



## **Amendment 9 (Genocide amendment) to the Trade Bill 2019-21**

**Briefing for Report Stage, 7 December 2020**

### **About**

The Coalition for Genocide Response is a human rights coalition-building organisation that works towards a comprehensive response to genocide and other international crimes, engaging the UK, regional and international actors. We are independent of any government, political party, international institution, or faith group. Patrons include the renowned judge, the Hon. Michael Kirby AC, CMG, founder of Genocide Watch, Professor Gregory H Stanton, and Sir Geoffrey Nice QC. Members include the Aegis Trust, All Party Parliamentary Group on North Korea, Burma Campaign UK, European Centre for the Responsibility to Protect, Genocide80Twenty, Genocide Watch, Oxford Human Rights Hub, Queen Mary University of London Law and International State Crime Initiative, Yazda, and others.

### **Summary**

The Coalition for Genocide Response strongly welcomes this initiative as a novel way of enabling the UK to come closer to honouring its obligations under the UN Convention on the Prevention and Punishment of the Crime of Genocide (the Genocide Convention).

### **The UK's quandary**

For decades the policy of the UK Government has been that only international judicial bodies should determine whether genocide has occurred. If international judicial bodies have not made such a determination, the UK proceeds on the basis that genocide is not occurring.

This is a position which does not sit easily with international law. The International Court of Justice confirmed that:

*'...a State's obligation to prevent, and the corresponding duty to act, arise at the instant that the State **learns of, or should normally have learned of, the existence of a serious risk that genocide will be committed.** From that moment onwards, if the State has available to it means likely to have a deterrent effect on those suspected of preparing genocide, or reasonably suspected of harboring specific intent (dolus specialis), it is under a duty to make such use of these means as the circumstances permit.'* [emphasis added]

### **What is the Genocide Amendment?**

The Genocide Amendment (Amendment 9), if passed, would make clear that parliament does not wish the UK Government to offer favourable trade tariffs to a genocidal state through a bilateral trade agreement. To determine whether or not a state has indeed committed genocide, the amendment enables the High Court of England and Wales - as the appropriate authority - to produce a reasoned judgment upon application from an interested party. Amendment 9 does not apply to past genocides and would not affect multilateral trade deals.

**Lord Alton of Liverpool**

**Baroness Kennedy of the Shaws**

**Lord Forsyth of Drumlean**

**Baroness Falkner of Margravine**

### **Agreements with states accused of committing genocide**

- 1. International bilateral trade agreements are revoked if the High Court of England and Wales makes a preliminary determination that they should be revoked on the ground that another signatory to the relevant*

*agreement represents a state which has committed genocide under Article II of the United Nations Convention on the Prevention and Punishment of the Crime of Genocide, following an application to revoke an international bilateral trade agreement on this ground from a person or group of persons belonging to a national, ethnic, racial or religious group, or an organisation representing such a group, which has been the subject of that genocide.*

- 2. This section applies to genocides which occur after this section comes into force, and to those considered by the High Court to have been ongoing at the time of its coming into force.*

### **The motivation for the amendment**

Currently, the UK Government does not have any formal mechanism for genocide determination (or even for the preliminary finding of genocide) and relies on the argument of the 'international judicial systems' discussed above. The UK Government does not have a strong recent history of engagement with such systems. For example, in the case of the Daesh atrocities, six years after the atrocities, the UK Government has not succeeded in engaging any international judicial bodies to make such a determination. The UK Government led on UN Security Council Resolution 2379 to establish an investigative mechanism to the Daesh atrocities in Iraq, but the mechanism, by design, does not seek to probe the question of genocide - contrary to the commissions of experts established by the UN Security Council in cases of Bosnia and Rwanda.

Not having such a mechanism or procedure in place means that the UK risks *de facto* breach of its international law obligations under the Genocide Convention.

The International Court of Justice (ICJ) in its judgment in *Bosnia and Herzegovina v. Serbia and Montenegro* clarifies that the duty to prevent:

'...arise[s] at the instant that the State learns of, or should normally have learned of, the existence of a serious risk that genocide will be committed.

From that moment onwards, if the State has available to it means likely to have a deterrent effect on those suspected of preparing genocide, or reasonably suspected of harbouring specific intent (*dolus specialis*), it is under a duty to make such use of these means as the circumstances permit. (*ibid.*, 431)

The duty to prevent is a conduct-oriented, not a result-oriented, duty. As such, 'a State cannot be under an obligation to succeed, whatever the circumstances, in preventing the commission of genocide: the obligation of States parties is rather to employ all means reasonably available to them, to prevent genocide so far as possible' (*Bosnia and Herzegovina v. Serbia and Montenegro*, Application of the Convention on the Prevention and Punishment of the Crime of Genocide, International Court of Justice, 26 February 2007, 430). As the duty is conduct-oriented, 'it is irrelevant whether the State whose responsibility is in issue claims, or even proves, that even if it had employed all means reasonably at its disposal, they would not have sufficed to prevent the commission of genocide' (*ibid.*). Ultimately, states must act to prevent.

The Genocide Convention does not make it clear that state parties should conduct their own genocide determination. However, the fact that, according to the ICJ, the duty to prevent is triggered when the state 'learns of, or should normally have learned of, the existence of a serious risk that genocide will be committed' ultimately means that the state should have effective monitoring and determination mechanisms in place. Where states do not have such monitoring and determination mechanisms, they may easily rely on the argument of the lack of relevant knowledge, and so avail themselves of responsibility. This is contrary to the duty to prevent and the spirit of the Genocide Convention.

Genocide determination should not be confused or conflated with the determination of such atrocities by courts for the purposes of criminal prosecutions of individuals involved. The analysis and determination discussed here concerns interim determinations made by states to inform their responses only and not to determine criminal liability of an individual.

## **Who should determine genocide, International or domestic courts?**

Several states have argued, like the UK, that it is for the 'international judicial systems' to make the determination. This argument is profoundly flawed as it neglects the basic fact that it is the state that the duty bearer under the Genocide Convention. Hence, the states that are parties to the Genocide Convention must act to ensure that the determination is made by a competent body, and that decisive steps follow that fulfil the state's obligations under the Genocide Convention to prevent and punish.

Furthermore, the reliance on the international judicial bodies neglects the issue that often there are no appropriate bodies to engage with the question. The UN-established investigative mechanisms, ad-hoc tribunals and the ICC are the main international bodies most relevant to the question of determination of genocide. Historically, the UN Security Council, despite being reluctant to deal with the question of genocide, has undertaken steps to ensure that such a determination is made. In the case of the mass atrocities in Bosnia and Rwanda, the UN Security Council established commissions of experts to examine and analyse the evidence and confirm whether the atrocities amount to genocide. Once the committees of experts confirmed their findings, the UN Security Council then proceeded to establish ad hoc tribunals to deal with prosecutions of the perpetrators. This changed with the emergence of the ICC. The ICC was established to remove the burden of requesting and overseeing the investigation and prosecution of international criminal law violations from the UN Security Council. However, as the ICC is a treaty-bound court, its jurisdiction is limited.

Another 'international judicial system', the ICJ, can also engage with the question of determination. However, to do so, it would have to be approached by one of the relevant organs, for example, the UN General Assembly, the UN Security Council, or specialised agencies. Alternatively, and as in the case of *The Gambia v Myanmar*, a state can initiate proceedings against another concerning violations of their treaty body obligations.

The determination and recognition of mass atrocities for what they are is not a matter of good practice only; it derives from states' international law duties, and is conducive of the duties to prevent and punish the crime of genocide. The word has power. Indeed, Gregory H. Stanton, former Research Professor in Genocide Studies and Prevention at

George Mason University, conducted a study on the perception and effects of using the words 'ethnic cleansing' or 'genocide' (Stanton, 2015). His research convincingly concludes that recognising mass atrocities that meet the legal definition of genocide as genocide has resulted in a more comprehensive response, including to stop the atrocities. Referring to such crimes as 'ethnic cleansing' did not have the same effect. As such, empirical reality suggests that there is a difference in the way different international crimes are being addressed by states.

Genocide determination also plays an important role in addressing the issue of genocide denialism, namely, the act of denying the occurrence of genocide that is aimed at denying justice to the victims and belittling their suffering.

### **What is genocide?**

Genocide is referred to as the *crime of crimes*. Article II of the Genocide Convention states that genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, (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 atrocities are to be accompanied by the 'specific intent' to destroy in whole or in part one of the protected groups.

### **What are the possible consequences?**

#### **Legal**

The amendment has the potential to help the UK to fulfil its duties under the Genocide Convention, at least partially. It is likely that the government will argue, correctly, that the procedure stipulated by the amendment does not currently exist in law. This is certainly true, but as former Supreme Court Justice, Lord Hope of Craighead, pointed out at Committee Stage, the amendment allows for genocide hearings to follow due process in full accordance with the rule of law. The amendment is deliberately novel. The Coalition

for Genocide Response believes that other states will replicate this model once it passes into law.

### **Diplomatic**

It will likely be argued that the amendment may jeopardise relations with states accused of genocide in the UK. It should be emphasised that positive genocide judgments are exceptionally rare, owing to the extremely high evidentiary standard. We content that a formal legal examination in court - to which the trade signatories may make representations - should not be any more diplomatically upsetting than, for example, the UK leading letters of complaint at the United Nations against nations like China for their alleged human rights abuses. The amendment will in time become a matter of diplomatic pride, sending a strong signal about the values of the UK as a leader in global human rights.

### **Economic**

Owing to the rarity of genocide judgments, very few countries would fall within the purview of these provisions. It is difficult to envisage, therefore, that the government's ability to trade will be significantly affected. Generally speaking, governments tend to seek to strike trade deals with nations with which they share common values. The UK does not currently have a trade deal with a country credibly accused of genocide, and one is not in prospect.

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