



MEDIA RELEASE

LTTE TRIALS

1. On 29 October 2019, 12 Malaysian men were charged with supporting the Liberation Tigers of Tamil Eelam (“LTTE”). All the accused have since been held in detention under the Security Offences (Special Measures) Act 2012, otherwise known as SOSMA, and will face trials in the coming months.

LTTE

2. Founded in May 1976 by Velupillai Prabhakaran, LTTE was involved in armed clashes against the Sri Lankan state forces and by the late 1980’s was the dominant Tamil militant group in Sri Lanka. Since 1983, more than 80,000 have been killed in the civil war that lasted 26 years.

3. President Mahinda Rajapaksa of Sri Lanka declared military victory over the Tamil Tigers on 16 May 2009. The rebels offered to lay down their weapons in return for a guarantee of safety. On 17 May 2009, LTTE’s head of the Department

of International Relations, Selvarasa Pathmanathan conceded defeat, saying in an email statement, “this battle has reached its bitter end”.

4. With the end of the hostilities, 11,664 LTTE members surrendered to the Sri Lankan military in May 2009.

5. In August 2011, President Rajapaksa presented to Parliament a repeal of the country’s stringent emergency regulations introduced in 2005 to deal with the LTTE threat. President Rajapaksa informed Parliament in 2011 that “from the time when terrorist activities ended in May 2009 until today there have been no reports of any terrorist activities”.

6. Independent reputable publications issued by the UNHCR, the US Department of State and Janes Defence Weekly confirmed that LTTE had ceased all activities in Sri Lanka by 2009.

7. In October 2014, the European Court of Justice annulled the anti-terrorism sanctions and several other restrictions placed by the European Union on the LTTE in 2006. The Court noted that the decision to proscribe the LTTE had been based on “imputations derived from the press and the Internet” rather than on direct investigation of the group’s actions, as required by law. Later, in March 2015, the EU reimposed the sanctions and restrictions.

8. In July 2017, the LTTE was removed from the terrorism blacklist of the European Union by the European Court of Justice for a second time. The Court found no evidence to establish LTTE carrying out attacks after its military defeat in 2009.
9. The LTTE was neither suspected nor linked to the most recent bomb attacks in Sri Lanka during Easter of 2019.
10. LTTE has never in its history carried out violent attacks in Malaysia.

Criteria and Considerations for Prosecution

11. As Public Prosecutor, I must conduct myself in a manner which will maintain, promote and defend the interest of justice: The Prosecution Policy issued by the Australian Office of Public Prosecutions in August 2019 expresses it appropriately:-

“In the final analysis **the prosecutor** is not a servant of government or individuals – he or she **is a servant of justice**”

12. It is incumbent upon a prosecutor that the law is properly applied and to seek a fair balance between conflicting public interests. The intensity of preparation for a trial makes it different from investigation by the police or other investigating

agency. Prosecutors must take account of facts that only become known as the case develops after charges are laid. The sufficiency of evidence to establish the “beyond reasonable doubt” criminal standard is always a particular challenge. I must be satisfied that there is sufficient evidence to provide **a realistic prospect of conviction** against each suspect on each charge. In reaching that judgement, I must exercise discretion responsibly and impartially.

13. It is noted that 6 of the accused have been charged for offences that allegedly took place between March and December 2014. But prosecutors did not see it fit to charge them soon after the alleged offences had been committed. It is against the public interest that these 6 persons are tried in 2020 for offences allegedly committed 6 years previously. The passage of time is unacceptable for a case of this nature.

14. The charges relating to the other 6 accused concern offences allegedly occurring in January and October 2019. But by this time, even if LTTE was still gazetted under our laws as a terrorist group, the defence will contend that LTTE has not been responsible for violence even in its home country, Sri Lanka in 2019, let alone having any impact on the ordinary affairs of ordinary people in Malaysia. The link is remote, specious and tenuous. Harm to Malaysians cannot be established by the prosecution.

15. Section 95 of the Penal Code deals with acts causing slight harm. It provides:-

“Nothing is an offence by reason that it causes, or that it is intended to cause, or that it is known to be likely to cause, any **harm**, if that **harm** is so slight that no person of ordinary sense and temper would complain of such **harm**.”

[my emphasis]

16. Section 95 emphasizes “harm”: thus, a victimless offence or one which “harms” no one should be treated with caution by prosecution.

The 34 Charges

17. Initially the focus was on SOSMA because the accused were arrested and detained pursuant to the procedures laid out in SOSMA. However, as their trials are approaching, the prosecution has to turn to the Penal Code which contains the provisions under which the offences forming the basis of the charges are found. The 12 persons charged for terrorist acts face a total of 34 charges, which can be broken up into the following 5 categories of offences:-

- (i) 6 charges for “giving support” to LTTE in an event;
- (ii) 13 charges for “giving support” to LTTE using social media;

- (iii) 13 charges for “possession” of items associated with LTTE;
- (iv) 1 charge for “distribution” of items associated with LTTE; and
- (v) 1 charge for “display” of an item associated with LTTE.

The expressions “giving support”, “possession”, “distribution” and “display” are defined in the Penal Code.

18. Section 130J(1) of the Penal Code makes it an offence if a person “gives support” to –

- (a) any terrorist group;
- or
- (b) the commission of a terrorist act.

Section 130J(2) lists numerous examples of “giving support” including: “using the social media or any other means to –

- (i) advocate for or to promote a terrorist group, support for a terrorist group or the commission of a terrorist act;
- or
- (ii) further or facilitate the activities of a terrorist group”

19. Section 130JB(1) of the Penal Code makes it an offence for anyone who–

(a) has possession, custody or control of;

or

(b) provides, displays, distributes or sells

any item associated with any terrorist group or the commission of a terrorist act.

What is a “Terrorist Group”?

20. Section 130B(1) of the Penal Code defines the term “terrorist group” by cross-referring to provisions in another Act, namely, Section 66B of the Anti-Money Laundering, Anti-Terrorism Financing and Proceeds of Unlawful Activities Act 2001. Section 66B(1) of that Act empowers the Minister of Home Affairs, if he is satisfied on information given to him by a police officer, that “an entity has knowingly committed, attempted to commit, participated in committing or facilitated the commission of, a terrorist act”, may, by Order published in the Gazette, declare the entity to be a specified entity, and therefore a terrorist group.

21. However, an Order made under Section 66B(1) by the Home Minister that an entity is a terrorist group is not meant to be permanent or enduring. Parliament recognizes that, over time, a group that uses violence to achieve its purposes may change or adapt by eschewing violence and accepting peaceful methods of change. History is replete with such examples. Section 66B(9) therefore provides that the Minister shall review his Order “every 6 months whether there are still

reasonable grounds for any such order to continue to apply to a specified entity”, and if the Minister determines that there are no such reasonable grounds, he shall immediately revoke the Order previously made.

22. It is therefore plain and clear that the law requires an Order declaring an entity a terrorist group must be reviewed every 6 months by the Minister. If its violent actions or tendencies continue, the Order stays. If, on the other hand, such actions cease or the entity itself becomes moribund, defunct, dissolved or disbanded, then the Order should be revoked. Parliament has used the expression “reasonable grounds”, thereby indicating an objective standard reviewable by the Courts if a legal challenge is made. It is not a subjective standard based on whims. One domestic and one foreign example come to mind of how military/political organizations evolve over time. If the Malayan Communist Party (“MCP”) is declared in 2020 to be a “terrorist group” under Section 66B(1), it would be a wrongful exercise of statutory power because as a matter of fact the Malaysian Government signed a Peace Treaty with the MCP in 1989 in Hat Yai, and it is long defunct. In Ireland, the Sinn Fein initially supported the IRA in its military objectives, but over time became a normal political party which gave up its violent struggle to secure power. Its electoral support from the ballot box in the recent Irish general elections were impressive. Any decision by a Malaysian Minister in 2020 to declare Sinn Fein a “terrorist group” would likewise be an error in law.

23. LTTE was declared a terrorist group by the Minister of Home Affairs by an Order gazetted on 12 November 2014. One of the accused was charged for giving support and distributing items associated with LTTE in March and June 2014, which were before LTTE was gazetted as a terrorist group. It is obvious that these charges against him simply cannot stand because at that point of time LTTE was not even gazetted, which is a necessary element of the offences. Additionally an argument is available to the defence of each accused that the declaration of LTTE as a terrorist group on 12 November 2014 may be invalid or at least ought have been revoked following a Section 66B(9) review of the Order.

What is a “Terrorist Act”?

24. A “terrorist act” is defined in Section 130B(2) of the Penal Code to mean an act or threat of action in Malaysia or elsewhere which meets one or more criteria in Section 130B(3) and which expressly does not fall within the exclusion provided in Section 130B(4). The criteria listed in Section 130B(3) make it clear that terrorist acts or threats of action are contemplated to be grave and serious in nature. Examples include acts that cause death(s) and the use of firearms and explosives. The exclusion provided in Section 130B(4), on the other hand, makes it clear that acts of advocacy, protest, dissent or industrial action which are not intended to cause death, serious injury or risk to public safety are not terrorist acts or threats of action. Simply put, peaceful acts are not terrorist acts.

25. The exclusion provided by Section 130B(4) reflects Parliament's recognition of fundamental constitutional rights, including the right to free speech and expression and the right to freedom of association and assembly. The dividing line between acts which are considered terrorist acts and acts which are not is the gravity of the act: if it causes or intends to cause death of another, it is a terrorist act. However, if it is merely a statement or protest, whether on the social media or otherwise, without threatening violence, it is not a terrorist act.

DECISION

26. It is commonplace to have idols to whom hero worship is displayed. It is not just pop stars, sportsmen or actors who are admired: historical personalities and politicians are often the subject of adoration. Thus, millions of people across the globe admire Lenin, Stalin, Mao Tse Tung or Che Guevara, and the like. Having their photos and other representations in one's mobile phone or on a Facebook account does not transform one to being a terrorist. Just because each of these leaders used terror or violence to achieve their political goals does not mean that an ardent supporter online should be regarded as a terrorist or is planning a terrorist act.

27. That is the common theme of all the 12 LTTE accused. Each of them had in his mobile phone or Facebook account photos of Prabhakaran and other leaders of LTTE slain during the Civil War in Sri Lanka. If such conduct can constitute a

criminal offence, it would bring the law into disrepute. But even if there were elements of a “terrorist act” on the part of all or any of the 12 LTTE accused by possessing, distributing or displaying such photos or Prabhakaran, it would be impossible for the prosecution to establish that they do not fall within the excluded category of Section 130B(4) of the Penal Code in that they merely constitute “advocacy, protest or dissent”.

28. For these reasons, I have decided that there is no realistic prospect of conviction for any of the 12 accused on any of the 34 charges. Accordingly, in the exercise of my discretion pursuant to Article 145(3) of the Federal Constitution, I have decided to discontinue proceedings against them with immediate effect.

Tan Sri Tommy Thomas
Public Prosecutor / Attorney General
21st February 2020