

PGA commentary to the selected provisions of the Bill on Amendments to Certain Legislative Acts of Ukraine on the Implementation of the International Criminal and Humanitarian Law no. 2689

09 March 2021

A) Universal Jurisdiction

1. Does universal jurisdiction enshrined in criminal laws of a certain State, such as the State extending its domestic criminal law on the crimes of genocide, war crimes, crimes against humanity and the crime of aggression irrespective of the place where they were committed, constitute interference in the sovereignty of foreign countries?

No, it doesn't.

According to the classical doctrine relating to ordinary crimes, the exercise of criminal jurisdiction is regarded as an 'aspect' or 'manifestation' of the sovereignty of a State¹. This stems from practical and logical consequences of territorial control, as it is the territorial State where the crime occurred that has primary responsibility for investigations and prosecutions in the exercise of its sovereign powers, as such State is usually best placed to gather evidence, secure witnesses and ensure that justice is given to those most affected. However, if the territorial State is unable or unwilling to exercise jurisdiction, there needs to be a complementary tool to ensure that an accused person does not escape criminal accountability for the crimes that he or she may have committed in a given territory. A fortiori, the same logic applies to the most serious crimes of international concern.

These crimes are labelled as "international crimes" or, to be more precise, "crimes under International Law" or "crimes against International Law" (*delicta juris gentium*). Given their extreme gravity, they do not affect the sovereignty of an individual State, but they affect the sovereignty of all States, rendering their suppression a joint concern of all members of the international community. In fact, in the Rome Statute of the ICC of 17 July 1998, there was a unanimously accepted decision to define these crimes in Article 5 as follows: "the most serious crimes of concern to the International Community as a whole." This means that when an international crime is committed on the territory of one States, there is a universally shared right and interest of all States on behalf of the International Community as a whole to investigate, prosecute, and adjudicate on, the suspected authors of such crimes, irrespective of their nationality, rank or other status.

As such, **Universal Jurisdiction** is a jurisdiction of "exceptional character" in the fight against impunity and towards the strengthening of justice. The absence of sovereign nexus is immanent

¹ C. Ryngaert, *Jurisdiction in International Law* (2nd edn, Oxford: Oxford University Press, 2015), para. 1.3.

in the very definition of the universal jurisdiction. Universal jurisdiction conferred on every State the competence to exercise criminal jurisdiction over those responsible for serious crimes of international concern. Any State can inquire and judge the individuals guilty of committing certain grave crimes beyond the borders of a certain State, no matter the nationality, the country of residence or any other relation of the respective individual with the accusing State. The State has the moral obligation and the general interest to punish this kind of deeds thanks to its atrocious and, at times, transnational character. According to some scholars, when such grave crimes occur on a State's territory, the territorial State cedes some of its sovereignty to the international community and becomes, in effect, *terra nullius* for the purposes of criminal jurisdiction². As such, every State has the duty, on behalf of the International Community, to put an end to impunity for these international crimes, which have been also defined by States practice as a threat to international peace and security.

The Rome Statute and other instruments reflect the notion that individual criminal responsibility applies for the most serious crimes of international concern that stem from violations of *jus cogens* norms (peremptory norms of International Law, such as the prohibition of genocide, crimes against humanity, large scale war crimes, and aggressive wars). These norms entail that the obligations to respect them work *erga omnes*, namely, amongst all Members of the International Community and its observation is the duty of the entire global community.

In addition, States have enshrined universal jurisdiction in the treaty law, which has evolved into customary international law, to ensure that there is no excuse, not even the preservation of State sovereignty of foreign States, which can justify that such grave crimes would go unpunished. Several international instruments, such as the widely ratified four Geneva Conventions of 1949, and the Convention against Torture, require the exercise of universal jurisdiction over the offences covered by these instruments³, or, alternatively to extradite alleged offenders to another State for the purpose of prosecution- in line with the customary law obligation to extradite or prosecute (*aut dedere aut judicare*)⁴.

2. Does criminal prosecution by the State within its territory, under the universal jurisdiction principle, of perpetrators of crimes referred to in question 1 constitute interference in the sovereignty of foreign countries?

In light of the arguments presented under question no. 1, undue interference in the sovereignty of other States may take place only if domestic prosecutions are frivolous or politically motivated.

As international criminal law operates in a political, as well as a legal sphere, so practical opportunities to exercise that jurisdiction are not equally distributed. As such, as ways to prevent

² Sammons, 'The Under-Theorization of Universal Jurisdiction', 21 Berkeley Journal of International Law (2003) 111.

³ UN General Assembly, Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 10 December 1984, United Nations, Treaty Series, vol. 1465, p. 85, available at: <https://www.refworld.org/docid/3ae6b3a94.html> [accessed 17 May 2020], Art. 5(2)

⁴ "Extradite or prosecute" was usually a mandatory obligation imposed by treaty law, whereas universal jurisdiction generally provided an entitlement to assert jurisdiction where no other State with a greater jurisdictional nexus was prepared to take action.

its misuse, universal jurisdiction should be used only as the last resort and should not be applied in cases where another form of extraterritorial jurisdiction is in fact applicable and ready to be seized by another State in a genuine way. It is important to avoid any abuse, selectivity, double standards or politicization in application of the principle.

In order to avoid the domestic prosecutions being frivolous or politically motivated, States must commit to the Rule of Law and the respect of human rights, guaranteed by separation of powers and the independence of the judiciary. Independent judges as well as prosecutors who are genuinely and effectively autonomous from the political powers of the States provide the best possible procedural guarantees against frivolous or politically motivated prosecutions. As such, it lies in the power of the authorities and laws of Ukraine to govern the usage of universal jurisdiction in line with the rule of law and subject to scrutiny. As a member of the Council of Europe, Ukraine's Rule of Law and separation of powers is internally guaranteed by its adherence to the jurisprudence of the European Court of Human Rights.

Additionally, if suspected authors of international crimes would travel, or be likely to travel, to the territories of Ukraine, it is in the national interest of Ukraine to prevent them to freely circulate in the country, where they could conspire to commit again mass atrocity crimes in the countries from where they come from, or in Ukraine itself.

3. Where the State restricts criminal prosecution within its territory under the universal jurisdiction principle to only those instances when a suspect is staying on the territory of this State and his extradition (transfer) has been denied, would it cause any additional — as compared to other extraterritorial jurisdiction principles (e.g., passive personality principle or protective principle) — problems that call for amendments to criminal procedure laws?

At the outset, it does not appear that criminal procedure law needs to be amended to the extent that it does not make a cross reference to the provisions of the criminal code. In case of such potential cross reference, it is important to incorporate additional amendments enabling the exercise of such jurisdiction in cases that the extradition of the suspect is denied, giving effect to the principle to *extradite or prosecute (aut dedere aut judicare)*.

The fact that the suspected author is present allows the gathering of evidence directly from the suspect, who may plea guilty for his/her crimes. Additionally, the State that would not be available to request the extradition due to political reasons, or to which Ukraine may not be able to effect the extradition due to legal impediments under the European Convention on Human Rights or other instruments (e.g. applicability of the death penalty), may be available to provide evidence to Ukrainian authorities. This shall be done through the use of already existing forms of international cooperation in judicial matters.

In particular, this is relevant as extraterritorial jurisdiction (e.g. passive personality principle or protective principle) supposes an existing link between the perpetrator and the country exercising jurisdiction (either through the nationality of victims or a threat for the State's vital interests). The universal jurisdiction, triggered in situations where the suspect is staying on the territory of the

State, on the other hand, does not require any connection between the perpetrator, crime and the country- it could be a national of a foreign State committing a crime in a territory of foreign State against a victim of that foreign State or the foreign State's vital interests and only finds himself/herself in the territory of another country which can exercise its jurisdiction.

Exercising criminal jurisdiction on the basis of the passive personality principle or protective principle may be much more problematic than exercising jurisdiction with this limited form or universal jurisdiction: First of all, the suspected author in the first two situations may be at large in a foreign country, possibly even protected by the authorities of that State in which he or she would be harbouring. Secondly, apart from the Ukrainian victims or the Ukrainian State officials defending a national interest, there may be no one available to provide evidence in such cases based on passive personality or protected interest (e.g. a case of counterfeiting, where Ukrainian national currency is produced by foreign national, in a foreign country, and it is "sold" to Ukrainian tourists travelling to such country).

B) Command/ Superior responsibility

4. Does the institution of responsibility of commanders and other superiors violate the principle of individual (personal) responsibility? Would it be right to presume that the persons listed in Article 28 of the RS will be held responsible not for their actions, but for those of other persons (their subordinates)?

International humanitarian law provides a system for repressing violations of its rules based on the individual criminal responsibility of those responsible, both for an act and a failure to act.

In armed conflict situations, armed forces or groups must be placed under a chain of command that is responsible for the conduct of subordinates. While the commander can be held directly responsible for ordering his subordinates to carry out unlawful acts, the commander may be also held liable for a subordinate's unlawful conduct under the 'command/ superior responsibility doctrine'. This doctrine finds its basis in the existence of a power of the superior to control the acts of his subordinates⁵ and the corresponding legal duty of a superior "to prevent and repress breaches undertaken by subordinates"⁶, even if physically distanced from the illegal act of the subordinate. The purpose of the doctrine, firmly established in international humanitarian law and customary international law⁷, is to reinforce the legal duty of the military commanders and civilian authorities to effectively control subordinates, and it applies only when effective command and control is objectively established. Given that the commanders must be exercising effective control and authority over their troops, they are legally responsible for the conduct of these individuals, whom they can stop by the issuance of an appropriate order, or they can sanction after the facts by reporting them to the military justice authorities.

⁵ *Prosecutor v. Zdravko Mucic aka "Pavo", Hazim Delic, Esad Landžo aka "Zenga", Zejnil Delalic* (Trial Judgement), IT-96-21-T, ICTY, 16 November 1998 (Čelebići Trial Judgement), para. 377.

⁶ 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.

⁷ Command responsibility and failure to act, ICRC, 31 October 2013, available at: <https://www.icrc.org/en/download/file/1097/command-responsibility-icrc-eng.pdf>

Article 28 provides for a standard of individual criminal responsibility that is accepted in International Law and by all States forming part of the International Community, and it is in line with the *mens rea* standard of *dolus eventualis*. As such, the responsibility of commanders is personal, as the doctrine constitutes a form of indirect responsibility: complicity through omission⁸.

It is not accurate to state that military commanders or civilian superiors are responsible for the crimes of other persons, who are responsible for the commission or attempted commission of their crimes. In case such commanders or superiors would order, plan, launch or contribute in any other form to the perpetration of crimes, they would be co-perpetrators with others. This doctrine has for the purpose to hold the commander 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 is relevant to note that the superior may incur command responsibility for failing to control his subordinates only if he ‘knew’ or ‘should have known’ of their criminal conduct. This doctrine does not necessarily presuppose intent (“dolus”) of the superior with regard to crimes of his subordinates⁹, as demonstrated by the threshold of ‘knew’ or ‘should have known’ in the definition: The superior “should have known” or alternatively, ‘had reason to know’ that, in the ordinary course of events, his subordinates could have committed murder against civilians, torture, rape or other international crimes, and he did not take any measure in its possibilities to either stop the crimes or bring to justice the authors of the same crimes, which he had failed to prevent. It is the difference in the lack of knowledge that sets this doctrine apart from an individual criminal liability of a direct perpetrator which sometimes would require only knowledge of the intent of the commission of the crime by others.¹⁰

There are at least two compelling underlying reasons for this doctrine:

First, while not sharing neither intent to commit the crimes¹¹, 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.

Therefore, the provision should not be conflated with the criminal liability under Article 426 of the Criminal Code of Ukraine of ‘Omissions of military authorities’ which requires ‘Willful failure to prevent a crime committed by a subordinate (...)’.

Second, if the threshold of the commander responsibility required the actual knowledge, the argument of having no knowledge could be easily used as a defence in those cases where there is

⁸ M. Ch. Bassiouni & P. Manikas, *The Law of the International Criminal Tribunal for the Former Yugoslavia* (1996) at 345 and 348-350.

⁹ *The Prosecutor v. Naser Oric*, International Criminal Tribunal for the former Yugoslavia (ICTY) Judgement, 30 June 2006, IT-03-68, para. 324.

¹⁰ See Art. 30 of the Rome Statute.

¹¹ ICTY, *The Prosecutor v. Naser Oric*, Judgement, 30 June 2006, IT-03-68, para. 324.

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*¹², 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.

5. Who is considered to be a commander?

The Article 28 of the Rome Statute distinguishes between two main categories of superiors and their relationships - namely, a military or military-like commander (paragraph (a)) and those who fall short of this category such as civilians occupying de jure and de facto positions of authority (paragraph (b)).”

“With respect to a ‘person effectively acting as a military commander’, this term covers a distinct as well as a broader category of commanders. This category refers to those who are not elected by law to carry out a military commander’s role, yet they perform it de facto by exercising effective control over a group of persons through a chain of command.”¹³

This category of military-like commanders may generally encompass superiors who have authority and control over regular government forces such as armed police units or irregular forces (non-government forces) such as rebel groups, paramilitary units including, inter alia, armed resistance movements and militias, or (Russian) mercenaries, that follow a structure of military hierarchy or a chain of command.”¹⁴

C) Customary International Law

6. Does international custom constitute a source of present-day international criminal law? Will it be right to presume that customary international criminal law at its current stage of development is so ambiguous that it, first, prevents a person from coordinating his behaviour with its requirements and, second, makes it impossible to take these requirements into account when interpreting those domestic criminal law provisions (see question 5) that establish liability for the crimes referred to in question 1?

¹² 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.

¹³ ICC, Bemba, PTC II, Decision on the Confirmation of Charges, Case No. ICC-01/05-01/08-424, 15 June 2009, para. 409.

¹⁴ Ibid. para. 410.

Pursuant to Article 38(l)(b) of the Statute of the International Court of Justice, "international custom, as evidence of a general practice accepted as law" serves as an essential source of law¹⁵. "International custom" may be described as a general recognition among States of a certain practice being in legal conformity with international law. There must exist a degree of uniformity and consistency in the practice of States (i.e., *State practice*) accompanied with a view that such action is in conformity with the practice (i.e., *opinio juris et necessitatis*). Complete uniformity in practice among States is not required¹⁶. Once a practice becomes a custom, all States in the international community are bound by it whether or not individual states have expressly consented—except in cases where a State has objected from the start of the custom, which is a stringent test to demonstrate.

The codification of International Criminal Law was largely undertaken in the 1990s through the adoption of secondary sources of written law (UN Security Council resolutions) and, above all, with treaty law, namely, the Rome Statute of the ICC. As such, **present day international customary law does not have any ambiguity in respect of the application of the principle of individual criminal responsibility for international crimes.**

There is no ambiguity in contemporary international criminal law. This argument is therefore advanced by those who are searching for an alibi not to respect the clear prescriptions against impunity for the most serious crimes of international law and are trying to create a new space for impunity and lawlessness in which the law of the jungle, and not the Rule of Law (based on the principle of equality of all before the law) would prevail.

D) **Extension of national criminal law to past acts that had been already existing crimes under international law**

7. Is criminal prosecution and punishment of perpetrators of those acts, which, at the time of their commission, were regarded as offences referred to in question 1 under international law, but were not yet regarded as such domestically, consistent with Article 7(1) of ECtHR?

Art. 7(1) of ECHR (as well as Art. 15(1) of International Covenant on Civil and Political Rights-ICCPR) lays down that "*no one shall be held guilty of any criminal offence (...) which did not constitute a criminal offence under national or international law at the time when it was committed. (...)*"

Further, para. 2 of Art. 7 of ECHR stipulates that the "*Article [7(1)] shall not prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognised by civilised nations.*"

Paragraph 1 refers to the recognition of national or international law in the alternative. As such, criminalization of the act or omission under one of these bodies of law at the time of the commission of the crimes suffices for the act to be considered a criminal offence and prosecutable.

¹⁵ Statute of the International Court of Justice, 1999 I.C.J. art. 38(1)(b).

¹⁶ M. N. Shaw, International Law 79 (5th ed., Cambridge University Press 2003) (1997).

The rationale behind these provisions is to avoid letting those who commit the most heinous atrocities go unpunished when no domestic legal rule prohibited the acts at the time of their commission¹⁷. Para. 2 appears as a sort of fallback option, or a subsidiary means of interpretation, to be relied upon when neither national law nor treaty or customary international law rules criminalize certain conduct.

All crimes governed by Bill no. 2689 are already binding on Ukraine, either through the international instruments Ukraine has ratified, or as a part of customary international law, which is binding on all international community. In particular:

- Crime of Genocide, included in the 1948 Genocide Convention, ratified by Ukraine in 1954 and 1977 Additional Protocols I and II to the Geneva Conventions, ratified by Ukraine in 1990 (already included in the Penal Code of Ukraine prior to the Bill no. 2689)
- War crimes, included in Four 1949 Geneva Conventions, ratified by Ukraine in 1954 and 1977 Additional Protocols I and II to Geneva Conventions, ratified by Ukraine in 1990 (partially implemented in the Penal Code of Ukraine prior to the Bill no. 2689)

While the crime of aggression is already included in the provisions of Ukrainian Penal Code¹⁸, it is also a part of customary international law through the extrapolation of an earlier concept of crimes against peace, which were first enshrined in the Charter of International Military Tribunal¹⁹ and later reaffirmed as a part of customary international law by the United Nations General Assembly²⁰.

Crimes against humanity have evolved under international customary law, which, as explained above, is binding on Ukraine, through the founding statutes and charters and jurisdictions of international courts such as International Military Tribunal, the International Criminal Tribunal for the former Yugoslavia and the International Criminal Tribunal for Rwanda.

The analysis carried out by the European Court of Human Rights in a number of cases dealing with the retroactive application of criminal law incorporating certain conduct which was already criminal under international law. For example, in *Kolk and Kishiy v. Estonia*, the Court held: “[E]ven if the acts committed by the applicants could have been regarded as lawful under the Soviet law at the material time, they were nevertheless found by the Estonian courts to constitute crimes against humanity under international law at the time of their commission. (...) The Court thus considers groundless the applicants’ allegations that their acts had not constituted crimes against humanity at the time of their commission and that they could not reasonably have been expected to be aware of that”²¹.

Therefore, new incorporating legislation concerning the conduct previously criminalized in international law allows courts to exercise jurisdiction over such conduct, but does not have the

¹⁷ *Hissène Habré c. République du Sénégal* (ECW/CCJ/JUD/06/10) (“ECOWAS Judgment”), Judgment of 18 November 2010, (ECOWAS Judgment) at para. 58.

¹⁸ Criminal Code of Ukraine, 01 September 2001 as amended, Art. 436-437.

¹⁹ 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, para. 6(a).

²⁰ Affirmation of the Principles of International Law recognized by the Charter of the Nürnberg Tribunal, G.A. Res. 95(I), U.N. Doc. A/RES/1/95 (11 December 1946).

²¹ *Kolk and Kishiy v. Estonia* (No. 23052/04, 24018/04), ECtHR, 17 January 2006), para. 9.

function of creating new crimes. Rather, it has a jurisdictional function: The incorporating legislation is only a tool that enables national courts to apply the relevant rule of international law criminalizing the conduct²².

8. Is criminal prosecution and punishment of perpetrators of those acts, which, at the time of their commission, were regarded as offences referred to in question 1 under international law, but were not yet regarded as such domestically, consistent with Article 58 of the Constitution of Ukraine (see below)?

Article 58 of the Constitution of Ukraine: "Laws and other statutory instruments have no retroactive force, unless they mitigate or revoke the responsibility of a person. No one shall be held responsible for those acts that, at the time of their commission, were not regarded as offences under the law."

Art. 9 of the Constitution provides that "*International treaties that are in force, agreed to be binding by the Verkhovna Rada of Ukraine, are part of the national legislation of Ukraine*". As such, the prosecution of international crimes included in international treaties that Ukraine adhered to, will be in conformity with the Art. 58 Constitution, because such international provisions are already a part of Ukrainian national law. This is applicable to:

- Crime of Genocide, included in the 1948 Genocide Convention, ratified by Ukraine in 1954 and 1977 Additional Protocols I and II to the Geneva Conventions, ratified by Ukraine in 1990 (already included in the Penal Code of Ukraine prior to the Bill no. 2689)
- War crimes, included in Four 1949 Geneva Conventions, ratified by Ukraine in 1954 (partially implemented in the Penal Code of Ukraine prior to the Bill no. 2689)

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Crimes against humanity have evolved under international customary law, which is binding on Ukraine, through the founding statutes and charters and jurisdictions of international courts such as International Military Tribunal, the International Criminal Tribunal for the former Yugoslavia and the International Criminal Tribunal for Rwanda, and the International Criminal Court.

²² See eg. United States District Court North Dakota c. Ohio, Eastern Division, Re Extradition of Demjanjuk [1985] 612 F.Supp.544, at 567.

²³ Criminal Code of Ukraine, 01 September 2001 as amended, Art. 436-437.

²⁴ 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, para. 6(a).

²⁵ Affirmation of the Principles of International Law recognized by the Charter of the Nürnberg Tribunal, G.A. Res. 95(I), U.N. Doc. A/RES/1/95 (11 December 1946).

According to the well- established principles of international law²⁶, and confirmed by ECtHR²⁷ - a directly applicable source of the Ukrainian law²⁸-, as well as the Supreme Court of Ukraine²⁹, customary international law is binding on Ukraine, even if Ukraine has not ratified the instrument codifying the law, provided it has not opposed it either³⁰.

In addition, in the Opinion of the Constitutional Court on the conformity of the Rome Statute with the Constitution of Ukraine, 11 July 2001, the Constitutional Court of Ukraine held that “(...) provisions of the [Rome] Statute, prohibiting the crime of genocide, crimes against humanity, war crimes, the crime of aggression, are considered at present as customary rule of international law, which was repeatedly confirmed by international organs. Therefore, their character as criminal ones, according to article 18 of Ukraine's Constitution³¹, does not depend on Ukraine's adherence to the Statute and its entry into force.”

Furthermore, as already explained in the question above, when new incorporating legislation is passed concerning conduct previously criminalized in international law, allowing courts to exercise jurisdiction over such conduct, this legislation does not have the function of creating new crimes. Rather, it has a jurisdictional function: the incorporating legislation is only a tool which enables national courts to apply the relevant rule of international law criminalizing the conduct.

Consequently, the prosecution of the international crimes governed by Bill no. 2689 will be in conformity with the Art. 58 of the Constitution of Ukraine.

Alternatively, if such application cannot be resolved through the reference to the above-mentioned arguments, the application of the provisions could be replaced with an appropriate start-date, which could be:

- A) 17 July 1998, date of adoption of the Rome Statute, or
- B) 1 July 2002, date of entry into force of the Rome Statute, or
- C) 21 November 2013 or 22 February 2014 marking the beginning or the end of the Euromaidan revolution - symbolic date of reform and change in Ukraine.

E) Aligning the interpretation of the Bill 2689 with international law

9. Could establishing responsibility for the crimes referred under Bill 2689 to a narrower extent than required by the international criminal law (for example, failure to recognise domestically as war crimes certain acts that are war crimes under international law) pose any problems?

²⁶ *North Sea Continental Shelf* cases, ICJ Reports 1969, p. 41, para. 71.

²⁷ *Oleynikov v Russia*, No. 36703/04, Judgment, 14 March 2013, ECtHR.

²⁸ See “On Execution of Judgments and Application of Jurisprudence of the European Court of Human Rights”, available at: [https://www.echr.coe.int/LibraryDocs/DG2/HRFILES/DG2-EN-HRFILES-19\(2008\).pdf](https://www.echr.coe.int/LibraryDocs/DG2/HRFILES/DG2-EN-HRFILES-19(2008).pdf)

²⁹ Oleksii Maslov (Avellum), Ukraine’s Supreme Court Takes an Unexpected Approach on Sovereign Immunities, 14 March 2019, available at: <http://arbitrationblog.kluwerarbitration.com/2019/03/14/ukraines-supreme-court-takes-an-unexpected-approach-on-sovereign-immunities/>

³⁰ *Cudak v. Lithuania*, no. 15869/02), European Court of Human Rights (ECtHR), Judgment, 23 March 2010, para. 66; *Sabeh El Leil v. France*, no. 34869/05, ECtHR, Judgment, 29 June 2011, para. 54.

³¹ Article 18 of the Constitution reads: “The foreign political activity of Ukraine is aimed at ensuring its national interests and security by maintaining peaceful and mutually beneficial co-operation with members of the international community, according to generally acknowledged principles and norms of international law.”

Yes, it would pose problems, as it would limit the scope of the crimes, leading to de facto reducing legal possibilities of trying the gravest crimes and depriving victims of appropriate recourse of justice.

Additionally, in the absence of any form of universal jurisdiction in the Ukrainian legal order, Ukraine could become an attractive destination for potential fugitives from justice (e.g. suspected war criminals from Syria or other countries), given that Ukraine's criminal justice system would have no means to investigate and prosecute their alleged responsibility for mass-atrocity crimes.

10. Could establishing responsibility for the crimes referred to in Bill 2689 domestically to a wider extent than required by the international criminal law (for example, recognising domestically as war crimes certain acts that are not regarded as war crimes under international law) pose any problems?

The answer to this question is different depending on the crimes and acts in question. In respect to those crimes which are not yet considered crimes under international law, but are being crystallized into customary international law, such wider penalisation could be welcome (for instance, concerning banning the use of nuclear weapons - which is not yet an absolute and unconditional prohibition under by international law³²).

However, there might be a potential drawback. Extending it to prosecuting acts that has not yet attained the status of a crime under treaty law or customary international law could lead to abusing the legislation for trying person for regular offences, which are not meeting the same threshold of gravity as genocide, crimes against humanity, war crimes or the crime of aggression. Such expanded types of "international" crimes may be used and abused to persecute politically inconvenient people under politically motivated or frivolous charges.

11. Should the interpretation of the national criminal law provisions, relating to the crimes covered by Bill. 2689, be in accordance with the international law provisions?

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.

³² ICRC, IHL Database: Customary International law: Nuclear Weapons, available at: https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_cha_chapter22_nuwe