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Item 142: Report of the International Law Commission on the Work of its Forty-Second Session

Statement by John Knox, United States Representative to the Sixth Committee, on the Draft Code of Offenses Against the Peace and Security of Mankind

Mr. Chairman,

In discussing the topic of the Draft Code of Offenses Against the Peace and Security of Mankind, all delegations start from a common position. We are all profoundly concerned at the spread of international crime; we all share the goal of eradicating it; and we are all extremely interested in any proposals that may contribute to that end.

It is with regret, therefore, that my delegation is unable to join those delegations that have expressed their approval of the work of the Commission on the articles of the Draft Code. Before discussing our reasons, let me state that we are following the example of the delegation of the United Kingdom, and will include specific comments on the Code in an attachment to the written copy of these remarks.

Like the distinguished delegate from Italy, we find it useful to examine the Draft Code in the light of its costs and proposed benefits. The costs are obvious, and easy to enumerate. First, they consist of the time spent by the Commission and the Sixth Committee on the topic, which causes the completion of other topics to be delayed. Second, implementation of the Code would of course cause much greater financial and economic costs, particularly if an International Criminal Court were established.

We might consider these costs manageable if the Code seemed a possible weapon against crimes such as terrorism and drug trafficking. But if the Code is a chimera that takes our attention away from more fruitful means of combatting international crime, then the costs are prohibitively high.

In determining whether the Code is likely to prove useful, the decisive question is whether it will be accepted by the international community. After examining the Commission's work from last year, we remain convinced that as the Code is now being shaped, it will not command the necessary acceptance.

There is a simple reason for this: There is no international consensus on what acts of individuals should be considered crimes against the peace and security of mankind.

Let me mention here in passing that we continue to expect that the Code is intended to apply to acts of individuals, not acts of States. The problems with taking the latter course are apparent, and need not be enumerated again now.

It is important to identify this lack of international consensus precisely. To a large extent, there is international abhorrence at many of the acts that are the subjects of the draft articles. For example, there is international agreement with regard to aggression by States in violation of the U.N. Charter. But the difficulty lies in transforming that general agreement on how States should behave into specific criminal provisions regulating individuals' actions.

We do not doubt that there are acts of individuals with regard to State aggression that the international community would agree violate international law. I need not remind the Committee of recent events in the Gulf that have underscored this point. But draft article 12 of the Code does not confine itself to defining those acts; as a result, it is too vague and overbroad to command international agreement.

The Commission faces the same problem with respect to other provisions, such as those on drug trafficking and terrorism. There is a great chasm between the general abhorrence at those acts and the specific, detailed provisions necessary to make up a criminal code. The Commission has not bridged that gap.

More fundamentally, we are not convinced that States agree on which acts should be dealt with in a universal code, rather than through specific international conventions, national laws, and agreements on enforcement. The international community has had some success drafting specific criminal provisions in certain conventions, but we have yet to be convinced that it can be done with respect to the entire field of international criminal law. The international conventions that have defined specific crimes are useful, but their relatively small number cautions us against expecting that the entire field of international criminal law is ready to be codified, and underscores the extent to which the Commission is faced with making new law.

We note that to some extent, the Commission may be planning to draw upon specific provisions from other conventions. This may avoid some problems, such as a lack of international consensus, but it raises the question whether it is useful to compile such provisions in a Code. In fact, it might even seem dangerous, in that it runs the risk of disturbing a consensus already reached.

Mr. Chairman,

We do not state that a Code of International Crimes can never be drafted. And we certainly do not mean to imply that it is impossible to identify specific international crimes upon which there can be international consensus. But attempting to codify this entire field is too much, too soon. We again encourage the Commission to spend its time on more useful endeavors.

Mr. Chairman,

We appreciate the Commission's work on an International Criminal Court. Their outline of issues and options is a useful basis for more detailed analysis of such a court, and of the problems of enforcing international offenses generally.

It has been suggested that the Court could operate, at least at first, independently of the Draft Criminal Code, and adjudicate a narrower range of crimes, such as those defined in existing international conventions. This would avoid our problems with the Code. A Code without a Court would seem unhelpful, but a Court could perhaps be of use without a Code.

We would point out, however, that there are effective national and international systems in place to respond to such crimes. Of course, we are always interested in possible means of improving the prosecution of international crimes. But it is still not clear to us that the Court would contribute to the existing system. There is in fact a danger, as the Commission notes in paragraph 118 of its Report, that the Court would disrupt satisfactory implementation of the existing system. This is a real danger, and one that we believe should be considered very carefully.

The fundamental question here is how the Court would work with existing national and international systems of criminal law enforcement. There are also a host of practical questions that must be addressed before States can decide whether the Court would complement, or interfere with, the existing system.

For example, what rules of evidence and procedure would the Court apply? How would evidence be obtained? Who would conduct the investigation and prosecution, and who would make the crucial decisions as to which individuals should be prosecuted? It would appear that the Court might require a large prosecution arm and a penal facility. What will these cost? How will they be administered? And, most important, how will the answers to these questions affect the current system of national and international enforcement?

These are not merely questions of implementation. They are fundamental, and must be answered before it is possible to decide whether the Court is worthwhile.

Mr. Chairman, given the relatively early stage of the Commission's consideration of these questions, the United States believes that the Commission should not be asked now to focus its analysis on a particular type of Court. Instead, we would suggest that the Commission be requested to continue its analysis in more detail, with particular emphasis on the practical questions attendant on the Court's relationship to the existing system of enforcement.

After we have had time to consider the Commission's more detailed analysis, we will all be in a better position to evaluate which model of International Criminal Court, if any, will be most likely to improve the ability of the international community to combat crimes that affect us all.

Mr. Chairman,

In addition to detailed comments on the articles of the Code, we have attached to the written copy of our remarks answers to the two specific questions raised by the Commission on the topic of International Liability for Injurious Consequences Arising out of Acts Not Prohibited by International Law.

With regard to this topic in general, the United States has not changed its view that the Commission should reconsider its objective of drafting articles for inclusion in a convention on this topic, at least for the time being. As with the draft articles for a Criminal Code, the development of draft articles for inclusion in a convention appears to be much too ambitious a task at the moment, given the lack of consensus in the area. The United States therefore reiterates its suggestion that the Commission consider limiting itself to the production of draft general principles on this topic, which would serve to assist States considering related specific questions.

Thank you, Mr. Chairman.