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EMINENT JURISTS PANEL on Terrorism, Counter-Terrorism and Human Rights

EMINENT JURISTS PANEL CONCLUDES AUSTRALIA HEARING ON COUNTER-TERRORISM LAWS, PRACTICES AND POLICIES

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Members of the Eminent Jurists Panel on Terrorism, Counter-terrorism and Human Rights, Professor Vitit Muntarbhorn (Thailand) and Ms Hina Jilani (Pakistan) ended their visit to Australia today. The eminent jurists are part of an independent group of eight jurists appointed by the International Commission of Jurists (ICJ) to examine the global impact of the fight against terrorism on human rights and humanitarian law. The hearing was the third in a series of hearings taking place in all regions of the world this year. Similar hearings were held earlier this year in Colombia and East Africa. The next hearings will be held in Belfast and London on 19-26 April.

Representatives of the legal community, human rights organisations, academics, the national human rights institution and government representatives provided information to the eminent jurists during the public hearing on 14-15 March in Sydney. The members of the Panel also visited Canberra where they held meetings with senior governmental officials of the Commonwealth of Australia and the Australian Capital Territory (ACT).

The eminent jurists thank civil society actors for their cooperation and assistance in gathering information on the subject matter of their inquiry. They also express their sincere appreciation to all senior governmental officials with whom they met and who contributed to the public hearing in Sydney. The Panel is grateful to the Australian Section of the ICJ for its cooperation and facilitation of the Panel's work.

During the hearing the Panel's attention was drawn to the large number of laws enacted since 2002 as part of Australia's strategy to counter terrorism. It is generally recognised that Australia is a country with longstanding democratic practices. The independence of the judiciary, respect for the rule of law, the rights of the accused and an accountable justice system are well established. There is an active and vibrant civil society and media. Collectively these factors provide an important protection against the arbitrary use of powers.

In the discussion with the Panel members, officials indicated that there was a substantial terrorist threat to Australia given that Australians have been victims of terrorist acts abroad. New laws were required to increase the powers of intelligence and law enforcement authorities to prevent terrorist acts; new terrorism related offences were necessary to ensure a federal response to terrorism which had previously been in the domain of the States of the Commonwealth. Officials were conscious of the need for checks and balances and mechanisms of oversight to ensure that human rights are respected and pointed to the fact that the new powers were administered carefully.

The ICJ is an international non-governmental organisation comprising sixty
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Members of civil society and the legal community questioned whether many of the new laws were indeed required. They stressed the need to complement counter-terrorism laws with the ability to effectively test them in court for compliance with international human rights standards. Concerns were raised regarding provisions that have introduced broadly defined offences, allowed retrospective application of the law, expanded powers of the executive branch of government and constrained avenues of judicial review and due process of law.

Apprehensions were, in particular, expressed concerning the role and powers of the intelligence/security personnel under amendments made to the Australian Security Intelligence Organisation Act (ASIO). The ASIO allows the authorities to question and detain persons who are not accused of any crime and who might simply have information about an event (“non-suspects”). Serious concerns were raised regarding the effectiveness of judicial control. Those subjected to a warrant under the ASIO are obliged to respond to any question put to them, which undermines the long-established privilege against self-incrimination. There are also serious constraints on access to lawyers and the right to effective legal representation and contact with family. There is also a prohibition on revealing that questioning and/or detention has occurred or any other information regarding questioning.

Numerous interventions expressed apprehension about the introduction of “preventative detention”. The recently adopted counter-terrorism law introduces the possibility of detaining suspects in exceptional circumstances without charge and without full recourse to the courts to question the legality of detention. Such detention aims to prevent an imminent terrorist act or simply to preserve evidence relating to a terrorist act. Detention is permissible for 48 hours at federal level, but State legislation allows preventative detention for up to 14 days.

The Panel members heard detailed objections to the regime of “control orders” introduced by amendments to the Criminal Code Act that could impose a wide range of restrictions on a person suspected of involvement in terrorism but not criminally charged and tried. For instance, house arrest could be permitted for up to 12 months. Concerns were raised with respect to several aspects of such orders, including the threshold of proof needed to justify an order, the lack of opportunity (on the part of the affected person) to be heard or to have legal representation to challenge an interim control order issued by a court.

The members of the Panel fully acknowledge the responsibility of the State to protect its citizens from terrorist attack. However, on the basis of the information received, they invite reflection on whether those counter-terrorism laws, policies and practices comply with international law. They express serious concern with regard to the ASIO powers to detain non-suspects, to limit the right to legal representation and the possible negative impact on confidentiality of communications between lawyer and client. The obligation of the affected person to render information also has negative impacts on the privilege against self-incrimination.

The possibility of preventative detention raises serious concern that such detention may be tantamount to derogation from the country’s human rights obligations under international law, including whether the various periods for detention are necessary and reasonable according to international standards.

Provisions permitting use of control orders are disquieting due to the wide range of conditions that can be imposed on the liberty, movement and communication of a person subjected to the order, without any trial or charge.

At the national level, a key difficulty in testing the above laws and practices against international standards, particularly the International Covenant on Civil and Political Rights (to which the country is a party), is that

the country has not yet adopted a federal law to incorporate international standards into national law. Such incorporation would help to establish a clear human rights framework based on international standards. However, one State has adopted a human rights law, which may allow courts in that State to directly test the application of the new powers.

The eminent jurists underline the need to ensure that security measures, including those taken to counter terrorism, correspond to the international human rights framework. Proposals for any exceptional laws, policies or practices should provide space for a broad public debate. Such a debate is necessary so that Australian society may assess the challenges raised by the measures and prevent any negative impact. Laws and related measures should be strictly necessary and proportionate to the exigencies of the situation a country faces. They should be subject to essential safeguards against arbitrary action and be applied with all possible transparency and accountability in accordance with international law.

The information, opinions and explanations obtained and other material other material received over the next 12 months will be further studied and will provide a valuable resource for the final global report of the Panel.

For further information on the Eminent Jurists Panel, see www.icj.org and www.icj-aust.org.au/.

For further information on the Australia hearing, please contact Elizabeth Evatt (ICJ Australia) or Gerald Staberock (ICJ Geneva in Canberra) or Isabelle Heyer (ICJ in Geneva).