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REPORT OF THE INTERNATIONAL LAW COMMISSION
THE DRAFT CODE OF CRIMES

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SIXTH COMMITTEE
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Mr. Chairman, it is a great honor for me to address this Committee today. Under your leadership, we look forward to a rich and interesting debate on the report of the International Law Commission.

We also thank Professor Mahiou for his clear and interesting introduction. Under his able leadership, and building on the wisdom and hard work of many individual members, the Commission made important breakthroughs this year.

Introduction

I shall begin with some brief comments on the highlights of the Commission's work during its memorable 1996 session. We shall consider each of these in greater detail at the appropriate stage in the debate. We will also in due course try to address the challenges and tasks that the Commission's report presents to Governments.

This was a notable year in the history of the Commission. The ILC completed its work on the Code of Crimes, a controversial project that has lingered on its agenda for many years. It completed the first reading of the draft articles on State responsibility, another project that long has been on the agenda. These will allow governments to take a hard look at this important subject and to offer constructive comments and criticisms. The Commission also asked governments some important questions concerning the future work on the regime of liability for hazardous activities. These are questions that need to be answered in order for the Commission to develop a sensible program for future work. We also applaud the Commission's constructive examination of its program, procedures, and working methods.

The Code of Crimes

Mr. Chairman,

Our debate begins this morning with the Draft Code of Crimes Against the Peace and Security of Mankind. The General Assembly first requested this work in November of 1947, forty-nine years ago. For twenty-seven of those years, work on the Code lay dormant while the international community wrestled with the problem of defining aggression. The project has been marked by years of controversy and difficulty, reflecting the difficulty and importance of the matters involved.

After all these years, a completed Code is at last before us for consideration. The articles and the accompanying commentaries are rich and detailed, reflecting much work by the Commission and the Special Rapporteurs. This text will require careful study and reflection, both by foreign ministries and by other agencies concerned with international criminal jurisdiction.

My government, like others, has for many years indicated grave reservations about prior versions of this text. It is clear, however, that the Commission has listened to governments' expressions of concern. The draft Code now before us reflects a process of dialogue between governments and the Commission. The Commission has sought, with considerable success, to address many legitimate and deeply held concerns. This is a much improved Code that deserves the close attention of governments. There are, however, a number of provisions that are innovative or that take the law beyond its present state.

My task here is not to offer a comprehensive or detailed analysis of the draft Code. Rather, I would like to offer a few general comments and observations.

First, we are pleased that the Commission decided to limit the scope of the draft Code to a core group of serious offenses generally recognized by the international community as involving matters of special gravity. Last year, we joined many other delegations in questioning the inclusion of international terrorism, illicit traffic in narcotic drugs, and "environmental crimes" within the scope of the draft code. The Commission wisely and correctly decided to omit these matters from its final text.

We further appreciate the clarifications of the mental states required for commission of crimes and the definitions of key terms or concepts that are set forth in the commentaries. It may be worth considering whether in some cases it would be more appropriate to have certain aspects of the crimes defined with greater specificity in the articles themselves.

Turning to the article on aggression, we have in the past noted our concerns over the previous definition of the offense of aggression. In its earlier work, the Commission drew from General Assembly Resolution 3314, and from Article 2(4) of the Charter in seeking to define aggression. We did not think that these provided an adequate basis for drafting a criminal law definition, nor did they properly reflect the historical roots of the crime of waging aggressive war in the aftermath of World War II.

In its current text, the Commission appropriately recognized that the draft Code was concerned with the conduct of individuals, not States. It consequently focused on the individual conduct that would be punishable. The Commission sought to ground itself on the Nuremberg precedent when it identified active participation in or ordering the planning, preparation, initiation or waging of aggression committed by a State.

We appreciate the analysis that led the Commission to this result in its desire to complete the Code. The concept of aggression is a difficult one to define; the historical precedents do not offer clear guides. That is why in the context of the negotiations on the international criminal court, we have urged that aggression not be included within the jurisdiction of the proposed new court at this stage. In Article 16, the ILC undertook a serious and considered effort that deserves further reflection.

As to the text on crimes against humanity, which we believe is generally fine, there are some areas that warrant further study. For example, we are interested in further examining the Commission's requirement that an enumerated act be "instigated or directed by a government, any organization, or group," which was included to exclude the situation where an individual commits an inhumane act while acting on his own initiative. It needs to be considered whether this formulation is not overly broad or vague.

Additionally, we have some questions with respect to particular enumerated acts. For example, the Code would deem as a crime against humanity the practice of enforced or involuntary disappearance. While enforced disappearance is a loathesome practice, we are not sure that it appropriately constitutes a matter for universal and international criminal jurisdiction. At the least, these terms could be defined more precisely so that it is clear they encompass recognized criminal conduct.

Next, my government appreciates the Commission's inclusion in the draft Code of crimes against UN and associated personnel. The article provides that certain actions, when committed intentionally and in a systematic manner or on a large scale, against UN and associated personnel constitute crimes against the peace and security of mankind. As a signatory of the Convention on the Safety of United Nations and Associated Personnel, we support in principle this provision, and will study it in further detail in the context of this Code. It may be that certain of the key terms in this article could be defined more precisely in the article itself.

Finally, regarding the Code's proposed descriptions of covered war crimes, the Commission sought to draw a line between those war crimes which are to be left to national jurisdiction and those which are of such consequence as to constitute crimes against the peace and security of mankind. We want to consider further whether the formulation suggested for making the distinction is adequate to the task.

Also, the Code appears to draw in several instances on provisions of Additional Protocols I and II to the 1949 Geneva Conventions. Neither these instruments, nor the concepts drawn from them in this connection, are universally accepted. With the guide of some of the commentary, we want to examine closely the extent to which the provisions in this article are based on conventional or accepted customary law. For example, we have doubts that the provision on damage to the natural environment merits inclusion in the draft Code.

Future Work

Mr. Chairman,

This concludes our preliminary observations and comments on the draft Code. I would like to turn now to the question of next steps in our consideration of this important item.

We emphasize again the need for all governments in the first instance to have further opportunity to study more deliberately and carefully the draft Code. This process should involve all parts of our governments concerned with matters of international criminal jurisdiction.

As part of this process, each of us should consider the implications of the draft Code for the ongoing negotiations regarding establishment of an international criminal court. As many speakers noted in their statements on the agenda item on the establishment of the proposed court, there is much in the draft articles and the rich commentary that may inform and assist governments in their work on the court. However, we must be careful not to impede or disrupt the work now underway on the international criminal court, nor to impair the thoughtful, independent review that the draft Code requires.

Accordingly, we believe the most appropriate course at this time would be for this Committee and the General Assembly to transmit the Code to governments for their complete assessment and comment. Once these comments are received and collected, we can determine at that time what further steps might be appropriate.

We offer our comments and suggestions in a positive spirit, and in recognition of the International Law Commission's notable work to improve and complete the draft Code of Crimes against the Peace and Security of Mankind.

Thank you, Mr. Chairman.