

**RE: TRADE BILL 2019-2021, “GENOCIDE AMENDMENT”**

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**INSTITUTE FOR CONSTITUTIONAL AND  
DEMOCRATIC RESEARCH  
BRIEFING**

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1. This amendment is desirable. It allows the UK to lead the world in instituting a meaningful deterrent to genocide. While the drafting might be improved in some areas, the amendment will mostly function as drafted.

**BACKGROUND**

2. The amendment provides that, where the UK is party to an international trade agreement, the High Court may suspend the agreement if it finds that another party has committed or is committing genocide.
3. Genocide is defined, in international law, as committing certain acts with the “intent to destroy, in whole or in part, a national, ethnical, racial, or religious group, as such”. The acts are (1) killing, (2) causing serious bodily or mental harm, (3) deliberately inflicting conditions of life calculated to bring about the destruction of the group in whole or in part, (4) imposing measures intended to prevent births, and (5) forcibly transferring children to another group.<sup>1</sup>
4. Enforcement of the prohibition against genocide is notoriously ineffective. International mechanisms either depend on political consent or else take place *post facto*, making them meaningless from the point of view of victims. Through trade with perpetrators, the UK may indirectly aid and abet genocide. Reports by the Australian Strategic Policy Institute, for example, indicate that the UK may have received imports from China manufactured using Uighur forced labour.<sup>2</sup>

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<sup>1</sup> UNGA, *Convention on the Prevention and Punishment of the Crime of Genocide*, (1948) 78 UNTS 277 (“the Genocide Convention”), Art. II

<sup>2</sup> Xu, V. X., Cave, D., Leibold, J., Munro, K., Ruser, N., “Uyghurs for sale”, ASPI, (1 March 2020)

## **ISSUES OF PRINCIPLE**

### ***Hierarchy of harms***

5. Every foreign policy decision involves a balance of harms. Parliament is entitled to identify a hierarchy of such harms. Genocide must sit at or near the top of any such hierarchy. It is difficult to conceive of a policy trade off in which the cost of preventing, discouraging, or even taking a public stand against genocide will not be justified.

### ***The role of the courts***

6. The determination that a state has or is committing genocide is well within the constitutional and institutional competence of the High Court. Domestic courts are already empowered to determine whether genocide has been committed<sup>3</sup> (although the issue has never been tried). The question before the court will be one of pure fact and law. While the subject matter is exceptional, questions of this nature lie within the court's core competence. In view of the government's stated Brexit policy, of bringing decisions "back home" from "foreign courts", it is right that decisions on genocide should be made by the domestic High Court.

### ***The UK's international obligations***

7. Current UK policy is to refrain from taking action or even formally identifying a genocide until an international organisation has determined that one is or has occurred. The UK has an international law duty to take action "at the instant [it] learns of, or should normally have learned of, the existence of a serious risk that genocide will be committed".<sup>4</sup> The amendment will put the UK on the right side of its international law duty. This will represent an important step towards rehabilitating the UK's reputation on human rights and rule of law issues in the international community.

### ***De-politicising genocide***

8. While genocide is recognised as a crime in both domestic and international law, action against perpetrators lies primarily in the political sphere. This forces politicians to take a political decision about a legal question. It also leaves the victims of genocide dependant on the political good will of governments. The amendment de-politicises genocide and empowers victims and their representatives by ensuring that legal questions are adjudicated by the courts. It will also assist diplomats by relieving political pressure to balance trade concerns against the imperative of preventing genocide.

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<sup>3</sup> International Criminal Court Act 2001, s. 51

<sup>4</sup> Genocide Convention, Art. I; *Bosnia v Serbia* [2007] 2 ICJ 43, at 430

## ISSUES OF PRACTICALITY

### *The effect of the amendment*

9. The amendment purports to invoke the trade agreement itself. This is impossible. States are not entitled to avoid their international law obligations on the basis of a provision in domestic law.<sup>5</sup> Parliament has no power to revoke a treaty recognised in international law. It is possible, however, to revoke the domestic implementing measures for a trade agreement, rather than the agreement itself. This would have a similar effect. In such an event, however, UK would be in breach of its obligations under the agreement in question. This is, however, an acceptable risk for the following reasons:
- (a) International treaties are subject to the peremptory norms of international law. The prohibition of genocide and (arguably) the duty to prevent genocide, are peremptory norms.<sup>6</sup> Any trade agreement is, therefore, subject to the duties not to commit/to prevent genocide.
  - (b) Treaties may be revoked or suspended on the basis of a “fundamental change in circumstances” where the circumstances constitute “an essential basis for the consent of the parties to be bound by the treaty”.<sup>7</sup> The assumption that both parties will abide by the peremptory norms of international law is such as basis.
  - (c) Many trade agreements (including all those signed by the EU, which are replicated in the “rollover agreements”) contain a “human rights” or “democracy” clause which allows a party to revoke or suspend the agreement where the other party violates fundamental rights.<sup>8</sup> The existence of the amendment in domestic law will, in any case, encourage negotiators to make appropriate provision in trade agreements.
  - (d) It is unlikely that a state will take retributive action. To impose unilateral measures or begin an international law claim against the UK would be to invite an international tribunal to investigate the circumstances of the genocide. This would be embarrassing for the perpetrator and likely lead to further sanctions.
  - (e) In any case, making a strong legislative statement against genocide is worth the legal risk.

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<sup>5</sup> UN, *Vienna Convention on the Law of Treaties*, (1969) 1155 UNTS 331 (“the Vienna Convention”), Art. 27

<sup>6</sup> Wouters, J., and Verhoeven, S., “The prohibition of genocide as a norm of jus cogens and its implications for the enforcement of the law of genocide”, (2005) 5 *Int. C. L. R.* 401

<sup>7</sup> Vienna Convention, Art. 62

<sup>8</sup> Zamfir, I., “Human rights in EU trade agreements”, EPRS PE 637.975, (July 2019)

### **Test for genocide**

10. The amendment allows the court to revoke a trade agreement if it makes a “preliminary determination” that a state has or is committing genocide. This is very difficult to prove. The court must find that (a) one or more of the five actions have been committed, (b) the perpetrator intended to commit that action, (c) the action targets a defined group within Article II, and (d) the perpetrator intended to eliminate all or part of the group. The International Court of Justice requires facts to be proved to a particularly high standard in cases of genocide.<sup>9</sup> It may, however, infer intent to eliminate the group from a course of conduct.<sup>10</sup>
11. It will, therefore, likely be very rare for the High Court to find the test in the amendment satisfied. This may be the drafters’ intention. Revoking a trade agreement is, after all, a serious sanction and the amendment is constitutionally innovative (although not unacceptable). It is arguable that it should only be deployed in the most severe circumstances. Alternatively, the drafters may wish to consider replacing the word “genocide” with “crimes against humanity” (as defined in Article VII of the Rome Statute 1998). Crimes against humanity cover broadly similar offences to genocide but can be proved without proving the intention to eliminate all or part of the group.

### **Standard of proof**

12. The amendment requires the High Court to make a “preliminary determination” that a state is committing genocide. From the context of the amendment, this appears to indicate that the court does not need to apply the onerous standard of proof required by the ICJ. In domestic law, however, the phrase “preliminary determination” refers to decisions made in advance of a full trial. Preliminary determinations are made on the same standard of proof as final determinations.
13. This is not fatal. The court may infer that a lower standard of proof is intended from the parliamentary debate on the amendment.<sup>11</sup> Clarification, however, is advisable. If the intention is for the court to apply a lower standard of proof than the ICJ then it would be helpful to specify the standard (some suggestions are made in the appendix).

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<sup>9</sup> *Bosnia v Serbia*, at 209

<sup>10</sup> *Bosnia v Serbia*, at 370-374

<sup>11</sup> *Pepper v Hart* [1992] UKHL 3