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# *Terrorist Organisation Offences and the LTTE:* **R v Vinayagamoorthy**

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## *Abstract*

The sentencing on 31 March 2010 of three Tamil Australians for providing resources to the Liberation Tigers of Tamil Eelam (LTTE) underscores the inherent problems with laws designating organisations as ‘terrorist’. The defendants — Vinayagamoorthy, Yathavan and Rajeevan — pleaded guilty to charges under the *Charter of the United Nations Act 1945* (Cth). The Victorian Supreme Court found that their actions were not for a terrorist purpose, although some of the resources provided to the LTTE were found to have a direct military purpose. It is significant that the Court took into account, as relevant to sentencing, the political status of the LTTE and the legitimacy of diasporic support for homeland reconstruction. This Comment argues that these considerations partially subverted the purpose of terrorist organisation law to criminalise self-determination. The conduct of the case, however, reveals the devastating criminalisation inflicted on the Tamil diaspora by acting against collective ethnic political identity. This prosecution also reflects how Australian terrorist organisation laws functioned to legitimate Sri Lanka’s bloody war — not only against the LTTE, but also its war crimes against the Tamil people.

## **Introduction**

On 1 May 2007, Aruran Vinayagamoorthy and Sivarajah Yathavan were arrested in Melbourne and charged with offences under the *Criminal Code* (schedule to *Criminal Code Act 1995* (Cth)) in relation to their alleged involvement with a ‘terrorist organisation’ — the Liberation Tigers of Tamil Eelam (LTTE). Police claimed that the two Sri Lankan Tamil Australian citizens were members of the LTTE and provided the organisation with support, resources and funds. The Sri Lankan Secretary of Foreign Affairs made a statement indicating that further arrests would occur in Australia (Asian Tribune 2007). A little over two months later, Arumugam Rajeevan was charged in Sydney on 10 July with the same offences in relation to the LTTE. The arrests were the culmination of an Australian Federal Police (AFP) operation codenamed ‘Halophyte’, begun in January 2005 (AFP 2007). During the trial, evidence emerged that the prosecutions were made at the behest of the Sri Lankan Government. However, by 2009 the Commonwealth Director of Public Prosecutions (CDPP) case had collapsed and the charges under the *Criminal Code* were withdrawn. The LTTE was not proscribed under the *Criminal Code* in Australia. Instead, the CDPP re-charged the defendants under the *Charter of the United Nations Act 1945* (Cth)<sup>1</sup>, in which the LTTE is listed as a terrorist organisation. The defendants pleaded guilty to the offence of providing funds to a listed organisation, which attracts up to five years’ imprisonment. In sentencing on 31 March 2010, the Supreme Court of Victoria imposed recognisance release orders and the defendants avoided immediate jail terms.<sup>2</sup>

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<sup>1</sup> An Act to approve the *Charter of the United Nations* (‘UN Charter’), and to enable Australia to apply sanctions giving effect to certain decisions of the UN Security Council.

<sup>2</sup> *R v Vinayagamoorthy* [2010] VSC 148. Vinayagamoorthy was sentenced to two years’ imprisonment and released on a good behaviour bond of four years and A\$1000. Rajeevan and Yathavan were each sentenced to one years’ imprisonment and released on a good behaviour bond for three years and A\$1000.

The LTTE had been engaged in a protracted civil war with the Sri Lankan Government for the last 30 years over the establishment of a separate Tamil State in the north-east of Sri Lanka. While both sides committed atrocities, there is credible evidence of Sri Lanka's systemic genocidal practices against the Tamil people over the course of this asymmetric conflict.<sup>3</sup> The judgment of the Supreme Court provides insight into the repressive effects of terrorist organisation designation on those who support self-determination struggles. This Comment discusses two of the myriad issues that reflect the extraordinary problems with terrorist organisation laws generally.

First, the case highlights in practice what some warned of when the terrorist organisation regime was first introduced — terrorist organisation laws politicise the criminal law in pursuit of foreign policy ends (Hocking 2003; Emerton 2007; Hogg 2008). In this instance, the prosecutions were in aid of the Sri Lankan Government's campaign against the LTTE. In the context of allegations of systemic genocide and other war crimes, the role of terrorist organisation laws in obscuring and legitimating these State crimes remains substantial. Second, the case reveals the ways in which terrorist organisation laws criminalise the Tamil diaspora in Australia as a suspect community. The purpose is to disrupt diverse diaspora claims for self-determination, which are understood to give the LTTE legitimacy. Terrorist designation has serious consequences for many migrant diasporas — including Tamils, Kurds and Palestinians — who remain connected to struggles for self-determination by virtue of being a people with a shared historical and political culture.

Terrorist organisation designation impedes the political resolution of intractable conflicts by labelling non-State actors as 'terrorist' and obscuring the violence of States (Federation of Community Legal Centres Vic (Inc) (FCLC Vic) 2006a, 2006b, 2007, 2009; Hogg 2008). Studies demonstrate how terrorist organisation laws: penalise otherwise legitimate political activities, including international solidarity (Hocking 2003; McCulloch and Pickering 2005); discriminate by proscribing predominantly Muslim organisations (Australian Muslim Civil Rights Advocacy Network 2007); and censure the diverse connections migrants in Australia seek to maintain in a multicultural plural democracy (Emerton 2007; FCLC VIC 2007). Less attention has focused on the effects of the laws on diaspora communities' claims to self-determination, their experiences of policing and the regulation of political mobilisation on the basis of collective ethnic identity (cf Western Suburbs Legal Service Inc 2009; Sentas 2009). *R v Vinayagamoorthy* provides an opportunity to connect the dots.

## The terrorist organisation regime

Three intersecting legal frameworks make up what is referred to here as 'the terrorist organisation regime': a court determination that an organisation is terrorist; executive proscription; and the suppression of financing of terrorism under the *UN Charter*. Each framework is briefly considered in turn.

The first method of designating a terrorist organisation relies on the prosecution of an offence in relation to an organisation. A court determines whether the alleged terrorist organisation satisfies the definition under the law before the offence can be made out. A terrorist organisation is defined in the *Criminal Code* as one that is directly or indirectly

<sup>3</sup> An indictment to charge Generals Sarath Fonseka and Gotabaya Rajapaksa with crimes of genocide (for events between 1983 and 2008) has been lodged with the United States Department for Justice (Tamils Against Genocide 2009).

engaged in preparing, planning, assisting in or fostering the doing of a terrorist act, whether or not the terrorist act has occurred or will occur (s 102.1(1)). A number of offences are triggered for a range of interactions with that organisation: membership of, or directing the organisation; providing or receiving training and funding; or providing support or resources (ss 102.2–102.7). These are among the most serious offences in the *Criminal Code*. Each offence carries a maximum term of imprisonment of 25 years, with the exception of the membership offence (10 years' maximum).

Second, a terrorist organisation can be proscribed by executive regulation made by the Governor-General of Australia on the advice of the Federal Attorney-General (s 102.1(2)). Recommendations on the proscription of entities are provided to the Attorney-General by the Australian Security and Intelligence Organisation (ASIO). In addition to being satisfied on reasonable grounds that the organisation meets the aforementioned definition of a terrorist organisation, the Attorney-General can also proscribe the organisation on the basis that it advocates the doing of a terrorist act (s 102.1(1A)). No organisation has yet been listed on this ground. Many commentators have criticised the definition of advocacy as too broad as it includes 'praising' terrorism (Lynch and Williams 2006:23). Eighteen organisations are currently listed in Australia.<sup>4</sup> Seventeen of the organisations are self-identified as Islamic, while the Kurdistan Workers' Party (PKK) identifies as a secular organisation. The same offences triggered by the first (prosecution) method of designation also apply to dealings with organisations listed by executive proscription. Additionally, it is an offence to associate with a proscribed organisation, which carries a maximum of three years' imprisonment.

Third, under the *UN Charter*, the Australian Government Department of Foreign Affairs and Trade (DFAT) maintains a rapidly expanding list of 3614 individuals and organisations whose assets are frozen.<sup>5</sup> It is an offence, punishable by 5 years' imprisonment, to make any donations or have any dealings with a listed entity (s 22). Listing at the discretion of the Foreign Minister, under a broad requirement by the UN to maintain a list, occurs if the individual or organisation is considered to be 'associated with terrorism' (s 15). The list includes armed revolutionary groups such as the Revolutionary Armed Forces of Colombia (FARC), Shining Path (the Communist Party of Peru), the New Peoples Communist Party of the Philippines, and Euskadi Ta Askatasuna (ETA). It also includes specified 'jihadi' groups with links to Al Qa'ida and militant Islamic groups with no apparent connections to Al Qa'ida. A number of international charities are also listed. No Australian-based organisations have yet been listed. The UN listings system for freezing financial assets has been critiqued as arbitrary, pre-emptive punishment that criminalises economic development efforts in the global south (McCulloch and Pickering 2005; McCulloch and Carlton 2005; McCulloch 2006).

It was under the *UN Charter* that the three defendants were re-charged and pleaded guilty on 24 December 2009. The UN charges were laid after the devastating last stages of the war in Sri Lanka, where at least 20 000 Tamils were estimated to have been killed in the Sri

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<sup>4</sup> Al Qa'ida; Al Qa'ida in Iraq; Al Qa'ida in the Lands of the Islamic Maghreb; Jemaah Islamiyah; Abu Sayyaf Group; Jamiat ul-Ansar; Ansar al-Islam; Asbat al-Ansar; Islamic Army of Aden; Islamic Movement of Uzbekistan; Jaish-e-Mohammed; Lashkar-e Jhangvi; Hizballah External Security Organisation; Hamas's Izz al-Din al-Qassam Brigades; Lashkar-e-Tayyiba; Palestinian Islamic Jihad; Kurdistan Workers' Party (PKK); Al-Shabaab.

<sup>5</sup> The 'consolidated list' contained 3614 individuals and entities as of 2 June 2010. In May 2008 there were 1700 entries. See DFAT (2010).

Lankan military's final offensive against the LTTE conducted in May 2009 (Philp 2009).<sup>6</sup> Sri Lankan forces repeatedly and indiscriminately bombarded an area densely populated by civilians after hundreds of thousands of Tamils were forced to retreat to Mullivaikal, a narrow strip of land on the north-east coast. Hospitals were subject to shelling and the International Committee of the Red Cross was prevented by the Government from providing medical aid to thousands of wounded civilians. The crimes of the Sri Lankan State at the close of the war in the name of annihilating the LTTE have been credibly documented to include summary executions by soldiers and the forcible internment of over 280 000 internally displaced peoples in camps, of which approximately 80 000 people remain. Enforced disappearances, extrajudicial killings, torture, sexual violence and other ill-treatment (including deaths from malnutrition and starvation) have been documented. There is also evidence that the LTTE committed war crimes, included killing civilians trying to flee the conflict zone (International Crisis Group 2010). While the Australian Government continued its pursuit of the defendants, the UN and international community were being heavily criticised for taking no action against Sri Lanka as the atrocities unfolded. Still, no Sri Lankan authorities have been called to account.

### **The findings in *R v Vinayagamoorthy***

The prosecution case was that the defendants 'directly or indirectly made money available to the LTTE' and collected and sent between A\$700 000 and A\$1 million dollars to the LTTE. In addition, Vinayagamoorthy was charged with sending electronic equipment to the LTTE alleged to be for the purpose of detonating bombs. The defendants argued that the electronic equipment and funds were sent for humanitarian purposes. Coghlan J accepted evidence that the equipment 'found itself in a landmine' and was put to a direct military purpose, but did not find this to be Vinayagamoorthy's intention (at [37], [69]).

Coghlan J found that it was impossible to tell how specifically the funds were put to use. He accepted the defendants knew that there was a risk the funds would be used 'inappropriately' in spite of their motivation to help Tamils in Sri Lanka (at [27]): 'I would not go so far as saying that your aims were entirely humanitarian. But I do accept that they were not purposely to assist terrorist activity' (at 31). The prosecution argued that the Australian-based Tamil Coordinating Committee was used to covertly collect donations from the diaspora under the appearance of humanitarian legitimacy. In announcing the arrests of the Tamil men in 2007, Victoria Police Assistant Commissioner Kieran Walshe declared: 'we're concerned that that sort of thing is taking place in Australia, that Australian citizens are being duped ... into making contributions to what they believe to be honest fund-raising activities in terms of relief for people in distress' (Dunn and Bice 2007). However, the Court concluded otherwise — tsunami relief funds were not diverted to the LTTE and this was never the prosecution case (at [29]).

The prosecution also relied heavily on the defendants' political involvement with the LTTE, despite the fact the DPP withdrew the charges under the *Criminal Code* for membership and for providing support and resources. This evidence included the defendants' distribution of LTTE propaganda and letters valorising the Tamil struggle for independence. For example, the evidence tendered against Sivarajah Yathavan by the AFP

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<sup>6</sup> According to the former UN spokesperson in Sri Lanka, Gordon Weiss, as many as 40,000 civilians could have been killed during the final stages of the war (Campbell 2010).

included: paying respects at an LTTE memorial; possession of LTTE insignia and photos of the LTTE leader; and publication and distribution of pro-LTTE material, such as newspapers to the Australian Tamil community (AFP 2007:18–20). Evidence was also tendered that Yathavan, with others, attended a meeting with LTTE military leaders. The AFP particularly noted that the group was requested to ‘continuously develop and strengthen our freedom fight, collect all migrant peoples together and create many people, and our organisation must grow strong in [sic] overseas’ (AFP 2007:21).

Political identification with a collective and transnational cause supported in the diaspora, were equated by police with ‘membership’ of a terrorist organisation and, hence, as evidence of the commission of an offence. In terrorist organisation law, a supportive diaspora is treated as a problem of equivalent magnitude to armed insurgency itself, because of its role in accumulating legitimacy for political claims. This author has argued in detail elsewhere how diverse identity formations are targeted in terrorist organisation laws as though they are terrorist identities, thereby perpetuating the idea that ethnic identity sustains and encourages violence (Sentas 2009).

The prosecution argued that evidence that the defendants were members or supporters of the LTTE were ‘aggravating circumstances’, supporting the contention that they had a subjective belief that the LTTE was a terrorist organisation. Coghlan J accepted the defence argument that this would be akin to treating the defendants as if they remained charged with membership and support offences, which they no longer were. The judgment provides implicit recognition of how pro-LTTE Tamil political identity remains criminalised as ‘membership’ through the laws. The provision of funding to the LTTE occurred at a time when there was a ceasefire agreement and when the LTTE were the effective government of the north-east region. This material fact was significant in Coghlan J’s finding that the defendants’ subjective beliefs were that the LTTE were the de facto government of the northern part of Sri Lanka and *not* a terrorist organisation, and that it was viewed as such by the broader Tamil community (at [16], [19]–[20]). This recognition in the sentencing judgment underscores how terrorist designation is inconsistent with the complex reality of political conflict. Consequently, the prosecution case was legally weak from inception. The charges against the three men under the *Criminal Code* were dropped by the DPP because it was too difficult to establish that the LTTE satisfied the definition of ‘terrorist organisation’. Between 2007 and 2008 preparations to executively proscribe the LTTE were under consideration by the Australian Government, but the organisation was never listed. However, listing the LTTE could not have remedied the prosecution case, as listing could not apply retrospectively to the defendants’ actions. Proscription has however, significant political effects.

## Suppressing self-determination

The terrorist organisation regime makes no distinction between armed conflicts and terrorism. The right to self-defence against oppressive regimes in furtherance of self-determination remains, however, a norm of international law (Muller 2008). It has been argued that the Tamil people first sought self-determination through peaceful means and resorted to armed struggle after victimisation by the Sri Lankan State (McConnell 2008). The designation of self-determination armed struggles as ‘terrorist’ criminalises actions and objectives regardless of whether these conflicts are governed by international humanitarian law. Under international humanitarian law, breaches such as the targeting of civilians in

armed conflict may be designated as war crimes. The conflict in Sri Lanka was an internal armed conflict, to which both parties should have been governed by international humanitarian law, including criminal responsibility for violations on either side. The LTTE's designation as terrorist by most of Sri Lanka's allies, arguably de-legitimised the application of international law to the conflict.

The targeting of civil conflicts beyond Australian jurisdiction through the terrorist organisation regime, is indicative of the end to the tenuous consensus achieved by decolonisation in interpreting minority claims to sovereignty through international law. The post-decolonisation period has, instead, seen a new consensus opposing the alteration of State boundaries, particularly additional claims on territory through armed struggle (Nadarajah and Sriskandarajah 2005:96). In the 'war on terror', the self-determination claims of non-State actors are reinscribed as global security threats through the circulation of international counter-terrorism instruments and obligations, primarily through the UN (Hayes 2005).

In the review of the listing of Palestinian Islamic Jihad under the *Criminal Code*, the Parliamentary Joint Committee on ASIO, ASIS and DSD (the Parliamentary Joint Committee on Intelligence and Security (PJCIS) from 2 December 2005) stated that while it believed political violence was not an acceptable means of achieving a political end in a democracy, it supported a distinction between terrorism and armed conflict governed by the Law of Armed Conflict and the *Geneva Conventions* (Parliamentary Joint Committee on ASIO, ASIS and DSD 2004:23). The PJCIS has reiterated this view in every subsequent listing, stating that designation of armed conflicts as terrorist threats may not be the most effective solution to the problem of conflict. The PJCIS has not, however, given serious consideration to this proposition in any individual listing. However, in a surprising move in 2006, the PJCIS recommended to the Australian Government that: 'the definition of terrorism be amended to include a provision or a note that expressly excludes conduct regulated by the law of armed conflict' (PJCIS 2006:56). The Rudd Government rejected the recommendation in 2008 (Attorney-General's Department 2008).

In *R v Vinayagamoorthy* we see the traces of a rebuke of Parliament's rationale that the terrorist organisation regime should legitimately criminalise non-State actors engaged in armed conflict, and their supporters. The judgment implicitly supports a distinction between armed conflict and terrorism, albeit based on the State-like status of the LTTE at the time of the offences. First, in finding that the electronic equipment was put to a direct military purpose, Coghlan J contrasted this to the defendants' lack of a terrorist purpose (at [69]). The defendants' motive, he concluded, were to assist the Tamil people and the only available vehicle to do this was through the LTTE: 'you did not intend to support any activity which *you* would have regarded as terrorist' (at [59], emphasis added). Coghlan J did not need to determine whether the LTTE was a terrorist organisation, as it was listed as such under the *UN Charter*. It is significant that he accepted that the defendants were active members and 'controllers' of the LTTE in Australia, 'doing the bidding of the LTTE', but not that they were in fact members of a terrorist organisation (at [36]). It is significant that Coghlan J chose to valorise the defendants' belief that the LTTE represented the Tamil people and that it was not a terrorist organisation in their estimation. While subjective belief was the required legal test, it was open to Coghlan J to accept the prosecution arguments about aggravating circumstances.

Second, the judgment recognised the role of the laws in *transforming* the conflict into terrorism and the status of the LTTE from effective government of the north-east to a

terrorist organisation. As Coghlan J stated, it was only the inclusion of the LTTE on the UN list that turned legitimate political activity into a terrorist offence: 'conduct which had previously been lawful became unlawful' (at [8]). The charges, Coghlan J argued, need to be understood in the context that there was a ceasefire in place until the end of 2005 and the complex, multi-level character of the LTTE as military organisation, government and provider of essential services. Ultimately, the judgment found that despite the inclusion of the LTTE on the consolidated list, the defendants were still dealing with the effective government of north Sri Lanka.

Third, Coghlan J points out that the AFP were aware that the electronic components were being shipped to Sri Lanka. He remarks that the AFP allowed the components to be sent regardless of their concern that it could be used in explosive devices (at [38]). This comment indicates an underlying problem with the laws. While the stated objective of government is to prevent political violence by criminalising all connection to it, terrorist organisation laws and their policing are not designed to resolve complex political conflicts. Rather, the laws maintain and escalate conflict by denying one party legal and political status. Terrorist organisation laws also provide automatic support of Sri Lanka's bloody war by its allies, including Australia. Foreign policy preferences should not structure the criminal law.

The Australian Government's role in allowing the prosecutions to be brought at the behest of Sri Lanka in the first place, and its heavy reliance on the evidence provided by Sri Lankan officials (such as alleged war criminal, General Fonseka), requires serious scrutiny. In committal proceedings for the *Criminal Code* charges, the AFP acknowledged that the prosecution was initiated by request of the Sri Lankan Government. Sri Lankan officials also exerted undue influence and control over the conduct of the case. Sri Lankan Deputy Solicitor General Kodagoda said that he would disrupt AFP statement taking unless he could review witness statements and 'advise' witnesses before they testified (McKenzie and Baker 2010). The defendants' solicitor Rob Stary has called for an inquiry into how the case was initiated (Carbonell 2010).

## **Criminalising the Tamil diaspora**

From the time the three men were first arrested on 1 May 2007, this prosecution has impacted negatively on the Tamil community. The charges of membership, support and funding had the effect of imposing a collective punishment on the Tamil diaspora in Australia. The majority of Tamils left Sri Lanka to escape repression, racism and the imputation that simply being a Tamil meant you were a terrorist. While there was wide support for LTTE in the diaspora globally, the diaspora are by no means homogenous and have also engaged in sustained criticism of the LTTE's hierarchical, authoritarian and brutal strategies, including the use of child soldiers, suicide bombers and violent suppression of its Tamil critics. However, support for the LTTE's struggle for Tamil self-determination, if not for all of its tactics, is fundamentally tied to the preservation of Tamil identity in the face of the violent history and present of Sri Lankan denial of ethnicity through ethnic cleansing and other recognised genocidal practices.

The prosecution was conducted in a way that criminalised the broader Tamil community as suspect. The case exposed how Rajeevan was arrested at gun point, and interrogated by the AFP without recourse to a lawyer or basic legal rights, all in spite of his cooperation. In throwing out the AFP's record of interview, Coghlan J described the unlawful procedure as



affording Rajeevan ‘less rights than you would have in circumstances where you’re under arrest’ (McKenzie and Baker 2010). However, this was just the tip of the iceberg. Tamil people reported between 50 and 70 incidences of informal questioning in Melbourne and Sydney between November 2005 and March 2008, as well as intimidation and harassment by the police — with raids and search warrants, but no arrests (Sentas 2009).<sup>7</sup> Cross-examination of AFP officers in the committal hearing established that the AFP were engaged in widespread informal questioning of the Tamil Community (*R v Vinayagamoorthy* Transcript of Proceedings, 17 September 2007:191). Balasubramaniam has pointed out that the authorities’ intelligence regarding the defendants and the broader Tamil community came from those who perpetrated institutionalised repressions and horrendous crimes against Tamils in Sri Lanka — namely, Sri Lankan police, military and Ministry officials (Western Suburbs Legal Service Inc 2009).

## Conclusion

The sentencing judgment in *R v Vinayagamoorthy* provides one brief and incomplete account with which to read the political function of the terrorist organisation regime. In furthering the foreign policy aims of militarily annihilating the LTTE, Australian law collectively criminalised Tamils, and transformed support for self-determination as terrorist. This form of criminalisation relies on erasing the histories and experiences of resistance against the systemic State repressions that motivate diasporic solidarities.

The attempt to prohibit and censure the political nature of Tamil diasporas through the threat of heavy criminal sanctions had a number of consequences in the prosecution of Vinayagamoorthy, Yathavan and Rajeevan. It dangerously misrepresented the criminal regulation of political claims as an appropriate achievable strategy for resolving protracted civil wars. Targeting diaspora support of non-State actors excludes and further marginalises minority communities within Australia who have been subject to persecution in countries of origin. There is a real threat that Australian police harassment of Tamils at the behest of Sri Lanka may continue. Sri Lankan authorities announced an international operation in May 2010 to counter Tamil activities in the diaspora towards self-determination (Hodge 2010). So long as laws designating terrorist organisations persist, the repressive logic of this operation remains an impediment to the recognition and resolution of the Tamil people’s legitimate grievances.

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<sup>7</sup> These estimates have been confirmed by the Australian Tamil Advocacy Council (Western Suburbs Legal Service Inc 2009).

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