



Briefing 19.10.09: Amendments to the Coroners and Justice Bill to Strengthen the law on genocide, war crimes and crimes against humanity

On Monday 26th October, during the Report Stage of the Coroners and Justice Bill, Peers will debate an amendment which is designed to act as a deterrent to those suspected of genocide, war crimes and crimes against humanity by preventing them from, for example, holidaying, shopping or seeking medical treatment in the UK. The amendment will close a major loophole in our law which allows the UK to be a safe haven for people suspected of the most serious international crimes.

Background

1. Lord Carlile QC, Baroness D'Souza, Lord Falconer QC and Lord Alton have tabled two amendments to the Coroners and Justice Bill to close impunity gaps in British law relating to genocide, war crimes and crimes against humanity.

Retrospective application of jurisdiction for genocide, war crimes and crimes against humanity

2. The first amendment (175) called for the International Criminal Court Act 2001 to be amended to allow our courts to try individuals for crimes against humanity, war crimes and genocide where the crimes in question were committed **prior to 2001**. Currently UK courts can only try suspects for these crimes if they were committed after 2001 (with a few minor exceptions). In practice, this has meant that four Rwandan genocide suspects living in the UK, who the High Court have ruled cannot be extradited to



Rwanda on fair trial grounds, could not be prosecuted here and therefore fall into an ‘impunity gap’.

3. In response to this amendment, the government announced on 7th July 2009 that they would extend the jurisdiction of UK courts to prosecute genocide, crimes against humanity and war crimes retrospectively back to January 1st 1991.

Replacing the ‘residency’ requirement for prosecution with a simple ‘presence’ requirement

4. The second amendment (176) calls for the International Criminal Court Act 2001 to be amended to allow our courts to try individuals for crimes against humanity, war crimes and genocide where a person suspected of these crimes is **present** in the United Kingdom. Current law states that you must be a **UK national** or **resident** to be prosecuted.
5. In its statement on July 7th, the Government made it clear it was not willing to address this loophole: *‘We propose no change to the categories of people covered by the legislation, which should remain UK nationals and residents. However, we are exploring the possibility of providing more certainty as to who may (or may not) be considered to be a UK resident’*.ⁱ
6. During the Committee Stage debate, a cross-party group of Lords was **critical of the government’s position** on this and spoke out in favour of a simple presence test for prosecution or an all-encompassing definition of ‘residence’.ⁱⁱ In addition, the **Joint Committee on Human Rights**, in their recent report ‘Closing the Impunity Gap: UK



law on genocide (and related crimes)’ said ‘*We recommend that ‘residence’ be replaced with a broadly defined ‘presence’ test so as to send the strongest possible message to international criminals that they are not welcome in the UK, whether to live here, shop, study or visit*’.ⁱⁱⁱ

7. **Since then, no compromise has been reached with the Government and Baroness D’Souza, Lord Carlile QC and Lord Hannay are re-tableing the ‘presence’ amendment ahead of Report Stage of the Coroners and Justice Bill. The amendment is likely to be debated on the second day of Report Stage on 26th October.**

Problems with the residency requirement and the case for a simple presence requirement

Below are the arguments, echoed by the JCHR report, for supporting this amendment, which calls for a simple presence test for prosecution of genocide, war crimes and crimes against humanity.

8. **The residency requirement is uncertain:** The definition of residency in the ICC Act is circular and unhelpful: ‘*a United Kingdom resident means a person who is resident in the United Kingdom*’.^{iv} The former Director of Public Prosecutions, Sir Ken Macdonald QC has said that ‘*the current residency requirement presents certain difficulties for the CPS and it lacks certainty*’.^v
9. **The retention of a residency test could potentially allow the following people to stay in the UK without fear of prosecution:**



- Visitors, including those on business visas – who currently have visas of up to six months;
- Students – who can stay the full length of their course (conceivably 3 or 4 years) plus three months;
- Domestic workers and academics – up to 12 months
- Skilled workers – up to 3 years
- Asylum seekers who cannot be deported but where residence is being denied through the process of refusing asylum status under Article 1F(a) of the Refugee Convention – currently allowed to stay until such time as they can be removed.

10. There is an unreasonable disparity between UK nationals and non-UK nationals:

UK nationals may be prosecuted with greater ease than non-UK nationals. This was recognised by Lord Lester when the ICC Act was being debated in the House of Lords. He noted that if a UK citizen and an Iraqi citizen were to be involved in a crime against humanity abroad and fled to the UK, the UK national could be prosecuted under the Bill before domestic courts but the Iraqi citizen could not be prosecuted and conceivably his crimes could go unpunished.^{vi}

11. There is an unreasonable inconsistency between the ICC Act and the Geneva

Conventions Act 1957: Under the Geneva Conventions Act, UK courts have jurisdiction over offenders ‘*whether in or outside the United Kingdom*’ who commit a breach of the Act.^{vii} A residency test does not apply to people suspected of grave breaches of the Geneva Conventions committed after 1957 or to suspects of torture committed after 1988. There is no practical or sensible reason for a jurisdictional



difference between these crimes, all of which belong to the same bracket of serious violations of international criminal law.

- 12. There are people suspected of genocide, war crimes and crimes against humanity who have been found to be present on UK soil but who are not residents:** According to media reports and publicly reported determinations of the Asylum and Immigration Tribunal (AIT) suspects that have been present in the UK but not resident include Felicien Kabuga, the alleged financier of the Rwandan genocide who is accused of purchasing hundreds of thousands of machetes before the genocide; and Chucky Taylor, head of the anti-terrorist unit in Liberia during Charles Taylor's time (recently convicted in the US for torture).^{viii}
- 13. The UK is out of line with other Commonwealth Countries:** A simple presence requirement would bring the UK into line with other common law countries such as the US (for genocide), New Zealand, Canada and South Africa – all of which have simple presence requirements.
- 14. A presence test would not necessarily result in a large number of prosecutions:** Prosecution would, as now, be a last resort where extradition, transfer to a tribunal or immigration action has failed. Justice works best when it is local. However, when a country is unable or unwilling to prosecute, or where there are concerns about the ability of the accused to receive a fair trial, then we must not allow the UK to become a safe haven for people suspected of heinous crimes. Canada provides an example. Canada has a 'presence' requirement rather than a 'residence' requirement for the prosecution of genocide, war crimes and crimes against humanity since 2000. This has only resulted in



one trial. In addition, Britain has universal jurisdiction for torture and hostage taking, this has not led to a large number of trials in UK courts.

- 15. The role of the Attorney General and Director of Public Prosecutions would be retained to stop proceedings where the evidence is not of a high enough standard or where it would not be in the public interest:** The proposed changes to the law would simply expand the power of the DPP to bring charges under the ICC Act. The decision to prosecute would remain with the Director of Public Prosecutions and will not be instituted except by or with the consent of the Attorney General (as stipulated in Section 54(c) of the ICC Act) and in line with the UK's international obligations to bring perpetrators of heinous international crimes to justice. While we have concerns about the retention of this power by a member of the government, her consent remains necessary and would continue to be necessary if the Amendment were passed.
- 16. Sitting Heads of States, and diplomats, are immune from prosecution under (i) the State Immunity Act 1978 and (ii) the Diplomatic Privileges Act 1964:** UK Courts have also interpreted the ICJ ruling in the 'arrest warrant' case between Belgium and the Democratic Republic of Congo (2002) such that head of state immunity also extends to high level Government ministers involved in functions which require them to travel. Using this reasoning, in February 2004 and September 2009, courts rejected applications for an arrest warrants to be issued against Israeli Defence Minister Shaul Mofaz, and Israeli Defence Minister Ehud Barak (respectively), and in November 2005, a magistrate refused to issue an arrest warrant against Chinese Trade Minister **Bo Xilail**, **arguing that as part of an official delegation to the UK, he enjoys immunity. Complaints filed against George Bush and Robert Mugabe were also not investigated.** Although



many disagree with the diplomatic immunity, the proposed amendments would have no impact on the immunities that currently exist.

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ⁱ <http://www.justice.gov.uk/news/newsrelease070709b.htm>

ⁱⁱ <http://www.publications.parliament.uk/pa/ld200809/ldhansrd/text/90707-0013.htm>

ⁱⁱⁱ Joint Committee on Human Rights, 'Closing the Impunity Gap: UK law on genocide (and related crimes) and redress for torture victims' Twenty-fourth Report of Session 2008-9

^{iv} International Criminal Court Act 2001, part 5, 67 (2)

^v Speech to the Genocide Prevention APPG and the Parliamentary Human Rights Group, 21st October 2008

^{vi} Second Reading Hansard 15 January 2001, col of living 939

^{vii} Section 1 on the Geneva Conventions Act

^{viii} See 'Suspected War Criminals and Genocidaires in the UK: Proposals to Strengthen our Laws' Aegis Trust, June 2009