



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

New York/The Hague, 24 May 2021

EXECUTIVE COMMITTEE

President

Ms. Margareta Cederfelt, MP, Sweden

Treasurer

Ms. Petra Bayr, MP, Austria

Board

Hon. Valerie Woods, Speaker of Parliament, Belize
 Mr. Ali Ehsassi, MP, Canada
 Dip. Tucapel Jimenez, Chile
 Dip. Jorge Calix, Honduras
 Hon. Millie Odhiambo, MP, Kenya
 Hon. Kasthuri Patto, MP, Malaysia
 Hon. Rozaina Adam, MP, Maldives
 Dep. Amina Maelainine, Morocco
 Dep. Antonio Niquice, Mozambique
 Sen. Boris Dittrich, The Netherlands
 Dep. Levy Nazare, São Tomé and Príncipe
 Mr. Mark Pritchard, MP, United Kingdom

INTERNATIONAL COUNCIL

Chair

Hon. Syed Naveed Qamar, MP, Pakistan

Councillors

Mr. Anastas Angjeli, MP, Albania
 Dip. María Carla Piccolomini, Argentina
 Ms. Maria Vamvakinou, MP, Australia
 Dep. Reine Benao Sakande, Burkina Faso
 Dep. José Manuel Sanches Tavares, Cape Verde
 Hon. Roland Betangai, MP, Central African Republic
 Dip. Victor Suárez, Dominican Republic
 Dip. Dr. Esther Cuesta, Ecuador
 Mr. Fabio Massimo Castaldo, MEP (Italy)
 Hon. Dawda Kawsu Jawara, MP, The Gambia
 Hon. Supriya Sadanand Sule, MP, India
 Ms. Lia Quartapelle, MP, Italy
 Dep. Ana Rita Sithole, Mozambique
 Hon. Evelyn Nawases-Taeyele, MP, Namibia
 Mr. Adrian Rurawhe, MP, New Zealand
 Hon. Abdulrazak Namdas, MP, Nigeria
 Dep. Raul Cardoso, São Tomé and Príncipe
 Mr. Patrick Kensenhuis, MP, Suriname
 Mr. Anders Österberg, MP, Sweden
 Hon. Jasson Rweikiza, MP, Tanzania
 Sen. Wade Mark, Trinidad and Tobago
 Hon. Jacob Oboth-Oboth, MP, Uganda
 Dr. Hryhorii Nemyria, MP, Ukraine
 Dip. Armando Armas, Venezuela
 Hon. Dorcas Sibanda, MP, Zimbabwe

SECRETARIAT

Secretary-General
 Dr. David Donat Cattin

Hon. Razumkov Dmytro Oleksandrovych
Chairman of the Verkhovna Rada of Ukraine

Honorable Chairman,

On behalf of **Parliamentarians for Global Action (PGA)**, a global network of over 1,200 members of parliaments from more than 130 democratically elected legislatures, including Ukraine, it is our honour to write to you concerning the Bill 2689 “*On amendments to certain legislative acts on the Enforcement of International Criminal and Humanitarian Law*” which was adopted by the Verkhovna Rada on 20 May 2021.

Let us first congratulate to you on your leadership which has been instrumental in achieving this important development enabling Ukraine to establish accountability for international crimes committed in Eastern Ukraine and the occupied territory of Crimea in the context of the ongoing 7-year armed conflicts and offering an efficient domestic recourse to justice to victims of atrocities, in line with international humanitarian law.

It is our understanding that some voices have been opposing the adoption of this Bill based on an incorrect understanding of the principle of command responsibility, incorporated in the Bill 2689 under Section VI-1, Article 31-1. We would therefore, respectfully, like to clarify this principle, which is firmly established in international customary law, binding on Ukraine, as well as international humanitarian law (Art. 86(2) of 1977 Additional Protocol I to the 1949 Geneva Conventions, to which Ukraine is a party as of 1990) and practice of international criminal tribunals (International Criminal Tribunal for the Former Yugoslavia -ICTY-, the International Criminal Tribunal for Rwanda, the Special Court for Sierra Leone, and the International Criminal Court).

Armed forces or groups are placed under a chain of command with a commander who is responsible for the conduct of subordinates (soldiers). It falls within the commander’s principal tasks to maintain an order within the troops and guarantee that the conduct of the subordinates is in full respect with international humanitarian law, which includes principles and norms of international criminal law. It is only the commander who has effective authority and can oversee that the subordinates on the ground, who are trained by the State not to commit crimes against humanity or war crimes against civilians, such as murder, torture, or rape. As such, the commander has not only the power (and responsibility) to control the acts of his/her subordinates, but also the corresponding legal duty “to prevent and repress breaches undertaken by subordinates”, even if physically distanced from the subordinate and the illegal act- Such commander can be even be exercising command and control from a neighbouring country. The commander can stop such illegal acts by issuing an appropriate order, and punish the subordinates through investigating the alleged crimes and/or reporting them to relevant authorities.

The failure to comply with this duty is addressed through the “command/ superior responsibility doctrine”, which stipulates that a commander may be held liable for a subordinate’s unlawful act. In other words, it serves to hold a commander accountable for failing in his/her duty by not preventing or punishing subordinates committing violations of international humanitarian law- the commander acquires liability by omission. It is important to highlight that the responsibility of commanders is personal, as the doctrine constitutes a form of indirect individual responsibility: complicity through omission.

In line with international humanitarian law (IHL) and jurisprudence of, among others, the UN Security Council's established ICTY, the Bill 2689 identifies a military commander as "a person who, under appropriate legal grounds, is authorized to exercise command and control over one, several or many subordinates who take part in hostilities and belong to the armed forces of the State." The commander is thus the one who has the material ability (power or authority in either a *de jure* or a *de facto* form) to prevent a subordinate's crime or to punish the perpetrators of the crime after the crime is committed.

A military commander is criminally responsible for grave human rights violations committed by forces or persons under his/her actual command and control, or actual authority and control, where:

- he/she either knew, assumed, or owing to the circumstances, could and should have known that the subordinates were committing or about to commit such crimes; and
- he/she failed to take all necessary and reasonable measures within his/her power to prevent or stop their commission or to submit the matter to the competent authorities for investigation and prosecution.

It is relevant to note that the Article 426 of the Criminal code of Ukraine already includes a provision on "*Omissions of military authorities*" which penalises "*Wilful failure to prevent a crime committed by a subordinate, or failure of a military inquiry authorities to institute a criminal case against a subordinate offender (...)*." Similarly, the §1.8.8. of the Ukrainian Manual on the application of IHL rules establishes criminal responsibility to the commander for the subordinates' crimes when the commander was "*aware of the subordinate's intentions and failed to take all possible precautionary measures to prevent violations*". In this regard, it is important to explain why the "wilful failure" or "aware of the subordinate intentions" which entails knowledge of the crimes, is not be sufficient to effectively prosecute the crimes. Under the threshold of "could or should have known" as stipulated in the Bill 2689, the commander can be held accountable for such commission even without having the actual 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. This prevents the situations where the argument of having "no knowledge" could be easily used as a defense by the commander, likely exonerating him/her of culpability.

The firm and recognised position of this principle in customary international law stems from its significant importance in practice. The possibility to hold those individuals who are in positions of seniority or leadership accountable for their failures to adequately supervise their subordinates or who "turn a blind eye", may have a valuable deterrent effect on the commission of future crimes. It also contributes towards ensuring accountability of those considered to be most responsible before criminal justice institutions at the national and international level. In the context of the on-going reported crimes against humanity and war crimes committed in the active parallel armed conflicts in Ukraine, the inclusion of this principle in domestic law is of crucial importance to effectively end impunity and offer justice to victims- the protected persons under 1949 Geneva Conventions.

It is also through the incorporation of this principles that the Bill 2689, aligned with IHL, is of such an importance. It empowers Ukrainian authorities to effectively investigate, prosecute and adjudicate on conduct that is criminalized under International Law, building on the creation of the specialized "*Department for Supervision in Criminal Proceedings of the Crimes Committed in Armed Conflict*" in October 2019. Consequently, this Law will strengthen the domestic justice system and respect for the Rule of Law. Importantly, it will send a strong message to the people of Ukraine and the international community that your country is committed to bringing all perpetrators of international crimes to justice, and that the suffering of victims will not be ignored.

Last, but not least, we wish to stress that this principle of law of command responsibility is already incorporated in the domestic frameworks of all the main allies of Ukraine, including EU Member States, USA and Israel.

We therefore respectfully ask you to sign the Bill to address accountability and end impunity, while offering victims of atrocities committed in the context of the ongoing armed conflicts in Ukraine an effective recourse to justice.

Please accept, Mr. Chairman, the assurances of our highest esteem and consideration.


Ms. Margareta Cederfelt, MP (Sweden)
President, Parliamentarians for Global Action (PGA)


Dr. David Donat Cattin
Secretary-General, PGA