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Commentary of PGA to the Draft Law prepared by the Committee on Law Enforcement of Verkhovna Rada on Amending Some Legislative Acts of Ukraine to Enforce the Implementation of International Humanitarian Law

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Parliamentarians for Global Action (PGA) is the largest global organization of individual Legislators engaged in promoting democracy, human rights, non-discrimination and peace under the Rule of Law worldwide through its network of more than 1250 Members in 135 Parliaments.

On behalf of PGA Secretariat, we would like to congratulate the Law Enforcement Committee of Verkhovna Rada on preparing the draft law which incorporates international criminal and humanitarian law into the domestic legal framework of Ukraine. We sincerely appreciate the opportunity to be able to submit our comments on this important Draft law, which is essential to guarantee effective investigations and prosecutions of the gravest human rights violations committed in Ukraine. In this respect, we are delighted to respectfully enclose suggestions for the consideration of the Law Enforcement Committee in the framework of the process of the finalization of the Draft Law.

We remain fully available to further assist and support the parliamentary process in Verkhovna Rada, as it may be deemed appropriate.

Preliminary comments

We fully support and align ourselves with the recommendations submitted by Global Rights Compliance dated 07 December 2019 on the draft law in question. The comments below therefore serve to complement and provide additional suggestions to those already put forward by Global Rights Compliance, without unnecessary repetitions.

We further defer to future considerations and position on the crimes and general principles of law to be expressed by the Ukrainian colleagues from Civil Society, International Committee of the Red Cross and respected representatives of academia who have participated in drafting the Bill 0892 on Amending the Criminal Code of Ukraine to Ensure Harmonisation Between the Criminal Code of Ukraine and Provisions of International Law.

1. Principles of international criminal law

1.1 Article 437(3) Command or Superior Responsibility:

While we strongly welcome the inclusion of the provision on the command or Superior Responsibility in the current draft law, we respectfully suggest aligning the provision with the wording of Art. 28 of the Rome Statute of the International Criminal Court[1], in particular:

(a) A military commander or person effectively acting as a military commander shall be criminally responsible for crimes within the jurisdiction of the Court committed by forces under his or her effective command and control, or effective authority and control as the case may be, as a result of his or her failure to exercise control properly over such forces, where:

(i) That military commander or person either knew or, owing to the circumstances at the time, should have known that the forces were committing or about to commit such crimes; and

(ii) That military commander or person failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution.

(b) With respect to superior and subordinate relationships not described in paragraph (a), a superior shall be criminally responsible for crimes within the jurisdiction of the Court committed by subordinates under his or her effective authority and control, as a result of his or her failure to exercise control properly over such subordinates, where:

(i) The superior either knew, or consciously disregarded information which clearly indicated, that the subordinates were committing or about to commit such crimes;

(ii) The crimes concerned activities that were within the effective responsibility and control of the superior; and

(iii) The superior failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution.

1.1.1 Removal of "such a crime was covered by his intent"

There are different standards set out as the subjective element for superior responsibility:

• Actual knowledge: The superior has actual knowledge that his subordinates are about to commit or have committed crimes.

• "Reason to know" (Imputed knowledge)- standard: i.e. the superior possesses information of a nature which would put him on notice of the risk of such offences by indicating a need for additional investigation in order to ascertain whether the crimes were about to be or had been committed.

If fulfilled, either of these subjective elements would give rise to responsibility under the doctrine of superior responsibility, including the imputed knowledge standard alone.

[1] Rome Statute of the International Criminal Court (last amended 2010), 17 July 1998 (Rome Statute), adopted by the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court on 17 July 1998. In force on 1 July 2002, 2187 UNTS 3.

Therefore, including the criterion of "*such a crime was covered by his intent*" would defy the purpose of this doctrine which does not necessarily presuppose intent of the superior with regard to crimes of his subordinates[2], as demonstrated by the threshold of having had 'reason to know' instead of requiring actual knowledge. It is the difference in the lack of intent that sets this doctrine apart from an individual criminal liability of a direct perpetrator which requires intent and knowledge.[3]

1.1.2 Inclusion of the criterion on "forces under his or her effective command and control, or effective authority and control"

The doctrine of commander/ superior responsibility finds its basis in the existence of a power of the superior to control the acts of his subordinates[4] and the corresponding legal duty of a superior "to prevent and repress breaches undertaken by subordinates".[5]

Therefore, it is pivotal to reflect this rationale by incorporating the criterion for the forces to be under the "effective command and control or effective authority and control" to encapsulate all situations where a superior is in position to exercise power over his/her subordinates, irrespective of such power being based on a *de jure* or a *de facto* position.[6] The criterion of *effective command and control* includes forces in lower echelons of the chain-of-command, providing it can be ascertained that the commander is in position to issue orders, either directly or through intermediate subordinate commanders. On the other hand, the criterion of *effective authority and control* also encompasses commanders who exercise control over forces which are not placed under him/her in a direct chain-of-command.[7]

1.1.3 Specific provisions relating to the responsibility of non- military superiors

We believe that it is important to explicitly state that all types of superiors are subjected to the obligation and are held accountable. In addition, the threshold of knowledge is less strict for superiors in civilian structures ("[t]he superior either knew, or consciously disregarded information" as opposed to "[…] either knew or, owing to the circumstances at the time, should have known" in the case of military commanders). This is based on the fact that civilian superiors have less opportunities and means to be properly informed about the conduct of their subordinates than military commanders.

We therefore respectfully suggest to adjust the threshold in line with the wording of the Rome Statute, so that the threshold of knowledge does not set excessively strict standards, to the potential detriment of the rights of the accused.

1.2 Irrelevance of official capacity of alleged perpetrators

In the presented draft law, there appears be no provision reflecting an essential general principle of international customary and criminal law on *the irrelevance of official capacity*, reaffirmed

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[2] *The Prosecutor v. Naser Oric,* International Criminal Tribunal for the former Yugoslavia (ICTY) Judgement, 30 June 2006, IT-03-68, para. 324.

[3] See art. 30 of the Rome Statute.

[4] Prosecutor v. Zdravko Mucic aka "Pavo", Hazim Delic, Esad Landzo aka "Zenga", Zejnil Delalic (Trial Judgement), IT-96-21-T, ICTY, 16 November 1998 (Čelebići Trial Judgement), para. 377.

[5] Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977, 1125 UNTS 3, Article 87.

[6] Čelebići Trial Judgement, paras 354, 370, 736, confirmed by Čelebići Appeal Judgement, paras 195 et seq.

[7] William J. Fenrick, Responsibility of Commanders and Other Superiors in *Commentary on the Rome Statute of the International Criminal Court* (Otto Triffterer ed., 1999) 518.

in article 27, paragraph 1, of the Rome Statute. This provision is fundamental in guaranteeing an equal application of law to all persons, irrespective of their position and immunities attached to such positions and ensuring that no alleged perpetrator can be shielded from criminal proceedings.

State officials, including those at the highest level, are not entitled to immunities from arrest and criminal proceedings — either of a national or international nature — if charged with international crimes, namely genocide, crimes against humanity, war crimes, or the crime of aggression. This development in case of prosecutions for international crimes results from the non-relevance of the reasons for which immunity *ratione materiae* had traditionally been conferred. The first reason for this type of immunity is that official acts done by individuals are deemed to be acts of the state for which it is the state and not the individual which is responsible. However, this general principle does not apply to acts that amount to crimes under International Law, as the immunities have come to conflict with more recently developed rules of International Law, according to which the official position of an individual does not exempt him/her from individual responsibility for international crimes.[8]

This principle has been already established in 1945 when the Nuremberg Charter[9] eliminated any immunity applicable to Heads of States for mass atrocity crimes. In a more recent development, the **International Court of Justice** (ICJ) acknowledged that the customary international law only recognized immunities of certain State officials before foreign national courts. It held that States officials enjoy no criminal immunity under international law in their own domestic jurisdictions, and may thus be tried by their countries' courts in accordance with the relevant rules of domestic law.[10]

This is even more compelling in light of the fact that many of the crimes included in the current draft law are of such nature, that the criminal responsibility would only arise in respect of the conduct of officials holding leadership positions, who would, in most certitude, enjoy immunities conferred to them. As such, unless such immunities are removed under domestic law, the criminalization of these acts would be rendered irrelevant and non-executable.

In light of the above, we therefore respectfully suggest the inclusion of the following provision:

Irrelevance of official capacity

1. This Law shall apply equally to all persons without any distinction based on official capacity. In particular, official capacity as a Head of State or Government, a member of a Government or parliament, an elected representative or a government official shall in no case exempt a person from criminal responsibility under this Law, nor shall it, in and of itself, constitute a ground for reduction of sentence.
2. Immunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law, shall not bar the domestic courts of Ukraine from exercising its jurisdiction over such a person.

[8] D. Akande & S. Shah: *Immunities of State Officials, International Crimes, and Foreign Domestic Courts*, in *European Journal of International Law* Vol. 21 no. 4, 2011, p. 840.
[9] United Nations, Charter of the International Military Tribunal - Annex to the Agreement for the prosecution and punishment of the major war criminals of the European Axis ("London Agreement"), 8 August 1945.
[10] ICJ, Arrest Warrant of 1 April 2000 (Dem. Rep. of the Congo v. Belgium), Judgment, I.C.J. Reports 2002, p. 26, para. 61.

1.3. Superior Order/ Obeying an order or command

We recognise that a provision on obeying an order or command is already included in the article 41 of the Criminal Code of Ukraine and article 60 of the Constitution of Ukraine. Nevertheless, we would recommend rephrasing the wording to guarantee that the lack of knowledge of the criminal nature of the order to commit genocide, crimes against humanity, war crimes or crime of aggression would not exonerate the person executing the order from his criminal liability. In particular, this could be accomplished by adding "*except for manifestly unlawful order to commit g*enocide, c*rimes against humanity, war crimes or crime of aggression* " in the article 41 of the Criminal Code. The amended provision would thus read:

Art. 41(5) of the Criminal Code of Ukraine:
Where a person was not and could not be aware of the criminal nature of an order or command, *except for manifestly unlawful order to commit g*enocide, c*rimes against humanity, war crimes or crime of aggression*, the criminal liability for the act committed in pursuance of such order or command shall arise only with respect to the person who gave the criminal order or command.

1.3 Universal Jurisdiction

Recognizing that the articles 7 and 8 of the Criminal Code of Ukraine include provisions enabling extra-territorial jurisdiction, we would respectfully wish to support the suggestion submitted by Global Rights Compliance, to extend the provision to encompass Universal Jurisdiction. In particular, this entails including the possibility to try the crimes not only irrespective of the territory where they occur, but also of the nationality of the alleged perpetrator. Enabling the authorities of Ukraine to proceed with criminal proceedings against alleged perpetrators holding neither Ukrainian citizenship nor residence in Ukraine for crimes committed outside of Ukraine would prevent such perpetrators from seeking refuge on the territory of Ukraine and would offer Ukraine the possibility to initiate domestic proceedings against such perpetrators if necessary.

2. Crimes under International Criminal Law

2.1 Crimes against humanity

Further to the suggestions submitted by Global Rights Compliance, we would recommend including the definition of the underlying acts criminalised under the crimes against humanity, in line with the article 7(2) of the Rome Statute, to ensure the coherent interpretation of the draft law with the existing provisions of international criminal law:

(a) "*Attack directed against any civilian population*" means a course of conduct involving the multiple commission of acts referred to in paragraph 1 against any civilian population, pursuant to or in furtherance of a State or organizational policy to commit such attack;
(b) "*Extermination"* includes the intentional infliction of conditions of life, inter alia the deprivation of access to food and medicine, calculated to bring about the destruction of part of a population;
(c) "*Enslavement*" means the exercise of any or all of the powers attaching to the right of ownership over a person and includes the exercise of such power in the course of trafficking in persons, in particular women and children;

(d) "*Deportation or forcible transfer of population"* means forced displacement of the persons concerned by expulsion or other coercive acts from the area in which they are lawfully present, without grounds permitted under international law;
(e) "*Torture*" means the intentional infliction of severe pain or suffering, whether physical or mental, upon a person in the custody or under the control of the accused; except that torture shall not include pain or suffering arising only from, inherent in or incidental to, lawful sanctions;
(f) "*Forced pregnancy*" means the unlawful confinement of a woman forcibly made pregnant, with the intent of affecting the ethnic composition of any population or carrying out other grave violations of international law. This definition shall not in any way be interpreted as affecting national laws relating to pregnancy;
(g) "*Persecution*" means the intentional and severe deprivation of fundamental rights contrary to international law by reason of the identity of the group or collectivity;
(h) "*The crime of apartheid"* means inhumane acts of a character similar to those referred to in paragraph 1, committed in the context of an institutionalized regime of systematic oppression and domination by one racial group over any other racial group or groups and committed with the intention of maintaining that regime;
(i) *"Enforced disappearance of persons*" means the arrest, detention or abduction of persons by, or with the authorization, support or acquiescence of, a State or a political organization, followed by a refusal to acknowledge that deprivation of freedom or to give information on the fate or whereabouts of those persons, with the intention of removing them from the protection of the law for a prolonged period of time.

Recognising that the definition of human trafficking is already included in the article 149 of the Criminal Code of Ukraine, for the purpose of aligning the legal framework of Ukraine with international human rights standards, we would nevertheless recommend adopting the widely accepted definition contained in the 2003 United Nations Protocol in Trafficking in Persons[11]:

Trafficking in persons shall mean the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs.

2.2 War Crimes

2.2.1 Article 438-3. War crimes involving the use of prohibited methods of warfare

a) We would respectfully recommend using the terminology of "*starvation*" instead of "*creating hunger for civilians*", in line with the legal terminology contained in 1977 Additional Protocols I and II to Geneva Conventions[12] and the Rome Statute[13].

[11] Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention against Transnational Organized Crime Adopted 15 November 2000, entered into force 25 December 2003) 2237 UNTS 319 (UN Trafficking Protocol), art 3(a).
[12] Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts ("Additional Protocol I to Geneva Conventions"), 8 June 1977, 1125 UNTS 3, Art. 54 (1); Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts ("Additional Protocol II to Geneva Conventions"), 8 June 1977, 1125 UNTS 609, Art. 14.
[13] Rome Statute, art. 8(2)(b)(xxv).

b) In addition, we would suggest aligning the provision with the International Humanitarian Law to include a more inclusive provision offering a wider scope of protection for civilians, by prohibiting *"to attack, destroy, remove or render useless objects in- dispensable to the survival of the civilian population."*[14]

c) In addition, closely intertwined with the prohibition of starvation as a method of warfare, it would be of importance to include an obligation for Parties to the conflict, both in international and non- international armed conflict, "*to allow and facilitate rapid and unimpeded passage of humanitarian relief for civilians in need, which is impartial in character and conducted without any adverse distinction, subject to their right of control."*[15]

A simplified combination of suggestions b) and c) above could also result in the following wording, as already included in the Art. 8(2)(b)(xii) of the Rome Statute:

Intentionally using starvation of civilians as a method of warfare by depriving them of objects indispensable to their survival, including wilfully impeding relief supplies as provided for under the Geneva Conventions.

d) The draft law limits the prohibition of sexual violence only to that committed against protected persons. While we strongly welcome the inclusion of this crucial provision, we would suggest adding it under the provision on the prohibited methods of warfare (Art. 438-3), so that it extends the protection to combatants as well. This would ensure that all combatants, not only those who are *hors de combat* or prisoners of war are protected against sexual violence.

2.2.2 Prohibition of means of warfare

a) The title of article 439 reads 'Usage of prohibited methods of warfare', instead of 'means'. Unless this is an inconsistency of translation, we would respectfully strongly suggest using the term 'means', in line with the provision of international humanitarian law and the text of the paragraph 1 of the provision that follows.

b) As to the content of the provision, we recommend expanding the provision beyond "the use of weapons of mass destruction prohibited by international treaties, the consent to be bound by which has been given by the Verkhovna Rada of Ukraine", or "other means of warfare prohibited by the international humanitarian law". Limiting the scope of the prohibited means as proposed in the current draft law would exclude its applicability to nuclear weapons, given that up to now, there exists neither customary nor conventional international law that would contain any comprehensive and universal prohibition of the threat or use of nuclear weapons.[16]

In addition, for the purpose of legal certainty, we would recommend providing a non-exhaustive list of the prohibited means of warfare already included in the Rome

[14] Additional Protocol I to Geneva Conventions, Art. 54 (2); Additional Protocol II to Geneva Conventions, Art. 14.
[15] Additional Protocol I to Geneva Conventions I, Art. 70 (1).
[16] ICJ, Nuclear Weapons case, Advisory Opinion, 8 July 1996, ICJ Reports 1996, 226; also see: International Committee of the Red Cross, Database on International Humanitarian Law; Nuclear Weapons; available at: https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_nuwe#Fn_E9E11084_00002. While the Treaty on the Prohibition of Nuclear Weapons was passed on 7 July 2017, it has still not come into effect, see: https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXVI-9&chapter=26&clang=_en

Statute and its subsequent amendments (in line with the article 438-5 in the draft law 0892), with an explicit inclusion of nuclear weapons.

As such, the amended article could read:

It is prohibited to employ weapons, projectiles and material and means of warfare of a nature to cause superfluous injury or unnecessary suffering, including, but not limited to:

1) poison or poisoned weapons;
2) weapons that use microbiological or other biological agents or toxins, regardless of their origin or method of production;
3) weapons, the main action of which is to cause damage with fragments that are not detected in the human body by X-rays;
4) laser weapons specially designed for combat use solely or inter alia to cause permanent blindness to unprotected human eyes;
5) suffocating, poisonous or other similar gases and any similar liquids, materials or means (including chemical weapons);
6) weapons, ammunition and supplies, provided that they are considered to cause undue suffering or are indispensable by virtue of the provisions of international humanitarian law;
7) bullets that are easily torn or flattened in the human body, such as shell bullets, the hard shell of which does not cover the entire heart or has cuts,
8) nuclear weapons

2.2.3. Additional inclusion of war crimes

To align the Criminal Code with the provision of international criminal and humanitarian law, and in addition to those already put forward in the submission of our partners, we would recommend including additional acts criminalized as war crimes, applicable in both international and non- international armed conflict:

a) Attacking or bombarding, by whatever means, towns, villages, dwellings or buildings which are undefended and which are not military objectives
b) Subjecting persons who are in the power of an adverse party to physical mutilation or to medical or scientific experiments of any kind which are neither justified by the medical, dental or hospital treatment of the person concerned nor carried out in his or her interest.
c) Destroying or seizing the enemy's property unless such destruction or seizure be imperatively demanded by the necessities of war.

Final Remarks

We wish to reiterate our sincere congratulations to the drafters of this highly important legislative initiative as well as our appreciation for being able to provide comments and suggestions. PGA Secretariat will be delighted to further cooperate with the Committee on Law Enforcement, jointly with legal experts and other partners from civil society and academia, in the further advancement of legislative process to support the adoption of this draft law by Verkhovna rada.