



## **Draft Articles on Prevention and Punishment of Crimes Against Humanity –**

### **Comments and Observations by Israel**

#### **A. Introduction**

1. At its 71<sup>st</sup> session in 2019, the International Law Commission (hereinafter: “the Commission”) adopted the Draft articles on Prevention and Punishment of Crimes Against Humanity, with commentaries (hereinafter: “the Draft Articles” and “the Commentaries”).<sup>1</sup> The Commission decided, in conformity with article 23 of its Statute, to recommend the Draft Articles to the General Assembly. In particular, the Commission recommended the elaboration of a convention by the General Assembly or by an international conference of plenipotentiaries on the basis of the Draft Articles (hereinafter: “the recommendation of the Commission”).<sup>2</sup> The future of the Draft Articles has been under discussion in the Sixth Committee of the General Assembly since that same year.
2. In its resolution 77/249 of 30 December 2022, the General Assembly decided that the Sixth Committee will resume its session during 2023 and 2024 in order to exchange substantive views on all aspects of the Draft Articles, and to consider further the recommendation of the Commission for the elaboration of a convention on the basis of the Draft Articles. Moreover, the General Assembly invited States to submit by the end of 2023 written comments and observations on the Draft Articles and on the recommendation of the Commission.<sup>3</sup> The resolution further specified that the process noted above will not prejudice the decision the Sixth Committee during the 79<sup>th</sup> session on the recommendation of the Commission. Israel welcomed the resolution, as it views the Sixth Committee as an appropriate forum for the exploration of additional steps for moving forward in relation to the present topic through constructive engagement and meaningful dialogue. Indeed, Israel proposed, already in 2019, that a forum be established within the framework of the Sixth Committee in order for States to review jointly the Draft Articles through an inclusive and robust discussion focused on clarifying outstanding issues and resolving differences, with a view towards

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<sup>1</sup> UN General Assembly, *Report of the International Law Commission on the work of its Seventy-first session (29 April–7 June and 8 July–9 August 2019)*, A/74/10, Chapter IV.

<sup>2</sup> *Id.*, para. 46.

<sup>3</sup> G.A. Res. 77/249, ¶ 6, U.N. Doc. A/RES/77/249 (30 December 2022).



examining the potential elaboration of a future convention.<sup>4</sup> Israel believed from the outset that due to the divergent views among UN Member States on several critical outstanding issues, further deliberation was required and stressed the need to reach broad consensus on key issues. Israel remains committed to contributing further to the formation of consensus among Member States on the Draft Articles and the recommendation of the Commission.

3. The present statement is submitted in reply to the invitation by the General Assembly mentioned above. By reason of current events, at this stage Israel wishes to highlight a number of key issues of concern, without prejudice to any further comments it may wish to make on this subject in the future.

#### **B. Preliminary comments**

4. The State of Israel has been committed to the cause of international criminal justice since its inception. Established in the aftermath of the catastrophic events of the twentieth century, including the Holocaust perpetrated against the Jewish people, Israel was one of the first nations to become party to the Convention on the Prevention and Punishment of the Crime of Genocide, and was expeditious in adopting domestic legislation on the matter.
5. It is against this background that Israel wishes to reiterate its deep appreciation to the Commission and in particular to the Special Rapporteur, Professor Sean Murphy, for their valuable work. Israel welcomed the work on this topic from the outset, as an expression of its consistent commitment to the prevention and punishment of grave international crimes that are of concern to the international community as a whole, including crimes against humanity.
6. Sadly, the need to ensure accountability for the most heinous international crimes remains no less relevant today than almost a century ago. Israel was itself recently subject to a heinous terror attack perpetrated by Hamas on 7 October 2023. The atrocities committed that day (and since then) unquestionably constitute serious violations of the most fundamental norms of international law,

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<sup>4</sup> In this regard, see statements made by Israel in the Sixth Committee since the 74<sup>th</sup> session: U.N. GAOR, 74th Sess., 24<sup>th</sup> plen. mtg., U.N. Doc. A/C.6/74/SR.24, para. 15 (29 October 2019); U.N. GAOR, 75th Sess., 6<sup>th</sup> plen. mtg., U.N. Doc. A/C.6/75/SR.6, para. 2 (15 October 2020); U.N. GAOR, 76th Sess., 8<sup>th</sup> plen. mtg., U.N. Doc. A/C.6/76/SR.8, para. 69 (13 October 2021); U.N. GAOR, 77th Sess., 11<sup>th</sup> plen. mtg., U.N. Doc. A/C.6/77/SR.11, para. 69 (11 October 2022).



amounting to war crimes and crimes against humanity. They include the slaughter of over 1,200 Israelis and foreign citizens, the wounding of over 5,500, widespread acts of torture and maiming, burning alive, beheading, rape and other forms of sexual violence, mutilation of corpses, the taking of some 240 hostages - including infants, women, the elderly, persons with disabilities, and Holocaust survivors - the indiscriminate firing of thousands of rockets, and the use of Palestinian civilians as human shields. The task of investigating the attack on 7 October 2023, and bringing its perpetrators to justice, is of great importance and Israel has been taking active steps in this regard. As part of its commitment to the rule of law and to ensuring accountability for violations of international law, Israel is committed to investigating and initiating legal proceedings against those who perpetrated, planned, or otherwise took part in these heinous acts.

7. The persistence of crimes against humanity, whether by Hamas in Israel or elsewhere, serves as a reminder of the need to take action to prevent and punish such crimes, which are among the most serious crimes of concern to the international community as a whole. Israel continues to support the process of elaborating a convention on prevention and punishment of crimes against humanity that can secure wide acceptance.

### C. Adherence to well-established principles

8. As Israel has previously stated, it is vital that a future international convention accurately reflect well-established principles of international law so as to attract wide acceptance and make the most effective contribution.<sup>5</sup> In certain respects, however, the Draft Articles and the Commentaries appear to stray from such principles. Below are a number of examples:
9. **Criminalization under national law (Draft Article 6(1))** – Israel is mindful of the considerations that brought the Commission to incorporate in Draft Article 2 the definition of crimes against humanity stipulated in Article 7 of the Rome Statute. However, the currentt definitions of crimes against humanity in Draft Article 2 do not necessarily overlap with customary international law. Indeed, the terms of domestic laws of States that have criminalized crimes against humanity differ from one another, as noted in the commentary to the Draft Articles themselves.<sup>6</sup> Israel maintains

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<sup>5</sup> See UN General Assembly, International Law Commission, *Crimes against humanity: Additional comments and observations received from Governments, international organizations and others*, 2 May 2019, A/CN.4/726, p. 11-12.

<sup>6</sup> See paragraphs (3-6) to the commentary of Draft Article 6.



therefore that the obligation stipulated in Draft Article 6(1) should not be understood or interpreted as requiring States to reproduce in verbatim the definition provided in Draft Article 2. States should rather be vested with discretion as to the manner in which they choose to incorporate the crimes into their national laws, taking into account, *inter alia*, the customary definitions of the crimes, the domestic criminal legal system, culture and principles, etc., insofar as these align with the object and purpose of a future international convention.

10. **Official position as a substantive defence of State officials (Draft Article 6(5))** – Draft Article 6(5) regulates the question of the official position of a defendant as a substantive defence from criminal responsibility. Yet the proposed text might be seen or taken to affect the issue of immunity from the exercise of foreign criminal jurisdiction. The Commentaries address this issue but do not clarify that the latter kind of immunity (immunity *ratione materiae*) can also apply to a *former* State official. The Commission itself made clear, in the context of its work on “Immunity of State officials from foreign criminal jurisdiction”, that the term “State official” includes “both current and former State officials”.<sup>7</sup>

11. **Criminal liability of legal persons (Draft Article 6(8))** – Draft Article 6(8), which provides that each State shall take measures, where appropriate, to establish criminal, civil or administrative liability of legal persons for the offences referred to in the Draft Article, does not reflect existing customary international law. As acknowledged in the Commentaries to this provision, the statutes of most international criminal tribunals to date did not include a provision on criminal liability of legal persons. As reflected in the oral report of the co-facilitators of the last resumed session, it appears that this point is subject to diverging views within the Sixth Committee.<sup>8</sup> As stated above, Israel believes that for a future international convention to be accepted as widely as possible, it is essential they reflect only well-established principles of international law. Therefore, Israel believes that this issue should not be addressed in a future international convention.

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<sup>7</sup> UN General Assembly, *Report of the International Law Commission Seventy-third session (18 April–3 June and 4 July–5 August 2022)*, A/77/10, Chapter VI, page 190. Israel recently submitted written comments to the Commission in the context of its ongoing work on this topic, in which Israel’s position is presented in further detail.

<sup>8</sup> U.N. GAOR, 77<sup>th</sup> Sess., 45<sup>th</sup> plen. mtg. Sixth Committee, U.N. Doc A/C.6/77/SR.45 (Apr. 14, 2023), para. 32.



#### D. Procedural safeguards

12. Israel, like numerous other States,<sup>9</sup> has expressed support for the inclusion of safeguards in the Draft Articles to ensure the proper implementation of a future international convention and prevent attempts to misuse it for political purposes. Similar proposals were made also in connection with other topics under discussion in the Sixth Committee, which raise the same concerns. For example, numerous States saw the inclusion of procedural safeguards in the draft articles on “Immunity of State officials from foreign criminal jurisdiction” as welcomed and necessary.<sup>10</sup> Moreover, in the Commentaries to Draft Article 7(2), the Commission itself recommended that States adopt safeguards to ensure the proper exercise of foreign criminal jurisdiction.<sup>11</sup> As noted above, in the context of its work on immunities, the Commission included procedural safeguards as an integral part of its output. Israel believes that at the very least, the Draft Articles, which also allow for the establishment of foreign criminal jurisdiction, should similarly contain procedural safeguards to prevent their misuse. Such procedural mechanisms would allow to pursue accountability while respecting international law and preventing undesired international friction.

13. While there is a wide range of possible safeguards that could be incorporated, Israel would mention two examples:

##### 1) Giving priority to States with the strongest jurisdictional links –

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<sup>9</sup> See, for example, U.N. GAOR, 77<sup>th</sup> Sess., 41<sup>st</sup> plen. mtg. Sixth Committee, U.N. Doc A/C.6/77/SR.41 (Apr. 12, 2023), para 71; See also U.N. GAOR, 77<sup>th</sup> Sess., 42<sup>nd</sup> plen. mtg. Sixth Committee, U.N. Doc A/C.6/77/SR.42 (Apr. 12, 2023), para. 10; UN General Assembly, International Law Commission, *Crimes against humanity: Comments and observations received from Governments, international organizations and others*, 21 January 2019, A/CN.4/726, page 75; See UN General Assembly, International Law Commission, *Crimes against humanity: Additional comments and observations received from Governments, international organizations and others*, 2 May 2019, A/CN.4/726/Add.2, p. 5.

<sup>10</sup> See U.N. GAOR, 74<sup>th</sup> Sess., 30<sup>th</sup> plen. mtg. Sixth Committee, U.N. Doc A/C.6/74/SR.30 (Nov. 5, 2019), paras. 41-43; U.N. GAOR, 77<sup>th</sup> Sess., 26<sup>th</sup> plen. mtg. Sixth Committee, U.N. Doc A/C.6/77/SR.26 (Oct. 28, 2023), para. 52; See *Id.*, para. 88.; U.N. GAOR, 77<sup>th</sup> Sess., 27<sup>th</sup> plen. mtg. Sixth Committee, U.N. Doc A/C.6/77/SR.27 (Oct. 28, 2023), para. 87.

<sup>11</sup> See paragraph (9) of the commentary to Draft Article 7. See also Footnote 422.



14. One of the most fundamental principles of international criminal law is that States have the primary sovereign prerogative to exercise jurisdiction through their own courts over crimes against humanity that have been committed either in their territory or by their nationals. This principle is consistent with the notion that the State with territorial or active personality jurisdictional is usually best suited to prosecute crimes effectively.
15. In accordance with well-established principles of international criminal law, assertion of universal jurisdiction should be regarded as a measure of last resort in appropriate circumstances only. In this respect, regard should be had to adherence to the principles of subsidiarity and complementarity. Therefore, only when such States are unable or unwilling to exercise jurisdiction, alternative mechanisms should be considered. This view is shared by numerous States in the Sixth Committee,<sup>12</sup> and is common in State practice. Israel believes that various safeguards should be included in a future international convention in order to reflect and promote these basic principles, and several Member States have expressed similar opinions in this regard.<sup>13</sup>

## **2) Required approval by high-level officials –**

16. Given the far-reaching implications of criminal proceedings against foreign nationals, including foreign State officials, charged with crimes against humanity, and in light of the gravity and unique characteristics of such crimes, a determination concerning such a proceeding should be made by sufficiently high-level officials. Such a mechanism is common in the law and practice of various jurisdictions, and Israel believes that such an approval should be an essential requirement prior to initiating investigations into allegations concerning crimes against humanity, initiating criminal proceedings, or taking coercive measures that may affect the official. It should be mentioned that the Commission included provisions to this effect in its work on “Immunity of foreign State officials from foreign criminal jurisdiction”.<sup>14</sup>

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<sup>12</sup> See, for example, U.N. GAOR, 77th Sess., 12<sup>th</sup> plen. mtg. Sixth Committee, U.N. Doc. A/C.6/77/SR.12, (11 October 2022), para. 15; *Id.*, paras. 16-17; U.N. GAOR, 77th Sess., 1<sup>st</sup> plen. mtg. Sixth Committee, U.N. Doc. A/C.6/77/SR.1, (11 October 2022), para. 44;

<sup>13</sup> For example, U.N. GAOR, 77th Sess., 10<sup>th</sup> plen. mtg. Sixth Committee, U.N. Doc. A/C.6/77/SR.10, para. 18.

<sup>14</sup> See Report of the International Law Commission Seventy-third session, *Draft articles on immunity of State officials from foreign criminal jurisdiction adopted by the Commission on first reading*, Commentary to Draft Article 14, paragraph 15, page 268, UN Document A/77/10.



17. To conclude, Israel believes that procedural safeguards, which are a frequent feature of many legal systems and have been recommended by the Commission itself, should be incorporated in a future international convention. This would only serve to encourage more Member States to join a future convention, while preserving its noble goals.

### **E. The path forward**

18. As noted above, Israel remains supportive of the efforts to foster consensus on the recommendation of the Commission. Given the divergent views in the Sixth Committee, consensus is still a long way away. Israel believes that the process specified in resolution 77/249 allows for an inclusive and robust discussion, and will review with interest other written comments and observations submitted by UN Members. Israel also looks forward to the second resumed session to be held in April 2024, and intends to further engage and contribute to the exchange of views.