

COALITION FOR 
GENOCIDE
RESPONSE

Genocide Amendment
to the Trade Bill 2019-21
Briefing

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).

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, the 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, and Yazda, among others.



www.genocideresponse.org

The Genocide Amendment

The Genocide Amendment enables the High Court to consider and make a preliminary determination of genocide in cases where the UK's trading partner stands accused of committing genocide. Where the High Court makes the determination of genocide, it would refer the trade deal back to Parliament to have the final say.

The Genocide Amendment aims to prevent the UK from becoming complicit in the genocide of its trading partners, and to deter genocide by preventing the UK continuing, or striking, preferential trade deals with countries committing genocide.

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 have to be accompanied by the 'specific intent' to destroy, in whole or in part, one of the protected groups.

What is a State's Duty to Prevent?

As with all international treaties, the Genocide Convention binds states and gives them certain responsibilities. While there is no clear duty to 'prevent' within the Convention itself, the International Court of Justice has subsequently provided clarity on this responsibility. In its judgment in *Bosnia and Herzegovina v. Serbia and Montenegro*, the Court states 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. (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, 431)

The UK Government's Position on the Question of Genocide

The UK Government has a long-standing policy is to leave the question of genocide determination to the 'international judicial systems.' The UK Government argues that 'international judicial systems,' rather than politicians, should make a determination of genocide, but the government has no reasonable justification for this policy, apart from its long-standing nature. Genocide has been committed under the watch of successive governments in Cambodia, Bosnia, Rwanda, Darfur (Sudan) and Libya, not to mention the Daesh genocide in Syria and Iraq, or the genocide of the Rohingya Muslims and other religious minorities in Burma – yet in the face of all this, the UK Government's stance remains unchanged.

In accordance with the Genocide Convention the UK introduced laws that criminalise genocide, no matter where it is committed. However, the UK does not have any formal mechanism that allows for the consideration and recognition of mass atrocities that meet the threshold of genocide.

In response to Lord Alton's WPQ, the UK Government identified an example of an international judicial body, which they accept as legitimate, making a determination on whether or not genocide had occurred: 'in November 2017, when the Trial Chamber of the International Criminal Tribunal for the former Yugoslavia convicted Ratko Mladić of genocide for his role in the Srebrenica massacre.'

This means that the UK Government will not recognise genocide until an international tribunal does so first, which can only occur after a full trial that may last years. It is also crucial to recognise that the cited example refers to a judgment made by an ad-hoc tribunal, which has been specifically established to investigate and prosecute crimes perpetrated in the former Yugoslavia, and is not mandated to look into situations elsewhere.

The lack of a formal mechanism, whether grounded in law or policy, was criticised by the Foreign Affairs Committee (FAC) in its December 2017 report on the situation in the Rakhine state of Myanmar. The report stated:

We are seriously concerned to find that the FCO has not undertaken its own analysis of the situation, nor committed its own expert team to gather evidence. The Minister said that its effort was focused on addressing the humanitarian situation, but it is unclear why humanitarian support and legal analysis cannot go hand-in-hand. The FCO's political and diplomatic response should be informed by a legal opinion on what is happening. The FCO should immediately undertake to:

- a) send an expert team to gather evidence on sexual violence in conflict and other possible atrocity crimes;
- b) conduct a review of the situation based on NGO and International Organisations' reports and its own findings, and provide the Committee with a summary of its findings, including a clear statement on whether it judges that, based on the evidence available, the actions of the Burmese security forces constitute ethnic cleansing, crimes against humanity, and/or genocide;
- c) respond to the Committee as to how it will use this designation to guide its policy on the Rakhine crisis, including in assessing whether to pursue a referral to the International Criminal Court.

The approach taken by the UK Government is highly flawed and must be amended to align with the UK's obligations under the Genocide Convention.

The Rationale 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 that it is for courts to do so. However, domestically, there is no mechanism to enable UK courts to deal with the question of genocide. While there are international options, the UK Government does not have a strong history of engagement with these judicial systems. For example, in the case of the Daesh atrocities, six years after the atrocities, the UK Government has not succeeded in engaging with any international judicial bodies to make such a determination. While recently the UK Government has led on some initiatives, such as UN Security Council Resolution 2379 (establishing an investigative mechanism into Daesh atrocities in Iraq), all of these have fallen short of engaging in the question of genocide itself.

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 ICJ ruling means that states 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 both to the duty to prevent and the spirit of the Genocide Convention.

Determination and Not Criminal Prosecution

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.

Moreover, it does not replace other avenues for legal recourse: criminal responsibility of individuals will need to be assessed by domestic criminal courts or international criminal tribunals; State responsibility would need to be assessed by the ICJ.

Why is Determination Important?

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.

Who Should Determine Genocide, International or Domestic Courts?

While there are already several different international courts that can deal with the crime of genocide, these do not necessarily negate the need for domestic determinations. There are two reasons for this: firstly, the international judicial system is profoundly flawed; and secondly, the Genocide Convention places responsibilities on states themselves to determine genocide, and does not require it be left only to the international system.

The international judicial system has several different bodies that can engage with the question of genocide determination: the ICC, ad-hoc tribunals, and UN-established investigative mechanisms. While historically it was the UN Security Council that had to determine investigations, the ICC was established to reduce this reliance, as the Council was often reluctant to deal with the question. However, the ICC is limited as it does not enjoy universal jurisdiction and is only recognised by 123 countries.

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 a relevant organisation — 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. However, this is not common; and as in the case of *The Gambia v Myanmar*, governments — including the UK — refused to support the initiative, despite it being in line with the UK’s long-standing policy.

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.

If not Courts, Could Politicians deal with the Question?

Yes, and in other countries they do. However, according to the UK Government’s long-standing policy, this should be done by courts. What was missing in the UK was a comprehensive mechanism to do so. The Genocide Amendment is this needed mechanism.

The UK Government is now considering a concession that would give the Foreign Affairs Committee (FAC) with the power to determine. However, FAC has always had this power. Moreover, it has used it several times: for the Daesh genocide in 2016, for the Burmese's military genocide in 2017, and most recently for the CCP's genocide against the Uyghurs in 2020. In each case, the UK Government ignored the FAC's determinations. In light of these previous genocides, there is no guarantee or hope that this position will change with the newly proposed concession.

Is the Genocide Amendment the Right Response?

The Genocide Amendment cannot solve all problems with the UK's responses to genocide. However, what it does is:

- Implement the UK Government's own long-standing policy that it is for courts to deal with genocide determination;
- Implement recommendation 7 of the Bishop of Truro's Review;
- Address the issue that international judicial systems are not engaged on the issue and the lack of political will;
- Bridge the gap between the duties under the Genocide Convention and their realisation;
- Implement the UK's duty to prevent by ensuring that the situation is assessed by a competent body and the UK Government can then act in an informed way;
- Implement the UK's duty to prevent, a conduct-oriented duty, namely, 'to employ all means reasonably available to them, to prevent genocide so far as possible' (ibid. 430).

What are the Possible Consequences?

Legal

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, the amendment allows for genocide hearings to follow due process in full accordance with the rule of law. The Coalition for Genocide Response believes that other states will

replicate this model once it passes into law as it provides for a mechanism to bridge the duties under the Genocide Convention and their realisation.

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 contend 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. The UK does not currently have a trade deal with a country credibly accused of genocide. 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.

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