

INTERNATIONAL LAW COMMISSION

Sixty-eighth session

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Crimes against humanity

Statement of the Chairman of the Drafting Committee, Mr. Pavel Šturma

21 July 2016

Mr. Chairman,

It gives me great pleasure to introduce the sixth report of the Drafting Committee for the sixty-eighth session of the Commission. The report reverts back to the topic “Crimes against humanity” and is contained in document A/CN.4/L.873/Add.1, which reproduces the text, as provisionally adopted by the Drafting Committee, of an additional paragraph, namely paragraph 7, to be inserted at the end of draft article 5.

As you may recall, I introduced an earlier report of the Drafting Committee on this topic during the first part of our current session, on 9 June. That report contained six draft articles provisionally adopted by the Drafting Committee this year, including draft article 5. At that time, I reminded the Commission that it had been suggested during the Plenary debate that the Special Rapporteur draft a “concept paper” on the issue of criminal responsibility of legal persons, for use by the Drafting Committee when addressing the six draft articles proposed by the Special Rapporteur in his second report. However, due to a lack of time, the Drafting Committee had not been able to consider the issue. The Commission subsequently decided to allocate a further meeting to the Drafting Committee to consider the question of the liability of legal persons.

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.

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Mr. Chairman,

I draw the Commission's attention to the text of draft article 5, paragraph 7, as contained in the report of the Drafting Committee. Such a provision was not included in draft article 5 as initially proposed in the Special Rapporteur's second report. Yet, the question of the liability of legal persons in the context of crimes against humanity generated much discussion during the Plenary debate. At the time, there was a divergence of views in the Commission as to the advisability of providing for such liability in the draft articles. It was in light of this debate that the Special Rapporteur was requested to draft a "concept paper" on the matter for consideration by the Drafting Committee. The Special Rapporteur subsequently presented such a paper to the Drafting Committee. The concept paper explored various options to deal with the issue, with a view to taking into account the different points of views that had been expressed in the Plenary, including: the draft articles remaining silent on the matter; inserting a without prejudice clause, which would be further elaborated in the commentaries; or developing an entire draft article on the topic, potentially modelled on article 26 of the United Nations Convention against Corruption.

In order to assist it in taking a decision on whether to include a provision on the liability of legal persons within the draft articles, the Drafting Committee also had before it a proposal by the Special Rapporteur for a new paragraph 7 in draft article 5. The provision was presented as a possible *via media* between the various approaches identified in the concept paper. The Drafting Committee took note of the fact that the formulation of the proposed paragraph 7 was based on that contained in article 3, paragraph 4, of the Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography, adopted in 2000, and which had been widely accepted by States. Currently, 173 States are parties to the Optional Protocol. The paragraph also reflected the core aspects of the corresponding article in the Convention against Corruption, and would be supplemented by an explanation in the commentary that the liability identified in the paragraph was without prejudice to the criminal liability of natural persons provided for elsewhere in the draft article.

The same divergent opinions that were voiced in the Plenary were maintained in the Drafting Committee. The key issues of contention were whether, and if so how, the liability of legal persons should be reflected in the draft articles. Various drafting options and formulations were explored, including with the aim of rendering the language of the Special Rapporteur's proposed provision more flexible or, conversely, more strict. Ultimately, a key consideration for the Drafting Committee was that the proposed provision was based on language, accepted by a large part of the international community of States, which had been intentionally drafted flexibly, as will be described shortly. Nonetheless, the differences of view could not be overcome and paragraph 7, in the formulation proposed by the Special Rapporteur, was provisionally adopted following an indicative vote.

Mr. Chairman,

Turning to the text of paragraph 7, the opening clause “[s]ubject to the provisions of its national law” is intended to accord to the State considerable discretion as to the measures that will be adopted; the obligation is “subject to” the State's existing approach to liability of legal persons for criminal offences under its national law. Such flexibility is further supplemented by an indication that a State would only be obligated to take measures where it deems it “appropriate” to do so in the context of the offences referred to in draft article 5.

The phrase “shall take measures” is intended to signal a clear obligation for States to address the liability of legal persons in the context of crimes against humanity. At the same time, as already indicated, the language of paragraph 7 provides the State with considerable flexibility to shape those measures in accordance with its national law. It acknowledges and accommodates the diversity of approaches adopted within national legal systems, including with respect to the definition of legal persons and as regards the possible measures which may be taken against legal persons.

The second sentence deals with the question of the possible measures to be taken. It provides that “[s]ubject to the legal principles of the State, such liability of legal persons may be criminal, civil or administrative.” Once again the formulation, which is the same as that found in

the Optional Protocol, is designed to allow maximum flexibility with a view to accommodating different legal traditions, hence the reference to “legal principles of the State”. The provision acknowledges the diversity of solutions adopted within national legal systems, and leaves it for each State to choose from among three options to secure the liability of legal persons, namely criminal, civil or administrative.

All of these matters will be further developed in the corresponding commentary.

Mr. Chairman,

This concludes my introduction of the sixth report of the Drafting Committee for the sixty-eighth session. It is my sincere hope that the Plenary will be in a position to adopt draft paragraph 7 to draft article 5, as presented.

Thank you very much.

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