



71th Session
of the General Assembly of the United Nations
Sixth Committee

Agenda item 83
Report of the International Law Commission on the work of its 68th session

Intervention by
Dr. Réka Varga
Head of International Law Department
Ministry of Foreign Affairs and Trade
Hungary

New York, 27 October 2016

Mr. Chairman,

The Hungarian Delegation would like to contribute to two Chapters, namely Chapter VII – Crimes Against Humanity and Chapter XI – Immunity of State Officials from Foreign Criminal Jurisdiction.

Regarding **Chapter VII (Crimes against humanity)**, the Hungarian delegation wishes to congratulate Special Rapporteur Sean D. Murphy for his detailed and comprehensive Second Report, and thank the Secretariat for providing information on existing treaty-based monitoring mechanisms which may be of relevance to the future work of the International Law Commission. By the provisional adoption of six additional draft articles (from 5 to 10, including paragraph 7 of Article 5 on the question of the liability of legal persons) together with commentaries thereto, the Commission has made enormous progress in the elaboration of a new convention in this field.

Hungary agrees with the Chairman of the Commission that since crimes against humanity still occur in today's world, strong legal measures are needed to prevent such crimes and punish the perpetrators. Therefore Hungary supports the Commission's notion to formulate draft articles with the intention that it might ultimately form the basis of a convention. Such a convention, solely by its existence, would help fight impunity and would also reflect the strong determination of the international community in this regard.

Mr. Chairman,

Turning to the specific draft articles, Hungary shares the opinion of the Commission that draft article 5, which deals with criminalization under national law, is the crucial part of the future convention for the very reason that the prosecution and punishment of perpetrators of crimes against humanity must be effective at the national level in order for the accountability mechanism to work at all. Moreover, the criminalization and punishment of crimes against humanity in national law are also necessary for effective national procedures.

I would also like to point out that it could be examined whether punishment at national level is possible based solely and directly on international law – international customary law in this case. As the Nuremberg Principles state, “[t]he fact that internal law does not impose a penalty for an act which constitutes a crime under international law does not relieve the person who committed the act from responsibility under international law”. Even though the Nuremberg Principles at the time understood this for international prosecution, it would be

worth examining whether this principle has evolved to the extent that even if internal law does not impose a penalty, national prosecution can directly be based on international law. The Hungarian Constitutional Court expressed in its decision nr. 53 of 1993 that “a typical feature of war crimes and crimes against humanity is that they are punishable irrespective of whether they were committed in breach of domestic law. (...) It is therefore immaterial whether the (...) Hungarian state fulfilled its obligation to implement (...).”¹ Thus, the Hungarian Constitutional Court held that international criminal law serves as a basis for prosecution of war crimes and crimes against humanity before national courts, and that the *nullum crimen sine lege* principle, in such a case, applies with respect to international law. The Hungarian Constitutional Court went on to say that a prosecution directly based on international law would not violate the principle of legality, because ‘*lex*’, in this case, is existent in international law, including customary law. Even though there have been examples of national proceedings where a domestic court relied directly on international law, it is regarded as a very out-of-the-box solution for national courts. Still, in our view, this issue and the practice of states in this regard would be worth further examination by the Commission.

The Report states that in order to elaborate a clear standard, its aim is to encourage harmonization in national law. To this end, draft article 5, para. 3 is modeled on the Rome Statute of the International Criminal Court. We believe that it must be clarified exactly which understanding and standard of command responsibility has a customary law nature. It must be examined, therefore, whether the formulation in the Rome Statute, namely “*should have known*” is of a customary nature and if not, whether states would consider a progressive development of customary law in this regard.

¹ “1. [...] the significance of these offences is too great to allow their punishment to be made dependent upon their acceptance by, or the general criminal-law policy of, individual States. [...] 2. It is the international community that prosecutes and punishes war crimes and crimes against humanity: it does so, on the one hand, through international tribunals, and, on the other hand, by obliging those States which wish to be part of the community of nations to undertake their prosecution. [...] (a) International law applies the guarantee of *nullum crimen sine lege* to itself and not to domestic law. ‘Customary international law’, ‘the legal principles recognised by civilised nations’ and ‘the legal principles recognised by the community of nations’ constitute a *lex* which classifies certain types of behaviour as prosecutable and punishable according to the norms of the community of nations (through international organisations or the States belonging to the international community), irrespective of whether the domestic law contains a comparable criminal offence or whether the relevant treaties have been incorporated into domestic law. The gravity of war crimes and crimes against humanity – namely the fact that they endanger international peace and security and mankind as such – is irreconcilable with leaving their punishability within the ambit of domestic laws. [...]” “In the context of these crimes, it is indeed the international community’s criminal-law power that is being exercised – under conditions and guarantees prescribed by the community of nations – through the Hungarian State’s criminal-law power.” Decision 53 of 1993 of the Hungarian Constitutional Court, Chapters IV and V.

Mr. Chairman,

Regarding the probably most thoroughly discussed part of the draft articles, namely paragraph 7 of article 5 on the responsibility of legal persons, my delegation fully accepts the fact that in order to achieve the object and purpose of the future convention, it is important to deal with the question of responsibility of legal persons. However, I have to highlight that Hungary, like many other states, does not recognize criminal liability of legal persons. Even though civil or administrative liability of legal persons is also foreseen by the draft articles, subject to national legislation, it remains to be discussed whether the existence of a paragraph on liability of legal persons that, in most national legislation, is not understood as criminal liability, has any effect on the general aim of preventing and punishing crimes against humanity. Crimes against humanity are among the most serious international crimes which must be dealt with by criminal law. Measures of other nature, such as disbandment of organizations that were involved in the commission or ordering of commission of crimes against humanity, may also be important, however, such measures are adopted at the national level irrespective of the criminal, civil or administrative liability of legal persons as it is currently foreseen by the draft articles.

Regarding draft article 10, the Hungarian delegation shares the opinion of some members of the Commission that this draft article should have replicated or made reference to Article 36 of the 1963 Vienna Convention on Consular Relations. Nevertheless, Hungary is well aware of the fact that of the approximately twenty treaties on crimes which had been concluded since 1963 and which contained a provision similar to draft article 10, not one had replicated article 36 of the Vienna Convention on Consular Relations, therefore the Hungarian delegation is ready to accept the Commission's proposal in this regard.

Finally, I would like to draw attention to the fact that the draft articles do not contain provisions on universal jurisdiction. While it is true that the existence of a customary rule on universal jurisdiction cannot be clearly established, it might be considered as *lex ferenda*. We believe that it should be examined how national laws address this issue and whether states would be ready to accept the existence of universal jurisdiction for crimes against humanity, similarly to war crimes and genocide.

Mr. Chairman,

Regarding **Chapter XI – Immunity of State Officials from Foreign Criminal Jurisdiction**, initially let me express Hungary's appreciation for the achievements of the Commission in its current session on this very topic. The Hungarian delegation has noted with satisfaction that the Commission has advanced in its work in the past year.

First of all, I would like to express Hungary's appreciation to Special Rapporteur Concepción Escobar Hernández for her efforts to prepare the Fifth Report.

The role of the International Law Commission on the question of immunity of State officials from foreign criminal jurisdiction has been viewed by States from two different perspectives: *lex ferenda* and *lex lata*. Hungary's point of view is that the task of the International Law Commission should be to – first and foremost – establish existing customary law and thus to compile international and national case law. If after identification of existing customary law, it becomes apparent that existing rules should be developed, the Commission could clarify the way of progressive development of immunity of state officials in international law.

The topic of limitations and exceptions to the immunity of State officials from foreign criminal jurisdiction raises many questions of which we would like to focus on the following controversial issues.

A major issue is the duration of immunity. While personal immunity is only granted to foreign officials for the duration of their mandate (covering acts performed during the mandate) and ceases to apply after the termination of their mandate, functional immunity is granted both during their mandate and after its termination (but the immunity only covers acts performed in the context of the mandate).

It is widely accepted that immunity *ratione personae* begins when the person concerned takes office and ends when that person leaves office. Thus, after a high-ranking state official lost his or her office, the possibility would open for prosecution. However, if a Head of State, Head of Government, member of Government or member of Parliament grants himself/herself continual titles, which can be wide enough to cover these crimes for a lifetime, it could also be considered how this conforms with the obligation to punish international crimes and immunity *ratione personae*.

Mr. Chairman,

Turning to another major issue, as it is well known, a very topical and controversial problem of contemporary international law is that of the relationship between the international norms on immunity (including those on the functional immunity of foreign officials) and international norms on obligation to prosecute gross violations of human rights, grave breaches of international humanitarian law and other major international crimes.

In our point of view, the international legal obligation to punish persons committing gross violations of human rights, grave breaches of international humanitarian law and other major international crimes should be regarded as a limit to immunity. This obligation is included in several international agreements. Hungary believes that international crimes should be considered, *prima facie*, as exceptions to immunity.

We believe that the Commission needs to take into account the developments that have occurred in international criminal law in recent decades, especially the exceptions to immunity, in a manner consistent with the rest of the norms and principles of contemporary international law, namely the fact that the way exceptions are regarded should not undermine the progress achieved in international criminal law.

I can assure you, Mr. Chairman, that Hungary will continue to follow the work of the Commission on these and other topics with great interest and will assist the work of the Commission by submitting answers on national law and practice on the given topics.

Thank you, Mr. Chairman.