Summary review of proposed pre- "Draft Law of Ukraine on Criminal Liability for International Crimes" as of 20 May 2024 [1]

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1. General Overview

Purpose of the proposed draft law

This pre-draft law on criminal liability for international crimes in Ukraine addresses critical gaps in the current legal framework, which inadequately provides for the effective prosecution of international crimes. With over 120,000 incidents of alleged war crimes registered with the Unified Register of Pre-trial Investigations as of June 2024, existing provisions like Article 438 of the Criminal Code of Ukraine ('CCU') offer insufficient guidance to justice actors – investigators, prosecutors, judges and others. Moreover, the current legal framework lacks specific provisions to effectively prosecute international crimes such as crimes against humanity. As stated in the Preamble, the law aims to align with the Rome Statute of the International Criminal Court ('ICC') in order to ensure that individuals who commit the gravest international crimes are held accountable and face fair punishment.

Purpose of the review

This review aims to provide a preliminary and brief analysis of the pre-draft law on criminal liability for international crimes in Ukraine. It is not intended to be a comprehensive or in-depth examination. To conduct a thorough review, further discussions with the drafters and legal experts are essential to address differing opinions and understand the motivations behind specific provisions. Explanatory notes are crucial for certain sections, as their intent is not immediately clear. Translation issues present additional challenges, making it necessary to further consult with the drafter and experts in order to accurately understand the legal terminology and provide a precise, comprehensive review. In particular, legal experts have highlighted that further discussions and reviews are needed for the provisions on war crimes to ensure the legal framework is effective and comprehensive.

Please note that when comparing legal frameworks or recommending alignment with international law, the text uses the Rome Statute as the primary reference point along with customary international law and the international legal obligations arising from Ukraine's treaty commitments (such as the European Convention on Human Rights ('ECHR'), Geneva Conventions, and Genocide Convention).

Summary feedback

The proposed pre-draft law includes provisions that extend beyond the Rome Statute in certain areas, as it is stated in Article 2, which states that "[t]his Law is adopted **in furtherance** to and **in accordance** with the Rome Statute". Comments from experts highlight both strengths and areas for improvement. The review highlights the following key issues:

Definitions

There is a significant need to incorporate clear definitions to avoid over-criminalisation and issues of retroactivity, which could violate human rights principles, such as the principles of certainty, accessibility, foreseeability and stability of the law. This could be achieved by including a separate article in the general provisions section, with general definitions, as well as separate definitions for relevant articles (for instance, as it is done by the Dutch International Crimes Act ('ICA'). Incorporating definitions is important to avoid ambiguity and to explain new terms such as those that would be introduced in the Ukrainian legislation. Although it is possible to define a term used in a legislative text by reference to a definition in another text such as the Rome Statute or the CCU, this so-called referencing technique[2] should be the exception rather than the rule. To the maximum extent possible, combining techniques, namely in-text definitions and referencing technique should be avoided as it may create interpretative issues. Further care must also be taken that definitions are used when essential for understanding the legislative text. Otherwise, over-defining or using definitions excessively can lead to unnecessary complexity and reduce the flexibility of the text, potentially narrowing its application in ways that might not have been intended.

[2] *See more*, ECtHR, Advisory Opinion concerning the use of the "blanket reference" or "legislation by reference" technique in the definition of an offence and the standards of comparison between the criminal law in force at the time of the commission of the offence and the amended criminal law, **requested by** the Armenian Constitutional Court, 29 May 2020, *Request no. P16-2019-001*.

Alternately, consideration should be given to drafting a non-binding interpretative guide like the ICC's Elements of Crimes, which assists the Court in the interpretation and application of the crimes under its jurisdiction.

War crimes provisions

To enhance the usability of the war crimes provisions in the pre-draft law, it is necessary to refine the current structure. Article 8, the lengthiest ICC Statute provision, contains a very detailed list of war crimes criminalised in the Statute, which, however, does not replicate all of the war crimes enshrined in other international humanitarian law ("IHL") instruments; therefore, it is essential to incorporate some flexibility in the law. This could be achieved by aligning the provisions with the Rome Statute to avoid misclassification and ensure effective legal application, which would, i.e., also help prevent complaints or ambiguity regarding retroactivity and facilitate cooperation on universal jurisdiction cases. However, this does not mean that Ukraine is or should be confined by the codification of war crimes in Article 8 of the Rome Statute. Ukraine can expand on the list of crimes in the law by adding war crimes enshrined in other humanitarian treaties. At the same time, to accommodate future developments in the law and enable Ukrainian courts to prosecute war crimes that may be included in treaties ratified after the law's enactment or based on newly crystallised norms of customary international law, it may be worth considering adding a reference to customary international law or conventional international law applicable to armed conflicts, whether or not it constitutes a contravention of the law in force at the time and in the place of its commission.

Crimes against humanity: contextual element - widespread or systematic attack

Crimes against humanity must include the contextual element of being part of a widespread or systematic attack against civilians. This crucial aspect is currently missing and must be explicitly stated to align with customary international law.

Crimes against humanity: extermination

The current provision on crimes against humanity focuses solely on murder, omitting extermination, which is also a recognised crime against humanity under the Rome Statute and customary international law. Including extermination in the relevant provisions is essential for comprehensive legal coverage.

Crime of aggression

The pre-draft law needs to align more closely with the definitions and thresholds established in the Rome Statute concerning the crime of aggression. Specifically, it should incorporate the "manifest" threshold for acts of aggression to prevent over-criminalisation of lesser acts that do not meet the required gravity criteria.

Over-criminalisation and compliance with international human rights law

Finally, the scope of criminalisation of speech crimes (e.g., incitement to genocide) should be clearly defined in order to safeguard freedom of expression and avoid litigation at the European Court of Human Rights (ECtHR).

While national discretion in the implementation model is crucial to integrate the law effectively within the domestic justice system, it is essential that any deviations from international law are well-justified and legally sound to uphold the principle of legality. Ensuring alignment with international law and providing clear definitions will help to establish a robust legal framework for prosecuting international crimes in Ukraine.

Expert Contributors

The review and commentary on the pre-draft law were significantly informed by the expertise of several distinguished individuals:

- Dr Annegret Hartig, Program Director, Global Institute for the Prevention of Aggression
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- Philip Dygeus, Lecturer, Swedish Defence University and Lieutenant Colonel (OF-4) & Legal Advisor, Swedish Armed Forces
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- Valérie Gabard, Co-Director and founder, UpRights

2. Article-by-Article Review

Preamble

Key issues

The Preamble references the specific context of the Russian Federation's aggression against Ukraine.
Recommendation: Consider broadening the language, focusing on a general commitment to international justice and adherence to international treaties. For instance,
"RECOGNISING that genocide, crimes against humanity and war crimes, as the most serious crimes of concern to the international community must not go unpunished and effective prosecution must be ensured [...]."[3]

Article 1: Subject Matter of Legal Governance

Key issues

The provision needs to clearly define the scope of criminal liability for international crimes to avoid ambiguity.
Recommendation: Explicitly state the categories of international crimes covered by the law, referencing established international definitions. For instance, a recommendation would be alignment with the Rome Statute to ensure consistency and clarity.

Article 2: This Law and the Rome Statute

Key issues

Despite the emphasis on the Rome Statute definitions and notions being incorporated, the draft does not fully integrate the Rome Statute's definitions and principles.
Recommendation: Ensure alignment with the Rome Statute by explicitly implementing its definitions and principles. This does not mean that in certain situations, the law cannot go beyond the Rome Statute, but those choices must be clearly analysed, understood and explained.

Article 3: This Law and Criminal Code of Ukraine

Key issues

There may be potential conflicts between this law and the CCU.
Recommendation: Clearly specify which provisions of the Criminal Code of Ukraine are overridden by this law.

[3] Model Law to Implement the Rome Statute of the International Criminal Court.

Article 4: Temporal Application of this Law

Key issues

4. 1. Continuous Crimes

The provision outlines that the law applies to ongoing international crimes but does not clarify the precise extent of its application to crimes that began before the law came into effect. This ambiguity can lead to challenges in prosecuting continuous or ongoing crimes that straddle the enactment date. Furthermore, it may pose issues of internal coherence given that Article 4 of the CCU states that "criminality and punishability of an act are determined by the law **in effect at the time of commission of the act**." This provision further clarifies that the relevant time for determining criminal liability is **when the act or omission occurs.**

Recommendation: Clarify the temporal jurisdiction of the law, particularly focusing on how it applies to crimes initiated before its coming into force but continuing afterwards. This can be achieved by explicitly stating that the law applies to acts or omissions of ongoing international crimes that occur after the new law comes into effect, while any actions of ongoing international crimes taken before the law came into effect would be treated in accordance with current CCU provisions. This clarification would help reconcile any potential conflict with existing criminal law and ensure coherent legal application. However, this approach may create inconsistency and lack of clarity in investigative, charging and judicial practices as it may prove too unfeasible to precisely define every action in the timeline of oftentimes a very complex chain of actions. Please note that this would become a muted issue if retroactive application of the law is allowed.

4.2. Retroactive application of the law

Paragraph 1 of the article clarifies that the law will apply prospectively from the date it comes into force, aligning with the principle of legality and preventing *ex post facto* criminalisation. While paragraph 3 strictly prohibits the retrospective application of the law, adhering to the principle of legality, particularly Article 7 of the European Convention on Human Rights (ECHR) and Article 15 of the International Covenant on Civil and Political Rights ('ICCPR'), there are circumstances under international law where retroactive application might be justified. This is specifically relevant to conduct criminalised by international law at the time of its commission, even if not explicitly recognised by Ukrainian domestic law. While logistical difficulties in applying the law retroactively are understandable, international human rights law permits retroactive application for crimes recognised under international law at the time of their commission. For instance, in the case of *Kolk and Kislyiy v. Estonia*, the ECtHR found that the deportations were recognised as crimes against humanity under international law at the time they were committed. Thus, their prosecution did not violate Article 7, which prohibits retrospective criminal laws unless the act was criminal under international law when committed. This decision underscored those international legal principles can justify retrospective prosecution for crimes against humanity, even if not explicitly recognised in national law at the time of commission.

Such an approach, however, would possibly conflict with Ukraine's Constitution, specifically Article 58, which states that laws and other normative legal acts shall not be retroactive, except for cases when they mitigate or annul the responsibility of a person. Nonetheless, the spirit of Article 9 of the Constitution permeates domestic legislation and is reflected in Article 19 of the Law on International Agreements of Ukraine, which provides that international treaties are part of national legislation and have higher hierarchical status than national law. More specifically, Article 17 of the Law on the Implementation of Decisions and Application of the Practice of the ECtHR mandates domestic courts to apply the ECHR and the ECtHR case law. Additionally, Article 3 of the CCU makes clear that the application of international law permeates the criminal domestic framework, as it establishes that "[t]he Criminal Code of Ukraine, based on the Constitution of Ukraine and generally recognised principles and rules of international law, shall be the Ukrainian legislation on criminal liability." The monist approach has also been confirmed by the practice of the Constitutional Court of Ukraine, establishing the principle of a "friendly attitude to international law" (Constitutional Court of Ukraine, case no.1-1/2016).

A review of European domestic jurisprudence, with some notable exceptions, dealing with the questions of retroactive application of criminal law further strengthens the argument that the prosecution of past crimes not criminalised domestically, but based on either customary international law or conventional

law, is not unlawful. French courts have addressed the retroactive application of laws concerning crimes against humanity. In *Barbie* (1988), *Touvier* (1994), and *Papon* (1998), French courts upheld prosecutions for crimes committed during World War II, invoking Article 7(2) of the ECHR to argue these acts were criminal under international law when committed. The Touvier case specifically dealt with crimes against humanity committed in the 1940s, prosecuted under a law enacted in 1964, and resolved by recognising that the acts were already criminal by international standards.
German courts have also addressed retroactivity, particularly in the context of East German border shootings. In *Streletz, Kessler, and Krenz*, the German Federal Constitutional Court emphasised that such laws conflicted with fundamental human rights, thus not protecting perpetrators from prosecution under international law. The ECtHR upheld the prosecution of former East German officials, rejecting the defence that East German laws justified the shootings.
The Dutch Supreme Court, in the *Bouterse* case (2011), ruled against the retroactive application of a 1988 law for crimes committed in 1982, citing the Dutch Constitution's provision on non-retroactivity. The court also refused to apply customary international law, asserting that Dutch law did not permit disregarding domestic statutes conflicting with international law. However, under the Dutch legal framework, retroactive application of laws is prohibited except where binding treaty provisions explicitly allow it. Crimes against humanity, for instance, can only be prosecuted if committed after the enactment of the ICA on 19 June 2003. The Dutch Parliament has recognised the challenges of applying customary international law retroactively, hence limiting prosecution to post-ICA crimes. However, specific crimes like genocide and war crimes have been prosecutable under earlier domestic laws, such as the Genocide Convention Implementation Act (1964) and the Wartime Offences Act (1952), based on the dates these laws came into force.
Norway's Constitution incorporates the principle of legality, prohibiting retroactive application of criminal laws. In the case of *Mirsad Repak*, a former member of a Croatian militia prosecuted for war crimes committed during the Yugoslav Wars, the Norwegian courts initially ruled that these acts were criminal under international law at the time they were committed. However, the Norwegian Supreme Court annulled Repak's conviction, citing that it was not in line with Norway's constitutional provisions on non-retroactivity. This decision underscores the strict adherence to the principle of legality in Norway.
In the *Pinochet* case (1999), the UK House of Lords adhered to the principle of non-retroactivity, ruling that only post-1988 crimes were prosecutable under UK law implementing the Torture Convention, thereby strictly applying non-retroactivity.

It is important to note that neither Norway, The Netherlands, nor the UK are directly comparable to Ukraine's situation. Ukraine needs to address effectively and lawfully the thousands of crimes already registered since 2014. Not allowing for retroactive application would severely amputate the law and the chances for accountability for victims.

Recommendation: Given the complex interplay between international obligations and domestic constitutional provisions, but also the 120,000 registered incidents of international crimes, it is recommended that Ukraine considers applying the law retroactively for all the acts that were either criminalised through treaty or customary international law, even though they were not criminalised domestically. This would be in line with human rights law, and the practice of other states (though not all) that have been confronted with this question.

Alternatively, Ukraine could focus on aligning its domestic law with international law by allowing retroactive application only for crimes that were recognised as such under international law at the time of their commission and that were partially implemented into Ukrainian domestic law (genocide, war crimes).

To ensure clarity and legal certainty, the Ukrainian Parliament or the President of Ukraine should submit a formal request to the Constitutional Court seeking clarification on the retroactive application of criminal law for international crimes. This request should outline the relevant constitutional provisions, international obligations, and specific cases where retroactive application is contested, providing

comprehensive legal arguments for the Court's consideration. Discuss the integration of international treaties into Ukrainian law, referencing Article 19 of the Law on International Agreements of Ukraine and Article 3 of the Criminal Code of Ukraine, which support the application of international law within the domestic framework, the acceptance of the ICC's jurisdiction twice and other relevant arguments.
A decision from the Constitutional Court could provide a clear legal basis for the retroactive prosecution of international crimes, aligning Ukraine's legal framework with its international obligations and providing a robust legal foundation for addressing the thousands of registered incidents of international crimes in Ukraine since 2014.

Article 5: Territorial Application of this Law

Key issues

5.1. Ambiguity of scope of universal jurisdiction (limited or unlimited?)

The scope of the jurisdiction is not clear and though in principle, Ukraine is free to enact provisions allowing for unlimited universal jurisdiction, it must be aware of the implications, and it must incorporate robust procedural safeguards to protect the rights of the accused and prevent politically motivated prosecutions, including mechanisms for cooperation with international bodies and other states. Generally, universal jurisdiction may be unlimited, where the crime may be committed anywhere in the world, and neither the victim nor the perpetrator must be a Ukrainian national, or limited, where some (territorial, personal, state interests) link to Ukraine is a pre-requisite. Despite unlimited universal jurisdiction being favoured by many in academia and civil society, this may lead to an overburdening of the domestic justice system. Most states have a form of limited universal jurisdiction, requiring that the accused be present in the country, the victims be nationals, or there be some relevant and substantial link to the prosecuting state (harm to its interests), or finally, requiring prosecutors to ask for approval from higher authorities (e.g., Ministry of Foreign Affairs) before proceeding. Moreover, even states that seem to theoretically allow an expansive/ unlimited universal jurisdiction, have in practice required some connection to the prosecuting state, such as the presence of the accused or victims on its territory. The procedural framework for initiating an investigation must be carefully considered to understand the ramifications of unlimited universal jurisdiction. Further, the fact that Ukraine also allows *in absentia* proceedings must be carefully weighted. For instance, Article 2(1)(a) of the Dutch ICA allows for prosecution under universal jurisdiction if the suspect is present in the country. Investigations into crimes committed abroad by foreigners against non-nationals require the suspect to be identified and present in the Netherlands, unless the victim is Dutch. Jurisdiction ends if the suspect leaves during the investigation, often leading to dismissed complaints. However, if the prosecution has begun, Dutch courts can continue the trial even if the suspect leaves the country, with trials *in absentia* allowed but deemed undesirable by the Dutch Parliament.

Recommendation: To avoid misuse/ politically motivated prosecutions and an overburdening of the justice system, consider clarifying the scope of the application of the law by defining clear criteria for initiating investigations and prosecutions under universal jurisdiction.

Article 6: Notion of an International Crime

Key issues

6.1. Definition and Scope of International Crimes

The term "international crime" should be explicitly defined to include all recognised categories of such crimes. This will help prevent any legal ambiguities and ensure consistency in the application of the law.
Recommendation: Consider defining them as "the most serious crimes of concern to the International Community as a whole", hence paraphrasing the Rome Statute Preamble and the famous Barcelona Traction *obiter dictum* of the International Court of Justice concerning *erga omnes* obligations. This would more clearly allow the differentiation between ordinary offences and transnational crimes (e.g., terrorism).

Article 7: Subject of an International Crime

Key issues

7.1. Age of criminal responsibility for international crimes

Experts generally support setting the age of criminal responsibility at 18, aligning with the Rome Statute, which ensures that minors are not held criminally liable for the most serious crimes. However, a recommendation not to include the Rome Statutes jurisdictional age limit in the law but to strike this provision and let the general age limit of criminal responsibility as per the CCU apply also to international crimes has been put forward. This may help avoid any problems or inconsistencies in the application between the ordinary criminal law provisions and the international crimes provisions. Nonetheless, research on the age of criminal responsibility emphasises that there are significant differences between the mental development of a minor and young adult, which may make controversial setting the limit to under 18s. Furthermore, setting the age of criminal responsibility for international crimes to under 18s, will require developing special juvenile justice arrangements, including rehabilitation, specially trained judges and staff etc.

Recommendation: It is generally recommended to align with the Rome Statute and other international human rights instruments and developments and set the age to 18 years old However, consider requesting clarification from the Constitutional Court of Ukraine on the question of age of criminal responsibility.

Article 9: Qualification of a Completed and Uncompleted International Crime

Key issues

9.1. Referencing technique

The provision uses vague terms like "corresponding article" and "hereof," which could lead to ambiguity and misinterpretation.

Recommendation: Specify the exact articles in Section II that define the completed international crimes. This ensures clarity and precision in legal references. For example, replace "the corresponding article of Section II hereof" with specific references like "Article X of Section II."

9.2. Alignment with international law: scope of preparation

International criminal does not criminalise the mere preparation for international crimes. Instead, preparatory acts may fall under the conspiracy, which is an inchoate offence. However, in international law, preparation might be addressed more through the concepts of planning, ordering, or aiding and abetting a crime, which are considered forms of participation/ modes of liability that attract criminal responsibility (e.g., see Article 25(3)(b), (c) and (d) of the Rome Statute). While Article 14 of the CCU specifically criminalises preparation for a crime, the Rome Statute addresses similar acts under broader categories of participation and liability. Both legal frameworks recognise the need to penalise acts that contribute to the commission of serious crimes, albeit through different legal constructs.

Recommendation:

There is a partial correspondence between Article 14 of the CCU and the Rome Statute. While the Rome Statute does not explicitly criminalise mere preparation, it addresses preparatory acts under broader categories of participation, such as planning, ordering, and aiding and abetting.

9.3. Alignment with international law: scope of attempt

Attempt is explicitly recognised as an inchoate crime under international law. Attempts involve actions that directly move towards the commission of a crime but are not completed. There is a direct correspondence between Article 15 of the CCU and the Rome Statute (Article 25(3)(f)). Both legal frameworks criminalise attempts to commit crimes, recognising the intent and actions taken towards the commission of the crime, even if it is not completed.

Recommendation: Ensure that national legislation consistently reflects the definitions and principles of the Rome Statute, particularly in the context of international crimes, to facilitate effective prosecution and cooperation with international legal bodies.

Article 10: Qualification of Complicity in an International Crime

Key issues

10.1. Referencing technique

The provision uses vague terms like "corresponding article of Section II hereof," which could lead to ambiguity and misinterpretation.
Recommendation: Specify the exact articles in Section II that define the completed international crimes and the corresponding liability for complicity. For example, replace "the corresponding article of Section II hereof" with specific references like "Article X of Section II."

10.2. Alignment with international law: scope of complicity

Complicity in international crimes is a well-established principle under international law. The Rome Statute addresses various forms of complicity, including ordering, soliciting, inducing, aiding, abetting, and otherwise assisting in the commission of crimes.

Article 27 of the CCU defines various roles in complicity: Part 3 describes an organiser as someone who plans, leads, or ensures the commission of a crime; Part 4 defines an instigator as a person who incites another to commit a crime; and Part 5 defines an abettor as someone who assists in committing a crime by providing advice, instructions, information, means or instruments, or otherwise facilitates the commission of the crime. In comparison, the Rome Statute's Article 25(3)(b) covers ordering, soliciting, or inducing the commission of a crime; Article 25(3)(c) addresses aiding, abetting, or otherwise assisting in the commission of a crime; and Article 25(3)(d) includes contributing to the commission or attempted commission of a crime by a group of persons acting with a common purpose.
Recommendation: Both the CCU and the Rome Statute recognise various forms of complicity, including organising, instigating, and abetting. On first sight, the roles defined in Article 27 of the CCU align fairly well with those outlined in Article 25 of the Rome Statute. However, ensure that the definitions and scope of complicity in Article 27 of the CCU align with the principles and definitions provided in the Rome Statute.

Article 11: Types of Sentences for International Crimes

Key issues

11.1. Necessity of including a separate general provision on types of sentences

The article appears redundant as the range of punishments for specific crimes is already stated under the specific crimes in Section II. Including a general statement of types of sentences without specifying the range of punishments available for each crime can lead to unnecessary duplication and confusion.
Recommendation: Consider removing Article 11 to avoid redundancy. Instead, ensure that the specific range of punishments for each crime is clearly stated within the articles addressing those specific crimes in Section II (as is already done).

Article 12: Imposing Sentence for an International Crime

Key issues

12.1. Logical inconsistency with paragraph 3 dealing with cumulative sentencing

The provision creates a logical inconsistency by capping the maximum sentence at thirty years, even in cases where the gravity of the international crime would warrant a higher punishment or where the provision itself recommends life imprisonment (such as Article 438 of the CCU). This cap could undermine the severity and deterrent effect intended for international crimes.

Recommendation: Consider removing paragraph 3 to allow sentences to reflect the gravity of the crimes committed, ensuring that international crimes, which often warrant harsher penalties, are adequately addressed.

Article 13: Non-Applicability of Statute of Limitation for International Crimes

Key issues

The provision, as currently drafted, is clear enough in its intent.
Recommendation: Possibly consider explicitly listing the types of international crimes covered and whether it would extend beyond the core international crimes to include other crimes mentioned in the pre-draft law.

Article 14: Specific Aspects of Relieving from Punishment and Serving Sentence for International Crimes

Key issues

14.1. Non-Applicability of Parole and Amnesty

This provision aligns with international law, seeking to ensure accountability for the most serious crimes. It is crucial to maintain this strict approach to uphold the principles of justice and deterrence.
Recommendation: None.

14.2. Exceptional Cases for Pardon

The provision allows for release based on an act of pardon solely in exceptional cases, but it lacks specific criteria or examples of what qualifies as an "exceptional case." Article 106 of the Ukrainian Constitution grants the President the authority to grant pardons. However, the criteria for what constitutes an exceptional case are not explicitly defined, which can lead to varied interpretations and potential misuse. Nonetheless, Ukrainian law specifies certain exceptions where pardons may not be applicable. For instance, individuals convicted of particularly serious crimes, such as terrorism, may face stricter scrutiny or exclusion from pardon eligibility.[4]
Recommendation: Define "exceptional cases" within the law or provide a set of criteria that must be met for a pardon to be considered to avoid arbitrary or politically motivated pardons, taking into account the fact that Ukrainian law already excludes or limits the possibility that individuals convicted of serious crimes may benefit from a pardon.

Article 15: Criminal Record of International Crimes

Key issues

This approach aligns with international and domestic legal practices.
Recommendation: None.

Article 16: Special Confiscation for International Crimes

Key Issues

16.1 Referencing technique

Article 16 specifies that special confiscation for international crimes will be applied according to Articles 96-1 and 96-2 of the CCU. While this reference integrates existing national legal mechanisms, it lacks specific details on how these provisions align with the gravity and complexity of international crime.

[4]Presidential Decree of Ukranine of April 21, 2015 No. 223/2015. About Regulations on pardon procedure (as amended on 22-12-2023).

Recommendation: The provision should explicitly outline how Articles 96-1 and 96-2 will be adapted or interpreted in the context of international crimes to ensure comprehensive and appropriate application.

16.2. Scope of assets confiscation

The article does not clarify the scope of assets subject to confiscation or the procedural safeguards necessary to prevent misuse. This lack of specificity can result in inconsistent application and potential abuses of power, undermining the fairness and effectiveness of the legal process.
Recommendation: Consider clarifying the scope of assets subject to confiscation and the procedural safeguards in place to prevent misuse.

16.2. Rights of victims to reparations

There is no explicit reference to the rights of victims to obtain reparations.
Recommendation: It is recommended that a separate provision is added referencing the rights of victims to reparations. This provision is meant to be a general referral rather than the text that regulates reparations per see:
Nothing in this part shall be construed as limiting or prejudicing the rights of victims, including survivors, of international crimes to obtain reparations under Ukrainian Law and International Law before relevant jurisdictions and mechanisms at domestic, regional and international level.

Article 17: Measures of Criminal Law Nature to Be Taken against Legal Entities for International Crimes

Ukraine can draw from international precedents, such as the Lundin and Lafarge cases, to develop robust mechanisms for corporate criminal accountability for international crimes, positioning itself as a pioneer in this area. In the Lundin case, Swedish prosecutors charged Lundin Petroleum itself, as well as its executives, under the Swedish Penal Code for aiding and abetting war crimes and crimes against humanity, including forced displacement, killings, and destruction of property. Similarly, in the Lafarge case, French prosecutors charged Lafarge company, as well as several of its executives, under the French Penal Code for financing terrorism and complicity in crimes against humanity. The dual charges against both individuals and corporations in these cases illustrate the complex nature of international crimes. It demonstrates how corporate actions are often intertwined with individual decisions and actions, complicating the legal landscape, and necessitating comprehensive legal frameworks to address both levels of accountability effectively.

Key issues

17.1. Referencing technique

The reference to multiple articles without providing a clear framework or guidelines for their application in cases of international crimes may result in inconsistent or inadequate legal measures. There is a need for a more explicit integration of these provisions to address the specificities of international crimes committed by legal entities.
Recommendation: Provide explicit guidelines on how Articles 96-3 through 96-11 of the CCU will be adapted or interpreted specifically for international crimes committed by legal entities. This includes specifically mentioning the types of measures that can be imposed, such as fines, dissolution, or restrictions on operations, and ensuring these measures are proportionate to the severity of the crimes. Further clarify the types of legal entities covered, including corporations, partnerships, non-profit organisations, and other business entities etc. if that is the case.

Article 18: Crime of Genocide

Key issues

Article 18 is a copy of the international consensus definition, which is agreed by all experts is the best way forward.

Recommendation: None.

Article 19: Managing *[Directing the]* Commission of the Crime of Genocide

Key issues

19.1. Leadership Requirement

Unlike the crime of aggression, the crime of genocide under international law does not specifically require a leadership position. The focus is on the intent to destroy, in whole or in part, a national, ethnical, racial, or religious group. In practice, this means that any individual can be held responsible for committing an act of genocide.

Recommendation: Remove the explicit leadership requirement that unjustifiably restricts individual criminal responsibility to leaders and focus on the actions and intent of the individuals involved in the commission of genocide. This is vital also because genocide is an international law violation that brings about state responsibility (see ICJ genocide cases dealing with state obligations), not only individual criminal responsibility, therefore, the provision should reflect this.

19.2. Mens rea

The language used in the provision does not align fully with Rome Statute and the Genocide Convention. The term "willful commission" is not typically used in legal definitions for genocide. Instead, the focus is on “the intent to destroy, in whole or in part, a national, ethnical, racial, or religious group”.

Recommendation: Clearly define genocide according to the Rome Statute and the Genocide Convention, emphasising the specific intent to destroy a protected group.

19.3. Specific Acts

Designing a plan for committing the crime of genocide

Planning is an essential **mode of liability** in ICL given the large-scale and inherently collective nature of international crimes, particularly genocide, but it is not an inchoate crime.

The explicit phrase "designing a plan" is not commonly used in international criminal law, the notion of planning genocide or other international crimes is recognised as a mode of liability rather than an inchoate crime. For example, the International Criminal Tribunal for Rwanda (ICTR) Trial Chamber in case of Akayesu found that, inter alia, planning was a critical component in the execution of the genocide in Rwanda.

Participating in approval of a political decision on the commission thereof

Participation in decision-making processes related to genocide has been recognised as a key element of joint perpetration/ co-perpetration (a mode of principal liability in international criminal law, to be distinguished from accessorial liability (aiding and abetting)). Participation in approving actions that constitute genocide is one of the markers courts have examined to establish the existence of a plan or common purpose, required by this mode of liability. For instance, the International Criminal Tribunal for the Former Yugoslavia (ICTY) case of *Prosecutor v. Karadžić* highlighted the involvement of political leaders in approving actions that constituted genocide (e.g., paras. 66-70 Trial Judgement).

Giving an order to commit the crime of genocide

Giving orders for or ordering genocidal acts or other international crimes is a well-established mode of liability in the statutes and jurisprudence of the international criminal courts and tribunals. According to the jurisprudence of the ICTY and the ICTR, ordering entails that a person in a position of authority instructs another individual to commit an offence. A person in authority can be held responsible for ordering if the order has a direct and substantial effect on the commission of the illegal act. Importantly, no formal superior-subordinate relationship between the accused and the perpetrator is required. The authority envisaged by ordering under Article 6(1) of the Statute can be informal or temporary. It is sufficient to prove that the accused held a position of authority that could compel another person to

commit a crime. Whether such authority exists is a question of fact.[5] For instance, in the. *Bagosora* case, the ICTR Trial Chamber found that Bagosora, as a military leader, gave orders that led to the genocide.

Instigating the commission of such crime

Instigation is a recognised form of participation/ mode of liability in genocide. Please note that despite the terms "instigation" and "incitement" often being used interchangeably, this practice ignores a crucial distinction: namely, "incitement" is an inchoate offence reserved for direct public actions that promote genocide, whereas "instigation" is a mode of liability which refers to acts that promote all international crimes (war crimes, crimes against humanity, crime of aggression, and genocide), but do not have to be public or direct. In *Prosecutor v. Akayesu*, the ICTR recognised instigation as a mode of liability (paras. 481-482), finding Akayesu guilty of instigating crimes against humanity (para. 694) and genocide and separately of inciting genocide.

Managing *[Directing]* actions which constitute the crime of genocide

Managing or overseeing actions that lead to genocide can be inferred from various cases. However, no specific mode of liability or inchoate crime exists for managing actions which constitute the crime of genocide. These actions could be captured by several modes of liability, including planning, ordering, or a form of joint perpetration/ co-perpetration, depending on the evidence. The *Nahimana* case at the ICTR demonstrates that while there may not be a specific mode of liability exclusively for "managing" actions leading to genocide, individuals in leadership positions can be held accountable under existing legal frameworks.

Recommendation: The acts mentioned in the proposed Article 19 are not recognised as inchoate offences but as independent modes of liability in international criminal law and jurisprudence, albeit sometimes under slightly different terminologies. In international criminal law, inchoate crimes refer to actions that are steps towards the commission of a crime but do not constitute the completed offence, such as conspiracy (only in relation to genocide), attempt, and incitement (only in relation to genocide).

Moreover, the list included in Article 19 aligns with the CCU modes of liability of direct perpetration (Article 27, CCU); co-perpetration (Article 28, CCU); organising: planning, directing, or managing the commission of a crime. (Article 27, Part 4, CCU); instigation: provoking or encouraging another to commit a crime. (Article 27, Part 4, CCU); **a**iding and abetting: assisting in the commission of a crime before, during, or after the act. (Article 27, Part 5, CCU); **c**omplicity: participation alongside principal perpetrators, contributing to the crime. (Article 27, CCU); superior orders (Article 41, CCU).

Given that the CCU already recognises most of the modes of liability found in ICL,[6] comprehensive accountability for the various roles involved in the commission of genocide would be adequately covered by the CCU. This could be supplemented, as it is intended by the current pre-draft law, with a provision on command responsibility. This would also align with the frameworks and practices of international criminal law and tribunals, including the ICC. To be precise, Article 25 of the Rome Statute specifies the modes of liability applicable to the crimes under the ICC's jurisdiction, namely Article 25(3)(a) – committing; Article 25(3)(b) - ordering and soliciting/inducing; Article 25(3)(c) - aiding and abetting; Article 25(3)(d) - contributing to a common purpose; and Article 28 - command/superior responsibility. There are no separate provisions elsewhere in the Rome Statute for these modes of liability or their inclusion as inchoate crimes (with the exception of conspiracy, attempt, and incitement); instead, they are all integrated into Article 25 of the Statute.

It is also worth mentioning that the modes of responsibility under the Statute are not mutually exclusive and that it is possible to charge more than one mode in relation to a crime if this is necessary in order to reflect the totality of the accused's conduct.

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[5] *See, for instance*: ICTR, *Setako v. The Prosecutor*v, ICTR-04-81-A, Appeals Judgement, 28 September 2011; ICTR, *Kalimanzira v The Proescutor*, ICTR-05-88-A, Appeals Judgement, 20 October 2010; ICTY, *Prosecutor v Boskoski & Tracul*ovski, IT-04-81-A, 19 May 2010, para. 60.

[6] There is no explicit provision in the CCU on command responsibility that is universal to everyone. However, Article 426 of the CCU criminalising omissions to act by Ukrainian military authorities as a military crime.

In any case, it is essential to ensure that the acts listed (designing, participating, ordering, instigating, managing [directing]) align with recognised international definitions and include necessary elements of intent and knowledge.

Article 20: Public Calls to the Crime of Genocide or Justification or Negation Thereof

Key issues

20.1. Compliance with International Human Rights Law

Freedom of expression may be limited under a state of emergency, such as armed conflict; however, it must meet the objective tripartite human rights test of **legality, necessity, and proportionality**, as per Article 19(3) of the ICCPR, and Article 10(2) of the ECHR. Blanket prohibitions must therefore be avoided and their sanctioning by criminal law, the most serious form of punishment, must be limited to where it is necessary to deter and punish the harm such speech may cause.

20.2. Definition and Scope

The Genocide Convention focuses on the **prevention and punishment** of the act of genocide itself and does not explicitly address the negation/ denial or justification of genocide. The Genocide Convention explicitly makes "**direct and public incitement to commit** genocide" a crime. It is in substance identical to Article III(c) of the 1948 Convention on the Prevention and Punishment of the Crime of Genocide, and the ICTY and ICTR Statutes. Genocide is the only international crime to which public incitement has been criminalised. The reason for this provision is to prevent the early stages of genocide even prior to the preparation or attempt thereof. To incite "publicly" means that the call for criminal action is communicated to a number of individuals in a public place or to members of the general public at large particularly by technological means of mass communication, such as by radio or television. To incite "directly" means that a person is specifically urging another individual to take immediate criminal action rather than merely making a vague or indirect suggestion. Among other things, its "public" nature distinguishes it from an act of private incitement (which could be punishable under the Genocide Convention as "complicity in genocide" or possibly not punishable at all). Incitement to genocide must also be proven to be "direct," meaning that both the speaker and the listener understand the speech to be a call to action. Prosecutors have found it challenging to prove what "direct" may mean in different cultures, as well as its meaning to a given speaker. Proving such directness often involves a careful parsing of metaphors, allusions, double entendres, and other linguistic nuances: a mode of speech may be perceived as direct in one culture, but not in another. In most cases, direct and public incitement to commit genocide can be preceded or accompanied by hate speech, but only direct and public incitement to commit genocide is prohibited under the Genocide Convention and the Rome Statute. This conclusion is corroborated by the *travaux préparatoires* to the Genocide. What is direct should be understood in the situational, cultural context. Nonetheless, several states have criminalised it. For example, Germany and France have laws that make Holocaust denial a criminal offence. However, this must be treated with great care and consideration as the ECtHR has already struck down such legislation, for instance, in the *Perinçek v. Switzerland* case where it held that Switzerland's criminalisation of genocide denial (specifically the Armenian Genocide) infringed on freedom of expression. This decision highlighted the tension between protecting free speech and preventing hate speech and ensuring that legality, necessity and proportionality are deeply considered.

Recommendation: Consider aligning the provision more closely with the Rome Statute and Genocide Convention by removing the denial and justification of genocide from the act which deals only with core crimes. Such provisions could instead be included as ordinary crimes under the CCU in similar fashion to other European States. Such a choice would also be supported by different legal instruments and domestic legal developments, including the European Union Framework Decision on Racism and Xenophobia, which calls for the criminalisation of genocide denial under national laws of EU member states. However, it is recommended to qualify the justification or negation of genocide by clearly stating that this only refers to **genocides confirmed to have occurred by independent courts or tribunals.** This will thus exclude any non-legal reference to genocide as colloquially used in the media.

20.3. Leadership Requirement

See above comments to Article 19, section 19.1.

20.5. Mens rea

The provision completely omits any mention of *mens rea* and appears to criminalise non-intentional dissemination of materials that call for committing genocide, to justify or negate/deny genocide. The concern here is the over-criminalisation of speech and dissemination, given the very high criminal sanction attached. Dissemination must be intentional (direct intent not negligence) and with knowledge of the content of such materials.

Recommendation: The following *mens rea* elements: **the intent to willfully disseminate with knowledge of the content of such material**, that is, **direct intent**, should be explicitly mentioned in the provision.

Article 21: Crime against Humanity in the Form of Murder

Key issues

21.1. Structure and Separation of crimes against humanity provisions

The separation into two articles for different types of crimes against humanity and the crime against humanity of murder could lead to redundancy and inconsistency.

Recommendation: Consider combining all provisions related to crimes against humanity into one comprehensive article as it is done in the Rome Statute. Combining these provisions into a single, comprehensive article would enhance clarity and coherence and assist with legal interpretation and application. Further, consider adding a separate provision that defines these acts, as it is done in the Rome Statute. Any differences in sentencing recommendations can be explicitly mentioned in a different paragraph. For instance, if murder/wilful killing carries a higher sentence under Ukrainian law, this can be specifically highlighted.

21.2. Contextual Element: Widespread and Systematic attack

Crimes against humanity require the contextual element of being part of a "widespread or systematic attack against civilians". This crucial aspect is currently missing in the provision.

Recommendation: Explicitly state that the crime must be "part of a widespread or systematic attack directed against any civilian population". This aligns with international legal law and ensures that the provision meets the criteria for crimes against humanity. It is important to emphasise that including this element is non-negotiable; its inclusion or exclusion is not a matter of policy or political choice but a requirement for aligning with established customary international law.

Please note that in addition to the definition of the attack as "part of a widespread or systematic attack directed against any civilian population" the ICC further requires that the attack be pursuant to or in furtherance of a State or organisational policy to commit such attack" (Article 7(2)(a), Rome Statute). However, this is not a requirement under the Genocide Convention or customary international law, rather the compromise agreed upon during Rome Statute negotiations, which means that Ukraine has no legal obligation to implement, and, in fact, it would be recommended against.

21.3. Omission of the crime of extermination

The current provision focuses solely on murder, omitting extermination (also a crime related to killing) which is a crime against humanity and is listed as such in the Rome Statute, and recognised as such under customary international law.

Recommendation: Include extermination in the provision(s) dealing with crimes against humanity. Define the crime of extermination in a separate provision. The Rome Statute defines extermination in Article 7(2)(b) as: *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*". This description of extermination has allowed interpreters to compare it with "genocide without special intent/ dolus specialis".

Article 22: Crime against Humanity in Other Forms

Key issues

22.1. Structure and Separation of Articles

See above comments to Article 22, section 21.1.

22.2. Contextual Element: Widespread and Systematic attack

See above comments to Article 22, section 21.2.

22.3. Human Trafficking

Human trafficking is not an underlying act of crimes against humanity. Under international law this conduct is likely to be considered encompassed under enslavement. For instance, the definition of "enslavement" in the Rome Statute includes a (type of) human trafficking: '"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".
Recommendation: Carefully consider the necessity/ feasibility of including this act as a separate crime against humanity, including how it would be distinguishable from ordinary crimes/ organised crime/ and human trafficking under enslavement. This being said it is not forbidden to add more underlying acts under domestic legislation.

22.4. Reference to Common Article 3 to the Geneva Conventions under sexual and gender-based violence as a crime against humanity.

References to violations of Common Article 3 to the Geneva Conventions is misleading and misplaced, as it regards a norm applicable in situations of non-international armed conflict and may create confusion and eventually issues with the application of this underlying act**.** Conversely, crimes against humanity may occur in situations of (international and non-international) armed conflict and during peacetime.
Recommendation: Consider aligning the provision with the Rome statute, which uses "*or any other form of sexual violence of comparable gravity*."

22.5. Pursuance of apartheid policies

Pursuance of apartheid policies is not an underlying act of crimes against humanity under the Rome Statute nor is it understood as such under customary international law.
Recommendation: Consider deleting the reference to "policies" and aligning with the Rome Statute, which uses "crime of apartheid". Further, consider adding the definition of the crime of apartheid which is widely recognised under both the Rome Statute, treaty law and customary international law to mean "*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*".

22.6. Other inhumane acts

The provision does not fully align with the Rome Statute, which speaks of "causing great suffering, or serious injury to body or to mental or physical health" rather than brutal violence.

Recommendation: Consider using the formulation in the Rome Statute, which clearly states that acts are not limiting to causing bodily harm only, but also covers important protection by criminalising the commission of injury to health (as distinguishable from the body injury) and psychological harm.

22.7. Imprisonment of a forcefully fertilized woman for the purpose of changing the ethnic composition of population

Imprisonment of a forcefully fertilized woman for the purpose of changing the ethnic composition of population is not an underlying act of crimes against humanity under the Rome Statute nor is it understood as such under customary international law.

Recommendation: Consider deleting this provision given it can be subsumed under enslavement (para.1) or forced pregnancy (para. 7) or as *or any other form of sexual violence of comparable gravity (para. 7).* This would maintain consistency and alignment with international law, including the Rome Statute. Furthermore, the act could also fall under genocide, specifically, "imposing measures intended to prevent births within the group" if the dolus specialis is present.

War crimes

General Structure

Structuring war crimes provisions effectively is crucial for clarity, comprehensiveness, and consistency with international law. Various approaches can be taken to structure war crimes provisions, including models based on the Rome Statute, or the Swedish model, and the German model.

The Rome Statute model (Article 8) provides a good model or basis for structuring domestic war crimes legislation, dividing them into categories based on the nature of the conflict (international vs. non-international) and the type of violation as follows:

- Grave breaches of the 1949 Geneva Conventions, related to international armed conflict;
- Other serious violations of the laws and customs applicable in international armed conflict;
- Serious violations of Article 3 common to the four 1949 Geneva Conventions, related to armed conflict not of an international character;
- Other serious violations of the laws and customs applicable in armed conflict not of an international character.

The Swedish and German model adopt a more simplified and straightforward approach, eliminating the distinction between international armed conflicts (IACs) and non-international armed conflicts (NIACs) and, to the extent possible, categorising crimes based on the nature of the violation: crimes against the person, crimes against property, prohibited means and methods of warfare, other serious violations.

Ultimately, the structure that is chosen is not imposed by international law. However, the ability of judges and justice actors to use the provisions efficiently needs to be considered. Further, since the Preamble states that the pre-draft law is in furtherance of the Rome Statute, incorporating the Rome Statute's definitions and the Elements of Crimes would make it easier for legal actors to interpret and apply the law. This approach ensures that the provisions are comprehensive and detailed, facilitating effective prosecution and consistency with the ICC Statute.

Grave breaches vs serious violations vs "ordinary" violations of international humanitarian law

There is no explicit obligation under IHL to investigate *every* violation, but all grave breaches and serious violations of IHL committed during IACs and NIACs must be investigated. This categorisation is based on the severity/ gravity/seriousness and impact of the respective violation.[7]

Ordinary violations of international humanitarian law in international and non-international armed conflict

Ordinary violations of IHL are usually handled by the military justice system of the offending party and do not warrant international criminal responsibility as they do not meet the threshold of severity/ gravity/seriousness and impact for a violation to be a war crime. Examples include minor offences by military personnel, not providing detainees with cigarettes etc.

Grave breaches of international humanitarian law in international armed conflicts

Grave breaches are the most severe breaches of IHL. They involve actions that cause significant harm to human life, dignity, and physical or mental integrity. They typically involve deliberate acts that result in severe suffering or loss of life, making them particularly egregious, which directly attack core principles of IHL, including distinction and humanitarian protection. Grave breaches in IACs are explicitly listed in the Geneva Conventions (Articles 50, 51, 130, 147 of Conventions I, II, III and IV respectively) and Additional Protocol I (Articles 11 and 85) and the Rome Statute. They include:

[7] *See, e.g.*, ICRC, Customary International Humanitarian Law, Rule 156. Definition of War Crimes.

(i) Wilful killing;
(ii) Torture or inhuman treatment, including biological experiments;
(iii) Wilfully causing great suffering, or serious injury to body or health;
(iv) Extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly;
(v) Compelling a prisoner of war or other protected person to serve in the forces of a hostile Power;
(vi) Wilfully depriving a prisoner of war or other protected person of the rights of fair and regular trial;
(vii) Unlawful deportation or transfer or unlawful confinement;
(viii) Taking of hostages.

Other Serious violations of international humanitarian law in international armed conflicts

Other serious violations in international armed conflicts include significant breaches of IHL that are not mentioned as grave breaches in the Geneva Conventions or Additional Protocol I; however, they cause substantial harm to protected persons or objects. Examples from the Rome Statute include the misuse of protected emblems (Article 8(2)(b)(vi), (vii)), declaring that no quarter will be given (Article 8(2)(b)(xii), intentionally directing attacks against civilians (Article 8(2)(b)(i)) or civilian objects (Article 8(2)(b)(ii)).

Serious violations of international humanitarian law in non-international armed conflicts

In NIACs, serious violations are acts that largely correspond with what is termed grave breaches in IACs. They are recognised as war crimes under customary international law and Additional Protocol II. The legal framework for NIACs is governed by Common Article 3, Additional Protocol II, and customary international law. The Rome Statute, in Article 8(2)(c), explicitly refers to Common Article 3, essentially copying paragraphs (a) to (d) which list the acts that are prohibited, with only a minor change. The formulation in paragraph (d), "recognised as indispensable by *civilised peoples*", was replaced in Article 8(2)(c) with "generally recognised as indispensable" and in the ICC Elements of Crimes with "generally recognised as indispensable under international law", and this is how it should be interpreted nowadays, mentions the ICRC in its 2020 Commentary to Common Article 3.

Other serious violations of international humanitarian law in non-international armed conflict

Beyond the core serious violations, there are other significant/ substantial breaches in NIACs, often referenced under customary international law and the Rome Statute in Article 8(2)(e). These provisions reflect those in Article 8(2)(b) of the Rome Statute concerning other serious violations in IACs and include intentionally directing attacks against civilians (Article 8(2)(e)(i)) or civilian objects (Article 8(2)(b)(ii)).

Article 23: War Crime in the Form of Murder

The article's reference to norms of IHL applicable to both international and non-international armed conflicts aligns with the Geneva Conventions.
However, several points need clarification/ amendment.

Key issues

23.1 Grave breaches reference

The provision refers to Common Article 3 as encompassing grave breaches; however, grave breaches are not explicitly listed in Common Article 3 or in NIACs in general.[8] The term aligning with the Geneva Conventions and Rome Statute is "serious violations".

[8] Cf. International Court of Justice (ICJ), Case concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), 27 June 1986, Judgment, paras. 218-219: "*Article 3 which is common to all four Geneva Conventions of 12 August 1949 defines certain rules to be applied in the armed conflicts of a non-international character. There is no doubt that, in the event of international armed conflicts, these rules also constitute a minimum yardstick, in addition to the more elaborate rules which are also to apply to international conflicts; and they are rules which, in the Court's* opinion, reflect what the Court in 1949 called 'elementary

Recommendation: Consider aligning the structure and terminology more closely with the Geneva Conventions and Rome Statue, by including a reference to “serios violations”.

22.2. Clarification of who is a protected individual under international humanitarian law

The article does not explicitly define "an individual who is protected under international humanitarian law," potentially leading to ambiguity in judicial interpretation.

Recommendation (re article 23(1)(1)): Explicitly define what constitutes "an individual who is protected under international humanitarian law" to aid in judicial interpretation and application of the law. This definition should include:

- Civilians not participating in hostilities.
- Members of armed forces who have laid down their arms or are *hors de combat*.
- Medical and religious personnel.
- Individuals granted special protection under the Geneva Conventions (e.g., prisoners of war, wounded and sick combatants).

23.3. Terminology

The terminology used in article 23(1)(2) to describe individuals involved in hostilities, is complex and could be simplified for better clarity and understanding. Further, the provision does not align with the Rome Statute or customary international law, which includes not only the perfidious killing but also wounding of an enemy combatant.

Recommendation (re article 23(1)(2): Consider clarifying and simplifying the terminology used. For instance, using terms like "killing a member of opponent armed forces or organised armed groups" would be clearer and more direct than the current phrasing. Further, consider including “wounding perfidiously” to better align with international definitions.

Article 24: War Crime in the Form of a Grave Breach of International Humanitarian Law in Connection with an International Armed Conflict

Key issues

24.1. Alignment

Most of the acts listed in article 24 are not grave breaches of the Geneva Conventions of 12 August 1949 that apply in IACs, namely, any of the following acts against persons or property protected under the provisions of the relevant Geneva Conventions and their Additional Protocols.

Recommendation: The reference to grave breaches is misleading as many acts listed are not classified as grave breaches under the Geneva Conventions. Consider aligning the structure and terminology more closely with the Rome Statute.

24.2. Forcing Protected Individuals to Serve in Enemy Armed Forces

This provision aligns with Article 51 of the Geneva Convention (IV), which prohibits the coercion of protected persons to serve in the forces of a hostile power. However, IHL specifies protected persons more precisely. The term "protected individual" can vary and may not be clear.

Recommendation (re article 24(1)(1)): Explicitly define the types of protected persons, such as prisoners of war (POWs) or other protected individuals, to avoid ambiguity and ensure accurate and effective application.

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considerations of humanity…’24 The Court reiterated this position in relation to the dispute at hand by also stressing that: Because the minimum rules applicable to international and to noninternational conflicts are identical, there is no need to address the question whether those actions must be looked at in the context of the rules which operate for the one or for the other category of conflict. The relevant principles are to be looked for in the provisions of Article 3 of each of the four Conventions of 12 August 1949, the text of which, identical in each Convent.”

24.4. Deporting or Displacing Individuals

This provision is inspired by Article 49 of the Geneva Convention IV, which prohibits the ***forcible*** transfer or deportation of protected persons from occupied territory, meaning that under IHL, there are situations where displacement may be sometimes permissible, for instance, for security reasons.

Recommendation (re article 24(1)(3)): Specify "unlawful" or "forceful" deportation or displacement to clarify the conditions under which these actions are prohibited, aligning with IHL. Further consider including a provision detailing the exceptions/ situations in which, for military or security, and notwithstanding the general prohibition, an occupying power may undertake the total or partial evacuation of a given area. Further, Article 49 Geneva Convention IV also includes the conditions for permissible evacuations. These changes would ensure that the provision incorporates the main points of Article 49 of the Geneva Convention IV, ensuring that the prohibitions and exceptions are clear and enforceable. Finally, specify what is meant by "directly" or "indirectly" as these terms are not used in relation to forcible transfer and deportation.

24.5 Depriving Protected Persons of Fair Trial Rights

24.5.1 Addressee of right

The provision mentions "protected persons"; however, without a definition in the text or the provision it may lead to different interpretations of who is a protected person. Furthermore, the rule customary international law mentions that **no one** may be convicted or sentenced, except pursuant to a fair trial affording all essential judicial guarantees in line with international human rights law.

Recommendation: Consider removing the reference to "protected person" and replacing it with "no one"/ "no person". Alternatively, consider removing the reference and defining "protected person in a separate paragraph.[9] Please note that international human rights law is not displaced by IHL during armed conflict.

24.5.2 *Mens rea* – wilfully

The provision excludes an essential element of the crime of denying a fair trial – intent.

Recommendation: Consider aligning the provision with Article 8(2)(a)(vi) of the Rome Statute, which requires the ***willful***[10] deprivation of **the rights of fair and regular trial.**

24.5.3. Terminology

The provision refers to a "proper" trial, which does not align with the Rome Statute, nor does it have a determined meaning in international law.

Recommendation: Consider removing the reference to a "proper" trial and aligning with the Rome Statute, Geneva Convention IV, which refer to a fair and "**regular**" trial. Alternatively, consider adding "fair and proper trial, **affording all essential judicial guarantees".** Finally, if the term "proper" is preferred, consider defining this in a separate provision. Please note that this may be a translation issue.

24.6. Cancelling, Suspending, or Declaring Inadmissible the Rights or Claims of Enemy Citizens

This provision addresses the legal protections afforded to enemy nationals, preventing arbitrary or unjust legal actions against them. A similar provision can be found in the Rome Statute, Article 8(2)(b)(xiv).[11]

24.6.1. Mischaracterisation as a grave breach

The provision is not a grave breach according to the Geneva Conventions or the Rome Statute. Article 8(2)(b)(xiv) of the Rome Statute classifies it under "*[o]ther serious violations of the laws and customs applicable in international armed conflict t[…].*"

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[9] Please note that in practice, protected person for the purpose of this provision, only refers to: prisoners of war (Geneva Convention III, Article 4);889 or civilians who at a given moment and, in any manner, whatsoever find themselves in the hands of a party to the conflict or occupying power of which they are not nationals (Geneva Convention IV, Articles 4, 13).

[10] Please note that international jurisprudence has indicated that war crimes are violations that are committed wilfully, i.e., either intentionally (dolus directus) or recklessly (dolus eventualis).")

[11] *See also*, Article 23(h) of the Hague Regulations of 1907: "To declare abolished, suspended, or inadmissible in a court of law the rights and actions of the nationals of the hostile party. A belligerent is likewise forbidden to compel the nationals of the hostile party to take part in the operations of war directed against their own country, even if they were in the belligerent's service before the commencement of the war."

Recommendation: Consider re-evaluating the classification of this act in order to align with the Rome Statute and Geneva Conventions, which classify this violation under "*[o]ther serious violations of the laws and customs applicable in international armed conflict[…].*"

24.6.2. Scope of rights and claims

The current provisions lacks clarity on what constitutes "rights or claims", which can lead to legal ambiguities and potential misuse. Further, both the Rome Statute and the Hague Regulations of 1907 refer to "actions" rather than "claims". Please not that this may be a translation issue. [12]
Recommendation: Clarify the scope of "rights or claims" and provide examples of permissible or impermissible actions. It is essential to provide such clear definitions to differentiate between legitimate legal actions and those that are arbitrary or discriminatory. For instance, an individual's rights or claims may be lawfully restricted as long as the principles of **necessity, proportionality, and legality** are met.

24.6.3 Scope of "declaring"

It is not clear whether the provision also covers administrative and legislative measures.
Recommendation: Consider clarifying whether the provision will cover both administrative and legal measures.

24.7. Misuse of Protected Symbols

24.7.1. Mischaracterisation as a grave breach

The provision is not a grave breach according to the Geneva Conventions or the Rome Statute. Article 8(2)(b)(vii) of the Rome Statute classifies it under "*[o]ther serious violations of the laws and customs applicable in international armed conflict […].*"
Recommendation: Consider re-evaluating the classification of this act in order to align with the Rome Statute and Geneva Conventions.

24.7.2. Symbols

The provision does not explicitly mention which symbols are protected, which can lead to ambiguity, interpretative issues, and a weakening of legal certainty.
Recommendation: Ensure that the article explicitly mentions these symbols and the consequences of their misuse can strengthen the provision.

24.8. Delaying Repatriation without Just Cause

24.8.2. Protected person under international Humanitarian Law

IHL specifies protected persons more precisely and provides different rules of protection for different types of protected persons.
Recommendation: Explicitly define the types of protected persons, such as POWs or other protected individuals, to avoid ambiguity and ensure accurate and effective application. For instance, POWs are combatants captured during conflict. Their internment is not punitive but aims to prevent their return to hostilities. They must be **released and repatriated without delay after active hostilities cease** (Third Geneva Convention, Article 118), or during the conflict because of **serious wounds or illness** (Geneva Convention III, Arts. 109-110). Although, POWs can be prosecuted and detained for war crimes or other IHL violations but not merely for participating in hostilities. They must be treated humanely, protected against violence, intimidation, insults, and public curiosity, and have their dignity, personal rights, and convictions respected. The Third Geneva Convention specifies minimum detention conditions, including accommodation, food, clothing, hygiene, and medical care. POWs are also entitled to communicate with their families.
Civilians can also be interned if justified by imperative security reasons. Internment is a security measure, not a punishment. **Civilians must be released when the reasons for internment no longer exist.** The Fourth Geneva Convention details protections for civilians, including the obligation to repatriate interned civilians as soon as possible after the close of hostilities (Article 134). Special categories like the wounded, sick, and shipwrecked should be repatriated as soon as their condition allows (Article 132).

[12] Please not that international law does not offer much to understand the scope of this violation, beyond emphasising that it does not cover trivial, isolated rights.

24.8.3. Good reason

"Good reason" is not typically an expression used in legal texts. Moreover, IHL sets certain rules with relation to what constitutes "good reason" for different categories of protected persons, such as serious wounds or illness, imperative security.

Recommendation: Consider defining "good reason" and providing guidelines on justifiable delays for each category of protected persons to ensure this provision is not misinterpreted or misused. This can include procedural delays for verification of identity or health reasons.

Article 25: War Crime in the Form of Grave Breach of International Humanitarian Law in Connection with Armed Conflict of Non-International Nature

Key Issues

25. 1. Misuse of the Term "Grave Breach"

Grave breach terminology is not used for NIACs. The terms employed in the Geneva Conventions and the Rome Statute is "serious violation".
Recommendation: Replace the term "grave breach" with "serious violation" to correctly reflect the application to non-international armed conflicts.

25.2 Clarification of Judicial Terms

While the administration of justice is a governmental function par excellence, IHL also recognises that during NIACs non-state entities must respect certain judicial guarantees. The most basic provision is Common Article 3 to the Geneva Conventions, which states that "the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognised as indispensable by civilised peoples" is prohibited with respect to persons taking no active part in hostilities.
Additional Protocol II develops and supplements Common Article 3. Its Article 6(2) is applicable "to the prosecution and punishment of criminal offences related to the armed conflict" and states that "[n]o sentence shall be passed and no penalty shall be executed on a person found guilty of an offence except pursuant to a conviction pronounced by a court offering the essential guarantees of independence and impartiality". As the ICRC commentary affirms, it applies equally "to civilians and combatants who have fallen in the power of the adverse party and who may be subject to penal prosecutions".[13] In addition, Article 6(3) asserts that a convicted person "shall be advised on conviction of his judicial and other remedies and of the time–limits within which they may be exercised".

Recommendation: Define "regularly constituted court" and "judicial guarantees" within the article or a section dedicated to definitions. These definitions should align with those outlined in the ICC's Elements of Crimes and Common Article 3 and Additional Protocol II.

25.3. Ensuring Judicial Guarantees

Recommendation: The Commonwealth Model Law on the Rome Statute includes detailed definitions and procedural safeguards, specifying judicial guarantees like the right to a fair trial, legal representation, and the right to appeal. Consider incorporating these judicial guarantees explicitly within Article 25 to align with international law and ensure comprehensive legal protection.

[13] ICRC, *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (Martinus Nijhoff Publishers 1987), para 4599.

4. Providing specific examples of serious violations

Recommendation: Add illustrative examples, such as extrajudicial executions, sham trials, and denial of legal representation, within the article to detail the types of prohibited actions and clarify the scope of the law, which in turn would assist with interpretation of the provision by legal professionals.

Article 26: War Crime in the Form of Grave Breach [or serious violation] of International Humanitarian Law in Connection with International Armed Conflict or Armed Conflict of Non-International Nature

Key Issues

26.1. Misuse of the Term "Grave Breach"

The term "grave breach" should be reserved for IACs. For NIACs, the term "serious violation"[14] is used.

26.2. Torture and Inhuman Treatment

Recommendation: Ensure consistency with the definitions under the Rome Statute and its Elements of Crimes and the Convention Against Torture. Explicitly state what constitutes "great suffering" to prevent ambiguity. Define "torture" and "inhuman treatment" clearly within the law, aligning with customary international law.

26.3. Inflicting Great Violence

The term “great violence” is vague.

Recommendation: Consider specify the types of violence (e.g., physical, psychological) and include examples. Replace "great violence" with "severe physical or psychological harm".

26.4. Outrages upon Personal Dignity

Recommendation: Include both mental and physical abuses that impact personal dignity. Specify actions like forced nudity, degrading treatment, and culturally insensitive acts.

26.5. Taking Hostages

Recommendation: Clearly define "hostage-taking" as capturing or detaining individuals to compel a third party to act or abstain from acting. Ensure the definition aligns with the International Convention Against the Taking of Hostages.

26.6. Deportation and Illegal Imprisonment

Recommendation: Clarify the conditions under which deportation or imprisonment is permitted, such as for security or imperative military reasons. Explicitly define "illegal" and detail permissible conditions.

26.7. Sexual Violence

Recommendation: Align definitions with the Rome Statute. Ensure comprehensive coverage of all forms of sexual violence, including emerging forms recognised under international law.

26.8. Conscripting Child Soldiers

Recommendation: This is an offence in IACs and NIACs, therefore, amend to say: “into the national armed forces or into irregular armed forces or groups, including non-state armed groups”.

26.9. Attacks on Civilian Objects and Non-Military Targets: Directing an attack against a civilian object; Directing an attack against or shelling unprotected city, village, housing or building not being military targets

Reiterate the principle of distinction in IHL, ensuring that attacks are only directed at legitimate military targets. Define "civilian objects" and include examples of prohibited attacks. For instance, Germany has: “directs an attack by military means against civilian objects, so long as these objects are protected as such by international humanitarian law, namely buildings dedicated to religion, education, art, science or charitable purposes, historic monuments, hospitals and places where the sick and wounded are collected,

[14] *See* pp. 19-20, general section, for further details.

or against undefended towns, villages, dwellings or buildings, or against demilitarised zones, or against works and installations containing dangerous forces."

26.10. Proportionality and Military Advantage

The principle of proportionality is a fundamental aspect of IHL, ensuring that even during armed conflict, measures are taken to minimise harm to civilians and civilian objects. This principle requires that the anticipated military advantage from an attack must outweigh the potential collateral damage to civilians and civilian objects.

26. 11. Prohibited Means of Warfare

Recommendation: Specify prohibited weapons and methods, such as chemical, biological, and indiscriminate weapons.

26. 12. Protection of Emblems and Humanitarian Missions

Recommendation: Clearly state penalties for misuse and provide examples of protected emblems.

Article 27: Crime of Aggression

Key issues

27.1. Definition and Threshold of Aggression – Manifest Gravity

Article 27 deviates from the ICC's Article 8*bis* by not explicitly stating the "manifest" threshold for the act of aggression. The ICC requires that acts of aggression must be of a **manifest character, gravity, and scale to be criminalised**.

Recommendation: Incorporate language that specifies the need for acts of aggression to be manifest in character, gravity, and scale, as per Article 8*bis* of the ICC Statute (see below). This will prevent the over-criminalisation of lesser acts that do not reach the required threshold. While the acts that would qualify as 'acts of aggression' under international law are listed in Art. 8*bis*(2) of the Rome Statute, the acts that do not reach the threshold do not have a stable definition and may include, inter alia, border skirmishes, unauthorised flights over another country's airspace without engaging in hostile actions, amassing of troops on the border, cyber-attacks. Please note that this list is non-exhaustive.

27.2. Inclusion of specific acts of aggression

The pre-draft law omits a detailed list of specific acts of aggression, which are included in Article 8*bis*(2) of the ICC Statute. While Article 2(2) of the draft implies that definitions from the Rome Statute should be used, the use of the "reference technique" for defining key terms such as "act of aggression" and "crime of aggression" might create ambiguities that need judicial interpretation, potentially undermining legal clarity. Explicit definitions within the law itself would enhance clarity and legal certainty.

Recommendation: It is advisable to include the list of specific acts of aggression, found in Article 8*bis*(2), Rome Statute, namely:

[…] "act of aggression" means the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations. Any of the following acts, regardless of a declaration of war, shall, in accordance with United Nations General Assembly resolution 3314 (XXIX) of 14 December 1974, qualify as an act of aggression:

(a) The invasion or attack by the armed forces of a State of the territory of another State, or any military occupation, however temporary, resulting from such invasion or attack, or any annexation by the use of force of the territory of another State or part thereof;

(b) Bombardment by the armed forces of a State against the territory of another State or the use of any weapons by a State against the territory of another State;

(c) The blockade of the ports or coasts of a State by the armed forces of another State;

(d) An attack by the armed forces of a State on the land, sea or air forces, or marine and air fleets of another State;

(e) The use of armed forces of one State which are within the territory of another State with the agreement of the receiving State, in contravention of the conditions provided for in the agreement or any extension of their presence in such territory beyond the termination of the agreement;
(f) The action of a State in allowing its territory, which it has placed at the disposal of another State, to be used by that other State for perpetrating an act of aggression against a third State;
(g) The sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another State of such gravity as to amount to the acts listed above, or its substantial involvement therein."

27.3. Specific Acts

Under Article 8*bis* of the Rome Statute the crime of aggression consists of four individual elements: "the **planning, preparation, initiation or execution** by a person in a position effectively to exercise control over or to direct the political or military action of a State, of an act of an aggression which, by its character, gravity and scale, constitutes a manifest violation of the Charter of the United Nations".
Although there is limited jurisprudence on the crime of aggression beyond the Nuremberg judgments, the process can be understood in distinct stages involving key leadership roles. The first stage, **planning**, entails the active participation of leaders in formulating a detailed proposal for aggression. This is followed by the **preparation** phase, which includes activities such as gathering resources and generating public support, both crucial for enabling the act of aggression. The **initiation** stage refers to the actual commencement of aggression, such as declaring war or initiating combat. Finally, the **execution** stage involves actions taken after initiation to further the aggression, with a focus on the significant contributions by leaders. This framework underscores the leadership nature of the crime of aggression, emphasising the central role of leaders at each stage.
The pre-draft law lists five individual conduct elements related to aggression: **developing plans, managing/directing preparatory actions, political decision-making, ordering aggression, and managing/directing aggression**. This approach offers an overly detailed breakdown of the acts that can be found in Article 8*bis* but may overlap conceptually with the broader categories in Article 8*bis* (planning, preparation, initiation, execution), but because of over-defining them it can lead to unnecessary complexity and reduce the flexibility of the provision, potentially narrowing its application in ways that might not have been intended.
Recommendation: Consider aligning these terms more closely with Article 8*bis* of the Rome Statute which could reduce ambiguity and ensure consistency in interpretation.

27.4. Leadership Clause

The proposal specifies that the crime of aggression applies to individuals who can manage or control political or military activities of a state, either alone, jointly, or through others. This mirrors the ICC's requirement but adds clarity by explicitly excluding accessorial liability, focusing on principal perpetrators only.

27.5. Intent and Inchoate Crimes

For crimes like developing plans or managing actions intended to facilitate aggression, the pre-draft proposal specifies that these are only punishable if the act of aggression subsequently occurs. This adheres to the principle that mere attempts or preparatory steps without resulting aggression should not be criminalised, aligning with customary international law and the ICC's Elements of Crimes.

Article 28: Propaganda of the Act of Aggression

Key issues

28.1. Definitions and Terminology

The provision uses three different terms: "aggressive war," "act of aggression," and "armed conflict." Article 20(1) of the ICCPR, which mandates the prohibition of propaganda for war, has faced criticism for its vague terms and lack of comprehensive jurisprudence. However, it is generally agreed that

propaganda must pose a real risk of war or result in acts of aggression contrary to the United Nations Charter to fall under this prohibition. Any implementation of this right should not prohibit advocacy of the sovereign right of self-defence under Article 51 of the Charter or the right of peoples to self-determination and independence in accordance with the Charter of the United Nations, but rather an unlawful use of force.[15]

Recommendation: Consider using a single term, such as "act of aggression" to streamline the language and ensure consistency.

28.2 Scope of Criminalisation

Initiation of Conflict: The current draft mentions the "initiation of an armed conflict" but not the "initiation of an act of aggression or aggressive war."

Recommendation: It should be clarified whether the criminalisation includes both speech acts and the actual initiation or preparation to start a war.

Public vs. Private Acts: The current provision, similar to Article 20 of the pre-draft law dealing with incitement to genocide, does not explicitly require that all speech acts which may constitute propaganda for an act of aggression be "public" (or "direct"). For instance, although "calls" must be "public", the negation and justification of the aggression or the praise and glorification of the aggressor state do not seem to require that they are public.

There is not much jurisprudence dealing with propaganda for aggression. However, human rights jurisprudence related to freedom of expression and the jurisprudence of the international criminal courts and tribunals related to incitement to genocide may offer guidance on how to best shape the private/public divide when it comes to criminalising speech acts without encroaching on freedom of expression. Public acts can be defined as communications disseminated to a broad audience, typically through mass communication channels such as radio, television, or the internet. In contrast, private acts occur within closed groups or personal conversations and should be protected under freedom of expression.

Recommendation: Specify that the criminalised acts must be public to avoid overreach into private discourse and ensure the provision targets harmful propaganda and does not encroach on freedom of expression. Consider expressly aligning the definition or understanding of what is considered public/private in Article 20 with Article 28a to ensure constituency in legal application and interpretation.

28.3. Mens rea and context

Mens rea: The provision does not explicitly mention that the speech acts must be direct, while the intent requirement, or *mens rea*, is a pre-requisite in distinguishing between permissible speech and criminal speech acts. The acts must be "direct", meaning that both the speaker and the listener understand the speech to be a call to action. Proving directness involves understanding cultural and linguistic nuances, as what may be perceived as direct in one culture might not be in another.

Recommendation: Explicitly include the requirement of direct intent to wilfully and knowingly engage in the wrongful conduct described. This helps prevent the over-criminalisation of speech and dissemination.

Contextual Consideration: Understanding context is indispensable in legal evaluations of speech. Establishing context requires an examination of all the circumstances that are relevant to the expression in question, including considering the potential impact of an impugned expression on the basis of all possible evidence, taking into account factors as diverse as the historical truth of a statement, the position in society of both those who have published a communication and those who are the target or subject of a communication, and the actual intent and potential impact of the expression.. For example, educational or journalistic discussions should be clearly exempt to protect academic and press freedoms.

28.4. Negation, Praise, and Glorification

Public Nature and Direct Intent: Under current international and European human rights law, the criminalisation of negation, praise, or glorification of war or an aggressor state is not permissible without

[15] ICCPR, General Comment No. 11: Article 20 Prohibition of Propaganda for War and Inciting National, Racial or Religious Hatred *Adopted at the Nineteenth Session of the Human Rights Committee, on 29 July 1983.*

intent. Such laws must align with principles of necessity, proportionality, and legality to lawfully restrict freedom of expression.
Recommendation: Carefully consider the criminalisation of speech acts that go beyond the incitement to genocide formula, which requires both public and direct incitement. If provisions criminalising speech acts related to war or aggression are to remain, they must be qualified by the term "public" and require direct intent. This ensures that only speech acts intended to incite immediate and concrete actions are criminalised. For instance, a teacher discussing various historical perspectives in a classroom should not be at risk of incarceration under these provisions.
Clarification of Terms: The terms are vague and may cause interpretative challenges and inconsistencies.
Recommendation: Terms like "praise" and "glorification" need clear definitions to avoid subjective interpretations that could unjustifiably infringe on freedom of expression.

28.5. Sentencing

The prescribed penalty for these offenses is incarceration for up to twenty years. This sentence is comparatively too high, as it is a speech crime, and thus could be compared to hate speech and incitement.
Recommendation: Consider other comparable crimes such as hate speech (even in other jurisdictions) to propose a fair and just sentence that meets the severity of the act.

Article 29: Responsibility of Commander (Superior) for International Crimes Committed by Subordinates

Key issues

29.1. Subordinate-Superior Relationship

The provision does not align with Article 28 of the Rome Statute, which provides for command and superior responsibility. While Article 28(1) of the Rome Statue dealing with the responsibility of military commander states that "a military commander or person effectively acting as a military commander shall be criminally responsible for crimes [...] committed by forces under his or her effective command and control, or effective authority and control, Article 29(a) of the pre-draft law only mentions "a military commander or person effectively acting as a military commander who was aware or, under circumstances which actual took place, should have been aware that the armed forces committed or intended to commit a crime". Further, while Article 28(b) of the Rome Statute mentions that under a "superior and subordinate relationship" not captured by military-subordinate relationship in Article 28(a), "a superior shall be criminally **responsible for crimes** [...] **committed by subordinates** under his or her effective authority and control", Article 29(b) of the pre-draft does not mention whether the superior is a civilian or whether the subordinate is under his/her effective control. As stated by the ICTY Appeals Chamber in the Čelebići case, "the ability to exercise effective control [...] will almost invariably not be satisfied unless such a relationship of subordination exists."[16]
Recommendation: In order to align with the Rome Statute, consider clearly defining the relationship, specifying the scope of authority and control, and outline different levels of command and corresponding responsibilities.

29.2 Mens rea

The provision does not clearly reflect the *mens rea* required for commanders and superiors to be held liable under command responsibility. Traditionally, the extent and nature of the "knowledge" required of a superior regarding the actions of subordinates was the same for both military commanders and other superiors (e.g., ministers, mayors and directors of factories), irrespective of office held. This is reflected in Rule 153 of the ICRC's customary law study: for both categories of superiors to attract

[16] ICTY, *Prosecutor v. Delalić* et al., IT-96-21-A, Appeals Judgment, 20 February 2011, para. 414

liability, it had to be shown that the superior either *knew* (actual knowledge) or *had reason to know* (a form of constructive knowledge).[17]

The ICC Statute **advances two separate standards**. For **military commanders in Article 28(1)(a)**, the test remains that the person either "**knew** or, owing to the circumstances at the time, **should have known** that the forces under his or her command were committing or about to commit such crimes". The "should have known" is not dissimilar to the traditional "had reason to know". By contrast, in Article 28(2)(a) **for other superiors** – that is non-military commanders – to incur responsibility, it must be shown that the person either "knew, or "**consciously disregarded information** that clearly indicated that the subordinates were committing or about to commit such crimes". The ICC Statute thus introduces additional elements that must be met to establish that a non-military superior had the requisite *mens rea* to be held liable through command responsibility. It must be shown not only that the superior had information in his possession regarding acts of his subordinates, but that the superior consciously disregarded such information, in other words, that he chose not to consider or act upon it. There is a higher *mens rea* required from civilian leaders compared to military commanders.

Recommendation: The provision should distinguish between actual knowledge ("knew") and constructive knowledge ("should have been aware").

29.3. Control[18]

Article 28(1) of the Rome Statute states that the military commander or the person effectively acting as such must have effective (command and) control or (authority and control), while Article 28(2) prescribes that the (non-military) superior must have effective (authority and) control. 'Effective control' is defined as the material ability to prevent or punish the commission of the crime.[19] A lower standard such as the simple ability to exercise influence over forces or subordinates, even if such influence turned out to be substantial, has been considered insufficient.[20] A commander or a superior who is vested with *de jure* authority but has no effective control over his or her subordinates would not incur criminal responsibility, whereas a *de facto* superior who lacks a formal appointment but, in reality, has effective control over the perpetrators of offences could incur criminal responsibility.[21] Possible indicators of effective control could be, but are not limited to official position and tasks; power to issue orders and ensure compliance with said orders; power to re-subordinate units and change structures; authority to transfer forces; the superior had the ability to prevent the criminal conduct; power to initiate investigations; power to promote, replace, remove or discipline members; access to / control over means, communications and equipment, finances; authority to represent forces; level of public profile and influence etc.[22] Article 29(a) does not explicitly include the requirement of having "effective command and control, or effective authority and control," which is a crucial element in Article 28(1) of the Rome Statute. This omission means that the pre-draft law may hold commanders accountable based on awareness alone, without ensuring that they had the actual ability to command or control the forces in question.

Recommendation: A clear definition of what constitutes "effective control" over subordinates is necessary, keeping in mind that the required control needs to be *effective* as opposed to *formal*. To be precise, explicitly state that military commanders or persons effectively acting as military commanders shall be criminally responsible for crimes committed by forces under their effective command and control, or effective authority and control.

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[17] ICRC, Customary International Humanitarian Law, Rule 153: Command Responsibility for Failure to Prevent, Repress or Report War Crimes.

[18] The term "control" is broadly defined, encompassing both "authority" and "command." According to the Bemba Confirmation Decision, the phrase "effective authority and control" does not add any additional meaning to the text. The term "effective command" is understood to signify "effective authority," as in English, "command" is defined as "authority, especially over armed forces." The term "effective authority" pertains to the way a military or military-like commander exercises control over their forces or subordinates (*Bemba Confirmation of Charges*, paras. 412-413).

[19] Decision Pursuant to Art 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor against Jean-Pierre Bemba Gombo, *Bemba, Situation in the Central African Republic*, ICC-01/05-01/08-424, PTC II, ICC, 15 June 2009, para. 415 [hereinafter "*Bemba Confirmation of Charges*"].

[20] Ibid, para. 415.

[21] *See, for instance*, ICTY, *Prosecutor v. Delalić* et al., IT-96-21-A, Appeals, Judgment, 20 February 2011, para.197.

[22] *Bemba Confirmation of Charges*, para. 418.

29.4. Acts of Omission

This provision contains several points that do not align with Article 28 of the Rome Statute or with customary international criminal law. The provision refers to "inability" while the above-mentioned Article 28 and customary international criminal law refer to failure to act, which are "acts of omission" rather than inability. Further, the three distinct duties that are imposed are to prevent, repress (rather than "terminate" as it is used in the pre-draft law) or "submit the matter to the competent authorities for investigation and prosecution"/punishment.

Possible indicators of these duties could be, but are not limited to:

- Prevention: ensuring compliance with rules; effective disciplinary measures in place; initiating action before superiors; precautions in military operations.
- Repression: suspending criminal acts that are in progress; conducting investigations regarding previous crimes; exercising disciplinary power; proposing a sanction to a superior or remitting the case to a judicial authority.
- Punishment: investigating possible crimes to establish the facts and effective measures to punish; submitting the matter to a functioning authority competent, if the superior is lacking powers

Recommendation: Acts of omission and their legal consequences need to be clearly defined.