



Parliamentarians for Global Action
Parlamentarios para la Acción Global
Action Mondiale des Parlementaires
برلمانيون من أجل التحرك العالمي

PGA comments on the finalized draft law “On Amendments to Certain Legislative Acts on the Enforcement of International Criminal and Humanitarian Law”

19 December 2019

Parliamentarians for Global Action would like to congratulate the Working Group on preparing the revised draft law “On Amendments to Certain Legislative Acts on the Enforcement of International Criminal and Humanitarian Law”. We are appreciative of the opportunity to provide additional comments on the finalized draft law submitted to the Law Enforcement Committee of Verkhovna Rada. We are pleased to reiterate our availability to further assist and support the parliamentary process in Verkhovna Rada, as deemed appropriate.

A Principles of international criminal law

1. Universal Jurisdiction (8(2))

From the outset, we strongly welcome the inclusion of universal jurisdiction. The provision, in the wording as submitted, is of pivotal importance to prevent the perpetrators of international crimes from seeking refuge on the territory of Ukraine and will equip Ukraine with the legal framework to initiate domestic proceedings against such perpetrators if necessary.

2. Command/ superior responsibility (31-1):

We strongly welcome the revision of the provision on the command/ superior responsibility. While the provision already encompasses most features of the principle, we respectfully suggest further amendments to guarantee it fully captures the aspects of the responsibility of a superior.

- a) We suggest using **effective** command and control/ **effective** authority and control instead of **actual** (31-1 (1)) to better align the provision with international criminal law standards and to guarantee that it properly encapsulates *the de facto* and *de jure* position over subordinates.
- b) We further support the previously submitted suggestion by Global Rights Compliance (GRC) to add “*for investigation and prosecution*” after ‘competent authority’ in 31-1 (1)(b) and 31-1 (2)(b), so it would read (military commander / superior) “*did not take the measures which he should and could have taken within the limits of his powers to prevent or stop the commission of the crime or to report the crime to the competent authority for investigation and prosecution*”.

The importance of specifying to whom the commander/ superior is obliged to report is to prevent the superiors from exempting themselves from legal culpability by merely reporting the crimes to an authority not in the position to effectively proceed to investigations and prosecutions of the crimes in question or to transfer the report to the designated authorities.

3. Removal of the non- applicability of the statute of limitations to all four crimes (Art. 49(5) and Art. 80)

We note that the revised new draft law removes the provision which ensures that the statute of limitations would not be applicable to “*any crime against the peace and humanity*”. Such removal would imply that the prosecution of these crimes would no longer be possible after 10 or 15 years since the commission of the crimes, as per the article Art. 49 of the Criminal Code:

Article 49. Discharge from criminal liability due to limitation period:

- i. A person shall be discharged from criminal liability if the following periods have elapsed from the date of the criminal offense to the effective date of the judgment:
 - 4) ten years where a grave offense has been committed

5) fifteen years where a special grave offense has been committed.

In the international arena, the non-applicability of statutory limitations pertains to crimes that are extremely difficult to prosecute immediately after they were committed. Owing to their serious nature, the imprescriptibility of the crime of genocide, crimes against humanity, war crimes and crime of aggression, constitutes a rule of customary international law and, according to many respected authors¹, *jus cogens*. Given the context in which such crimes tend to be carried out, as well as their complexity, it is often necessary to wait for a change of the situation- for instance, an end to the conflict- to obtain access to witnesses or evidence. Hence, the Criminal Code of Ukraine should contain provisions on the non-applicability of the statute of limitation to all four international crimes to prevent them, and those responsible, from going unpunished, so that Ukraine would not be declared unable and unwilling to end impunity in the cases affected by the passage of time.

B Provisions on international crimes

1. War crimes:

- a) While we welcome the extension of the provisions on sexual and gender- based crimes in 438(2)(8), we would suggest to include a specific reference to their definitions in line with international law standards, or, in line with the suggestion submitted on 7 December by GRC, to include "*rape and other forms of sexual violence in accordance with Article 153 of this Code, as well as with international treaties, customary international law and international criminal jurisprudence*".
- b) To extend the protection granted by the provision, we suggest removing the *purpose* for which the forced pregnancy is to be committed, despite the fact it follows the wording of the provision of the Rome Statute (Art. 7(2)(f). As such, the amended provision could read: (i) "*forced pregnancy means the unlawful deprivation of liberty of any woman who has been made pregnant by force,*" or (ii) "*Forced pregnancy is the practice of forcing a woman to become pregnant.*"
- c) *Killing of hors de combat combatant*: While the war crimes in the current draft law list a crime of "Injuring of hors de combat combatant: (438(2)(11)), it appears that the provision on 'killing hors de combat combatant' has been removed. We would therefore strongly suggest to include the act of 'killing' to ensure the criminalization of such act under war crimes.
- d) *Willful killing*: In respect of crimes against any protected person (483), we note that the crime of "willful killing" has been omitted in the current draft. We would therefore suggest either (i) to refer to "*willful killing*" instead of "*premeditated murder*" (438 (3)), or, alternatively, (ii) to include both acts. Including only premeditated murder in the provision would not encompass killings which are done intentionally, but without the previous plan, as would be required for the crime of premeditated murder.
- e) *Pillage*: We would respectfully suggest including an explicit provision on the prohibition of pillage under 438-1 (1)(3) to align the Criminal Code with the international criminal law. While the current draft includes an extended scope of provisions on war crimes against property, these, in our opinion, may not fully encompass all elements of the definition of pillage under international law, under which pillage constitutes "*appropriation of property for private, personal use and embraces acts of plundering, looting and sacking.*"²
- f) *Starvation* (438-2 (2)(6): I would respectfully reiterate the suggestion to align this provision with the provision of the Rome Statute, so it would read: "*Intentionally using starvation of*

¹ M. Cherif Bassiouni, *Crimes Against Humanity in International Criminal Law* (Dordrecht: Nijhoff) 1999, p. 227; Antonio Cassese, *International Criminal Law* (Oxford: Oxford University Press) 2003, p. 319.

² Mark Klamberg, "Article 8(2)(b)(xvi)", Mark Klamberg and Jonas Nilsson (Eds.) *Commentary on the Law of the International Criminal Court – The Rome Statute* available at <https://cilrap-lexsis.org/clicc/8-2-b-xvi/8-2-b-xvi>.

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

g) *Prohibition of sexual violence as a method of warfare:*

We strongly welcome the inclusion of the crucial provision prohibiting sexual violence committed against protected persons. Nevertheless, we would suggest adding the prohibition of sexual violence under the provision on the war crimes involving the use of prohibited methods of warfare (438-2). As such, the prohibition would be extended to apply to the sexual violence committed against combatants, ensuring that all combatants, not only those who are *hors de combat* or prisoners of war, are protected against sexual violence.

Such provision would be in line with the Additional Protocol I of Geneva Conventions, which provides: “In any armed conflict, the right of the Parties to the conflict to choose methods or means of warfare is not unlimited”³ and “it is prohibited to employ (...) methods of warfare of a nature to cause superfluous injury or unnecessary suffering”⁴. Sexual violence is, by definition, unnecessary suffering or superfluous.⁵

h) *War crimes consisting of the use of prohibited methods of warfare (438-3):*

We respectfully submit that the terminology of ‘means’ instead of ‘methods’ would be more accurate to use in this article which governs the use of weapons. In particular, ‘*means of warfare*’ refers to weapon used in combat operations,⁶ while ‘*method of warfare*’ is understood as the way in which a weapon is used⁷ or as any specific tactical or strategic way of conducting hostilities that is intended to overwhelm and weaken the adversary.⁸

- *Nuclear weapons:* We strongly welcome the inclusion of a non-exhaustive list of prohibited weapons in 438-3, but would respectfully reiterate the suggestion to list nuclear weapons among them, given the importance of preventing their usage.

i) Finally, to increase the protection to civilians and align the Criminal Code of Ukraine with international human rights law, we suggest including a crime on:

“Attacking or bombarding, by whatever means, towns, villages, dwellings or buildings which are undefended and which are not military objectives” (Art. 8(2)(b)(v) of the Rome Statute of the ICC).

2. Crimes Against Humanity (442-1)

Other inhumane treatment: We note that the current draft does not include the underlying act of ‘other inhumane treatment’ (442-1(8) under previous draft law). The particular importance of this provision is to allow for the prosecution of those crimes that, while of similar character and gravity, do not fall under other narrowly construed acts under crime against humanity.

In respect of torture, it is the absence of the required element that the victim needs to be under the control of the accused that distinguishes inhuman treatment. Further, unlike “moderate or grievous bodily harm”, other inhumane treatment also entails “serious injury to mental or physical health.” We therefore strongly recommend including the provision to ensure that those acts which cause serious injury to mental or physical health, committed against a victim who was not under the control of perpetrator, shall not go unpunished.

³ Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Additional Protocol I), 8 June 1977, 1125 UNTS 3, Article 35 (1).

⁴ Additional Protocol I, Article 35(2).

⁵ Letitia Anderson, ‘Politics by Other Means: When does Sexual Violence Threaten International Peace and Security?’ *International Peacekeeping* (2010) 17:2, p. 253.

⁶ Program on Humanitarian Policy and Conflict Research, Harvard University, Manual on International Law Applicable to Air and Missile Warfare, 2009, p.6.; also see: ICRC, Rule 70. Weapons of a Nature to Cause Superfluous Injury or Unnecessary Suffering, *IHL Database*, available at: https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule70

⁷ Yves Sandoz, Christophe Swinarski and Bruno Zimmermann (eds), *Commentary on the Additional Protocols*, ICRC, Geneva, 1987, on AP I, Art. 51, para. 1957.

⁸ Marco Sassoli, Antoine Bouvier and Anne Quintin, *How Does Law Protect in War?* ICRC, Geneva, 2011, p. 280.