastern Monthly* magazine during a period when an official ceasefire agreement had been secured, arising from the 2002 Norwegian-government sponsored agreement (the “**Ceasefire Agreement**”). The indictment extracts the following from the 2006 Articles, as set out in Schedule “X” (English translation):

⁴ See *The Island* newspaper, at <http://www.island.lk/2009/08/31/news4.html>.
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'Providing security to Tamils now will define northeastern politics of the future ... It is fairly obvious that the government is not going to offer them any protections. In fact it is the state security forces that are the main perpetrator of the killings.'

'With no military options, Govt. buys time by offering watered-down devolution ... Such offences against the civilians are accompanied by attempts to starve the population by refusing them food as well as medicines and fuel, with the hope of driving out the people of Valahari and depopulating it. As this story is being written, Valahari is being subject to intense shelling and aerial bombardment.'

- 20.6 The third charge is brought pursuant to a general provision of the Emergency Regulations. The charge is particularised as the receipt of funds which were used to publish information and is more fully referred to below.

Arrest of Mr Tissainayagam

- 20.7 On 6 March 2008, officers of the Sri Lankan TID searched the offices of a Mr Jasikaran. That night Mr Jasikaran and his wife Mrs Valarmathi were taken into custody. They remain in custody and their trial commenced on 24 November 2008. Mr Jasikaran⁵ and his wife have been charged under the same provisions that Mr Tissainayagam has been charged under, on the basis that they 'aided and abetted' Mr Tissainayagam in publishing the 2006 Articles.

- 20.8 On 7 March 2008 Mr Tissainayagam went to the TID to enquire after Mr Jasikaran and Mrs Valarmathi. Mr Tissainayagam was then questioned by TID police and placed in custody⁶. His home was subsequently searched.

- 20.9 Mr Tissainayagam was charged on 25 August 2008 under the Prevention of Terrorism (Temporary Provisions) Act 1979 (the "Prevention of Terrorism Act 1979"):

'by words either spoken or intended to be read or by signs or by visible representations or otherwise causes or intends to cause commission of acts of violence or religious, racial or communal disharmony or feelings of ill-will or hostility between different communities or racial or religious groups'

and the Emergency Regulations, being offences allegedly arising from a conspiracy between Mr Tissainayagam and persons unknown to the prosecution to commit the offence alleged.

- 20.10 On 9 September 2008 the charges were amended to remove an allegation of discrediting the government. The charges now essentially assert that the two 2006 Articles would create ethnic disharmony and are in the following terms (English translation):

1. This complaint states that in Colombo, which is within the jurisdiction of this court during the period between 1st June 2006 and 1st June 2007, the accused together with unknown persons committed an offence or abetted the commission of an offence or entered into a common intention with a prior understanding to abet the commission of an offence whether planned or unplanned, by words either spoken or intended to be read or by signs or by

⁵ Mr Jasikaran owned and operated the printing press which printed North Eastern Monthly

⁶ He was refused bail and has been in custody ever since

visible representations or otherwise, which intends to cause the commission of acts of violence or racial or communal disharmony, through the printing or distribution of the publication North Eastern Monthly magazine or by agreeing to commit or abet the commission of the offence of acting to promote that organization, and that since the aforesaid offence has been committed as a result of the said conspiracy, an offence which is a punishable under section 2(2)(ii) read with section 2(1)(h) of the Prevention of Terrorism (Temporary Provisions) Act no. 48 of 1979 as amended by Act No. 10 of 1982 and Act No. 22 of 1988 which is to be read with section 113 (a) and section 102 the penal code has been committed [**“Charge 1”**].

2. In the above time, place and circumstances, an offence has been committed by words either spoken or intended to be read or by signs or by visible representations or otherwise, which intends to cause the commission of acts of violence or racial or communal disharmony through editing, printing or distribution of the publication North Eastern Monthly Magazine or by acting to promote that organization, through the publishing of its contents seen in the document extract marked “X” and annexed hereto, which is a punishable offence under section 2(2)(ii) read with section 2(1)(h) of the of the Prevention of Terrorism (Temporary Provisions) Act no. 48 of 1979 as amended by Act No. 10 of 1982 and Act No. 22 of 1988 which is to be read with section 113 (a) and section 102 the penal code [**“Charge 2”**].

The third charge arises for an alleged “...collection of money for the furtherance of terrorism or specified terrorist activities...”, the Charge being in the following terms (English translation):

“...In the above time, place and circumstances, an offence has been committed by contributing or collecting or obtaining information relating to or donating funds for the purpose of terrorism through the collection of funds for the editing, printing and publishing the North Eastern Monthly magazine, which is an offence punishable under Regulation 6 (c) of the Emergency (Prevention and Prohibition of Terrorism and Specified Terrorist Activities) Regulations No. 07 of 2006 published on 6th December 2006 in Gazette Extraordinary No. 1474/3 of the Democratic Socialist Republic of Sri Lanka...” [**“Charge 3”**]

20.11 Mr Tissainayagam filed a Fundamental Rights Application in the Supreme Court (the **“Supreme Court Application”**). That case is still pending before the Supreme Court of Sri Lanka, a superior court to the High Court pursuant to the outcome of the High Court Trial. The Supreme Court Application was filed to challenge his arrest and subsequent detention. The Supreme Court refused to grant interim relief releasing Mr Tissainayagam, instead urging the State to either indict him or consider his release. Subsequent to the indictment being served, the Supreme Court expressed the view that it did not wish to hear the merits of the case on the legality of the arrest and detention of Mr Tissainayagam until the criminal proceedings (being the High Court Trial) had drawn to a close. The Supreme Court Application therefore remains to be concluded, following the conclusion of the High Court Trial at the end of August 2009.

20.12 Mr Tissainayagam’s High Court Trial was expedited and commenced in October 2008. The trial is being heard by High Court Judge Deepali Wijesundara alone.

There is no jury in terrorism cases⁷. The prosecuting authorities are represented at the High Court Trial by State Counsel (“**State Counsel**”) and Mr Tissainayagam by counsel appearing on his behalf, including Mr Sumanthiran (“**Defence Counsel**”). There were a number of hearing dates for the High Court Trial, including for the hearing of evidence, the hearing of a *voir dire* concerning acceptance as evidence of a statement allegedly made by Mr Tissainayagam (the “**Voir Dire Hearing**”) and to accept oral and written submissions on behalf of the State and on behalf of Mr Tissainayagam as the defendant. The Observers attended at the hearing of the High Court Trial on the dates set out above.

The *Voir Dire* Hearing

- 20.13 During the trial the prosecution attempted to tender a statement written by Mr Tissainayagam obtained by the Sri Lankan police while he was in custody (the “**Statement**”). The defence objected on the basis that the Statement was not given voluntarily and thereafter, the Court convened the *Voir Dire* Hearing during November 2008 to determine the admissibility of the Statement.
- 20.14 The prosecution called the Assistant Superintendent of Police (“**ASP**”) who gave evidence that Mr Tissainayagam approached him to give a confession statement (the “**Statement**”). The ASP said that he cautioned Mr Tissainayagam about the ramifications of such a Statement and that he asked Mr Tissainayagam to consider his position. The ASP said that Mr Tissainayagam returned and the Statement was given after the ASP again cautioned him.
- 20.15 The prosecution called a typist who said that she was present when the ASP spoke to Mr Tissainayagam on two separate days.
- 20.16 Both witnesses were challenged as to the truth of their evidence. The prosecution had stated that it proposed to call three officers who were said to have been in the room when the Statement was written. After the cross-examination of the ASP and the typist, the prosecution changed its position and did not call the additional witnesses.
- 20.17 Sri Lankan rules of evidence ordinarily exclude any confession made to police whilst an accused is in custody. It is understood that there are narrow exceptions in limited circumstances, of discovery of a fact or if the confession is given in the presence of a Magistrate. However, pursuant to the Prevention of Terrorism Act 1979 at s. 16, a confession made while in custody to police at the rank of ASP or higher is admissible in evidence, but the burden of proving involuntariness not only shifts to the accused but the test the accused is to meet to satisfy the Court is a test whether ‘if it appears to the court’ that such evidence ought be excluded because it was obtained by threats, promises or inducements. .

Evidence of Mr Tissainayagam in the *Voir Dire* Hearing

- 20.18 Mr Tissainayagam gave evidence during the *Voir Dire* Hearing, during which he denied that he had met with the ASP as asserted by the prosecution. Mr Tissainayagam claimed that his confession Statement was not voluntary, but rather was the involuntary product of intimidation and inducement. He also

⁷ S. 15 Prevention of Terrorism Act 1979
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asserted that the ASP was not present during all of the time the Statement was given, a prerequisite to the admissibility of the Statement.

- 20.19 Mr Tissainayagam further gave evidence that he observed Mr Jasikaran after he had been assaulted by TID police. Mr Tissainayagam's evidence was that he believed that unless he co-operated with the police, he would also be assaulted. Mr Tissainayagam gave evidence that he was fearful of any assault, as he has a long-standing eye condition which he feared could have been further exacerbated.
- 20.20 Mr Tissainayagam also asserted that he was told that if he made the Statement, he would be released. He asserted that the contents of the Statement were not his own words, but were dictated to him by a police officer.
- 20.21 Mr Tissainayagam was cross-examined extensively during the *Voir Dire* Hearing, as was appropriate for State Counsel in any criminal trial involving the defendant giving evidence. He was asked to point out which parts of the Statement were true and which were false. Defence Counsel objected on the grounds that the *Voir Dire* Hearing was about the voluntariness of the Statement and not its accuracy. The judge permitted the cross-examination and Mr Tissainayagam gave evidence as to which parts of the Statement were accurate and which were inaccurate.
- 20.22 Mr Tissainayagam also gave evidence in which he denied that the signature to the Statement was his. There does not seem to be any expert evidence about the signature which appears on the Statement.
- 20.23 Additional evidence was to be led during the Trial seeking to demonstrate that parts of the Statement had been altered and there appeared on the face of the Statement to be changes to it in the hand-writing of persons other than Mr Tissainayagam, including at significant points of the Statement.
- 20.24 Mr Tissainayagam was further asked in cross-examination why he did not complain to anyone at the hospital about the conduct of the police, which he alleges to include abuse, intimidation and coercion. He said that he was too scared to report anything.
- 20.25 It was further put to Mr Tissainayagam in cross-examination that he never previously asserted to anyone, including his lawyers, that he had been threatened with assault at the TID, nor had he included those allegations as part of his affidavit in relation to the Supreme Court Application. Mr Tissainayagam replied that police from the TID were always present when he met with his lawyers.
- 20.26 At the conclusion of the *Voir Dire* Hearing, the Judge found that the Statement was given voluntarily (the "**Interlocutory Judgment**"). Brief reasons were given by the Judge. A written judgment was delivered by the Court at a later date, but for reasons unknown was not made available to Defence Counsel until after the expiration of the fourteen (14) day period in which an appeal of the Interlocutory Judgment might be lodged.
- 20.27 It is believed, but not presently known that any appeal of the Interlocutory Judgment might also be lodged after the conclusion of the High Court Trial and/or as part of the Supreme Court Application.

Defence Case at the Trial

- 20.28 At the conclusion of the prosecution case, an application was made on behalf of Mr Tissainayagam that the charges be dismissed, on the basis that there was “no case to answer”. The Court made a finding that this application was not successful and this decision (the “**No Case Judgment**”) was set out by her Honour, giving what has been described as “limited reasons”.
- 20.29 It is not known if there is any right of appeal of the No Case Judgment and if so, if such appeal may be brought on behalf of Mr Tissainayagam at the conclusion of the High Court Trial and/or as part of the Supreme Court Application.
- 20.30 Following the No Case Judgment, the matter thereafter proceeded with the defence case. Other than as part of the *Voir Dire* Hearing, Mr Tissainayagam did not give further oral evidence at the trial. Instead he made a dock statement to the Court (the “**Dock Statement**”).
- 20.31 As part of the Dock Statement, Mr Tissainayagam explained that since 1989, he had been working on how to solve peacefully the dispute between the Government of Sri Lanka and the organisation known as the Liberation Tigers of Tamil Eelam (“**LTTE**”). He helped the Organisation of Parents and Family Members of the Disappeared (“**OPFMD**”), an organisation which current Sri Lankan President Rajapaksa and Presidential adviser Vasudeva Nanayakkara had given political impetus by their support. OPFMD was at one time involved in securing the release of soldiers and policemen captured by the LTTE and OPFMD members made contact with the LTTE for this purpose, travelling to Wannai when required. Mr Tissainayagam said that in order to arrange these trips, he had often spoken on the telephone using the Tamil language.
- 20.32 From 1994 to 1995 Mr Tissainayagam worked on a project for UNICEF through an organisation called “The Medium” and he visited eastern Sri Lanka and made documentaries about the conflict. Between 1994 and 1996, he helped the Disappearance Commission to collect information, translate this information into English and co-ordinate with families.
- 20.33 Mr Tissainayagam further stated that his activities at this time demonstrated that he had always worried about the safety of civilians caught up in the war and his intention was to stop the killing of young people, regardless of ethnic background. He said that he had explained all of the above to officers from the TID when they questioned him, but that the TID officers had never written these matters down during the interviews.
- 20.34 In his Dock Statement, Mr Tissainayagam said that it was unfair and illegal to charge him for offences under the Prevention of Terrorism Act (“**PTA**”) for acts said to have been committed during the operation of the ceasefire agreement, when the Sri Lankan government had given an undertaking to relax the operation of the PTA and had allowed the free movement of people from north and south into both LTTE- and government-controlled areas.
- 20.35 During the period of the ceasefire agreement, Mr Tissainayagam said he had travelled in his capacity as a journalist to the north and east of the country. Whilst there, he collected information about life in those areas to include in his

articles. He interviewed people from a vast spectrum, including political leaders, religious leaders, scholars, displaced people, activists, representatives of NGOs and LTTE leaders. At this time, many other journalists also travelled to the same parts of the country for the same purposes.

- 20.36 Mr Tissainayagam further told the Court in his Dock Statement that he had never received any money from the LTTE, that the magazine publication *North Eastern Monthly* was run on a commercial basis, being sold at places such as Vijitha Yapa and Makeen bookshops. There were also subscribers to the magazine. The bank account number to which the subscription money was to be deposited was printed in the *North Eastern Monthly* from January 2007. Therefore, the bank account number was available to anyone who bought the magazine.
- 20.37 The Dock Statement thereafter continued with Mr Tissainayagam reiterating that he cannot speak Tamil fluently, and that for the first time since he left school he was made to write Tamil when the investigating officer from the TID, Razik, forced him to take down what Razik dictated to Mr Tissainayagam. The Dock Statement continued with the information that Mr Tissainayagam did not write the document on his own and he stood by the evidence he gave in the *Voir Dire* Hearing.
- 20.38 Mr Tissainayagam further stated that he was scared at the time of the interviews by TID officers, because of his eye condition. He has had surgery for retina detachment. If it recurred, he would go completely blind. Therefore, when he protested at the factual inaccuracies in what is said to be his confession, Mr Tissainayagam wrote it because Razik threatened him and also told him that he would be released soon if he co-operated.
- 20.39 Vasudeva Nanayakkara (“**Mr Nanayakkara**”) was called by the Defence. He is presently an adviser to the President of Sri Lanka. He was previously an Attorney-at-Law and a former member of Parliament and Opposition Leader of the Colombo Municipal Council.
- 20.40 Mr Nanayakkara gave evidence that he founded the OPFMD and looked after the interests of the aggrieved parties when complaints were made regarding people who had disappeared. He took part in the activities of the OPFMD, starting with the insurgency in 1983.
- 20.41 He told the Court that he originally knew Mr Tissainayagam as an individual who worked in the OPFMD in the 1980s. Mr Tissainayagam was to be said to also have actively protested against the illegal detention of civilians by the LTTE. The evidence was that at one point, Mr Tissainayagam, through his actions, had forced the LTTE movement to release those citizens who were illegally detained and, in addition, six (6) police officers who had been imprisoned by the LTTE.
- 20.42 Mr Nanayakkara gave further evidence that he was aware of Mr Tissainayagam’s writings in the magazine “*North Eastern Monthly*”. When shown the 2006 Articles forming part of the indictment, he said that in his opinion they do not lead to or create any conflict or communal or racial disharmony among the public or between different religious sects and ethnic groups.
- 20.43 The defence next called Mrs Manouri Muttettuwegama (“**Mrs Muttettuwegama**”), a prominent Sri Lankan Attorney-at-Law and veteran

human rights activist. She told the court that the Sri Lankan constitution guaranteed certain rights to journalists to express their opinions on current political issues, that inevitably there will be a difference of opinion between the readers on these issues and that it is impossible that anyone could consider that the 2006 Articles could provoke opinion in only one way. In her opinion, the 2006 Articles did not have the tendency to incite racial and ethnic disharmony.

- 20.44 Mrs Muttettuwegama further gave evidence that she thought that the views expressed in the 2006 Articles were personal opinions of the author and did not contain any animosity towards any ethnic group or stigmatize the armed forces for committing genocide in the Vakarai region. The 2006 Articles only made reference to the hardships and constraints that residents of the Vakarai had to endure.
- 20.45 The witness Mrs Muttettuwegama was cross-examined. When asked whether the particular statement in the 2006 Articles “State Security forces are the main perpetrators of the killing” effectively accused the army of committing genocide and thus damaged its reputation, she said that this could only be determined by an appointed Commission of Inquiry, not by the public reaction of those who had read the article.
- 20.46 The defence also called an officer of the Sri Lankan Peace Secretariat (the “**Peace Secretariat Officer**”). The Secretariat is a government organisation aimed at promoting reconstruction and reconciliation arising from the war. The Peace Secretariat Officer was asked to produce the Cease Fire/Peace Agreement. This was a Norwegian sponsored agreement between the Government and the LTTE signed in 2002. She was also asked to produce the Orders of the government cancelling the Cease Fire agreement.
- 20.47 The defence wanted to prove that at the time of the 2006 Articles in question, the Cease Fire was still in operation. The Peace Secretariat Officer produced a letter from an officer stating that the agreement and order produced was a copy of the one held by the Secretariat. The State Counsel objected on the basis that it was a copy. There was a dispute about the provisions of a statute which permitted copies to be tendered. More questions were asked of the Peace Secretariat Officer. It was revealed that the Secretariat only had a copy of the Agreement and Order and that it was the Prime Minister’s office which held the original. Accordingly, Defence Counsel asked for a summons to that office for the original of the documents. The copy documents were not tendered and the Peace Secretariat Officer retired as a witness.
- 20.48 The next defence witness was one of the deputy directors (the “**HRC Deputy Director**”) of the Sri Lankan Government’s Human Rights Commission (the “**HRC**”). The HRC Deputy Director was asked if the 2006 Articles written by Mr Tissainayagam would engender conflict between the sections of the people. He said “I do not think so.” The HRC Deputy Director was asked if he thought it was possible that the 2006 Articles would make hostilities. He said “No. I do not think so. I do not think these paragraphs give rise to the possibility of rising hostilities between the communities.”
- 20.49 The HRC Deputy Director was then cross examined by State Counsel, who showed the part of Mr Tissainayagam’s 2006 Articles which dealt with attempts to starve the population and not provide them with medicine. The HRC Deputy

Director was asked whether that statement was wrong and he agreed that the statement was wrong. The HRC Deputy Director was asked whether it was wrong of a journalist to write untruths to the people and he agreed that it was bad practice. The HRC Deputy Director was asked again if the accused Mr Tissainayagam was writing untruths and this was bad practice and the witness agreed.

- 20.50 The HRC Deputy Director further agreed the 2006 Articles included allegations of war crimes and accused the Sri Lankan Government of not providing any protection at all to the Tamil population. He was asked that between the Tamil community and Sinhalese community groups, such claims would cause conflict by reading about such allegations. The HRC Deputy Director said "...No, because the people on the ground know the truth." The HRC Deputy Director was asked whether the 2006 Articles would not provoke bad relations amongst pro-Tamil forces and he said that the 2006 Articles were not read in the actual places in the north. The HRC Deputy Director was asked whether the allegation that the Tamils would not be given food and medicine would that not make the Tamils angry with the Sinhalese people. The witness said maybe.
- 20.51 The HRC Deputy Director was asked that if he heard that the Tamils had come to his home town and captured all the people and taken away food and medicine and was starving them wouldn't that provoke anger in him towards the Tamils. Would that not be your feeling? The HRC Deputy Director replied he would think it would be unfair. He was asked whether that would provoke him into action, and he said no because he was just one person and he would just see it as being unfair. The HRC Deputy Director was asked whether he accepted that the Sri Lankan army was practising under accepted norms of laws and he agreed. He was asked under what influence was the author writing and the witness said he did not know. He was asked whether the arguments Mr Tissainayagam used were false and the witness agreed the arguments were false. The HRC Deputy Director was asked whether it was wrong of a journalist to write untruths and the witness agreed it was bad practice. The HRC Deputy Director was asked whether he was critical of the writing of the accused Mr Tissainayagam and the witness said that he could not answer that. State Counsel raised with the HRC Deputy Director that instances of starving a population and not providing them with food or medicine was a breach of the Geneva Convention and a war crime and the witness agreed that there was no Sri Lanka government plan to kill these people.
- 20.52 The cross examination of the HRC Deputy Director then ended. There was then re-examination of him by Defence Counsel. The HRC Deputy Director was asked in re-examination whether a hospital in the internally displaced camp was destroyed by government forces and the witness agreed that it had been partially bombed by government forces, which hindered the supply of medicine. The HRC Deputy Director was further asked in re-examination if, in the event a journalist had written something false, whether the witness would be angry with the journalist. The witness agreed. In those circumstances, The HRC Deputy Director was asked whether the journalist would be the focus of his attention for writing false allegations and the witness agreed that would be his response. After the conclusion of the evidence from the HRC Deputy Director, Defence Counsel had an exchange with her Honour in a fairly robust manner, submitting in a somewhat rhetorical fashion that the evidence explained the prosecution and further submitting that the Sinhalese-controlled Sri Lankan government was

angry with the accused Mr Tissainayagam for writing what they thought were false allegations and they wanted to punish him for doing so and that is why the Sinhalese State Counsel and a Sinhalese judge were sitting in judgment on Mr Tissainayagam and punishing him for writing what they thought were false allegations against the Sinhalese. There was no response to this submission by the judge.

- 20.53 A witness from the archive department was thereafter called to produce bundles of newspaper articles (the “**Archive Department Witness**”). These included many articles from different Sri Lankan newspapers, each one containing allegations similar to those made by the accused Mr Tissainayagam. State Counsel submitted that it had concerns and objected to the tender of these archive articles as evidence if they were being sought to be relied upon for the truth of what was asserted in the archive articles. Defence Counsel submitted that the archive articles were not being tendered as to the truth of them, but simply of the fact of what was being reported in the press at the time. The archive articles were received and admitted into evidence.

Submissions to the Court on behalf of Mr Tissainayagam

- 20.54 The High Court Trial including hearing days for oral submissions of State Counsel and Defence Counsel, as well as provision by Counsel of written submissions to the Court. The Observers have not been able to obtain a copy of the written submissions of State Counsel, but request a copy be obtained, if available.
- 20.55 A copy of the written submissions dated 17 July 2009 of Defence Counsel (the “**Defence Written Submissions**”) has been provided. Permission has been granted to annex a copy of the Defence Written Submissions to this Summary Report.
- 20.56 In being in a position to only refer to the Defence Written Submissions, it is not intended in this Summary Report to create any impression of bias.
- 20.57 The Defence Written Submissions refer to Sri Lankan and Indian case law and the provisions of the Prevention of Terrorism Act 1979 in addressing the evidence in the High Court Trial including, in summary, the following matters:
- (i) the Charges and the Articles Published by Mr Tissainayagam;
 - (ii) the Defence Summary of the Prosecution’s Evidence;
 - (iii) the Requirements of the Prosecution’s Evidence;
 - (iv) the Defence Summary of the Prosecution’s Case;
 - (v) the Prosecution’s Allegation of War Crimes Tribunal Evidence;
 - (vi) the Defence Summary of the Prosecution’s Requirements – Intention;
 - (vii) the Defence Summary of the Insufficient Evidence of the Prosecution;
 - (viii) the Defence Submission the Charges Ought to Have Been Abandoned;
 - (ix) the Defence Summary of Mr Tissainayagam’s Arrest;
 - (x) the Defence Summary of Prosecution’s Case Concerning Ethnicity;
 - (xi) the Defence Summary of Abuse of Process and Unjust Incarceration;
 - (xii) the Defence Summary of Prosecution’s Case – No Evidence of Violence;

- (xiii) the Defence Case's Evidence – No Intention to Cause Acts of Violence;
- (xiv) the Defence Summary of Comparable Indian Supreme Court Authorities;
- (xv) the Defence Summary of Articles – Criticism of Sri Lankan Government, but Not Inciting any Religious, Racial, Linguistic, Regional Group or Community;
- (xvi) the Defence Summary of the Groups Comprising the Sri Lankan Security Forces – Not Limited to One Religion or Ethnic Group;
- (xvii) the Defence Summary – Accused Cannot be Convicted;
- (xviii) the Defence Summary of Indian Authorities – Objective Legal Test and Standard;
- (xix) the Defence Summary of Readers of the Articles;
- (xx) the Defence Summary of the Context of the Articles;
- (xxi) the Defence Summary of “Honest Agitator”;
- (xxii) the Defence Summary of the Prosecution's Burden of Proof and Insufficient Evidence;
- (xxiii) the Defence Summary of the Prosecution's Case;
- (xxiv) the Defence Summary of Mr Tissainayagam's Circumstances, including his Previous Work to Assist the now President of Sri Lanka;
- (xxv) the Defence Summary of Defence Witnesses and their Views of the Articles of Mr Tissainayagam;
- (xxvi) the Defence Summary of Sri Lankan Newspaper Articles Not Written by Mr Tissainayagam, for Which There Were No Prosecutions;
- (xxvii) the Defence Summary of the Defence Case;
- (xxviii) the Defence Summary of the Third Charge;
- (xxix) the Defence Summary of the Evidence Concerning the Third Charge;
- (xxx) the Defence Summary of the Changes Made to the Statement of Mr Tissainayagam Alleged to be his Confession;
- (xxxi) the Defence Summary of the Changed Evidence for the Third Charge;
- (xxxii) the Defence Summary of the Acceptance of the Changed Evidence;
- (xxxiii) the Defence Summary of the Bank Evidence; and
- (xxxiv) the Defence Final Summary.

20.58 With reference to the matters listed above, a summary of the Defence Written Submissions is set out in Annexure A to this Summary Report.

20.59 As noted above, to more fully review the proceedings, it is requested that a copy of the written submissions of State Counsel be obtained, as and if they are made available. When a copy is available, it is intended to undertake a summary of the State Counsel submissions comparable to Annexure A, again to form part of this Summary Report.

A Sri Lankan Government website commenting directly on Mr Tissainayagam's guilt or innocence

21. A web site maintained by the Sri Lankan Department of Defence, Public Security and Law and Order on or about at least 14 January 2009 published information concerning Mr Tissainayagam (the “**January 2009 Defence Publication**”). The January 2009 Defence Publication was published at a time the trial against Mr Tissainayagam had commenced, but had not concluded. The January 2009 Defence Publication was published on the world wide web and was available for public consideration.

22. The January 2009 Defence Publication referred with some detail to the alleged “confession” Mr Tissainayagam, saying as follows:

“...It can be reasonably suspected with the available evidence that Mr Tissainayagam had obtained money from LTTE knowingly (sic) that it is a terrorist organisation. Also, it is worthwhile to note that Mr Tissainayagam had received the payments of which the TID has substantial proof, during a time when the LTTE was carrying out many civilian massacres, bus bombings, train bombings etc. If Mr Tissainayagam was a responsible citizen he could have come to the police and revealed the information he knew about the terror agents in Colombo.

However the possibility cannot be ruled out that Mr Tissainayagam was actually another individual like those free media fighters who had been lured by the terrorist outfit exploiting his greed for money. This possibility comes to the surface when looking at the profile of Mr Jasikaran, the main suspect of the case..”

23. On an understanding of the evidence at the High Court Trial by that time, these allegations published in the January 2009 Defence Publication go considerably beyond a fair reading of the evidence at the trial and the claims made in the trial.
24. After President Obama of the United States included the name of Mr Tissainayagam in his statement on World Press Freedom Day released on 1 May 2009, the Sri Lankan Ministry of Defence published a reply on its website (the “**May 2009 Defence Publication**”), which refers in critical terms to the role of the accused Mr Tissainayagam and his supposed links with the LTTE. The May 2009 Defence Publication further refers to what is alleged to be Mr Tissainayagam’s association with “*several opinion making publications of the LTTE*” and that he was part of their propaganda outfit and “*was instrumental in securing funding for LTTE publication*”.
25. On an understanding of the evidence at the High Court Trial by that time, these allegations published in the May 2009 Defence Publication go far beyond a fair reading of the evidence at the trial and the claims made in the trial.
26. It nonetheless appears that the Sri Lankan government (and particularly by the Department of Defence, Public Security and Law and Order) considers it appropriate to use military authorities to publish information critical of lawyers appearing as defence counsel in court proceedings.
27. Following the conclusion of the High Court Trial, at a time when issues of *sub judice* have resolved, the Department of Defence, Public Security and Law and Order has added the following commentary on its website, found at http://www.defence.lk/new.asp?fname=20090831_07

“Tissanayagam found guilty on terrorism: sentenced 20 years imprisonment

The Colombo High Court today (Aug 31), sentenced terror suspect J. Tissanayagam, to 20 years of Rigorous Imprisonment (RI) under the Prevention of Terrorism Act (No: 48/1979).

J. Tissanayagam was found guilty on 3 charges of - 1) Attempting to cause the commission of acts of violence or racial or communal disharmony with clear intentions of causing disrepute to the government, an act of conspiracy.

2) Attempting to cause the commission of acts of violence or racial or communal disharmony relating to articles he published in the North Eastern Monthly magazine in 2006 and 2007, and 3) Collecting and obtaining information for the purpose of terrorism and raising funds for the purpose of terrorism through the collection of funds for the said magazine. He was consecutively proved guilty on all charges and given successive sentences of 5, 5 and 10 years rigorous imprisonment, respectively on each charge.

The prosecution showed that Tissanayagam had strong links with the LTTE and supported it through his actions, for which he was indicted.

"Media freedom and rule of law must co-exist for democracy to flourish. They mustn't be brought on a collision course, if it is the well being of democracy that we seek", a senior defence official said commenting on Tissanayagam's sentencing.

"It is imperative that the media rights groups be able to separate journalism from terrorism and help identify terror advocates masquerading as journalists" he further said. Tissanayagam was taken into custody by the Terrorist Investigation Department (TID) on 07 March 2008, and indicted under the Prevention of Terrorism Act (No: 48/1979) by the Attorney General on 11th August, 2008. The High Court trial commenced on 09th September, 2008.

The Constitution of the Democratic Socialist Republic of Sri Lanka (1977) recognizes freedom of speech, expression and publication as fundamental rights of all citizens of the country, but such freedom is constrained with regard to specific acts, which are contrary to requirements of a democratic society.

Related News >>>

Background: Thissanayagam Case and Others

Reference to Thissanayagam

MEP Robert Evans attempts to sully Sri Lanka's good name in the European eye- Ambassador Aryasinha ..."

The Conduct of the Proceedings in the High Court Trial

28. Each of the Observers was able to gain an impression of the process of the proceedings in the High Court Trial. Evidence was given in Sinhalese, whilst submissions by Counsel were made both in Sinhalese and in English.
29. The prosecuting authorities were represented by State Counsel and Mr Tissainayagam represented by Defence Counsel. In addition to the prosecution and the defence being well-served by legal representation, it appeared to the Observers that the Court also benefited from the availability and expertise of Counsel appearing in the trial to argue points of law, examine witnesses and assist the Court, as required.
30. It appears the proceedings are recorded by short-hand reporters and also appear to be tape recorded, with some care taken by the Court staff to ensure that evidence and oral submissions are recorded onto the tape and with Counsel awaiting the change-over of tapes before recommencing the proceedings. At least two of the Observers also attended the High Court Trial with an interpreter.
31. The High Court Trial is held in accordance with the criminal law of Sri Lanka, which features many characteristics of the common-law derived from English law adopted in numerous countries world-wide. The proceedings are adversarial in nature. Witnesses are examined in chief, then cross-examined, and also re-examined where appropriate. Unlike other criminal trials in Sri Lanka, there is no jury for "terrorism" cases and therefore the judge alone presided in the High Court Trial, adopting the role of both judge of fact (comparable to a jury) and judge of law.
32. The court room is set out in a manner similar to court rooms in jurisdictions in the United Kingdom, the United States, Canada, Australia, New Zealand and elsewhere. The Judge sits on a raised bench and in front of her Honour's Bench is a table with the court clerk, the shorthand writer and/or the operator of the tape recording equipment. Immediately in front of them is the Bar Table reserved for the prosecuting lawyer representing the State, known as State Counsel. Immediately behind that Bar Table is the comparable Bar Table reserved for Counsel appearing for the defendant. The witness stand is located to the side of the Bench, aligned at a point between the Bar Tables of opposing Counsel.

33. On a number of occasions, her Honour heard not only the High Court Trial but conducted other proceedings. When the High Court Trial was to commence, Mr Tissainayagam walked to sit on a seat within a wooden dock located at the rear of the court, directly in front of the Bench. He was not chained or handcuffed during the proceedings.
34. During the proceedings that the Observers saw, there were several robust exchanges between opposing counsel. Objections were made by both sides relating to leading questions, and the admissibility of evidence. This was much as one might see every day in any criminal court in the common law world.
35. At the conclusion of the day's proceedings, Mr Tissainayagam was not surrounded by guards. He was allowed out of the dock and could talk to his lawyers and well wishers in the courtroom. No guard listened in. The Observers were able to talk to him at this time.
36. The Observers generally found the trial process and procedures, including the *voir dire* Hearing, to be satisfactory from what they saw and observed, accepting that the proceedings were conducted from time to time in a language unfamiliar to the Observers. While there were rulings that went against the defence case, that can and does happen in every jurisdiction. Delays in listing hearings before a Court, including the listing from time to time of the High Court Trial, are delays not uncommon in many jurisdictions. The Observers also saw part of the hearing of other cases unrelated to the High Court Trial where steps were being taken to list matters for hearing, press the security forces and prosecution for completion of their preparation and to finalise cases.
37. The high level of education and literacy in Sri Lanka, which has a long and credible history of judge-made law (including the education of both women and men, so that many women are appointed to the Sri Lankan judiciary) provides a strong framework for the Rule of Law in Sri Lanka. This framework is strengthened by the judicial officers and the legal representatives appearing before the Court.
38. However, whilst there are fewer concerns as to procedural matters arising in the High Court Trial, the prosecution of a journalist for publishing of articles by reference to laws intending for "terrorism" and security issues give rise to many concerns for the Rule of Law in Sri Lanka. In part as noted above, the questions which arise from those concerns do not necessarily include whether laws intending for "terrorism" and security issues ought be passed by the Sri Lankan government or enforced by its security forces, but significantly whether laws intending for "terrorism" and security issues ought be invoked by the government to prosecute journalists, and to prosecute journalists for articles said to be critical of the government and/or the security forces of Sri Lanka.

Observers' visits to Mr Tissainayagam in Gaol

39. Mr Tissainayagam is being held in custody in New Magazine prison in Colombo. It is a high security prison. An Observer visited Mr Tissainayagam there on Tuesday 24th March 2009 and a second Observer visited him there on Friday, 12 July 2009. The guards were co-operative. There was no hesitation in allowing the Observers to see Mr Tissainayagam on these occasions.
40. The Observer who attended the gaol visit in March 2009 did not have to see Mr Tissainayagam in the gaol's normal visiting area, which is very noisy, but was permitted to see him in one of the offices of the prison. It is the same room in which Mr

Tissainayagam sees his lawyers. Whilst at least one officer was in the room at all times, they did not appear to be listening to the conversations and were not offensive or in any manner intimidating. Indeed, they appeared disinterested in the conversation (whether or not this was the case). Some of the gaol's officers who were in the room at the time appeared to be watching television. The Observer was told that this was also the case when Mr Tissainayagam's lawyers visited.

41. Mr Tissainayagam has said that he shares a ward at the gaol with seven other prisoners, each of whom is Tamil. The ward room is described as "quite a large" room⁸ and Mr Tissainayagam and the other prisoners are allowed outside for most of the day, where they can talk freely. The prisoners wear their own clothes. There is no forced working within the prison.
42. The food at the gaol is said to be satisfactory, with three (3) meals a day. However shortage of water is a problem and the water quality is also poor.
43. Mr Tissainayagam's eye condition is a problem. Medical attention is available within the prison. If the prison doctor is unable to deal with the problem, a prisoner is said to be sent to the prison hospital. However the cells in the hospital are small (about 8 ft x 12 ft) and a prisoner there would be required to share with 4 or 5 other prisoners. The conditions are not satisfactory.
44. Mr Tissainayagam is allowed visitors. The Red Cross and Swiss Embassy officials visit all the prisoners once a month. He is allowed some books and newspapers.
45. He has not experienced any brutality from guards whilst in prison. When he was first transferred to New Magazine prison he shared a ward with non-Tamil prisoners. They threatened him and intimidated him, calling him a terrorist. He was scared. He complained about this to his lawyers and, as a result of intervention from the US embassy, the non-Tamil prisoners were removed from the ward.
46. In the prison van whilst being transported in March, 2009 Mr Tissainayagam had an altercation with a non-Tamil prisoner, who abused and threatened him. He said that this was also frightening. He expressed himself to be worried what might happen in prison in the future if he is convicted.
47. The Observer in the gaol visit in June 2009 met with Mr Tissainayagam in the area of the desk of the guards, near the entrance to the gaol rather than in a meeting room. Many guards were standing or sitting nearby but did not appear to listen to the conversation (conducted primarily in English), whether or not this was the case. The guards were considerate and efficient in permitting the meeting, which was arranged when the Observer arrived that morning at the gaol and with no prior notice to the prison authorities.
48. The meeting with Mr Tissainayagam was conducted over a period of more than half an hour, during which time he spoke eloquently and with intelligence and dignity concerning his circumstances and his concerns that journalists in Sri Lanka were being attacked or intimidated or threatened by security and government forces in Sri Lanka, whether the journalists were Sinhalese or Tamil.

⁸ Although the Observer did not see it
11 September 2009

Overall conclusions

49. From what they saw, the Observers found the High Court Trial proceedings to be generally fair on strictly procedural grounds, with some significant exceptions as noted in the report. This conclusion does not address the serious rule of law and human rights issues raised by the use of anti-terrorism laws to prosecute journalists for written expression, including the admissibility of confessions while in custody and the shifting of the burden to the accused to prove involuntariness.
50. The outcome of the High Court Trial is the conviction of Mr Tissainayagam on each of the three (3) charges, and he being sentenced to serve twenty (20) years Rigorous Imprisonment in total (without the sentence for each charge being served concurrently).
51. Notwithstanding the Court finding him guilty of all three charges, there remain fundamental concerns about the initial detention of Mr Tissainayagam by TID and the circumstances in which the alleged confession by Mr Tissainayagam was produced.
52. The refusing of bail, rather than the imposition of conditions temporarily restricting further publications, has the effect of deterring journalists and others from speaking out against government policy and is a matter of significant concern, particularly for Mr Tissainayagam himself and given his health considerations.
53. A further concern is that, Mr Tissainayagam having been convicted in the High Court Trial, the time served by him since he was arrested on 7 May 2008 but prior to 31 August 2009 may only be counted towards his sentence at the discretion of the judge. It is possible that the time Mr Tissainayagam has been in gaol since he was arrested may not be included in the time he may be required to serve in prison. This will continue to be the case in the event Mr Tissainayagam proceeds with an appeal of the conviction reached in the High Court Trial, the effect of which being that Mr Tissainayagam may be held in custody for a considerable period of time (with all the concerns for his health, his liberty and access to support and legal assistance that such detention requires) whether or not the conviction in the High Court Trial is overturned on appeal.
54. There is a significant concern given that other journalists in Sri Lanka have been physically attacked and/or intimidated and/or killed, whether they were of Tamil background or Sinhalese background or otherwise and likely because of publications perceived to be critical of the Sri Lankan government.
55. Further, that a Tamil journalist such as himself might be prosecuted in court proceedings, but a Sinhalese journalist would not be prosecuted, as such a prosecution would likely embarrass the government.
56. There are obvious concerns over the continuing commentary by the Sri Lankan Ministry of Defence on its website in respect of the High Court Trial and subsequent publications.
57. There is significant concern (as set out in the transcript, as it is understood, of the High Court Trial and in the Defence Written Submissions) that the police arrested Mr Tissainayagam not in the period in 2006 or 2007 shortly after the publication of articles in the North Eastern magazine, but in May 2008 at the time he visited colleagues held at the offices of the TID that day after the arrest of those colleagues.

58. There is significant concern (as set out in the transcript, as it is understood, of the High Court Trial and in the Defence Written Submissions) that State Counsel as the prosecuting authority for the Sri Lankan government is alleging a breach of Sri Lankan law by a person, whether or not a journalist, seeking to gather information intended for or available as information for a War Crimes Tribunal, or other consideration by authorities reviewing any alleged breaches of domestic or, more particularly, international law.

Rule of Law Issues for Comment

59. As noted above, in summary some elements of the High Court Trial give rise to the following Rule of Law issues:
- (a) the proceedings in the High Court Trial, including the unavailability of the Interlocutory Judgment before the expiration of the 14 day appeal period;;
 - (b) as to perceptions of impartiality, that the presiding judicial officer in the High Court Trial, including that she is the sister of the officer who signed the Indictment against Mr Tissainayagam (and that the officer who signed the Indictment against Mr Tissainayagam is the prosecutor in the Jasikaran Trial, being conducted before a different judicial officer);
 - (c) criticism of the Sri Lankan government concerning the prosecution of Mr Tissainayagam in the High Court Trial (particularly the question of the care taken in deciding to prosecute under terrorism laws, which laws offer procedural advantages to the prosecution by reducing or reversing the onus of proof required to meet elements of the charge);
 - (d) the prosecution of Mr Tissainayagam in the High Court Trial for allegedly obtaining information to be used by or provided to a “war crimes tribunal”;
 - (e) the gaol conditions for Mr Tissainayagam, including access to legal representation;
 - (f) reporting of the High Court Trial (including web publications of the Sri Lankan Department of Defence, Public Security and Law and Order during the course of the High Court Trial);
 - (g) attacks and threats of attacks on journalists in Sri Lanka, in breach of the Sri Lankan Constitutional right to free speech;
 - (h) the proceedings in the Jasikaran Trial; and
 - (i) the gaol conditions for Mr Jasikaran and his wife Vadivel Valarmathi, including access to legal representation.
60. With the forthcoming Presidential elections, media integrity and independence in Sri Lanka must be improved and sustained. The circumstances of :
- (j) notwithstanding the Constitutional protection in Sri Lanka of freedom of speech, the prosecution of a journalist in Sri Lanka for criminal charges;
 - (k) the magazine articles being published during a period of an internationally brokered cease-fire of hostilities;
- is of significant concern.
61. The circumstances where the charges brought against a journalist are not only those under Sri Lankan criminal law, but are charges laid many months after his arrest under its terrorism laws is of great concern.

62. The effect of a prosecution case being brought under terrorism laws includes that no jury can preside over questions of fact, the burden of proof falls on the defendant and the Court determines matters without publishing reasons within time to allow an appeal.

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INTERNATIONAL COMMISSION OF JURISTS

OBSERVATION MISSION TO SRI LANKA, 2008 and 2009
TO THE PROCEEDINGS BEFORE THE HIGH COURT OF SRI LANKA BROUGHT AGAINST
THE DEFENDANT MR JAYAPRAKASH SITTAMPALAM TISSAINAYAGAM

TRIAL OBSERVATION REPORT

3 SEPTEMBER 2009

This is a summary to the International Commission of Jurists of reports of a number of the Observers appointed by the ICJ for the Observation Mission to Sri Lanka in 2008 and 2009 to observe the High Court Trial. However, none of the individual Observers ought to be considered as the author of this Trial Observation Report.

ANNEXURE A – SUMMARY OF DEFENCE WRITTEN SUBMISSIONS

(See paragraph 19.58 of the Summary Report)

As noted in paragraph 19.57 of the Summary Report, the Defence Written Submissions refer to Sri Lankan and Indian case law and the provisions of the Prevention of Terrorism Act 1979 in addressing the evidence in the High Court Trial including, in summary, the following matters.

I. The Charges and the Articles Published by Mr Tissainayagam.

1. The gravamen of Charges 1 and 2 are that an offence under sub-section 2(1)(h) of the Prevention of Terrorism Act 1979 has been conspired/committed by Mr Tissainayagam by causing/intending to cause the commission of acts of violence by inciting communal feelings by words either spoken or intended to be read or by signs or by visible representations or otherwise, by the editing, printing or distributing the North Eastern Monthly magazine, of which the offending words are contained in schedule “X” to the Indictment.
2. State Counsel has limited the prosecution case by specifying that violence was caused/intended to be caused by the specific offending words in “X” and thereby inciting communal feelings.

II. Defence Summary of the Prosecution’s Evidence

3. No evidence having been led by the prosecution to prove that acts of violence were caused by the publication of the alleged offending words, Mr Tissainayagam cannot be convicted of causing the commission of violence.
4. Therefore the only matter in issue would be whether Mr Tissainayagam intended to cause violence.
5. The conspiracy charge must fail since the indictment alleges conspiracy with persons unknown to the prosecution.
6. If the persons are unknown to the prosecution, this excludes any allegation of conspiracy against the persons named in the alleged confession of Mr Tissainayagam, since those persons have been identified and are known to the prosecution.
7. No further evidence was led of any conspiracy and therefore it is submitted by Defence Counsel that Charge 1 must fail on this ground alone.

III. The Requirements of the Prosecution's Evidence

8. It is further submitted that Charges 1 and 2 require positive proof (beyond reasonable doubt) to be led by the prosecution that Mr Tissainayagam had a particular intention in mind when he wrote the impugned passages referred to in Schedule 'x' to the indictment.
9. However, the prosecution's position is that Mr Tissainayagam intended something other than what is described as an offence when he wrote the said passages.

IV. Defence Summary of the Prosecution's Case

10. Originally, the indictment stated that the intention of Mr Tissainayagam was to "bring disrepute to the government", but this phrase in the indictment was deleted by State Counsel at the commencement of the High Court Trial when it was realised that such an intention did not constitute an offence under any law.
11. However, in the oral submissions of State Counsel, it was specifically asserted that the intention of Mr Tissainayagam, when he wrote the said passages, was to gather evidence to be used at a War Crimes Tribunal subsequently and "bring disrepute to the government.", a position of the prosecution said also to be suggested to many of the witnesses called for the defence case.

V. The Prosecution's Allegation of War Crimes Tribunal Evidence

12. Although Mr Tissainayagam is charged with intending to cause the commission of acts of violence (without any evidence remotely connected with same), in the submissions of State Counsel, it is said that the intention was instead the intention to record evidence to be used at a War Crimes Tribunal.
13. Therefore it is submitted, Mr Tissainayagam cannot be convicted of Charge 1 when, according to the prosecution, his intention was to record evidence to be used at a war crimes tribunal.

VI. Defence Summary of the Prosecution's Requirements – Intention

14. The relevant part of Charge 1 is the following (emphasis added and English translation):

“... by words either spoken or intended to be read or by signs or by visible representations or otherwise, **which intends to cause** the commission of acts of violence or racial or communal disharmony, through the printing or distribution of the publication North Eastern Monthly magazine or by agreeing to commit or abet the commission of the offence...”;

15. It is further submitted that the prosecution's argument might have been to address an alleged criminal breach of trust (not leading any evidence in support of such criminal breach of trust) suggesting that an accused has committed criminal defamation (said not to be an offence under Sri Lankan law) and wanting the Court to find the accused guilty of criminal breach of trust.
16. Comparable to the matter of The Queen v Somapala 69 NLR 465 (at 467), Mr Tissainayagam must have the benefit of the position taken by State Counsel that the intention of Mr Tissainayagam was to "record evidence to be used at a war crimes tribunal" and not to "cause violence by inciting communal feelings", as charged.

VII. Defence Summary of the Insufficient Evidence of the Prosecution

17. Therefore, Mr Tissainayagam cannot be found guilty of an offence with which he is not charged and cannot be found guilty of “intending to record evidence to be used at a war crimes tribunal”, which in any event is not an offence.
18. No evidence of any intention at all was led by the prosecution and no witness for the prosecution mentioned or speculated on the possible intention of Mr Tissainayagam.
19. There are requirements of Sri Lankan law as to how an intention ought to be proved and those requirements have not been met, nor met beyond reasonable doubt.
20. The prosecution must prove that the intention and the only intention Mr Tissainayagam could have had when he wrote the two articles was the intention that has been made an offence as set out in Charge 1, and the prosecution has not done so.
21. The Defence cites authority of Lord Goddard in R v Steane [1947] KB 997 (at 1004):

“...No doubt, if the prosecution prove an act the natural consequences of which be a certain result and no evidence or explanation is given, then a jury may, on proper direction, find that the prisoner is guilty of doing the act with the intent alleged. But, if, on the totality of the evidence, there is room for more than one view as to the intent of the prisoner, the jury should be directed that it is for the prosecution to prove the intent to a jury’s satisfaction [sic], and if, on a review of the whole evidence, they either think that the intent did exist or they are left in doubt as to the intent, the prisoner is entitled to be acquitted...” (emphasis added)
22. The prosecution did not even attempt to place before Court evidence of any intention at all of Mr Tissainayagam (leave alone the intention to cause acts of violence), noting that the police officers called to give evidence expressly stated that they did not have the proficiency of language to even comprehend what is stated in the two article passages said to be authored by Mr Tissainayagam.

VIII. Defence Submission the Charges Ought to Have Been Abandoned

23. It is therefore submitted that State Counsel ought not ask the Court to proceed further, and that the prosecution ought to have been abandoned.

IX. Defence Summary of Mr Tissainayagam’s Arrest

24. The circumstances of the arrest of Mr Tissainayagam provide an insight that the charges ought not have been made, or continued with, including that Mr Tissainayagam was arrested when he went to the offices of the TID to visit colleagues arrested the previous day.
25. Arguably therefore, the arrest of Mr Tissainayagam was unlawful, following which the police seized several issues of the North Eastern Monthly magazine.
26. Even after the magazines had been seized by the police, the evidence of the arresting officer was that he did not understand what was written in those magazines and therefore, it is submitted that there was no basis for the offences alleged against Mr Tissainayagam, particularly given the police had not formed (and perhaps did not form for some time) a belief that the articles were capable of giving rise to an intention to

cause the commission of acts of violence or racial or communal disharmony, as referred to in Charge 1 and Charge 2.

27. The prosecution claims that it has proved, not an illegal publication, but what was in the mind of the author, through a witness who cannot read what is published, a position the Defence Counsel submitted was extraordinary.
28. The Defence Written Submissions instead submits that what was required of the prosecution "...was to at least attempt through a witness who could say that he was able to read the mind of the author of those passages or at the minimum say that if anyone wrote those passages, by the very nature of that writing, the only intention he could have had was what is described in the offence, which is called 'the natural consequence test'...".
29. However, this task had not been undertaken by State Counsel.

X. Defence Summary of Prosecution's Case Concerning Ethnicity

30. Instead what had occurred was the prosecution of Mr Tissainayagam because he is an "Ethnic Tamil".
31. Additionally State Counsel questioned at least three witnesses called by the defence that the magazine articles in Schedule "X" were critical of the Sri Lankan Army, said to have been "...described as the Army belonging only to the Sinhalese..." and since Mr Tissainayagam was Tamil, the Sinhalese would be provoked in anger against this Tamil writer.
32. The inferences to be drawn were therefore that the Sri Lankan Army is a "Sinhala Army" and had Mr Tissainayagam been Sinhalese, he would not have been charged.
33. However, even if this is the position of the prosecution, still no offence had been committed by Mr Tissainayagam, in particular because (as set out in the Defence Written Submissions) sub-s. 2(i)(h) of the Prevention of Terrorism Act 1979 refers specifically to "...violence between different communities and not some kind of antipathy one community might have against an individual of another community for what he [Mr Tissainayagam] had written...".

XI. Defence Summary of Abuse of Process and Unjust Incarceration

34. Therefore it is submitted, "...far from establishing the commission of any offence, the prosecution's stand put in the form of suggestions to defence witnesses, only goes to demonstrate the abuse of process of court by the prosecution which has already resulted in the unjust incarceration of this Accused for well over an year. It was a submission made by the State that this indictment was filed in order to counter 'false' statements in the articles written by this Accused [Mr Tissainayagam] since otherwise the allegations in those articles would have gone unchallenged and resulted in a serious inconvenience to the government internationally. What more could be an abuse of process of this Court...".

XII. Defence Summary of Prosecution's Case – No Evidence of Violence

35. Additionally, that mutually contradictory positions taken up by the prosecution point to the fact that "...Charges 1 and 2 state that the Accused intended [to] cause [the

commission of] acts of violence [or racial or communal disharmony] by inciting communal feelings...”, however, no evidence was led of the occurrence of acts of violence by inciting communal feelings or any intention to cause acts of violence by inciting communal feelings.

36. Additionally, the purported confession of Mr Tissainayagam in the Statement, also does not state any intention.
37. Further, the prosecution suggested to some defence witnesses that Tamils would have been angry with Sinhalese because the articles stated that the Army was harming the Tamils, to other defence witnesses that since the Sri Lankan Army is a “Sinhala Army” and the writer of the articles [Mr Tissainayagam] is Tamil, all Sinhalese will be angry with a Tamil writer of these articles.

XIII. Defence Case’s Evidence – No Intention to Cause Acts of Violence

38. Notwithstanding the absence of any evidence adduced by the prosecution to discharge the onus to make out Charges 1 and 2, the Defence Written Submissions noted that the defence placed before court evidence which may not have been necessary, but to prove that, in writing the articles, Mr Tissainayagam could never have had the intention to cause acts of violence by inciting communal feelings or even communal disharmony.

XIV. Defence Summary of Comparable Indian Supreme Court Authorities

39. The Defence Written Submissions sets out further a comparison of the Prevention of Terrorism Act 1979 in sub-s. 2(1)(h), said to be in the following terms:

“...any person who acts in the manner described below commits an offence:

by words either spoken or intended to be read or by signs or by visible representations or otherwise causes or intends to cause commission of acts of violence or religious, racial or communal disharmony or feelings of ill-will or hostility between different communities or racial or religious groups...”

and the Penal Code of the Republic of India (the “**Indian Penal Code**”) and in particular sub-s. 153(A)(1)(a) thereof, which is said to be in the following terms:

“...any person who acts in the manner described below commits an offence:

whoever by words, either spoken or written, or by signs or by visible representations or otherwise, promotes or attempts to promote, on grounds of religion, race, place or birth, residence, language, caste or community or any other ground whatsoever, disharmony or feelings of enmity, hatred or ill-will between different religious, racial, language or regional groups or castes or communities...”

40. The further submission is that the element of *mens rea* in the Sri Lankan law is of a higher standard of proof than that of the Indian Penal Code, because the requirement of “causes or intends to cause” requires the demonstration of a causal nexus between the words spoken and the consequences envisaged, but otherwise the provisions of the Indian Penal Code are comparable to the law of Sri Lanka and therefore, case law authority of Indian decisions might be very persuasive if not binding for the High Court of Sri Lanka, on the question of “incitement”.
41. The Defence Written Submissions thereafter refer to the decision of the Indian Supreme Court in Manzar Sayeed Khan v. State of Maharashtra [2007] INSC 367 (5 April 2007), which is said to have held:

“The gist of the offence is the intention to promote feelings of enmity or hatred between different classes of people. The intention to cause disorder or incite the people to violence is the sine qua non of the offence under Section 153A of IPC and the prosecution has to prove prima facie the existence of mens rea on the part of the accused. The intention has to be judged primarily by the language of the book and the circumstances in which the book was written and published...”.

42. It is thereafter submitted that the *sine qua non* [essential element or condition] of the Indian Penal Code (being, the intention to cause disorder or violence) is the critical element of the offence under Sri Lankan law and that, on reading the articles of Mr Tissainayagam, the articles are not in the nature of publications or speeches as offences envisaged under sub-s. 2(1)(h) of the Prevention of Terrorism Act 1979.

43. For the phrase “between different communities”, the Defence Written Submissions thereafter refer to the decision (the facts of which are submitted are not distinguishable from the instant prosecution against Mr Tissainayagam), of the Indian Supreme Court in Bilal Ahmed Kaloo v. State of Andhra Pradesh [1997] INSC 646 (6 August 1997), concerning a publication the subject of the Indian Penal Code charge (s. 153A thereof) which was alleged to have reported that the Indian army was killing Muslim Kashmiris and was committing atrocities, in which the offence was overturned on appeal and the Supreme Court is said to have held:

“...the common feature in both sections being promotion of feeling of enmity, hatred or ill-will ‘between different’ religious or racial or language or regional groups or castes and communities it is necessary that at least two such groups or communities should be involved. Merely inciting the feeling of one community or group without any reference to any other community or group cannot attract either of the two sections. The result of the said discussion is that appellant who has not done anything as against any religious, racial or linguistic or regional group or community cannot be held guilty of either the offence under Section 153A or under Section 505(2) of IPC...”;

44. A decision relied upon by State Counsel (referred to as Satya Ranjan Bakshi v Emperor), is said to be distinguishable because “...the words referred explicitly to Europeans killing Indians (two classes), and not to EI Railway officials who happened to be Europeans...” and additionally that the decision in Kaloo (referred to above) is a subsequent decision of the Indian Supreme Court, the facts of which are “...directly relevant to the instant case....”.

XV. Defence Summary of Articles – Criticism of Sri Lankan Government, but Not Inciting any Religious, Racial, Linguistic, Regional Group or Community

45. It is further submitted that Mr Tissainayagam “...has not done anything as against any religious, racial or linguistic or regional group or community. He has only criticized the government and the State security forces, and not directed any criticism or attack against any race or religion...”, that the “...’state security forces’ comprise persons from at least five ethnic groups, Sinhala, Tamil, Moor, Malay and Burgher and therefore, any criticism or displeasure expressed towards the armed forces cannot be seen to be an attempt to incite violence on the basis of race or ethnicity...”.

XVI. Defence Summary of the Groups Comprising the Sri Lankan Security Forces – Not Limited to One Religion or Ethnic Group

46. Further, that Mr Tissainayagam “...did not consider the state security forces to be “Sinhala”, since he helped the families of the disappeared in the South, who themselves were all Sinhala...”.

47. Further that "...the Government and the State security forces [being] comprised of persons from diverse races and all four religions...conviction of [Mr Tissainayagam] would have to be based on the absurd assumption that the Government and the security forces belong to only one religion and one ethnic group...".

XVII. Defence Summary – Accused Cannot be Convicted

48. It is therefore submitted that "...according to the authority of Kaloo, and according to the plain meaning of the words of the [Prevention of Terrorism Act 1979], the Accused cannot be convicted for the offence of causing violence by inciting communal feelings...".

XVIII. Defence Summary of Indian Authorities – Objective Legal Test and Standard

49. The Defence Written Submissions thereafter refers to additional case law of India on s. 153A of the Indian Penal Code (concerning the objective legal test and the standard of a reasonable man) as authorities relevant in the matter, including Ramesh Chotalal Dalal v. Union of India & Others [AIR 1988 SC 775], the Supreme Court of India approving the observations of Vivian Bose, J. in Bhagvati Charan Shukla v. Provincial Government [AIR 1947 Nagpur 1] and observing the following (said also to be "...cited with approval in Manzoor Sayeed Khan's case in 2007..."):

"...the effect of the words must be judged from the standards of reasonable, strong-minded, firm and courageous men, and not those of weak and vacillating minds, nor of those who scent danger in every hostile point of view. It is the standard of ordinary reasonable man or as they say in English Law, 'the man on the top of a clapham omnibus'...";

XIX. Defence Summary of Readers of the Articles

50. The Defence Written Submissions thereafter refers to page 532 of *Ratanlal and Dhirajlal on the Law of Crimes* (23rd edition) in which "...the writer observes that 'for judging what are the natural or probable consequences of the writing, it is permissible to take into consideration the class of readers for whom the book is primarily meant as also the state of feelings between the different classes or communities at the relevant time.'...".
51. It is thereafter submitted that in "...judging the natural and probable consequences of the words..." the standard ought be the "...reasonable, strong minded, firm and courageous reader of the English language publication in question...".
52. Additionally, it is submitted that it is important for the Court to take into account the number of readers of the articles the subject of Charge 1 and Charge 2, the evidence (from the prosecution witnesses) being that fewer than fifty copies of the publications were "kept for sale", and therefore the question arising as to whether Mr Tissainayagam "...could have intended to cause violence through the editing of a Magazine which was sold to less than 50 English language readers [from] Colombo, the likes of whom frequent the Vijitha Yapa Bookshop. Therefore the question is whether the reasonable man of affluence from Colombo would be excited to violence by reading the text in extract "X"?...".

XX. Defence Summary of the Context of the Articles

53. The Defence Written Submissions thereafter raises the issue of the context of a publication such as the articles the basis for Charge 1 and Charge 2 and refers again to *Ratanlal and Dhirajlal on the Law of Crimes* (23rd edition) at pages 530-531, in which it is said "...the writer cites Ghulam Sarwar's case and comments as follows 'In order to ascertain the intention of the accused, the offending article must be read as a whole and the circumstances attending the publication must be taken into account. A person cannot, therefore, be convicted under this section where the article does not show any intention as is referred to in the section even though isolated portions of the article may, taken by themselves, fall within the section.'...".
54. Thereafter, reference is made to "...Manzar Sayeed Khan's case (2007) [where] it was held that 'The matter complained of within the ambit of Section 153A must be read as a whole. One cannot rely on strongly worded and isolated passages for proving the charge nor indeed can one take a sentence here and a sentence there and connect them by a meticulous process of inferential reasoning.'...".
55. Thereafter, it is submitted in the Defence Written Submissions that Charge 1 must fail "in limine", because in alleged incitement, the prosecution has relied upon "...a certain strongly worded passage [in the article]...", the context of which the Defence submits ought be considered by the Court (rejecting in any event that these passages would fall within the ambit of the offence).
56. Each of the articles the subjects of the Charge 1 and Charge 2 are said to be "...pieces on the prevailing politico-military realities as perceived by the writer at the time the respective articles were written. They neither explicitly nor implicitly encourage nor exhort readers to take up arms, nor to hatred of another group. They are merely meant to draw to the attention of readers of the Magazine, to wrongs committed by the Government and military as perceived by the writer...".

XXI. Defence Summary of "Honest Agitator"

57. The Defence Written Submissions thereafter refer to the dictum of Meredith J. in decision of the Indian Supreme Court in Emperor v Banomali Mahorana, (cited in Gaur page 1376 para 2):

"...I do not think this section was ever intended to apply to the case of the honest agitator, whose primary object is to secure redress of certain wrongs, real or fancied, and who is not actuated by the base mentality of a mere mischief-monger. If the writer is expressing views which he holds honestly, however wrong that may be, and has no malicious intention, I do not think he can be brought within mischief of this section.(emphasis added)...";

58. The Defence Written Submissions thereafter refers to the decision of Iswari Prasad Sharma (cited in Ratanlal page 531) said to have held that:

"...a writer cannot be convicted under this section where it is possible that he may have, without any malicious intention and honestly, though wrongly in the opinion of the court, thought that he should express himself in the manner which he did with a view to the removal of causes which according to him were promoting or had a tendency to promote feelings of enmity or hatred between different classes of citizens of India. (emphasis added)...".

Defence Summary of the Prosecution's Burden of Proof and Insufficient Evidence

59. It is therefore submitted that "...these authorities indicate that merely because the Prosecution or the Court believe the contents of the words written to be false, it does not render the Accused [Mr Tissainayagam] more culpable than if the words were true. Even

in the event that that were not the case, the Prosecution has not even attempted to lead evidence that the allegedly offending words were untrue...”.

60. It is further submitted that “...the Court must be convinced beyond reasonable doubt that the Accused [Mr Tissainayagam] intended to cause violence, and did not write the allegedly offending words with a desire to redress perceived wrongs...”.
61. It is further submitted that the prosecution has not established that Mr Tissainayagam “...maliciously intended to write the article in question so as to cause violence...”.

XXII. Defence Summary of the Prosecution’s Case

62. Additionally, the Defence Written Submissions asks the Court to consider the further submissions in the light of the authorities already referred to.
63. The Defence Written Submissions summarises the prosecution’s case as follows:
 - (A) Mr Tissainayagam committed the offences;
 - (B) in “...purporting to discharge its onus of proving beyond reasonable doubt the offences described in the indictment...”, evidence was led of police officers who said nothing other than to produce a purported confession of Mr Tissainayagam;
 - (C) also called were witnesses from a bank to produce statements of bank accounts; and
 - (D) also called was a person from Vijitha Yapa Book Shop who said that only about 50 copies of the North Eastern Monthly magazine were available for sale at their book shop.

XXIII. Defence Summary of Mr Tissainayagam’s Circumstances, including his Previous Work to Assist the now President of Sri Lanka

64. The Defence Written Submissions then sets out the background of Mr Tissainayagam and that “...evidence of with what intentions he has consistently acted in his life were placed before Court through witnesses Shakya Nanayakkara and Vasudeva Nanayakkara...”, such evidence not contradicted or challenged by the prosecution.
65. In summary the evidence before the Court (including information from his Dock Statement and evidence at the *Voir Dire* Hearing) was that Mr Tissainayagam lived his life mainly in Colombo, Sri Lanka, “...attended a leading private school in which students of all communities sat together in one classroom and subsequently graduated from the University of Peradeniya...” – his father was Director of Information and an Assistant Secretary to several of Sri Lanka’s Prime Ministers – that in his working life, Mr Tissainayagam “...had always stood up for the underdog or the oppressed. He had even lost his own job on account of speaking up for other workers...” – during 1988 to 1990 (a period of the second JVP insurrection), Mr Tissainayagam “...helped the cause of the families of the disappeared, who were all Sinhala youth. He had compiled names of missing persons which was sought to be carried in 1990 to the United Nations working committee meetings in Geneva by His Excellency Mahinda Rajapakse [the current executive President of Sri Lanka and Commander in Chief of the Sri Lankan Armed Forces], who was an opposition MP at that time...”, the act of the now President seeking to take the information to Geneva being confirmed in the judgment of the Supreme Court of Sri Lanka reported “...1992 (2) SLR at page 223 (Mahinda Rajapakse Vs. Kudahetti and others)...”.

66. Evidence was also led of the fact that Mr Tissainayagam "...helped the families of the disappeared in very many other ways without any payment entirely as acts of voluntary service. He also worked together with two others on a project to create a documentary about the children orphaned as a result of acts of terror perpetrated by the IPKF, the LTTE, JVP and other paramilitary groups in the East of Sri Lanka...".
67. It was further submitted that no contradictory evidence was led by the prosecution to counter the evidence of witnesses of the personal circumstances of Mr Tissainayagam, nor was any suggestion put "...that he was a man whose history showed that he intended to cause communal disharmony..".

XXIV. Defence Summary of Defence Witnesses and their Views of the Articles of Mr Tissainayagam

68. Four witnesses were called by the defence to give evidence of the articles and the said two passages in Schedule 'X' to the Charges, each of which "...categorically stated that those writings will never give rise to any communal violence or even communal disharmony...", which evidence was not changed under cross-examination by State Counsel.
69. Citing passages from the transcript of the High Court Trial, the Defence submitted that it "...deliberately called four witnesses who thought in four different ways as to the factual accuracy of the writings concerned. However, all four were unison in their view that these could never have resulted in any communal violence or communal disharmony and if that is not the natural consequence the Accused could never have intended it...".
70. It is therefore submitted that "...there is available before Court sworn testimony of four witnesses whose unassailed testimony is that no person reading the said passages would have been provoked to communal violence. Therefore it can never be said that the natural consequence of the publication of the said passages is acts of violence...".
71. The onus of proof was on the prosecution to lead evidence "...that the natural consequence of the publication of the said passages is communal violence or communal disharmony..." and not only had the prosecution failed to discharge that onus, but the contrary had been proved in the Defence case.
72. It was further submitted that in light of the evidence, the Court "...cannot disregard the evidence of the said four witnesses and impose another view as to what would be the natural consequence of the said publication..." and further, the "...truth or falsity of the contents of the passages in Schedule 'X' are wholly immaterial to the offence the Accused is charged with...".

XXV. Defence Summary of Sri Lankan Newspaper Articles Not Written by Mr Tissainayagam, for Which There Were No Prosecutions

73. The Defence Written Submissions continued that several Sri Lankan newspaper articles from the *Daily Mirror* and *Sunday Leader* newspapers were produced to the Court "...to show that this type of news are published almost everyday, yet no one has been instigated to communal violence as a result...", the authenticity of those articles being met as a requirement of evidence and additionally, the prosecution having accepted the fact of the publication of those newspaper articles.

74. It was thereafter noted that the "...truth or otherwise of the articles/news items in those newspapers is irrelevant to the matter in issue. The fact is that those were published, but no violence, communal or otherwise, resulted as a consequence...".

XXVI. Defence Summary of the Defence Case

75. It was therefore submitted that "...the prosecution has [not only] failed to discharge its burden and prove that the natural consequence of the publication of the statements in 'X' necessarily is communal violence, but the Defence has gone on to prove that such writings do not result in violence between communities...".

XXVII. Defence Summary of the Third Charge

76. Mr Tissainayagam had been charged with a third charge, under the Emergency Regulations (Regulation 6 (c)) of the Emergency (Prevention and Prohibition of Terrorism and Specified Terrorist Activities) Regulations No. 07 of 2003, being Charge 3 more fully described in the Summary Report.
77. Charge 3 refers to the facts and circumstances alleged for Charge 1 and Charge 2.
78. It is therefore submitted in the Defence Written Submissions that "...the act or series of acts that are sought to be prosecuted under the [Charge 3] is the collection of money for the furtherance of specified terrorist activities..." and therefore, if Mr Tissainayagam "...is found "... 'not guilty' of Charge 1 and 2, he cannot be convicted of Charge 3 since then the writing and editing of the words in Extract 'X' would not amount to an offence under the PTA, and thus would not be a 'specified terrorist activity'...".

XXVIII. Defence Summary of the Evidence Concerning the Third Charge

79. Further, that the only evidence of the prosecution seems to be the "...purported 'confession' of the Accused, which was allowed to be marked in evidence after the voir dire. Even so, the Defence urges Your Honour to consider the serious infirmities in this document and the requirements of the law with regard to confessions. Particular reference is made to the evidence that emerged after the said order, with regard to the unreliability of this tampered document, in addition to the various discrepancies highlighted at the voir dire...".

XXIX. Defence Summary of the Changes Made to the Statement of Mr Tissainayagam Alleged to be his Confession

80. It ought be noted that the said "Statement" included important hand-written changes which Mr Tissainayagam asserts are not made by him, are not in his hand-writing and which were made after the document had been typed by the security authorities and after he saw the document.
81. Further that the change made to the statement show that Mr Tissainayagam's "...hand-writing has been altered subsequently to indicate that he asked a person named Baba from the LTTE to provide him with monies for the publication, when in fact the original statement made by the Accused is that he intimated to Baba that he did not want the monies from the LTTE... This is evident if one were to look carefully at page 031021 of the statement in Tamil where the word in Tamil for 'I said I don't want' has been altered in blue ink (the statement was made in black ink) to read 'I said I want' ...".

XXX. Defence Summary of the Changed Evidence for the Third Charge

82. The Defence Written Submissions continue that for the prosecution to prove Charge 3 by the “alleged confession” , then the prosecution must assert the contents of the statement are true.
83. Further that the “...unaltered statement very specifically says that the Accused did not want any money from Baba..” and therefore the required *mens rea* element for Charge 3 must fail.
84. During the High Court Trial, it was submitted that:
 - (a) the alteration was made by some person other than Mr Tissainayagam, since it is in blue ink;
 - (b) the word “I said I don’t want” is visible even though the alteration has been made on top of the original word;
 - (c) the alternation has not been initialled by Mr Tissainayagam unlike all other 57 alterations to the document;
 - (d) “...subsequent to the alteration, the word as appears in Tamil “vendum-mendren” is wrong and is never used in that manner, since when the words “vendum”(I want) and “endren”(I said) are conjoined, the last letter of the first word and the first letter of the last word (M and E(eh) are collapsed to make one letter “me”(meh), so that the word would correctly read “vendumedren” and not “vendum-mendren” as appears now...”;
 - (e) “...the word appears in this erroneous form because when the word “vendaamendren” was changed to “vendum-mendren”, the “da” sound was changed to “du” but the character than elongates the word “da” to “daa” (in Tamil aravu, alapilla) remained. That character was changed to “m”, to cover up the alteration, albeit while doing violence to Tamil grammar and spelling..”;
 - (f) “...after the word “vendaamendren” later altered to “vendummendren”, the next phrase that appears is “despite this money was deposited”(eninum) This sentence would have meaning only if the word “vendaamendren” was used. The logical law of noncontradiction does not permit one to say “I said I want; despite this money was deposited..”.

XXXI. Defence Summary of the Acceptance of the Changed Evidence

85. The Defence Written Submissions confirm that following the submissions outlined by Defence Counsel during the High Court Trial “...the Mudaliyar recorded that he substantially agreed with the arguments made by Counsel relating to the improper use of the Tamil language, and Your Honour’s Court was pleased to observe that the Mudaliyar agreed with the contention of Counsel for the Accused...”.
86. It is thereafter submitted that “...It is clear therefore that the Accused has neither solicited any funds from the LTTE for any purpose, nor done any act in furtherance of a specified terrorist activity, and that the only allegation that he did, is based on a fraudulent alteration of the Accused’s purported confession....”.
87. Additionally, it was noted that Mr Tissainayagam stated that “...this money was used for the purpose of printing and publishing North Eastern Monthly magazines...”, but the statement or confession relied upon by the prosecution states that the money was used

“...to purchase a ‘server’ (equipment to access the internet) for the computer...” and therefore again, Charge 3 cannot be sustained by the prosecution’s evidence.

XXXII. Defence Summary of the Bank Evidence

88. Additionally, the evidence of the bank witness (including bank documents and records) does not support Charge 3, including the money was said by the prosecution to have been received by telegraphic transfer, but the bank records show monies received (including after the date relevant to Charge 3) by “...cash deposits by unknown persons at a branch office of the bank...”.
89. It is thereafter further submitted that the description in the “...purported confession are so different to the acts described in charge 3 of the indictment...[and] Thus, the prosecution cannot blow hot and cold at the same time: it must either assert that the details in the purported confession are true, in which case the charge must necessarily fail; or else, if the prosecution abandons the purported confession, then there is no evidence at all before court in respect of this charge...”.

XXXIII. Defence Final Summary

90. The Defence Written Submissions conclude by submitting that:
- (a) the “...prosecution has not led any evidence of intention to prove charges 1 and 2...”;
 - (b) “...it is the position of the prosecution that the intention of the Accused was to make a record of war crimes and not what he is charged with; he must have the advantage of that concession by the prosecution..”;
 - (c) “...Acts of violence by the inciting of communal feelings, is not the natural consequence of the passages contained in ‘X’...”;
 - (d) “...four defence witnesses said so under oath; publication of similar news items/articles have not resulted in violence...”;
 - (e) “...The life and history of this Accused shows that he could never have had the intention he is charged with...”;
 - (f) “...The purported confession is tampered with and altered and cannot be considered a genuine document; in any case it does not prove charge 3; it is contradictory on every material point...”;
 - (g) “...it is submitted with respect that Your Honour will not hesitate to find the Accused “not guilty” of all the three charges and acquit him...”.

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