

PGA comments for the second reading of the Bill no. 2689 “On Amendments to Certain Legislative Acts on the Enforcement of International Criminal and Humanitarian Law”

12 December 2020

Parliamentarians for Global Action would like to congratulate the Verkhovna Rada on passing in the first reading the Bill “On Amendments to Certain Legislative Acts on the Enforcement of International Criminal and Humanitarian Law”. We are grateful for the opportunity to provide additional comments on the Bill prior to the second reading 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 - Art. 8(2)

From the outset, we reiterate that we strongly welcome the inclusion of universal jurisdiction in the Bill. 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. We fully support the amendment made as it reflects a feature of the international legal principle “*aut dedere, aut judicare*” (either extradite or prosecute).

2. Command/ superior responsibility - Art. 31-1

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

- a) *‘knew or should have known’ instead of ‘knew or subconsciously supposed’*: While we appreciate the intention of the drafters has been to extend the accountability beyond certainty of the knowledge of the commission of the subordinates’ crimes (*‘knew or subconsciously supposed’*), we humbly suggest using the previous wording of the provision (*‘knew or should have known’*), which replicates the text of the Rome Statute.

While “*subconsciously supposed*” does indeed capture a situation where a commander does not dispose of full knowledge of the crimes committed by his/her subordinates, it fails to hold him/her to account for failing to assume his/her hierarchical position and effective control over his/her troops and take any possible measure to either stop the crimes or bring to justice the authors of these crimes, which s/he had failed to prevent. It defies the purpose of this doctrine, firmly established under international criminal law,¹ which does not necessarily presuppose intent and knowledge of the superior with regard to crimes of his subordinates.² This is demonstrated by the threshold of ‘should have known’, or alternatively, ‘had reason to know’ instead of requiring actual knowledge or supposing the crimes have been committed. It is the difference in the lack of knowledge that sets this doctrine apart from an individual

¹ Rome Statute of the International Criminal Court, 17 July 1998 (17 July 1998) 2187 UNTS 3, Art. 28.

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

criminal liability of a direct perpetrator which sometimes would require only knowledge of the intent of the commission of the crime by others.³

There are at least two compelling underlying reasons: First, while not sharing neither intent to commit the crimes⁴, nor agreeing with their commission, it is one of the principal tasks of the commander to maintain an order within the troops and guarantee that the conduct of his/her subordinates is in full respect with international humanitarian and criminal law. It is only the commander who has effective authority who can oversee that the subordinates do not commit murder against civilians, torture, rape or other international crimes while on the ground. The commander has, therefore, to assume this responsibility and do the utmost maximum to prevent the commission of international crimes by keeping himself/ herself fully informed of the conduct of his/her subordinates.

Second, the argument of having no knowledge or not *subconsciously supposed* can be easily used as a defence in those cases where there is no evidence that a commander was actually aware of the crimes, or supposed their commission. It is important to reiterate, however, that the commander is accountable for such commission even when having no knowledge of the commission of the crimes, just by the virtue of his/her position and effective control that obliges him/her to oversee the conduct of the troops.

An inaccurate definition of the crime or even incorrect interpretation may lead to unjustifiable acquittals, absolving the commanders of their criminal responsibility based on the difficulty in proving any extent of knowledge. For instance, in the appeals judgment at the International Criminal Court in *The Prosecutor vs Jean-Pierre Bemba Gombo*⁵, the commander Jean Pierre Bemba Gombo was acquitted on the basis of the 'logistical difficulties' he had faced as a remote commander sending troops to a foreign country where the crimes were committed, suggesting he could not be fully aware of the extent of their commissions and the efficacy of the measures he had taken. This judgment demonstrates the danger of interpreting the command responsibility through a strict approach as it ultimately leads to dire consequences, denying justice to thousands of victims of the crimes committed by his troops that he had failed to properly control, as he had been obliged to in his position.

- b) *Subordinates* instead of “*such persons, in particular, may include officials, state, political, public and religious figures*”. We support the amendment.

B Provisions on international crimes

1. Crime of Aggression

- a) “The ***unleashing*** an armed conflict”: We strongly suggest replacing it with ‘***launching*** an armed conflict’
- b) *Switching Art. 436 and Art. 437*: In order to provide more clarity, we suggest positioning firstly Art. 437 (*Crime of aggression*) explaining the scope of the crime of aggression, leaving the corresponding note 1 (which has been moved to Art. 436) and only afterwards inserting the Art. 436 (*Public calls for an act of aggression or launching of a non-international character*).
- c) *Applicability of customary international law*: We strongly suggest to replace ‘*shall be taken into account*’ with ‘*shall apply*,’ in the note on Art. 437 which reads: “the provisions of international treaties approved by the Verkhovna Rada of Ukraine and customary international law in force at the

³ See Art. 30 of the Rome Statute.

⁴ ICTY, *The Prosecutor v. Naser Orić*, Judgement, 30 June 2006, IT-03-68, para. 324.

⁵ ICC, Situation in the Central African Republic in the case of *the Prosecutor v. Jean- Pierre Bemba Gombo*, ICC-01/05-01/08 A (Appeals Judgment) 08 June 2018. Para. 166-193.

time the respective act was committed, as well as practice of applying these provisions by international judicial institutions (tribunals) shall be taken into account”.

Any domestic provision of Ukraine has to be in line and interpreted in accordance with international law binding on Ukraine. This applies not only to the treaty law of international criminal and humanitarian law, where Ukraine is a party to the treaty notably (e.g. 1948 Genocide Conventions and the four 1949 Geneva Conventions), but also customary international law binding on all countries. Further, interpreting the domestic provisions in line with 1977 Geneva Conventions' Additional Protocol I and II (which have not achieved the status of customary international law yet) is in line with principle of legal certainty as Ukraine ratified both Additional Protocols in 1990 and is thus bound by its provisions.

2. War crimes

- a) *Abuse of human dignity - Art. 438(2)(5)*: We support the previous version of the provision which read ‘violation of human dignity’.
- b) In the explanation of *the abuse of human dignity – Art. 438(Note 9)*, we would suggest removing ‘insulting’, as it does not constitute a grave violation of international humanitarian law for it to be included among war crimes. The article would thus read: “*The abuse of human dignity in this article should be understood as degrading or other treatment of a person (including that committed against a deceased person) (...)*”
- c) We strongly welcome the extension of the provisions to include *forced prostitution - Art. 438(2)(8)*.
- d) *Torture or other inhumane treatment dangerous to life or health at the time of infliction (..) – Art. 438(2)(9)*. We suggest removing “*at the time of infliction*” and use the following wording: “*Torture or other inhumane treatment dangerous to life or health, including unlawful conduct of any kind of experiments on a person, the use of illegal methods of treatment*”. Keeping “*at the time of infliction*” may be interpreted as excluding those situations where the effect of the torture comes in the aftermath of the torture- even years afterwards- even though it may have not been perceived as dangerous at the time of the infliction.
- e) *Willful killing/premeditated murder - Art. 438(3)*: We note that the crime of “willful killing” has been omitted in the Bill. We would therefore suggest either (i) to refer to “*willful killing*” instead of “*premeditated murder*” - 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 well thought of plan, as would be required for the crime of premeditated murder.
- f) *Protection of cultural property*: We applaud the legislators for including two articles enhancing the protection of cultural property: *Article 438-5 on War crimes against cultural properties protected by international humanitarian law* and *Article 445-1 on Illegal actions with cultural properties in connection with the armed conflict*. The protection of cultural heritage is crucial in preserving the history and culture of mankind. Adopting strong legislation protecting cultural heritage of Ukraine and prohibiting certain acts specifically in the context of an occupied territory is particularly urgent given the on-going occupation of Donbass and Crimea by the Russian Federation.

We would nevertheless like to make a suggestion as to the structural order of this article within the Bill. In light of the interconnection of the two above mentioned articles and the fact that they are both falling under war crimes, we would suggest inserting the Art. 445-1 immediately after the article 438-5, instead of placing it after crimes against humanity.

- g) *Attack on a civilian object that is not used for military purposes - Art. 438-2 (5)*: We support the amendment.

- h) *Acts aimed at creating hunger for the civilian population as a method of warfare, by depriving it of the items necessary for the survival, including by creating obstacles to the provision of assistance under the Geneva Conventions for the Protection of War Victims of 12 August 1949- Art. 438-2 (7). We support the amendment.*

3. Genocide

- a) *Causing them serious injuries or mental disorder - Art. 442. We respectfully suggest changing the wording to “Causing serious bodily or mental harm”.*
- b) *We support the deletion of the Note.*

4. Crimes Against Humanity

- a) *The interpretation of the ‘attack’ - 442-1 (Note 1): We respectfully suggest removing the “Note 1” and the specification of what constitutes a repetition of an act. The provision reads: “The attack on a civilian population in this article shall be understood to mean the repeated (three or more times) commission of any of the acts referred to in this article (...).”*

An act constituting a crime against humanity does not need to occur in repetition. While the Art. 7(2)(b) of the Rome Statute suggests otherwise, the jurisprudence has established that in the term “widespread” has mainly a quantitative meaning referring to the scale of the attack or to the number of victims. It covers situations involving a multiplicity of victims, as a result of the cumulative effect of a series of inhumane acts or the singular effect of one inhumane act of extraordinary magnitude.⁶ As such, a crime against humanity could also be committed through one act, for instance through launching a weapon of mass destruction at the civilian population outside of the context of war, resulting in high number of casualties.

- b) *We strongly welcome the extension of the provisions to include forced prostitution- Art. 442-1(1)(4).*
- c) *Human Trafficking - Art. 442-1(1)(5): We applaud the drafters for including a crime on human trafficking, making Ukraine one of the most progressive States by including human trafficking as an underlying act of crimes against humanity, taking an important stance in protecting victims of sexual and gender- based crimes.*
- d) *Moderate or grievous bodily harm - Art. 442-1(1)(9): We suggest adding mental harm, to read: Moderate or grievous bodily and mental harm so that it is not limiting the bodily harm only, but also covers important protection by criminalising the commission of psychological harm.*
- e) *Other inhumane treatment: We note that the Bill does not include the underlying act of ‘other inhumane treatment’ – (442-1(1)(8) under the first version of the draft law in November 2019). 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: “torture” and “moderate or grievous bodily harm” (unless the latter is to be extended to encompass mental harm).*

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 inhumane 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.

⁶ ICTY, *Prosecutor v. Kordić and Cerkez*, “Judgement”, IT-95-14/2-T, 26 February 2001, para. 179.