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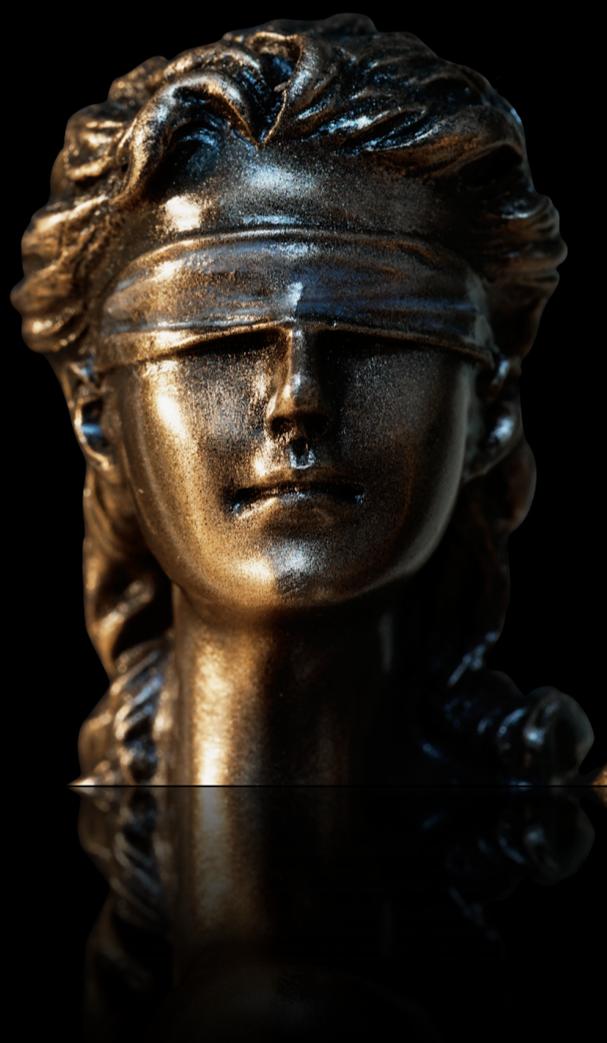
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# LEGAL FACTSHEET

GENOCIDE AMENDMENT TO THE TRADE BILL 2019-2021

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ACCOUNTABILITY  
UNIT

# LEGAL FACTSHEET

## GENOCIDE AMENDMENT TO THE TRADE BILL 2019-2021

### A. WHAT THE GENOCIDE AMENDMENT DOES

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1. The Genocide Amendment to the Trade Bill 2019-2021<sup>i</sup> allows survivors and victims<sup>ii</sup> of genocide to make an Application to the High Court for a Preliminary Determination on whether a current or prospective UK trading partner is committing or has committed genocide.<sup>iii</sup>
2. Genocide is a crime as defined and codified in the United Nations Convention on the Prevention and Punishment of the Crime of Genocide (“Genocide Convention”).
3. The prohibition, prevention and punishment of genocide constitute binding obligations on the UK and all other State Parties to the Convention. Those obligations also bind all States under customary international law. The Genocide Amendment seeks to give meaningful effect to those obligations.
4. If the High Court finds, through a Preliminary Determination, that genocide has been, or is being, committed by a State then the Government must present that finding to both Houses of Parliament and set out its proposed course of action in response.
5. The Government’s course of action *may* include the cessation of trade negotiations in respect of a future trade agreement, or withdrawal or termination of an existing agreement.<sup>iv</sup> The Government must consult Parliament and it must decide whether it wishes to continue to trade and, if so, to what extent, with a State to which genocide is attributed.

### B. HOW THE GENOCIDE AMENDMENT WORKS

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1. An Application for a Preliminary Determination to the High Court will provide an independent and impartial mechanism by which it may be established whether the UK’s obligations under the Genocide Convention are engaged.<sup>v</sup>
2. It is for Parliament, and ultimately the Government, to decide whether the legal interests of the other State are affected. A conflict of interests, including related to trade, is for the Government to resolve.
  - i. The Genocide Amendment does not detract from the Government’s obligation to prevent genocide and continually assess the risk of genocide being committed.<sup>vi</sup>
3. The Application must only concern the crime of genocide (sub-section (1)).
4. The Application must relate to a genocide that has occurred or is occurring after the Genocide Amendment comes into force (sub-section (5)).
5. The Application must be in the form prescribed by the Government and must meet reasonable admissibility criteria prescribed by the Government (sub-clause (7)(a)).
6. The Application will follow the procedural rules and rules of evidence prescribed by the Government (sub-clause (7)(b)).

7. The procedures and rules may permit the admission of contradictory and exculpatory evidence to allow for full investigation of an Application. The Government may make provision for the form that takes (sub-clause (7)(c)).<sup>vii</sup>
8. The High Court can determine whether non-UK nationals were victims of genocide. There are many precedents for this being achieved including where witnesses are outside the UK. For instance, UK courts have dealt with international crimes, in respect of individual criminal responsibility, under universal jurisdiction for the past three decades at least.<sup>viii</sup>

## C. WHAT THE GENOCIDE AMENDMENT DOES NOT DO

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The Genocide Amendment:

1. Does not apply to other types of international crimes such as war crimes or crimes against humanity.
2. Does not invite vexatious claims on genocide as the Government can set the form, content and criteria for Applications.<sup>ix</sup>
3. Does not apply to all trading arrangements.
  - i. The Genocide Amendment only applies to bilateral trade agreements (sub-clause (2)).
4. Does not automatically impact prospective or existing bilateral trade agreements.
  - i. Separate to the requirements of the Genocide Amendment, and in accordance with its international obligations, the Government in consultation with Parliament, can decide on any conflict between bilateral trade agreements and obligations relating to genocide. The Genocide Amendment merely formalises this process (sub-clause (4)).
5. Does not apply to genocides that occurred before the Genocide Amendment comes into force.
6. Does not violate the rules on State immunity of serving foreign State officials.
  - i. An Application leading to a Preliminary Determination is not a criminal process or procedure; individuals are not being tried and there is no trial process.
7. Does not violate the rules on immunity of foreign States in national courts.
  - i. An Application leading to a Preliminary Determination merely sets out a state of affairs as to whether or not genocide is occurring or has occurred to a particular standard of proof.
8. Does not preclude further action such as referral, by the Government, of the issue of genocide to international courts or tribunals (where they exist and have jurisdiction) for a final determination of a dispute.<sup>x</sup>

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Aarif Abraham, led by Sir Geoffrey Nice QC, has advised widely on the revised Genocide Amendment. This legal factsheet, drafted by Aarif Abraham, is provided as a high-level explanatory note only.

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## Endnotes

- i UK Parliament. 2020. Lord Alton of Liverpool's Amendment After Clause 2 (9) *Trade Bill* 2019-2021, Report Stage; UK Parliament. 2021. Lord Alton of Liverpool's Amendment After Clause 2 *Trade Bill* 2019-2021, Motion to be Moved on Consideration of Commons Reasons and Amendments.
- ii Legal representatives of survivors or victims, or groups representing them, would make an Application to the High Court of England and Wales, or the Court of Session in Scotland, or the High Court of Justice in Northern Ireland.
- iii The Genocide Amendment was moved by Lord Alton of Liverpool and sponsored by Baroness Kennedy QC of The Shaws, Lord Forsyth of Drumlean, and Baroness Falkner of Margravine. It received significant support of 287 to 161 in the U.K. House of Lords on December 7, 2020. The Genocide Amendment was rejected by MPs in the House of Commons by a vote of 318 to 309 on 19 January 2021. The revised Genocide Amendment was re-tabled on 20 January 2021 in the House of Lords and will be debated on 2 February 2021.
- iv See further, International Bar Association Human Rights Institute (IBAHRI). 2021. High-Level Briefing Paper: Genocide Amendment to the UK Trade Bill. London: IBAHRI, January 15, 2021.
- v There is no basis in international law to suggest only international courts or tribunals can determine genocide. Such a position would render meaningless the obligations under international law on States to prohibit, prevent and punish perpetrators of genocide. The duty would fall on State officials to provide a credible mechanism for a determination in order that obligations are fulfilled. Allowing national courts to determine the issue depoliticises and formalises a mechanism which should already be in existence.
- vi United Nations. 2014. Framework of Analysis for Atrocity Crimes. New York: United Nations Office on Genocide Prevention and the Responsibility to Protect.
- vii The Government, drawing upon international and domestic practice, can consider various precedents to allow exculpatory or contradictory evidence. These precedents include: appointment of special advocates to advocate for a contradictory or alternative case; invitation to interested parties to intervene on public interest grounds; invitation to a foreign state, which believes its legal interests may be affected, to intervene in or be a party to proceedings. These procedures may be augmented by allowing an investigatory role for the war crimes team of the Metropolitan Police Counter Terrorism Command (SO15) who may provide relevant evidence in any case.
- viii Ministry of Justice (MoJ). 2018. Policy Paper, Universal Jurisdiction Information Note. London: MoJ, May 21, 2018.
- ix UK courts routinely deal with the issue of vexatious claims and there are a whole host of precedents that may be drawn upon to address this issue if it was to arise.
- x The Genocide Amendment does not preclude or prevent further consideration of the issue by international organisations including the United Nations.