

INTERNATIONAL LAW COMMISSION

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Check against delivery

Crimes against humanity

Statement of the Chairperson of the Drafting Committee

Mr. Aniruddha Rajput

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Mr. Chairperson,

It gives me great pleasure to introduce the fourth report of the Drafting Committee for the sixty-ninth session of the Commission concerning the topic “Crimes against humanity”. You may recall that I introduced an earlier report of the Drafting Committee on this topic during the first part of our current session, on 1 June. That was an extensive report that reflected the discussions in the Drafting Committee and the consequential text of the draft preamble, the draft articles and the draft annex provisionally adopted by the Drafting Committee, all of which were subsequently adopted by the Commission.

In that statement, it was expressly mentioned that the Drafting Committee had concluded its deliberations based on the draft preamble and draft articles proposed by the Special Rapporteur. The question whether the present draft articles should contain a provision on ‘immunity’ was raised in the Special Rapporteur’s report, discussed in the Plenary, and referred to the Drafting Committee for consideration. However, due to paucity of time, this issue was allowed to stand over until this part of the Commission’s session, while other provisions were adopted by the Drafting Committee and thereafter adopted by the Plenary based on my last

report. Consequently, the Drafting Committee was convened on 6 July to give a thorough consideration to the topic of ‘immunity’.

Today I am introducing a further report, contained in document A/CN.4/L.892/Add.1, which contains the text, as provisionally adopted by the Drafting Committee, of an additional paragraph, namely paragraph 4 *bis*, to be inserted in draft article 6 [5].

Before addressing the details of the report being introduced today, let me, once again, pay tribute to the Special Rapporteur, Mr. Sean Murphy, whose mastery of the subject greatly facilitated the work of the Drafting Committee. I also thank the members of the Drafting Committee for their active participation and valuable contributions to the successful outcome. Furthermore, I also wish to thank the Secretariat for its assistance.

Mr. Chairperson,

I draw the Commission’s attention to the text of paragraph 4 *bis* in draft article 6 [5], as contained in the report of the Drafting Committee.

During the discussions in the Drafting Committee, three alternatives emerged. First, views were expressed that a provision on immunity should not be added. Second, views were expressed to add a provision on immunity, although no specific proposal in that regard was discussed. Third, views were expressed that, while the question of immunity should not be addressed at all, a different issue should be addressed, by including a provision on the irrelevance of a person’s official position for purposes of substantive criminal responsibility in the context of allegations of the commission of crimes against humanity. The third alternative found favour with the majority of members of the Drafting Committee.

Accordingly, the Committee decided to work on the basis of a proposal by the Special Rapporteur, which was subsequently adopted as paragraph 4 *bis*, with the formulation of the text as presently appearing before you.

The Drafting Committee noted that the inability to assert the existence of an official position as a substantive defence to criminal responsibility before international criminal tribunals is well-established in international law. The rule was expressly reflected in the Nürnberg Charter, and has appeared in a number of key instruments since then, including in the Commission's own Draft Code of Crimes Against the Peace and Security of Mankind, adopted in 1996. A recent confirmation of the rule is to be found in Article 27, paragraph 1, of the Rome Statute of the International Criminal Court of 1998. The inability to use one's official position as a substantive defence to criminal responsibility is also addressed in Article IV of the 1948 Convention on the Prevention and Punishment of the Crime of Genocide. Some members initially expressed the view that such a provision may not be necessary, since it is such an entrenched principle of international criminal law that express mention may not be necessary. But the majority view within the Drafting Committee was that not having the provision may introduce inconsistency in relation to the treaties and instruments mentioned above. Therefore, an express provision in this regard is desirable.

Accordingly, for the purpose of the draft articles on crimes against humanity, the inclusion of paragraph 4 *bis* is to be understood as meaning that an alleged offender cannot raise the fact of his or her official position as a substantive defence so as to negate any criminal responsibility. By contrast, paragraph 4 *bis* has no effect on any procedural immunity that a foreign State official may enjoy before a national or international criminal jurisdiction, which continues to be governed by conventional and customary international law. Further, the decision to include paragraph 4 *bis* is without prejudice to the Commission's work on "Immunity of State officials from foreign criminal jurisdiction."

Having agreed to base its work on the proposal of the Special Rapporteur, the Drafting Committee focused on the formulation and location of the text. As to the former, the Drafting Committee considered a suggestion to make it also explicit in the text that official position would not, in and of itself, constituted a ground for reduction of a sentence handed down for the commission of a crime against humanity. The Committee decided not to include such specification in the text, as it was adequately covered by paragraph 6 of the same draft article. According to that paragraph, States are required, in all circumstances, to ensure that crimes against humanity are punishable by appropriate penalties that take into account their grave

nature. Such language should be understood as precluding an alleged offender from invoking his or her official position as a ground for reduction of sentence.

The Drafting Committee also considered several suggestions for locating the provision elsewhere, including higher up in draft article 6 [5], possibly even as a component of paragraph 1, or as a self-standing draft article located either earlier or later in the draft articles. In the end, however, the Drafting Committee accepted the Special Rapporteur's assessment that the provision was best located in draft article 6, as part of the logical sequence following paragraph 3 (dealing with command responsibility) and paragraph 4 (dealing with the unavailability of the superior order defence). New paragraph 4 *bis* would accordingly complete the set of provisions dealing with the legal impermissibility of certain substantive defences.

The legal basis for the inclusion of the provision, which I alluded to earlier, as well as the question of relationship with the Commission's ongoing work on immunity of State officials, will be addressed in the corresponding commentary.

Finally, given the fact that the draft commentaries for the draft articles adopted in early June are in advanced stage of translation, the Drafting Committee did not itself propose a renumbering of the new and subsequent paragraphs in draft article 6 [5]. Instead, should the Commission decide to adopt the recommendation of the Drafting Committee to include a further paragraph 4 *bis* in draft article 6 [5], the Secretariat will introduce the necessary adjustments in the final report of the ILC, including renumbering the paragraphs in the draft article, and making any corresponding adjustments in the commentaries.

Mr. Chairperson,

This concludes my introduction of the fourth report of the Drafting Committee for the sixty-ninth session. It is my sincere hope that the Plenary will be in a position to adopt draft paragraph 4 *bis* to draft article 6 [5], as presented.

Thank you very much.
