Executive Summary – Lifting Canada's LTTE ban

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with

Coalition for Tamil Political Rights

The 2nd International Conference on Tamil Nationhood and Genocide in Sri Lanka was held in 2018, as a follow-up, legal research work started in 2020. This document provides a legal argument to consider by the community. The Liberation Tigers of Tamil Eelam (LTTE) was viewed as the Tamil Eelam government from the 1990s until 2009. When they entered peace talks in 2002, the international community accepted LTTE as a party to negotiate a political solution, a solution ISGA was proposed in 2003 and LTTE ceased to exist on May 18, 2009, after the genocidal war. The fog of the U.S.-led War on Terror normalized the application of terrorism bans by the EU and Canada in 2006 to the LTTE, and the Peace Process by proxy. The EU's LTTE ban functioned as the lead domino in a domino effect that materially abetted the collapse of the GoSL-LTTE Peace Process. The Sri Lankan government uses the LTTE ban to tarnish the Tamil community's image and continue to Genocide without even considering a political solution to the Tamil issues Fifteen years after the end of Sri Lanka's armed conflict, the time has come for the EU and Canada to de-list the LTTE.

Disclaimer: This summary does not include all international law arguments. For example, IHL is not in there, nonintervention, statehood.

On the world stage, Canada is known for its global leadership in human rights, upholding the rule of law, and setting an example for other States in the international community to follow. Promoting respect for human rights, and working to strengthen the rules-based international order that protects universal ideals like human rights, democracy, and respect for the rule of law remain at the heart of Canada's international policies and engagement.[1]

As such, it is imperative for Canada's government, under Conservative or Liberal Party administration, to stand firm against any grave breaches of International Law when considering the prohibition of groups that strive for liberation and freedom from oppression. As Canadians, it is in furtherance of our responsibility to thwart the subversive aims of genocidal States and safeguard our nation's foreign policy when such States abuse counterterrorism policy as a pretext to deliberately target civilians in post-9/11 armed conflicts.

Canada proscribed the Liberation Tigers of Tamil Eelam ("LTTE") as a terrorist group on April 8, 2006, while the LTTE was actively participating in an ongoing, Norway-mediated Peace Process with the Government of Sri Lanka ("GoSL") to negotiate a sustainable political settlement to the ethnic conflict.[2] Today, almost 15 years after the end of the armed conflict in Sri Lanka on May 18, 2009, arguably via Tamil Genocide perpetrated by the Sri Lankan State, we urge Canada to reevaluate and review the legality of:

(a) the April 8, 2006 terrorism ban placed on the Liberation Tigers of Tamil Eelam ("LTTE")
(b) Canada-Sri Lanka cooperation in the War on Terror on the basis of said terrorism ban since April 8, 2006.

In light of the internationally-recognized human rights abuses perpetrated by the Sri Lankan State between January-May 2009, it is paramount at this time to acknowledge a number of critical inadequacies within Canada's administrative decision-making, anti-terrorism legislation, and compliance with the rule of International Humanitarian Law (IHL) in connection with terrorism bans placed on combatants in wars beyond Canada's borders.

If Canada's Executive Branch-based administrative decision to ban the LTTE is not compatible with the rule of law in Canadian jurisdiction, Canada must promptly delist the LTTE by lifting the LTTE Ban. We would also urge Canada to take further corrective policy measures to ensure that the human rights abuses inflicted on Tamils by the Sri Lankan State, often justified by the LTTE Ban, will not repeat in the future, and harm similarly situated ethnic communities under the same pretext: counterterrorism.

To be sure, the Tamil community's request to lift the LTTE Ban today is not an effort to create legal or political space for the LTTE to revive or regroup in Canada or elsewhere. While matters with any plausible connection to "terrorism" remain polarizing

[1] Government of Canada, "Voices at Risk: Canada's Guidelines on Supporting Human Rights Defenders," Policy Statement (March 3, 2023), https://www.international.gc.ca/world-monde/issues_development-enjeux_developpement/human_rights-droits_homme/rights_defenders_guide_defenseurs_droits.aspx?lang=eng (last visited December 9, 2023)

[2] Government of Canada, "Canada's new government lists the LTTE as a terrorist organization," News Release (April 10, 2006), https://www.canada.ca/en/news/archive/2006/04/canada-new-government-lists-ltte-terrorist-organization.html (last accessed December 9, 2023)

and politically sensitive in public debate, Canada's act of delisting the LTTE does not signal Canada's support of the LTTE's mission or methods. Indeed, Canada and her allies like the United States (U.S.) have delisted groups before.[3]

Delisting the LTTE today is fundamentally about Canada's commitment to the rule of law.

Since the LTTE's military defeat on May 18, 2009, no military activities connected with an armed liberation actor representing oppressed Tamils has demonstrably emerged anywhere, inside or outside of Sri Lanka. Similar to post-9/11 Supreme Court cases in Canada such as *Canada v Khadr*[4] or in American jurisdiction like *Hamdi v. Rumsfeld,*[5] our request to lift the LTTE Ban arises from fundamental legal tensions between Canada's counterterrorism policy and the constraints on said policy grounded in Canada's binding commitments to the rule of law, namely, International Law and the *Canadian Charter of Rights and Freedoms.*

Section A: Historical Overview of the De-Listing Argument

Our request for Canada to de-list the LTTE is fundamentally a request for Canada to review and comply with its rule-of-law obligations, detailed further in Sections B-D below.

Almost two decades ago in 2006, 'Osama bin Laden', 'Al Qaeda', and 'national security' dominated foreign policy discussions from Washington to Toronto, and understandably so - Al Qaeda's 9/11 attacks on the U.S. were horrific. Canada and the European Union ("EU") banned the LTTE in these extraordinary, early post-9/11 years, a time when methods like rendition,[6] waterboarding,[7] and incommunicado detention[8] without criminal charge were normalized in Western counterterrorism operations, even though such methods do not conform to the rule of International Law.

During the 2001-2006 time period, Canada cooperated with the U.S. in the rendition and torture Omar Khadr and Maher Arar, each in violation of Canada's international human rights obligations. Canada also banned the LTTE during the same 2001-2006 time period.

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[3] See Generally, The Canadian Press, "Canada drops Iranian group MEK from terror list, " Canada Broadcast Corporation (December 12, 2012), https://www.cbc.ca/news/politics/canada-drops-iranian-group-mek-from-terror-list-1.1239066 (last accessed December 9, 2023). Also see generally, Blinken, Antony, "Revocation of the Terrorist Designations of Ansarallah," U.S. Department of State Press Release (February 12, 2021), https://www.state.gov/revocation-of-the-terrorist-designations-of-ansarallah/ (last accessed December 9, 2023).

[4] Canada v. Khadr, [2010] 1 SCC 123

[5] Hamdi v. Rumsfeld, 542 U.S. 507 (2004)

[6] See Generally, Amnesty International, "The secretive and illegal programme of rendition," News Feature (April 4, 2006), available at https://www.amnesty.org/en/documents/amr51/056/2006/en/ (last accessed December 10, 2023)

[7] Amnesty International, "WE TORTURED SOME FOLKS," Report (September 2, 2014), available at https://www.amnesty.org/en/wp-content/uploads/2021/07/amr510462014en.pdf (last accessed December 10, 2023)

[8] Amnesty International, "United States of America: Rubber stamping violations in the war on terror," Public Statement (September 29,2009), available at https://www.amnesty.org/en/wp-content/uploads/2021/08/amr511552006en.pdf (last accessed December 10, 2023)

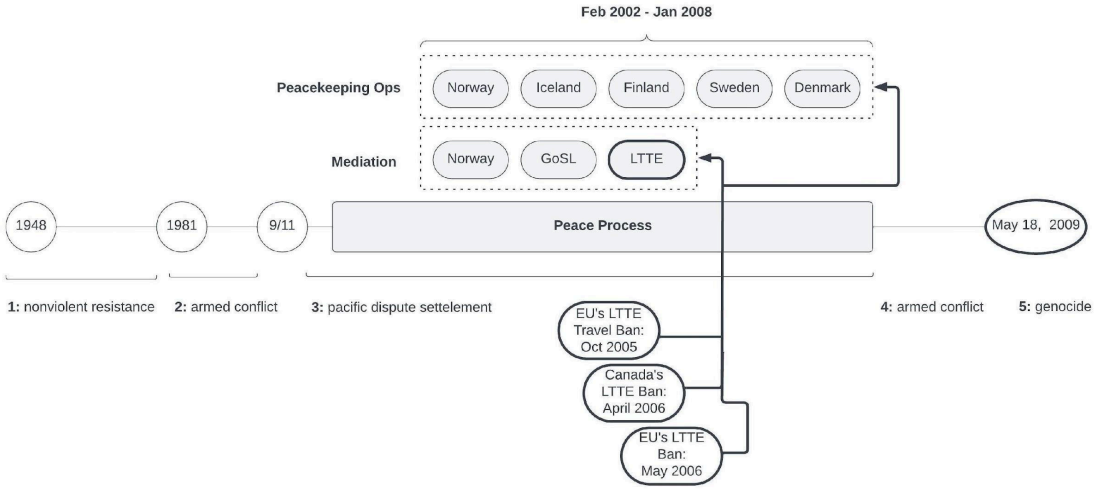

Figure 1: Post-Colonial History of the Tamil Freedom Struggle from 1948 to May 2009.

On April 8, 2006, Canada's direct application of s.83 of the *Criminal Code* to the LTTE indirectly criminalized negotiation, mediation, and peacekeeping activities of European stakeholders in the ongoing GoSL-LTTE Peace Process as material support to terrorist activity.

The following month, on May 29, 2006, the EU also invoked anti-terrorism laws to ban the LTTE when the Council of the EU adopted Decision 2006/379/EC that implemented Art. 2(3) of Regulation No 2580/2001.[9] The EU's use of anti-terrorism legislation to proscribe the LTTE in 2006 also directly criminalized negotiation, mediation, and peacekeeping activities of European stakeholders in the ongoing GoSL-LTTE Peace Process as material support to terrorist activity. For example, the EU's counterterrorism policy included the imposition of a travel ban on the LTTE in 2005, during the GoSL-LTTE Peace Process, directly obstructing the LTTE's ability to meaningfully participate in peace talks and rounds of negotiation.

In hindsight, the EU's LTTE ban functioned as the lead domino in a domino effect that materially abetted the collapse of the GoSL-LTTE Peace Process. The EU's use of anti-terrorism laws, including the imposition of a travel ban, isolated the LTTE and frustrated the LTTE's ability to participate in said Peace Process. Given the focus of public discourse on human rights scandals at the time, such as Guantanamo Bay and Abu Ghraib, the impact of the EU's counterterrorism policy on the GoSL-LTTE Peace Process generally went unnoticed during the early post-9/11 years of the U.S.-led War on Terror.

[9] The EU passed anti-terrorism proscription legislation in December 2001, approximately two months after Al Qaeda's terrorist attack on the United States on September 11, 2001. Through the extraterritorial application of EU law, the EU proscribed the LTTE as a terrorist organization on May 29, 2006. Generally, see the LTTE's delisting proceeding at the European Court of Justice ("ECJ"). *Liberation Tigers of Tamil Eelam v Council of the European Union*, Case T-208/11, ECLI:EU:T:2011:537 (Gen Ct Oct. 25, 2011)

As *Figure 1* illustrates, the Canada and the EU[10] bans of the LTTE in April and May of 2006, respectively, were enacted to align with U.S. diplomatic objectives[11] to isolate and 'condemn' the LTTE on counterterrorism grounds since September 2005, during the ongoing GoSL-LTTE Peace Process. The EU's travel ban on the LTTE was imposed in October 2005. When Canada banned the LTTE, approximately three months after a Conservative Party election victory in January 2006, similar to the EU's LTTE ban, Canada's (extraterritorial) use of domestic anti-terrorism law to proscribe the LTTE simultaneously criminalized a spectrum of pro-peace conduct – protected under International Law – as material support to terrorist activity, including: the LTTE's participation in peace talks with the Government of Sri Lanka ("GoSL"); Norway's mediation of the GoSL-LTTE Peace Process; and the operations of the Sri Lankan Monitoring Mission ("SLMM"), a European peacekeeping force established to monitor the Ceasefire Agreement ("CFA") between the GoSL and LTTE during the Peace Process. In August 2006, retired brigadier Ulf Henricsson, the Swedish head of the SLMM, criticized the EU for banning the LTTE during the Peace Process.[12]

The fog of the U.S.-led War on Terror normalized the application of terrorism bans by Canada and the EU in 2006 to the LTTE, and the Peace Process by proxy. U.S.-Canada-EU coordination in counterterrorism policy to criminalize the LTTE's participation in said Peace Process occurred without substantial public objection from the international community. As evidenced three years later by the Tamil Genocide in May 2009, this legal reduction of the LTTE's role in the Tamil freedom struggle to a post-9/11 terrorism problem emboldened the Sri Lankan State to violate international human rights law in 2009.

For the avoidance of doubt, historically, the Tamil freedom struggle is not reasonably reducible to a post-9/11 terrorism problem. Since the end of British colonial rule of Sri Lanka in 1948, the Tamil freedom struggle evolved through five chronological Phases: (1) Nonviolent Resistance; (2) Armed Conflict; (3) the Norwegian-mediated Peace Process; (4) Armed Conflict; (5) Genocide. In Phase 1, Tamil nonviolent resistance within the democratic system to check and balance State-sponsored anti-Tamil government policies of ethnolinguistic discrimination and religious extremism, endorsed by Sri Lanka's Sinhala-Buddhist majority, resulted in anti-Tamil pogroms from the 1950s-1970s; the Sri Lankan police force burning the Jaffna Library in 1981; and Sri Lanka's first act of Tamil genocide in 1983 known as Black July. The failure of nonviolent resistance in Phase 1 lead to war in Phase 2 and peace negotiations in Phase 3.

From the 9/11 attacks in 2001 to April 8, 2006, the legal or policy positions of Canada's Western allies in the War on Terror vis-a-vis the LTTE, such as the U.S. or the U.K., did not materially alter Canada's rule-of-law obligations in Canadian jurisdiction. The essential facts that shaped the Tamil freedom struggle from Phase 1 to Phase 3 were material to and triggered specific international legal obligations that bound Canada's government action, with respect to Canadian jurisdiction, during the GoSL-LTTE Peace Process.

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[10] Senanayake, Shimali, "EU adds Tamil rebels to its list of banned terrorist groups," New York Times (May 30, 2006), https://www.nytimes.com/2006/05/30/world/asia/30iht-srilanka.1846575.html (last accessed December 17, 2023)

[11] U.S. Department of State, "Sri Lankan Government Urges EU Terrorist Designation for LTTE, Invites UN Envoy," Wikileaks (September 2, 2005), https://wikileaks.org/plusd/cables/05COLOMBO1547_a.html (last accessed December 9, 2023); in this U.S. Department of State cable, the U.S. indicates that the "[d]esignations by the EU and Canada" of the LTTE as a terrorist group would be favorable to U.S. interests in Sri Lanka.

[12] Kirk, Lisbeth, "Swedish general slams EU for terror listing Tamil Tigers," euobserver (August 25, 2006), https://euobserver.com/news/22264 (last accessed December 17, 2023)

As shown in Figure 1, Canada'a administrative decision to proscribe the LTTE as a terrorist group under s.83 of the *Criminal Code* – without adequate review of Canada's international legal obligations – disregarded the fact that an internationally-mediated Peace Process was ongoing, and that the LTTE was a party to said Peace Process. Canada's LTTE ban indirectly impacted mediation and peacekeeping operations by European States in the Peace Process.

Section B: Three Reasons to De-List

Now, fifteen years after the end of Sri Lanka's armed conflict, the time has come for Canada to de-list the LTTE for at least three reasons.

1. Policy
2. International Law
3. Constitutional Law

First, from a Policy Perspective, the termination of Sri Lanka's armed conflict fifteen years ago was clear and unambiguous.[13] The Sri Lankan State militarily defeated the LTTE, using Tamil Genocide[14] as a method of counterterrorism in the U.S.-led War on Terror. No credible evidence of organized violence, by the LTTE, inside or outside of Sri Lanka, has been reliably attributed to a functioning LTTE since May 18, 2009.[15]

Second, from an International Law Perspective, Canada's April 2006 LTTE Ban violated several provisions of International Law in the post-9/11 fog of the U.S.-led War on Terror. We note that such material departures in Canada's counterterrorism policy from Canada's international legal obligations resemble Canada's participation in the torture and rendition of Omar Khadr[16] and Maher Arar,[17] two human rights abuse cases that also transpired in the post-9/11 fog of the U.S.-led War on Terror.[18] In particular, from the *Kellogg-Briand Pact of 1928* to the United Nations ("UN") Charter, UN General Assembly ("GA") Resolutions and *jus cogens* norms, multiple sources of International Law that are part of Canada's legal order establish a peace law framework ("Peace Law") that collectively protects mechanisms for peaceful dispute settlement in

[13] Weaver, Matthew, Chamberlain, Gethin. "Sri Lanka declares end to war with Tamil Tigers." The Guardian (May 19, 2009), https://www.theguardian.com/world/2009/may/18/tamil-tigers-killed-sri-lanka (last visited on December 9, 2023)
[14] Preamble, Tamil Genocide Education Week Act, 2021, S.O. 2021, c. 11 - Bill 104, https://www.ontario.ca/laws/statute/s21011; People's Tribunal on Sri Lanka, Final Report, pg.28, https://www.ptsrilanka.org/wp-content/uploads/2017/04/ppt_final_report_web_en.pdf.
[15] Alleged criminal acts of "terrorist" activity attributed to a post-May 18,2009 "LTTE" by any of Canada's contemporary War on Terror allies, including the U.S. or the U.K., have not yet been subjected to meaningful judicial review, in fifteen years, by an impartial legal proceeding wherein the LTTE had independent legal representation. Further, a government's attribution of acts to a group, pursuant to any administrative anti-terrorism law, logically presupposes said group exists and functions in fact as a coherent organization at the time of attribution. This presupposition – a factual predicate to renew the LTTE ban in any jurisdiction via administrative decision-making – has also not been subjected to meaningful judicial review, in fifteen years, by an impartial legal proceeding wherein the LTTE had independent legal representation.
[16] Canada (Prime Minister) v. Khadr [2010] 1 SCR 44, https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/7842/index.do (last visited on December 9, 2023)
[17] Ito, Suzanne. "Canadian Torture and Rendition Victim Denied Supreme Court Review," American Civil Liberties Union (June 14, 2010), https://www.aclu.org/news/national-security/canadian-torture-and-rendition-victim-denied-supreme-court-review (last visited on December 9, 2023)
[18] [cite Khadr, Arar]

international affairs – i.e. an internationally-mediated Peace Process – from disruptive action by third-party States.

When Canada banned the LTTE in April 2006, during the ongoing, Norwegian-mediated Peace Process between the GoSL and LTTE, this directly criminalized the LTTE's ability to lawfully participate in the Peace Process and indirectly criminalized European peacekeeping efforts in the GoSL-LTTE Peace Process as material support to terrorist activity under *s.83*. To be sure, we note that Peace Law is one of several international legal obligations that bound Canada on April 8, 2006 and prohibited Canada from banning the LTTE on April 8, 2006. As the timeframe from April 8, 2006 to May 18, 2009 in Sri Lanka disturbingly illustrates, any State's use of anti-terrorism justifications to criminalize one party in an ongoing, internationally-mediated Peace Process can undermine peace negotiations, frustrate peacekeeping efforts, escalate war, and end in Genocide.[19]

And Third, from a Constitutional Law Perspective, continuous, administrative decisions by Canada to renew an LTTE Ban that criminally focuses on the Tamil 'diaspora' since May 18, 2009 raises serious civil liberty-based concerns regarding the facial compatibility of the present LTTE Ban with long-standing principles of fundamental justice enshrined in the Canadian *Charter.*[20]

Canada amended its statutory definition of the LTTE after May 18, 2009 by appending one sentence to the end of the group's description:

> Founded in 1976, the Liberation Tigers of Tamil Eelam (LTTE) is a Sri Lankan-based terrorist organization that seeks the creation of an independent homeland called "Tamil Eelam" for Sri Lanka's ethnic Tamil minority. Over the years, the LTTE has waged a violent secessionist campaign with the help of ground, air, and naval forces, as well as a dedicated suicide bomber wing. LTTE tactics have included full military operations, terror attacks against civilian centres, and political assassinations, such as the successful assassinations of Indian Prime Minister Rajiv Ghandi and Sri Lankan President Ranasinghe Premadasa. The LTTE has also had an extensive network of fundraisers, political and propaganda officers, and arms procurers operating in Sri Lanka and within the Tamil diaspora. *Although the LTTE was militarily defeated in May 2009, subversion, destabilization, and fundraising continue, particularly in the diaspora.*[21] (Emphasis Added)

Today, Canada's statutory definition of the LTTE is the only description of a terrorist group in Canadian jurisdiction that expressly incorporates a "diaspora" in said group's description. A diaspora is not a group as contemplated by s.83 of the *Criminal Code*. This prosecutorial pivot of the LTTE Ban's focus from a 'group' to a 'diaspora' after May 2009 overreaches the scope of s.83's legislative authorization to proscribe groups as terrorist organizations. In the context of Canadian criminal law, the term 'group' holds specific definitional connotations, typically associated with an organized entity engaging in goal-directed, unlawful activities (i.e. terrorist activity). Conversely, a 'diaspora' holds distinct definitional connotations, typically associated with a dispersed

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[19] Sri Lankan Monitoring Mission ("SLMM") memo titled 'SLMM Assessment of Possible Consequences of EU Banning the LTTE', dated 18 April 2006 and signed by Henricsson, cited in Pawns of Peace Evaluation of Norwegian peace efforts in Sri Lanka, 1997-2009, by NORAD, pg.60

[20] At some point after the end of the Sri Lankan armed conflict on May 18, 2009, and the Sri Lankan State's undisputed military defeat of the LTTE, arguably via Tamil genocide, Canada updated its statutory organizational definition of the LTTE under s.83 of the *Criminal Code* to pivot the primary focus the post-May 19, 2009 LTTE Ban from the LTTE as a group to the Tamil community as a global diaspora.

[21] Government of Canada, "Currently Listed Entities" (June 25, 2021), https://www.publicsafety.gc.ca/cnt/ntnl-scrt/cntr-trrrsm/lstd-ntts/crrnt-lstd-ntts-en.aspx#46 (last accessed December 9, 2023)

ethnic community linked by a common culture and heritage that transcends the kind of political or organizational cohesion attributed to a "group."

For purposes of anti-terrorism law, Canada's inclusion of 'diaspora' in describing the post-May 2009 LTTE as a 'group' constitutes a material departure from established group-diaspora legal distinctions, oversteps intended legislative boundaries, and raises serious constitutional concerns with regard to vagueness, overbreadth, due process, and racial discrimination in law enforcement policies. For example, a Canadian Tamil citizen of the diaspora, who resides in Montreal or Toronto, and who attends a protest, raises a flag, or expresses a particular viewpoint online – each fundamental civil liberties protected by the *Charter* – can be assigned the label of LTTE member by Canada, without notice, today, 15 years after the end of Sri Lanka's war.

Delisting the LTTE today – an essentially defunct group post-May 2009 that no longer presents any credible national security threat to Canadian interests – would partially remedy the direct and disparate impacts of the rule-of-law issues presented by Canada's original LTTE ban and its post-May 2009 renewals from the perspectives of Policy, International Law, and Constitutional Law.

Section C: The Legality of Canada's LTTE Ban

In Canada, policy rationales to list the LTTE as a terrorist group under s.83 of the *Criminal Code* are inseparable from Al Qaeda's 9/11 attacks on the United States. Over two decades ago, Canada responded to Al Qaeda's horrific terrorist attacks on the United States on September 11, 2001 by rapidly mobilizing in coordination with a coalition of Western allies to fight global terrorism. Canada immediately sent her own troops to participate in the U.S.-led War on Terror, a national security policy and committment that was geographically limited to battlefields in Afghanistan[22] in 2001, and later expanded discreetly to Iraq[23] by 2003.

The U.S.-led War on Terror globalized in geographic scope beyond Afghanistan and Iraq in the coming years, to over 85 countries.[24] During the 2005-2006 time period, Canada responded to non-public U.S. diplomatic pressure to ban the LTTE as a terrorist group. On April 8, 2006, to further U.S.-Canada coordination in the War on Terror, Canada took criminal legal action and proscribed the Sri Lanka-based LTTE as a terrorist group via application of *s.83* of the *Criminal Code* – Canada's federal anti-terrorism law – on the basis of universal jurisdiction. In Sri Lankan jurisdiction, the GoSL had de-listed the LTTE as a terrorist group as a confidence-building measure to support the Peace Process.

Since April 8, 2006, including the period following May 18, 2009, a continuous chain of administrative decisions by Canada's Executive Branch has effectively and quietly rubber-stamp renewals of the LTTE Ban. It appears that Canada has renewed the LTTE Ban since May 2009, whether or not the LTTE exists in fact as a militant group since May 2009, with the requisite organizational leadership and organizational capacity

[22] Government of Canada, "Canada-Afghanistan Relations," May, 9, 2023, https://www.international.gc.ca/country-pays/afghanistan/relations.aspx?lang=eng (last visited December 9, 2023)
[23] Weston, Greg. "Canada offered to to aid Iraq invasion: WikiLeaks," The Canadian Broadcast Company ("CBC"), May, 15, 2011, https://www.cbc.ca/news/politics/weston-canada-offered-to-aid-iraq-invasion-wikileaks-1.1062501 (last visited December 9, 2023)
[24] Brown University. "GLOBAL EXPANSION OF POST-9/11 WARS," July 2021, https://watson.brown.edu/costsofwar/costs/social/global-expansion (last visited on December 9, 2023)

to intentionally use force in ways that could plausible rise to statutory 'terrorist activity' thresholds defined in *s.83* of the *Criminal Code*. For the avoidance of doubt, although no publicly-available body of credible evidence has reasonably established that the LTTE still exists in fact as a post-May 2009 militant group, Western democracies such as the U.S. and the U.K. also continue to quietly rubber-stamp renewals of the LTTE Ban through administrative decisions, supported by scant evidence of questionable authenticity, reliability, and probative value.

Turning to Canada, the legal validity of Canada's LTTE Ban has not yet been subjected to substantive legal scrutiny or judicial review since the LTTE Ban was enacted on April 8, 2006. In our legal assessment, the LTTE Ban, both when enacted on April 8, 2006 and as renewed since, was not and is not in compliance with Canada's rule-of-law commitments, in particular, International Law and the Canadian Constitution.

1. International Law.

    a. Peace Law. Under the rule of international law, the constraints of Peace Law are binding on the foreign affairs and national security policies of States in the conduct of international relations.

        1. "Peace Law" refers to the body of treaties and legal principles under international law that collectively strives to protect and promote the peaceful settlement of disputes in lieu of the use or threat of force. The core elements and doctrine of Peace Law establish a binding obligation on States to resolve conflicts through peaceful means, and to not interfere or sabotage ongoing mechanisms of pacific dispute settlement. For example, the Kellogg-Briand Pact of 1928, an international treaty that Canada signed and ratified in 1929[25], renounced war as an instrument of national policy and called for the peaceful settlement of disputes[26]. Likewise, United Nations ("UN") law, such as Article 2(3) of the *UN Charter* requires member States to "settle their international disputes by peaceful means"; Article 33 of the UN Charter further outlines various mechanisms States should utilize to do so[27].

        2. Modern Peace Law now recognizes the peaceful settlement of disputes as a *jus cogens* (peremptory) norm that all States must adhere to[28]. This norm prohibits States from threatening or using force to bypass dispute settlement mechanisms and requires they negotiate in good faith using mediation, arbitration, judicial

[25] U.S. Department of State, Office of the Historian, Kellogg-Briand Pact [1928], https://history.state.gov/milestones/1921-1936/kellogg (last accessed February 24, 2024)
[26] See *Kellogg-Briand Pact*, Aug. 27, 1928, 46 Stat. 2343, 94 L.N.T.S. 57
[27] See U.N. Charter, arts. 2(3), 33.
[28] Nuclear Tests Case (N.Z. v. Fr.), 1974 I.C.J. 457 (Dec. 20).

settlement and other peaceful means[29]. As affirmed in numerous resolutions grounded in UN law, Peace Law obligations that attach to State conduct includes refraining from any actions that may undermine or obstruct the pacific settlement of disputes[30]. For example, UN General Assembly ("UNGA") Resolutions affirm that States must "seek early and just settlement of their international disputes by negotiation, inquiry, mediation, …" and refrain from "acts of reprisal involving the use of force."[31] Similarly, UNGA Resolution 37/10 mandates States to "refrain from any action " that may "impede the peaceful settlement of disputes."[32] Taken together, and grounded in authorities such as the Kellogg-Briand Pact, the UN Charter, UNGA Resolutions, and case law, the binding legal obligations of Peace Law require States to resolve disputes peacefully and refrain from actions that undermine pacific dispute settlement mechanisms.

3. For the avoidance of doubt, the U.S.-led War on Terror did not suspend the rule of Peace Law. In jurisdictions that recognize the binding effect of international law on all acts of State, no act of State to implement or further counterterrorism objectives can supply a valid legal basis to violate Peace Law. If a State's post-9/11 counterterrorism measures included the direct or indirect application of anti-terrorism laws to criminalize activities that are essential for a pacific dispute settlement mechanism to function – such as the Norwegian-mediated GoSL-LTTE Peace Process – such counterterrorism measures violate Peace Law.

a. The Peace Process. Canada's LTTE Ban on April 8, 2006 and counterterrorism policy in Sri lanka between 2006-2009 appears to have conflicted with Canada's international legal obligations under Peace Law[33]. When Canada enacted the LTTE Ban, the LTTE was then a party to a Cease-Fire Agreement (CFA) with the GoSL; the LTTE was also actively participating in the 2002-2008 GoSL-LTTE Peace Process, facilitated by Norway, and monitored by the Sri Lankan Monitoring Mission ("SLMM"), to reach a negotiated political settlement to the ethnic conflict. Earlier, the GoSL had delisted the LTTE in 2002 in Sri Lankan jurisdiction for the specific purpose of creating political space for the LTTE to meaningfully participate in rounds of negotiations in said Peace Process. On April 8, 2006, Canada banned the LTTE without adequate review of whether applying a federal anti-terrorism law to a peace process was barred by

[29] U.N. Charter, art. 2(3); Resolution 26/25, U.N. Doc. A/RES/26/25 (Oct. 24, 1970).
[30] E.g., Resolution 37/10, U.N. Doc. A/RES/37/10, ¶ 1 (Nov. 15, 1982).
[31] GA Res 2625 (XXV) (Oct. 24, 1970).
[32] GA Res 37/10 (Nov. 15, 1982).
[33]

Canada's international legal obligations. As a consequence, Canada's use of anti-terrorism laws to proscribe the LTTE in April 2006, directly obstructed the LTTE's ability to participate in the Peace Process while indirectly criminalizing ongoing European peacekeeping efforts in Sri Lanka as material support to terrorist activity under s.83. A domino effect ensued: (1) Canada's LTTE Ban precipitated the withdrawal of the Sri Lankan Monitoring Mission (SLMM) from LTTE-controlled areas of the Vanni Region in Sri Lanka; (2) the SLMM's withdrawal escalated armed conflict between the GoSL and LTTE; (3) the escalation of armed conflict collapsedthe Peace Process; (4) after the Peace Process collapsed, the continued escalation of armed conflict within the U.S.-led War on Terror emboldened Sri Lanka to commit Tamil genocide under the pretext of counterterrorism by May 18, 2009. In Canadian jurisdiction, in the absence of conflicting domestic legislation, Canada's use of an anti-terrorism law to criminalize the peace-related activities of State and non-State actors in the GoSL-LTTE Peace Process was prohibited under applicable International Law in Canadian jurisdiction.

b. Canada-Sri Lanka Cooperation. Between January-May 2009, the GoSL repeatedly invoked the pretext of counterterrorism to justify systematic human rights violations in military operations that targeted Tamil civilians inside three No-Fire-Zones designated by the GoSL. As counterterrorism must be conducted in compliance with international human rights law,[34]Canadian cooperation with Sri Lanka between 2006-2009 that advanced Canadian national security policy grounded in Canada's LTTE Ban and resulted in the killing of Tamil civilians, would establish breaches of Canada's human rights-related international legal obligations on the basis of Canada-Sri Lanka shared responsibility. The legal basis establishing Canada's shared responsibility for international human rights violations incorporated in methods of Sri Lankan counterterrorism operations in 2009 would be analogous to the legal bases that established Canada's responsibility for the U.S.' rendition and torture of Omar Khadr and Maher Arar.

2. Constitutional Law. After the Tamil genocide in May 2009, Canada's 'diaspora' clause modification to s.83's post-May 2009 definition of the LTTE redirected the focus of the LTTE Ban from the LTTE as a group to the Tamil community as a diaspora. While the Charter does not categorically prohibit the use of racial profiling in law enforcement activities directed towards certain racialized minority communities, the federal government's ability under s.83 to infer an individual's LTTE membership from that individual's Tamil racial identity, when that individual engages in certain forms of speech or associational activities raises serious constitutional concerns with regard to Canada's commitments under the rule of law. s.83 of the *Criminal Code* authorizes the application anti-terrorism laws to proscribe a "group." It does not authorize Canada to redefine a listed group in such a way that the bright-line boundary that should clearly separate the listed

[34] UN Security Council Resolution 1456 (2003)

group from the diasporic community is so blurred that a ban on the group essentially functions as a criminalized placeholder to label or target any individual of that diaspora as a terrorist. Such law enforcement practices are not congruent with the fundamental interests of justice enshrined in the *Charter*.

Section D: Canada's "Stringent Legal Test"

On April 8, 2006, Canada applied an incorrect legal test to ban the LTTE as a terrorist group under s.83 of the *Criminal Code*, during a then ongoing GoSL-LTTE Peace Process.

While Canada's administrative decision-making process did review if the statutory elements of s.83 of the *Criminal Code* were satisfied, Canada did not adequately evaluate if banning the LTTE as a terrorist group was prohibited by Canada's obligations under International Law. While the fog of the U.S.-led War on Terror does introduce nuanced factual and legal complexities, the basic test to determine the compliance of Canada's LTTE Ban with the rule of law in Canada is reducible to one, simple, legal proposition: the rule of law.

In Canada, in the absence of conflicting domestic legislation, Canadian counterterrorism measures that target a specific group to further the legislative mandate of *s.83* must comply with supreme sources of constitutional and International Law in Canada's legal order to constitute a valid act of State that conforms to the rule of law. To be sure, in Canadian jurisdiction, any domestic law or act of State that is enacted but fails to align with supreme, paramount sources of law, notably Charter-based constitutional law and applicable International Law, is rendered null and void within the legal order. Sources of supreme law, including binding provisions of constitutional or International Law, effectuate substantive limitations on government action based in federal criminal laws, such as *s.83*. Any government action by Canada that applies s.83 to a group (i.e. the LTTE), in contravention of constitutional or International Law is legally invalid.

For example, pursuant to the supremacy of International Law in Canada, if *s.83* specifically approved Canada's use of waterboarding – a method of torture – in government action during counterterrorism operations, Canada's judiciary would deem such government action as invalid for violating Canada's human rights obligations under International Law. Similarly, pursuant to the doctrine of constitutional supremacy, if s.83 specifically approved the use of blanket racial discrimination in law enforcement activities to target a specific ethnic minority community residing in Canada (i.e. the Tamil diaspora, Somali diaspora, or First Nations community), Canada's judiciary would also deem such government action as null and void for incongruence with the *Charter*'s civil liberty protections against blanket racial discrimination in government action.

Hence, any legal deference to administrative decision-making in the sphere of national security-related government action should not function as a proxy to circumvent the substantive limitations on government action based in supreme sources of constitutional and International Law. Pursuant to Canada's rule-of-law obligations, proper legal analysis of listing any group as a terrorist organization under s.83 must consider if the government action complies with all sources of applicable law, federal, constitutional and international. The supremacy doctrine underscores that *prima facie*

conformity with the statutory elements of a federal anti-terrorism law – i.e. s.83 of the Criminal Code – is insufficient to legitimize an act of State under Canada's rule of law.

For Canada's proscription of a group to constitute a lawful act of State in Canadian jurisdiction, the governmental action must comply with domestic federal law and constitutional law and applicable provisions of International Law. Canada's proscription of the LTTE on April 8, 2006 did not. On April 10, 2006, the Honourable Stockwell Day, Minister of Public Safety, announced Canada's LTTE Ban:

> The decision to list the LTTE is long overdue and something the previous government did not take seriously enough to act upon," said Minister Day. "Our government is clearly determined to take decisive steps to ensure the safety of Canadians against terrorism. "In listing the LTTE, the Government of Canada conducted an extensive analysis of security information and intelligence to ensure the stringent legal test outlined in the Criminal Code was met. (emphasis added)[35].

This stringent legal test used by Canada to proscribe the LTTE was erroneous. Said otherwise, Canada applied an incorrect, incomplete legal test to ban the LTTE, in violation of Canada's rule of law.

While the "stringent legal test" did appear to check for the compliance of Canada's decision to ban the LTTE with the statutory elements of s.83 of the *Criminal Code*, it did not evaluate if supreme sources of International Law that concurrently bound government action in Canadian jurisdiction prohibited Canada from banning the LTTE on April 8, 2006, during the then ongoing GoSL-LTTE Peace Process, mediated by Norway.

To be clear, the *Criminal Code* does not function in isolation in Canada's legal order. The *Criminal Code* – including the set of federal anti-terrorism laws that shape Canadian counterterrorism policy – alone does not control the legal validity determination of a terrorist group proscription under Canada's rule of law. In Canadian jurisdiction, government action based in the *Criminal Code* must also conform to supreme sources of applicable international and constitutional law, especially when Canada acts globally, in international affairs, and beyond Canadian territorial borders. The LTTE Ban's internationalized fact pattern in Sri Lanka around April 2006 presented such a situation: a low-intensity armed conflict, an internationally-mediated peace process, a Scandinavian peacekeeping force. To disregard or discount such facts in Canada's administrative decision-making process to ban the LTTE did not neutralize the legal obligations triggered by these facts under International Law. Rather, by disregarding such facts, the reasoning and outcome of the administrative decision-making process to proscribe the LTTE likely committed "palpable and overriding error" under *Canada v. Vavilov.*[36]

Consider the following mixed questions of fact and law that were relevant to Canada's administrative decision to proscribe the LTTE back on April 8, 2006:

1. Can Canada lawfully use a federal anti-terrorism statute to criminalize the LTTE's ability to participate in an internationally-mediated Peace Process in Sri Lanka?

[35] Government of Canada, "Canada's new government lists the LTTE as a terrorist organization," News Release (April 10, 2006), https://www.canada.ca/en/news/archive/2006/04/canada-new-government-lists-ltte-terrorist-organization.html (last accessed December 9, 2023)
[36] Canada v. Vavilov, [2019] 4 SCR 653

2. Can Canada use a federal anti-terrorism law to criminalize the SLMM's peacekeeping operations during the Peace Process?

3. Between April 8, 2006 and May 18, 2009, could Sri Lanka legally rely on Canada's LTTE Ban to commit human rights violations against Tamils under the pretext of Canada-Sri Lanka counterterrorism cooperation in U.S.-led War on Terror?

4. Did the historical Tamil self-determination component of the armed conflict in Sri Lanka create the privilege of combatant immunity under IHL for the LTTE, and protect certain uses of force by the LTTE from domestic criminal prosecution, in turn triggering s.81's Armed Conflict Exclusion in *s.81*?

When Canada exercises universal jurisdiction and applies anti-terrorism laws to a group operating primarily overseas – i.e. the LTTE in Sri Lanka – Canada is acting as a State, beyond its territorial jurisdiction, on the world stage, and in the arena of international relations. Whilst acting as a State on the world stage, Canada cannot ignore relevant facts of import in the determination of Canada's international legal obligations at Canada's political discretion – such as an armed conflict in Sri Lanka, or an ongoing Peace Process between the GoSL and LTTE, actively supported by EU peacekeeping operations. These four questions are representative legal issues that Canada's administrative decision-making process to ban the LTTE on April 8, 2006 should have contemplated prior to enacting the LTTE Ban, in Canadian law, and during the U.S.-led War on Terror.

Section E: Summary

Based on United Nations data and expert analysis, the minimum number of excess human deaths attributable to the U.S.-led Global War on Terror that geographically spanned a multitude of conflicts – Afghanistan, Pakistan, Iraq, Syria, Libya, Somalia, Yemen, and Sri Lanka – is estimated between 4.5-4.6 million. [cite] This estimate includes approximately 146,000 Tamil civilians, killed by the Sri Lankan military in the fog of war and counterterrorism operations between January-May 2009.

While Western States such as the U.S., U.K., and Canada procedurally maintain one list of terrorist groups, the groups targeted for proscription do not necessarily share common attributes. The LTTE is certainly an outlier on Canada's terrorist group list. When Canada banned the LTTE, the LTTE controlled a de facto State, administered a de facto government, was participating in a Cease-Fire Agreement, was participating in a Norway-mediated Peace Process supported by Canada prior to the January 2006 election, and was later militarily defeated via Tamil genocide by the Sri Lankan State on May 18, 2009. Sometime after May 18, 2009, Canada amended the LTTE ban and redirected its criminal focal point towards the Tamil diaspora, and has continued to renew the LTTE ban for now 15 years since the end of the armed conflict.

Fifteen years after the end of Sri Lanka's armed conflict, the time has come for Canada to de-list the LTTE.