

Legal opinion on issues arising from enactment of the
Tamil Genocide Education Week Act, 2021

by Prof. William Schabas

1. I have been asked to provide an opinion on legal issues relating to the prohibition of the international crime of genocide in light of the recent enactment of the Tamil Genocide Education Week Act, 2021. I am the author of one of the major studies of the UN Genocide Convention, *Genocide in International Law*, published by Cambridge University Press in 2000 (a second edition appeared in 2009). According to Google Scholar, the book has been cited in academic publications 1,536 times. Judges of the major international tribunals have referred to it in several judgments and opinions.¹ I am also the author of dozens of journal articles and book chapters on the Genocide Convention, and the entry on ‘Genocide in International Law’ of the UN Audio-visual Library of International Law. I have appeared as counsel before the International Court of Justice and the Grand Chamber of the European Court of Human Rights in important litigation concerning the Genocide Convention. When I was made an Officer of the Order of Canada the citation described me as ‘one of the foremost international authorities on genocide’. A full curriculum vitae is appended to this opinion.
2. It is my general conclusion that the term ‘genocide’ is used improperly in the Tamil Genocide Education Week Act, 2021. The Ontario Legislature did not adequately consider the international legal sources including United Nations reports on the situation in Sri Lanka, academic studies of genocide, and the case law of the major international courts and tribunals interpreting the definition of genocide. These sources tend to confirm that genocide is not an appropriate term for the situation experienced by Sri Lanka’s Tamil population in recent decades. The Ontario legislative debates indicate horrific accounts of atrocities perpetrated against the Tamil population of Sri Lanka. These may properly be prosecuted as war crimes or as crimes against humanity, but there is no support for their characterisation as ‘genocide’ if recognised sources of international law are considered.

The legislation

3. Several weeks prior to the first reading of the bill on Tamil Genocide Education Week Act, a private member’s bill, dated 2 April 2019, was proposed with the title: An Act to proclaim April as Genocide Awareness, Education, Condemnation and Prevention Month.² The preamble includes the following statement: ‘Ontario recognizes the genocides committed against the following communities: ... 5. The Tamil speaking people in Sri Lanka.’ A week later, the same private member proposed An Act to proclaim Genocide Awareness, Commemoration, Prevention and Education Month.³ It had a similar reference to Sri Lanka and to the Tamil people, adding the dates ‘from

¹ For example, *Jorgić v. Germany*, no. 74613/01, § 47, ECHR 2007-III; *Vasiliauskas v. Lithuania* [GC], no. 35343/05, Dissenting Opinion of Judge Ziemele, § 3, ECHR 2015-III; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment, ICJ Reports 2007, p. 43, Separate Opinion of Judge Tomka, pp. 310-351, at p. 347; *Prosecutor v. Krstić* (IT-98-33-A), Judgment, 19 April 2004, para. 10, fn. 15, 16, para. 13, fn. 23, para. 25, fn. 39, para. 33, fn. 53; *Prosecutor v. Bashir* (ICC—02/05-/01/09), Decision on the Prosecution’s Application for a Warrant of Arrest Against Omar Hassan Al Bashir, 4 March 2009, para. 125, fn. 143.

² Bill 94, 1st Session, 42nd Legislature, Ontario, 68 Elizabeth II, 2019.

³ Bill 97, 1st Session, 42nd Legislature, Ontario, 68 Elizabeth II, 2019.

1983 to 2009'. It explained that the reference, along with references to other historic events, was 'in addition' to 'genocides' that had already been recognised by either the Ontario Legislature or the Parliament of Canada. These two bills did not advance.

4. On 30 April 2019, the Ontario Legislature began debate on the Tamil Genocide Education Week Act, 2019. Explaining succinctly the purpose of the legislation, Vijay Thanigasalam MPP said that in May the Tamil community would be 'remembering the lives lost in the Tamil genocide perpetrated by the Sri Lankan state'. He said that members of Ontario's Tamil community 'have suffered mental, physical and emotional trauma from the genocide. By recognising the Tamil genocide, it will allow for the community to begin a healing process and continue to contribute to Ontario.'⁴ During second reading of the Bill, on 16 May 2019, Vijay Thanigasalam recounted the events of 2009, known as the 'May Massacre', when the Liberation Tigers of Tamil Eelam were defeated militarily. He said that 'a programme of structural genocide had been occurring for decades prior'.⁵ Stephen Lecce MPP referred to Benjamin Dix, the communications manager for the United Nations in Sri Lanka between 2004 and 2008, stating '[i]t is fair to say that the Sri Lankan army committed genocide. The atrocities in Sri Lanka were definitely toward ethnic cleansing.' Although Mr Thanigasalam did not explain this to the Legislature, it appears that Benjamin Dix, who is a photographer and not a legal expert or political analyst, made the statement many years after the events, in 2018, and not when he was acting in an official capacity with the United Nations.⁶ Vijay Thanigasalam also cited UN spokesman Gordon Weiss who, in 2009, spoke of 'large-scale killing of civilians, including more than 100 children' but nothing suggests that Weiss ever used the term 'genocide'.⁷ Several other MPPs also spoke in favour, providing evidence of a range of atrocities but without discussing the legal aspects of 'genocide'.⁸ No Member of the Legislature questioned the wisdom of the legislation's use of the term 'genocide' in any way. There was no reference to the very extensive reports on the events by UN investigators that concluded that there was compelling evidence of war crimes and crimes against humanity but that did not make any finding with respect to genocide. The draft legislation passed second reading by a vote of 59 to none.⁹
5. The Bill was summarily approved by the Standing Committee on Regulations and Private Bills on 5 May 2021.¹⁰ There was no discussion of its content. The following day, the Bill received third reading in the Legislature. Vijay Thanigasalam spoke of the events of 2009 and of the 'structural genocide'. Several other Members took the floor making general statements about the situation of Tamils in Sri Lanka although, as in

⁴ Official Report of Debates (Hansard), No. 98, 1st Session, 42nd Parliament, Tuesday 30 April 2019, p. 4629.

⁵ Official Report of Debates (Hansard), No. 108, 1st Session, 42nd Parliament, Tuesday 16 May 2019, p. 5192. The term 'structural genocide' is unknown in international legal materials. It seems to have been coined in a 2012 book by an investigative journalist, Garry Leach, *Capitalism: A Structural Genocide*, London: Zed Books, 2012. The meaning of Vijay Thanigasalam's qualification of genocide as 'structural' is unclear.

⁶ 'Very fair to say SL army committed genocide': former UN staffer, *The Economic Times*, 27 January 2018.

⁷ Official Report of Debates (Hansard), No. 108, 1st Session, 42nd Parliament, Tuesday 16 May 2019, p. 5193.

⁸ Official Report of Debates (Hansard), No. 108, 1st Session, 42nd Parliament, Tuesday 16 May 2019, pp. 5193-5197.

⁹ Official Report of Debates (Hansard), No. 108, 1st Session, 42nd Parliament, Tuesday 16 May 2019, pp. 5193-5198.

¹⁰ Official Report of Debates (Hansard) T-26, Standing Committee on Regulations and Private Bills. 1st Session, 42nd Parliament, Wednesday 5 May 2021, p. T-226.

the previous debate, there was no serious consideration given to the applicability of the term ‘genocide’ and to the legal issues that arise.¹¹

United Nations investigations

6. In 2010, the Secretary-General of the United Nations appointed a panel of experts to probe human rights violations ‘during the final stages’ of the civil war in Sri Lanka the previous year. This was quite an extraordinary measure because the Secretary-General normally acts in this manner only when assigned by one of the other organs of the United Nations, in particular the Security Council and the General Assembly. His initiative confirms the great concern of the international community with developments in Sri Lanka and the reports of atrocities in the final stages of the armed conflict in May 2009.
7. Three distinguished international human rights specialists were appointed by the Secretary-General: Marzuki Darusman of Indonesia, Yasmin Sooka of South Africa and Steven Ratner of the United States. Their report was issued in March 2011. The panel reached many damning conclusions about the conduct of the Government of Sri Lanka. Its report referred to indiscriminate bombardment of civilians and artillery attacks on safe zones and protected structures such as hospitals, taking of hostages, deprivation of humanitarian aid including food and medical supplies, and the deaths of tens of thousands of civilians during the January-May 2009 period. The three-member panel specifically addressed the issue of international criminal responsibility. It said it believed that there were ‘credible allegations’ of war crimes committed by persons acting on behalf of the Government of Sri Lanka, including intentional, indiscriminate and disproportionate attacks on civilians, starvation of the population and enforced disappearances, amongst others.¹² It reached similar findings with respect to crimes against humanity, which are defined under international law as consisting of various acts, including extermination, committed in the context of a widespread or systematic attack on a civilian population.¹³ The panel said that ‘[w]ith respect to the Government of Sri Lanka, the credible allegations above point to a widespread or systematic attack on the civilian population of the Vanni during and subsequent to, as well as perhaps preceding, the final stages of the war’. It continued: ‘This attack included the widespread shelling of a large IDP [internal displaced persons] population; extrajudicial killings and disappearances in the aftermath of the armed conflict; deprivation of food and medicine; large-scale imprisonment; and other violations, including on discriminatory grounds.’¹⁴ The three experts made a specific finding with respect to the crime against humanity of extermination.¹⁵ However, the Secretary-General’s experts did not even entertain the idea that the crime of genocide might have been committed.
8. On 9 April 2014, the United Nations Human Rights Council adopted a resolution requesting the UN Office of the High Commissioner for Human Rights to conduct an investigation with respect to Sri Lanka. The Human Rights Council is the primary

¹¹ Official Report of Debates (Hansard), No. 259, 1st Session, 42nd Parliament, Thursday 6 May 2021, pp. 13371-13378.

¹² Report of the Secretary-General’s Panel of Experts on Accountability in Sri Lanka, 31 March 2011, para. 247.

¹³ *Rome Statute of the International Criminal Court*, art. 7(1)(a).

¹⁴ *Ibid.*, para. 251.

¹⁵ *Ibid.*, para. 251.

United Nations body with responsibility for human rights. It is subordinate to the General Assembly. The Office of the High Commissioner for Human Rights falls under the Secretariat of the United Nations and takes responsibility for implementation of decisions by various bodies, and notably the Human Rights Council. The mandate given to the Office by the Council was '[t]o undertake a comprehensive investigation into alleged serious violations and abuses of human rights and related crimes by both parties in Sri Lanka during the period covered by the Lessons Learnt and Reconciliation Commission, and to establish the facts and circumstances of such alleged violations and of the crimes perpetrated with a view to avoiding impunity and ensuring accountability'.¹⁶ Three distinguished independent international experts, Martti Ahtisaari, former President of Finland, Silvia Cartwright, former High Court Judge of New Zealand, and Asma Jahangir, former President of the Human Rights Commission of Pakistan, were appointed by the High Commissioner for Human Rights to support and advise the Investigation.

9. In September 2015 the report of the Investigation was issued.¹⁷ It actively considered whether genocide had been committed or was threatened, in the context of a more general discussion of other international crimes, specifically crimes against humanity and war crimes.¹⁸ The report of the Investigation reached several conclusions that acts perpetrated in Sri Lanka could be classified as either war crimes or crimes against humanity. It made no finding with respect to genocide. An important section of the conclusions of the report was entitled 'Prosecuting war crimes and crimes against humanity in Sri Lanka'.¹⁹ The report concluded: 'While it has not always been possible to establish the identity of those responsible for these serious alleged violations, these findings demonstrate that there are reasonable grounds to believe that gross violations of international human rights law, serious violations of international humanitarian law and international crimes were committed by all parties during the period under investigation. Indeed, if established before a court of law, many of these allegations would amount, depending on the circumstances, to war crimes and/or crimes against humanity.'²⁰
10. The independence and impartiality of these two United Nations investigations, one under the authority of the Secretary-General and the other the High Commissioner for Human Rights, cannot be impeached. Neither report can be said to have understated the allegations against the Government of Sri Lanka. Both reached conclusions that there were credible allegations to support prosecutions for two of the three recognised categories of international crimes, war crimes and crimes against humanity. Neither gave any support for use of the term 'genocide'. In my opinion, the failure to indicate that acts of genocide might also have been committed was not an inadvertent omission. The experts of the Secretary-General and of the High Commissioner for Human Rights were certainly aware of the possibility of making such a finding because the elements of the crime of genocide are discussed explicitly. Indeed, they were urged to do so by Tamil activists and their supporters. Perhaps if the reports of these two investigations had been made available to the Members of the Ontario legislature they might have hesitated with respect to use of the term 'genocide'. It is not as if United Nations experts

¹⁶ Promoting reconciliation, accountability and human rights in Sri Lanka, A/HRC/RES/25/1, para. 10(b).

¹⁷ Report of the OHCHR Investigation on Sri Lanka (OISL), A/HRC/30/CRP.2.

¹⁸ Ibid., paras. 200-203.

¹⁹ Ibid., paras. 1241-1248.

²⁰ Ibid., para. 1113.

are shy about using the term ‘genocide’ when they feel it is appropriate, as recent human rights reports dealing with situations in Syria and Myanmar confirm.²¹

11. It is also noteworthy that several resolutions concerning the situation in Sri Lanka have been adopted by the United Nations Human Rights Council since 2012,²² most recently in March 2021.²³ None of these has used the term ‘genocide’. A number of Special rapporteurs of the Human Rights Council, who are independent experts, have conducted missions to Sri Lanka. None of them has used the term ‘genocide’.²⁴ Like all members of the United Nations, Sri Lanka has participated in the Human Rights Council’s Universal Periodic Review process, where other Member States comment on a State’s human rights record and highlight problems. None of these has used the term ‘genocide’.²⁵ A keyword search on the website of the Office of the High Commissioner for Human Rights did not identify any official United Nations documents referring to genocide of Tamils. The only occurrences of the words ‘Tamil’ and ‘genocide’ appear to be in documents produced by Tamil activist organisations that have been submitted to the United Nations in one form or another.

International non-governmental organisations and academic commentary

12. There does not appear to be any use of the term ‘genocide’ with respect to the situation of the Tamil population in Sri Lanka by the major international human rights non-governmental organisations, such as Amnesty International²⁶ and Human Rights Watch.²⁷ Again, this does not suggest any reluctance to condemn the very serious human rights violations that have taken place in Sri Lanka. Rather, it is merely further

²¹ For example, “They came to destroy”: ISIS Crimes Against the Yazidis, A/HRC/32/CRP.2; Report of the detailed findings of the Independent International Fact-Finding Mission on Myanmar, A/HRC/39/CRP.2.

²² Promoting reconciliation, accountability and human rights in Sri Lanka, A/HRC/RES/19/2 (22 March 2012); Promoting reconciliation, accountability and human rights in Sri Lanka, A/HRC/RES/22/1 (21 March 2013); Promoting reconciliation, accountability and human rights in Sri Lanka, A/HRC/RES/25/1 (27 March 2014); Promoting reconciliation, accountability and human rights in Sri Lanka, A/HRC/RES/30/1 (1 October 2015); Promoting reconciliation, accountability and human rights in Sri Lanka, A/HRC/RES/34/1 (23 March 2017); Promoting reconciliation, accountability and human rights in Sri Lanka, A/HRC/RES/40/1 (21 March 2019).

²³ Promoting reconciliation, accountability and human rights in Sri Lanka, A/HRC/RES/46/1 (23 March 2021).

²⁴ Report of the Special Rapporteur on minority issues on her mission to Sri Lanka, A/HRC/34/53/Add.3 (10 to 20 October 2016); Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment on his mission to Sri Lanka, A/HRC/34/54/Add.2 (29 April to 7 May 2016); Report of the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence, A/HRC/45/45/Add.1 (10 to 23 October 2017).

²⁵ Report of the Working Group on the Universal Periodic Review, Sri Lanka, A/HRC/37/17 (29 December 2017); Report of the Working Group on the Universal Periodic Review, Sri Lanka, A/HRC/22/16 (18 December 2012).

²⁶ Amnesty International, ‘Stop the War on Civilians in Sri Lanka: a briefing on the humanitarian crisis and lack of human rights protection’, 27 March 2009, ASA 37/004/2009; Amnesty International, ‘Twenty Years of Make Believe: Sri Lanka’s Commissions of Inquiry’, 11 June 2009, ASA 37/005/2009; Amnesty International, ‘When Will They Get Justice? Failures of Sri Lanka’s Lessons Learnt and Reconciliation Commission’, 7 September 2011, ASA 37/008/2011; Amnesty International, ‘Sri Lanka: Suppressing Calls for Justice’, 26 February 2014, ASA 37/003/2014; ‘Sri Lanka: Refusing to Disappear’, 23 January 2017, ASA 37/5497/2017; Amnesty International, ‘Old Ghosts in New Garb: Sri Lanka’s Return to Fear’, 17 February 2021, ASA 37/3659/2021.

²⁷ Human Rights Watch, ‘Besieged, Displaced and Detained, The Plight of Civilians in Sri Lanka’s Vanni Region’, 23 December 2008; Human Rights Watch, ‘War on the Displaced: Sri Lankan Army and LTTE Abuses Against Civilians in the Vanni’, 19 February 2009; Human Rights Watch, ‘Legal Limbo: The Uncertain Fate of LTTE Suspects in Sri Lanka’, 2 February 2010; Human Rights Watch, ‘“Why Can’t we go Home?”; Military Occupation of Land in Sri Lanka’, 9 October 2018.

evidence of the careful use of language by specialists in the area of international protection of human rights.

13. The same can be said of the academic literature where issues of genocide in specific contexts, such as Bosnia and Herzegovina, Rwanda, Syria, Myanmar and the People's Republic of China, are regularly discussed. There is only the flimsiest support for use of the term 'genocide' with respect to Tamils and Sri Lanka in the academic international law literature. The main academic authority appears to be a book by Francis A. Boyle, *The Tamil Genocide by Sri Lanka*.²⁸ Francis A. Boyle is a professor of international law at the University of Illinois College of Law. The term 'academic' is used with a certain generosity to describe the book because it was not published by an academic publisher nor is it in the classic academic format. It would seem highly improbable that it was peer reviewed according to standard practice in academic publishing. The second edition of the book is 285 pages long and consists of a collection of more than 100 short articles, blog posts and interviews by Prof. Boyle produced between 2009 and 2016. It appears to have had virtually no impact on scholarly discussions of genocide under international law. According to the compilation on Google Scholar, the book has been cited only 16 times.
14. Prof. Boyle also posted an eight-page research paper titled 'The Tamil Genocide by Sri Lanka', dated 2013, on the Social Sciences Research Network website. The article does not appear to have been published in a peer-reviewed academic journal. It has been cited twice, according to Google Scholar. His article begins with a boast that he 'single-handedly won two World Court Orders on the basis of the 1948 Genocide Convention that were overwhelmingly in favour of the Republic of Bosnia and Herzegovina against Yugoslavia to cease and desist from committing all acts of genocide against the Bosnians'. In fact, the two 'Orders' were for provisional measures where the applicant need only demonstrate that the claim on the merits is 'plausible'.²⁹ The claim on the merits that Yugoslavia had committed genocide was ultimately dismissed, by a 2007 judgment.³⁰ Proceedings subsequent to the two 1993 Orders confirm that Prof. Boyle was replaced as Agent for Bosnia and Herzegovina and that he played no further role in the case.³¹ The short article, which is very polemical, does not constitute a serious analysis of the issues. It does not make any reference to the case law of the International Criminal Tribunals for the former Yugoslavia and Rwanda and of the International Court of Justice or to the rich academic literature on the subject of genocide. There is one distorted reference to the 2007 judgment of the International Court of Justice claiming 'the World Court definitively agreed with me once and for all time'. But the Court actually rejected Bosnia's allegation that Serbia had committed genocide, so it hardly 'agreed' with Boyle.
15. My research also identified a book chapter by two Canada-based academics, Christopher Powell of Ryerson University and Amarnath Amarasingam of Queen's

²⁸ Francis A. Boyle, *The Tamil Genocide by Sri Lanka*, 2nd ed., Atlanta: Clarity Press, 2016.

²⁹ *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Qatar v. United Arab Emirates), Provisional Measures, Order of 23 July 2018, I.C.J. Reports 2018 (II)*, pp. 421-422, para. 43.

³⁰ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro), Judgment, ICJ Reports 2007*, p. 43.

³¹ See, for example, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide, Preliminary Objections, Judgment, I.C.J. Reports 1996*, p. 595, at p. 5.

University. It uses the term ‘proto-genocide’ suggesting it is a preparatory or preliminary stage, but appears to reject the term ‘genocide’ as a description of the situation in Sri Lanka. A footnote refers to writers who support the genocide thesis.³² Other than Boyle’s book, discussed above, the footnote only mentions an article by a Toronto Star journalist and a brief article under the heading ‘Commentary’ published in an academic journal that, upon inspection, does not actually support use of the term genocide.³³

16. Finally, I located a study by an international relations specialist on the use of the label ‘genocide’ by Tamil activist organisations based in the United Kingdom. It does not provide any evidence of the term being used outside the sphere of Tamil organisations nor does it support or endorse its use. It comments upon debates within the community concerning the use of the term:

In the years immediately following the end of the war, some organizations made a conscious decision to limit their use of the term for strategic reasons. GTF, for example, has not used the term frequently based on the calculation that to do so might undermine their access at the UN. Some lobbying groups received support from international advocacy consultants who suggested that they avoid use of the genocide frame and encouraged them instead to campaign within the human rights and war crimes discourse. In November 2012, there was considerable internal debate among diaspora groups about whether or not the term should be included in a Resolution resulting from the World Tamil Conference in London. It was eventually included, despite fears that this would undermine wider support for the resolution in India.³⁴

The article is not helpful from the standpoint of legal analysis, but does shed light on the phenomenon of the weaponising of the term ‘genocide’ where its use is governed exclusively by political imperatives rather than intellectual accuracy.

Legal issues and the interpretation of the definition

17. Misuse of the term ‘genocide’ frequently rests upon an incorrect reading of the established definition, set out in article 2 of the 1948 Convention on the Prevention and Punishment of the Crime of Genocide.

In the present Convention, genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:

- (a) Killing members of the group;
- (b) Causing serious bodily or mental harm to members of the group;
- (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
- (d) Imposing measures intended to prevent births within the group;
- (e) Forcibly transferring children of the group to another group.

The definition is repeated, essentially word for word, in article 6 of the Rome Statute of the International Criminal Court. That definition has also been incorporated into the legislation of many countries without significant change, including the laws of

³² Christopher Powell and Amarnath Amarasingam, ‘Atrocity and Proto-Genocide in Sri Lanka’, in Scott W. Murray, ed., *Understanding Atrocities: Remembering, Representing and Teaching Genocide*, Calgary: University of Calgary Press, 2017, pp. 19-47, fn. 2.

³³ A. Sivanandan, ‘Ethnic cleansing in Sri Lanka’, (2010) 51(3) *Race and Class* 59.

³⁴ Oliver Walton, ‘Framing disputes and organizational legitimation: UK based Sri Lankan Tamil diaspora groups’ use of the “genocide” frame since 2009’, (2014) 38 *Ethnic and Racial Studies* 959, at pp. 966-967.

Canada.³⁵ Canada signed the Genocide Convention on 28 November 1949 and ratified it on 3 September 1952.³⁶

18. Sri Lanka was one of the first States to accede to the Convention on the Prevention and Punishment of the Crime of Genocide, on 18 October 1950,³⁷ even before the entry into force of the Convention on 12 January 1951. Sri Lanka has accepted the jurisdiction of the International Court of Justice for settlement of disputes concerning its implementation of the Convention. Other States Parties, including Canada, may file suits against Sri Lanka in the International Court of Justice alleging its failure to respect the Convention. No State has done this.
19. The definition of genocide in the Convention consists of an introductory paragraph or *chapeau* which sets out the contextual elements of the crime. Although the definition does not say this explicitly, the most prestigious international judicial bodies, namely the International Court of Justice and the Appeals Chambers of the International Criminal Tribunal for the former Yugoslavia and for Rwanda, have held consistently that the reference to destruction is restricted to ‘physical’ destruction³⁸ as opposed to ‘cultural’ destruction. This reference to intent in the *chapeau* is regularly described as being a ‘specific intent’ or ‘special intent’, or *dolus specialis*, and it is very similar in nature to ‘specific intent’ as this is understood in Canadian criminal law.
20. The *chapeau* is followed by a list of five punishable acts, of which the first is ‘killing’. Several other acts are not homicidal in nature, such as ‘causing serious bodily or mental harm’ or ‘forcibly transferring children from one group to another group’. Non-specialists frequently read the list and conclude that genocide has been committed if such acts occur and are directed against a national, ethnic, racial or religious group. In fact, many of the acts listed in the definition of genocide are quite common occurrences in contexts of racial discrimination and ethnic conflict. Yet the term genocide is clearly inappropriate unless there is evidence of the intent to destroy the group physically in accordance with the words of the *chapeau*.
21. Although it is not unknown for there to be direct evidence of the ‘specific intent’ to destroy the group physically, it is usually very difficult to find such indicators. As a result, conclusions about genocidal intent need to result from inferences based upon behaviour, what the international courts often call a ‘pattern of conduct’. International courts have been quite rigorous in rejecting inferences of genocidal intent where alternative explanations of the mental element could not be definitively ruled out.³⁹
22. The definition of genocide does not set any numerical threshold, and it uses the expression ‘in whole or in part’. However, international case law has attached considerable importance to the number of victims relative to the overall size of the

³⁵ Crimes Against Humanity and War Crimes Act (S.C. 2000, c. 24), ss. 4(3), 6(3).

³⁶ C.N.145.1949.TREATIES; [1949] CTS 27; C.N.114.1952.TREATIES.

³⁷ C.N.176.1950.TREATIES.

³⁸ For example, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia)*, Judgment, ICJ Reports 2015, p. 3, para. 136, 157, 160.

³⁹ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment, ICJ Reports 2007, p. 43, para. 373; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia)*, Judgment, ICJ Reports 2015, p. 3, para. 417.

group. In its most recent pronouncement, the International Court of Justice explained that where the number of fatalities was not very high, it tended to weaken any inference of genocide intent to the extent that the alleged perpetrators had not seized the opportunity to conduct mass killing.⁴⁰ Professor Boyle's summary analysis of the legal issues involved in charging genocide, discussed above, appears to hinge on the observation that the killing of 40,000 Tamils in Vanni in 2009 is greatly superior to the killing of 7,000 Bosnian Muslims in Srebrenica in 1996,⁴¹ which the international courts have characterised as genocide. But if that were really accurate, then any mass killing involving 7,000 or more members of a group would be genocide. Yet in its 2015 judgment, the International Court of Justice referred to Croatia's charge that 12,500 Croats were killed by Serbia, stating that 'even assuming that this figure is correct — an issue on which it will make no ruling — the number of victims alleged by Croatia is small in relation to the size of the targeted part of the group'.⁴² The Court suggested that given the opportunities available for mass murder on a much larger scale, it was difficult to make an inference that there was an intent to destroy the group physically in whole or in part.

23. The international criminal tribunals require proof to a 'beyond a reasonable doubt' standard before they will enter a conviction for genocide. It has been argued unsuccessfully before international courts, and more specifically the International Court of Justice, that a 'balance of probabilities' standard is appropriate in cases dealing not with individual criminal liability but rather with State responsibility. However, since its earliest days the International Court of Justice has insisted that in charges of 'exceptional gravity', there must be 'conclusive evidence' and 'a degree of certainty'.⁴³ In particular, when inferences of intent are drawn from patterns of facts, there must be 'no room for reasonable doubt'.⁴⁴ The Court returned to these words in its judgment rejecting Bosnia's claim that Serbia had committed genocide.⁴⁵ Legislators generally take great care when speaking of criminal allegations that have not yet been established in a court of law, qualifying any suggestions about individual guilt with the caveat that these must be proven beyond a reasonable doubt. Should not the same prudence be observed when an entire State is being accused of a serious crime?
24. Obviously, the subject of genocide is deserving of much more detailed treatment. This summary is intended to provide some assistance to the Court in understanding why UN experts, academics, and human rights activists, with rare exceptions, have not used the term 'genocide' to refer to the various acts perpetrated against Sri Lanka's Tamil population over the decades and especially during the military activities that saw the defeat of the Liberation Tigers of Tamil Eelam in 2009. It is important to stress that UN experts, academics and international human rights activists are not at all indifferent to the allegation that Sri Lanka's Tamil population has been victim to international

⁴⁰ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia)*, Judgment, ICJ Reports 2015, p. 3, para. 437.

⁴¹ 'Boyle: Word "Genocide" missing in UN Panel's war crimes report', in Francis A. Boyle, *The Tamil Genocide by Sri Lanka*, 2nd ed., Atlanta: Clarity Press, 2016, pp. 119-120.

⁴² *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia)*, Judgment, ICJ Reports 2015, p. 3, para. 437.

⁴³ *Corfu Channel case, Judgment of April 9th, 1949, I.C.J. Reports 1949*, p. 4, at p. 17

⁴⁴ *Ibid.*, p. 19.

⁴⁵ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment, ICJ Reports 2007, p. 43, para. 209.

atrocity crimes. This is not a situation where there are conflicting factual narratives. The horrific accounts described by Members of the Ontario legislature in the debates about the Bill are consistent with the findings of the United Nations investigations and the reports of the major international non-governmental organisations. The only difference of significance, it would appear, is that politicians who spoke in the debates and activists within Tamil communities invoke the term ‘genocide’ whereas international human rights experts and academics do not.

25. War crimes, crimes against humanity and genocide constitute a kind of triad of international offences dealing with large-scale human rights violations. War crimes would appear to be applicable to the military activities that took place in the early months of 2009. They generally involve acts of armed force and violence directed against non-combatants, and there is no shortage of relevant accusations, as the UN reports confirm. However, war crimes law does not apply in the absence of an armed conflict. Crimes against humanity, on the other hand, may be committed in peacetime. They consist of widespread or systematic attacks on a civilian population and involve a wide range of serious human rights violations, including murder, disappearance, torture, sexual violence and persecution. Unlike genocide, crimes against humanity do not require evidence of an intent to destroy a group physically. Genocide, sometimes called ‘the crime of crimes’, overlaps crimes against humanity. An attack of genocide will almost invariably be punishable as a crime against humanity as well, but the contrary is not the case. Often courts have made findings of crimes against humanity but rejected genocide charges.
26. In the preparation of this opinion, I have reviewed the reports of the two UN investigations. I have also considered the materials produced by the major international human rights non-governmental organisations on the situation in Sri Lanka, with an emphasis on the 2009 events. I have also taken into account the material in the book by Francis Boyle and the anecdotal comments made by the members of the Ontario legislature during the debates in 2019 and again in 2021. Assuming that all of these materials, taken together, provide an accurate factual portrait of the events, there is much evidence to support charges of both war crimes and crimes against humanity. However, the claim that these acts may amount to genocide is not seriously substantiated. The inference that the Government of Sri Lanka, and its agents, intended to destroy the Tamil population of Sri Lanka, or even a substantial part of it, cannot be drawn to the exclusion of other reasonable explanations. The Sri Lankan military was engaged in an armed conflict with the Liberation Tigers of Tamil Eelam, a political organisation bent on secession, one with a considerable reputation for engaging in acts of terrorism. Of course, this is no justification for massive human rights violations. However, these suggest plausible alternative explanations for the intent of the perpetrators. The materials consulted do not provide any real direct evidence of genocidal intent, for example in the form of policy documents and official statements indicating a plan to exterminate the group physically. To the extent that proof of genocidal intent rests upon inferences drawn from a pattern of conduct, the existence of such alternative theses for intent cannot be dismissed.

Legislative declarations of genocide

27. The adoption of resolutions and statutes by domestic legislative bodies that pronounce on the occurrence of genocide in specific circumstances is on the increase, generally as

a result of campaigns by communities and organisations. Obviously, to the extent that these amount to legal conclusions they would seem to be inadmissible in any court as they amount to an extra-judicial conclusion about facts and law. In a criminal court, such resolutions and statutes would inevitably encounter challenges that they violate the presumption of innocence. Sometimes, legislation of this sort in certain countries is linked to the creation of offences for the contestation or denial of such official pronouncements on historical events. Such measures are often contested based upon freedom of expression.⁴⁶

28. Faced with requests to enact legislation declaratory of genocide, the Dutch House of Representatives asked its External Adviser on Public International Law and the Advisory Committee on Issues of Public International Law, which is made up of internationally recognised experts, to study the desirability and significance of the use of the term ‘genocide’ by politicians, both in general and in relation to the alleged atrocities in the Middle East. The report, issued in 2017, provides many examples of legislative declarations from a variety of countries although none dealing with the Tamils and Sri Lanka.⁴⁷ The experts concluded that while there was no prohibition on such legislative initiatives, ‘

a determination that an international standard has been violated can be made only on the basis of a rigorous and meticulous investigation of the facts. Determinations of genocide and crimes against humanity are extremely serious and it is essential that they be based upon thorough investigation. Furthermore, in determining whether particular conduct constitutes genocide, it is necessary to ascertain whether the acts were committed with the intent to destroy a particular group, as set out above. The burden of proof is substantial. In the absence of sufficiently reliable findings of fact, restraint is to be preferred.⁴⁸

The Dutch experts also pointed to the complications that such legislative initiatives may pose for the conduct of a state’s foreign relations. Using terms like genocide ‘is tantamount to an accusation against a foreign government and can prove counterproductive, for example when prevention measures necessitate obtaining that government’s consent to the deployment of UN peacekeepers or even an international fact-finding commission’, they wrote.⁴⁹ In line with this sage advice, it would seem that as a minimum, any governmental initiative that amounts to accusing another State of genocide should only be taken after the foreign policy implications are properly weighed.

29. The potential for disruption in a country’s foreign relations seems particularly acute when the declarations about genocide are the product of local or regional legislative bodies rather than the parliamentary body with formal responsibility for foreign relations. The Ontario legislative debates do not appear to contain any evidence that consideration was given to the impact of such a determination upon Canada’s foreign relations, or that the government responsible for foreign relations was even consulted

⁴⁶ See, for example, the judgment of the Grand Chamber of the European Court of Human Rights: *Perinçek v. Switzerland* [GC], no. 27510/08, ECHR 2015-VI.

⁴⁷ Netherlands, Advisory Committee on Issues of Public International law and External Adviser on Public International Law, ‘Advisory report on the scope for and the significance and desirability of the use of the term “genocide” by politicians’, March 2017, pp. 5-6.

⁴⁸ *Ibid.*, p. 8.

⁴⁹ *Ibid.*, p. 15 (internal reference omitted).

about the wisdom of such a measure. I note the Government of Canada devotes considerable attention to human rights and issues of accountability in Sri Lanka.⁵⁰

30. The situation would be different if the issue had already been addressed either by the federal government or by Parliament, or in the case of a ‘genocide’ that has been widely recognised at the international level through initiatives of United Nations bodies and judicial determinations by international courts. For example, in 2004, the United Nations General Assembly declared that 7 April 2004 was an ‘International Day of Reflection on the Genocide in Rwanda’.⁵¹ In 2005 the United Nations General Assembly unanimously adopted a resolution declaring that 27 January would be the ‘International Day of Commemoration in memory of the victims of the Holocaust’. The Resolution refers to ‘the Convention on the Prevention and Punishment of the Crime of Genocide, which was adopted in order to avoid repetition of genocides such as those committed by the Nazi regime’.⁵² There is nothing comparable with respect to the Tamils in Sri Lanka from international organisations like the United Nations. Moreover, I have not been able to find anything similar from a national legislature in any country. International recognition of genocide, be it by political declaration of a United Nations organ or a judicial finding by an international court, remains relatively rare, and tends to be reserved for the clearest of cases.

Respectfully submitted

St-Denis-le-Ferment, France
30 July 2021



William A. Schabas OC MRIA

⁵⁰ Canada’s Minister of Foreign Affairs, ‘Canada welcomes UN Human Rights Council resolution on Sri Lanka, 23 March 2021.

⁵¹ International Day of Reflection on the 1994 Genocide in Rwanda, A/RES/58/234.

⁵² Holocaust remembrance, A/RES/60/7.