



Draft Articles on Prevention and Punishment of Crimes Against Humanity –

Comments and Observations by Israel

A. Introduction

1. At its 71st session in 2019, the International Law Commission (hereinafter: “the Commission”) adopted the Draft articles on Prevention and Punishment of Crimes Against Humanity, with commentaries



examining the potential elaboration of a future convention.⁴ 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,



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”.⁷

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.⁸ 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. T



D. Procedural safeguards

12. Israel, like numerous other States,⁹ 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.¹⁰ 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.¹¹ 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 –

⁹ See, for example, U.N. GAOR, 77th Sess., 41st plen. mtg. Sixth Committee, U.N. Doc A/C.6/77/SR.41 (Apr. 12, 2023), para 71; See also U.N. GAOR, 77th Sess., 42nd 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.

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

See paragraph (9) of the commentary to Draft Article 7. See also Footnote 422.



17. To conclude, Israel believes that procedural safeguards, which are