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**Eighth report on the draft Code of Crimes Against the Peace and Security of Mankind by  
Mr. Doudou Thiam, Special Rapporteur**

Topic:  
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draft statute for an international criminal court**

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## Introduction

1. The present report, which is the eighth in the series of reports submitted by the Special Rapporteur to the International Law Commission on the draft code of crimes against the peace and security of mankind, is in three parts.

2. Part I concerns the "related offences" or "other offences"—i.e. complicity, conspiracy (*complot*) and attempt—which the Special Rapporteur had occasion to discuss in his fourth report<sup>1</sup> and on which he is submitting draft articles, accompanied by comments.

3. Part II concerns international drug trafficking, pursuant to the Commission's decision, at its forty-first

session, to request the Special Rapporteur to prepare a draft provision on the question.<sup>2</sup> In the light of the views expressed by several members of the Commission,<sup>3</sup> the Special Rapporteur is submitting two draft articles, accompanied by comments, one defining international drug trafficking as a crime against peace and the other defining it as a crime against humanity.

4. Part III deals in a preliminary manner with the question of the statute of an international criminal court, for which the Special Rapporteur offers the Commission various possible solutions.

<sup>1</sup> *Yearbook* . . . 1986, vol. II (Part One), pp. 63 *et seq.*, document A/CN.4/398, paras. 89-145.

<sup>2</sup> *Yearbook* . . . 1989, vol. II (Part Two), p. 65, para. 210.

<sup>3</sup> *Ibid.*, paras. 205-209.

## PART I. COMPLICITY, CONSPIRACY (*COMPLIT*) AND ATTEMPT

### A. Complicity

#### 1. DRAFT ARTICLE 15

5. The Special Rapporteur proposes the following draft article 15:

#### *Article 15. Complicity*

The following constitute crimes against the peace and security of mankind:

1. Being an accomplice to any of the crimes defined in this Code.

[2. Within the meaning of this Code, complicity may mean both accessory acts prior to or concomitant with the principal offence and subsequent accessory acts.]

#### 2. COMMENTS

##### (a) *Remarks on methodology*

6. Before article 15 is considered, a question of methodology must be resolved. Some members of the Commission maintained that the concept of complicity should be included in the general part of the draft code, dealing with general principles, rather than in the part dealing with the crimes themselves. The Special Rapporteur does

not agree. It is no doubt axiomatic that the accomplice incurs the same criminal responsibility as the principal. But the affirmation of this principle is one thing, and the definition of the crime of complicity itself is another. Complicity, as a crime, should be included in the part of the code dealing with the definition of offences.

(b) *Paragraph 1*

(i) *Physical and intellectual acts of complicity*

7. Acts of complicity can be divided into two categories: physical acts (aiding, abetting, provision of means, gifts etc.) and acts which are intellectual or moral in character (counsel, instigation, provocation, orders, threats etc.).

8. Aiding, abetting, and provision of means and gifts are specific physical acts. In the case of acts in this category, it is relatively easy to draw a distinction between the principal—the person who has killed, for example—and the accomplice—the person who aided and abetted the principal or provided him with the means to kill.

9. The problem is more complex in the case of acts of an intellectual character. It is sometimes difficult to determine who is the principal and who the accomplice: the person who inspired, instigated or ordered an act, or the person who actually committed it. In such situations, those who ordered, inspired or instigated the commission of a criminal act have sometimes been considered as “originators” (*auteurs intellectuels*), sometimes as indirect perpetrators and sometimes as accomplices. On other occasions, those who gave the order and those who executed it have been considered as co-perpetrators. Everything depends on the circumstances of the case and the degree of participation of the persons involved, and also on the legal system.

10. It is for this reason that the laws of some countries provide examples in which superiors are considered the accomplices of their subordinates. Thus, the French Ordinance of 28 August 1944 on the punishment of war crimes (art. 4) provides that where a subordinate is prosecuted as the actual perpetrator, and his superiors cannot be indicted as being equally responsible, they shall be considered as accomplices in so far as they have organized or tolerated the criminal acts of their subordinates. A similar approach is taken in the Luxembourg Act of 2 August 1947 on the punishment of war crimes (art. 3), the Greek Constitutional Act. No. 73 of 8 October 1945 on the trial and punishment of war criminals (art. 4) and the Chinese Act of 24 October 1946 on the trial of war criminals (art. 9).

11. The United States Supreme Court, in the *Yamashita* case, considered that complicity could result from an army commander's breach of his duty to control the troops under his command, which in the case in question had led to serious violations of the laws and customs of war.<sup>4</sup>

<sup>4</sup> See *Law Reports of Trials of War Criminals* (15-volume series, prepared by the United Nations War Crimes Commission) (London, H.M. Stationery Office, 1947-1949), vol. IV, p. 43; and *United States Reports* (Washington, D.C., 1947), vol. 327, pp. 14-15.

12. Along the same lines, one may also cite the judgment of the International Military Tribunal for the Far East, which extended this complicity to members of the Government and to all officials concerned with the well-being of protected persons.<sup>5</sup> Again, in the *Hostages* case, a presumption of responsibility was established in the case of corps commanders for acts committed by their subordinates which they “knew or ought to have known about”.<sup>6</sup>

13. These examples show that there is no hard and fast distinction between the concepts of principal perpetrator, co-perpetrator and accomplice. The content of these concepts varies from one penal code to another. The difficulty of establishing precise criteria for distinguishing between accomplices, principal perpetrators, co-perpetrators and so on probably explains why the Charters of the International Military Tribunals referred, in the same articles and without distinction, to “leaders, organizers, instigators and accomplices” (art. 6 *in fine* of the Charter of the International Military Tribunal<sup>7</sup> and art. 5(c) of the Charter of the International Military Tribunal for the Far East),<sup>8</sup> or again, any person who “was an accessory to the commission of a crime or ordered or abetted the same or took a consenting part therein” (art. II, para. 2, of Law No. 10 of the Allied Control Council).<sup>9</sup> These brief references illustrate the scope of the concept of complicity and the variety of its content, which are reflected both in the acts of complicity and their characterization and in the status of those committing such acts.

(ii) *Acts of complicity and their characterization*

14. Penal codes vary in their approach to the different categories of acts of complicity. Thus, some codes do not qualify counsel as a crime (for example, the French Penal Code). Others, on the other hand, consider that counsel to commit a crime is an act of complicity. The Canadian Criminal Code, for example, defines counsel as the act of procuring, abetting or leading a person to commit an offence (art. 22).

15. Concerning another aspect of the question, it may be observed that in the laws of some countries negative acts such as abstention or non-intervention are not defined as crimes or are so defined only on very rare occasions (for example, the French Ordinance of 28 October 1944 on the punishment of war criminals). In the laws of other countries abstention is defined as a crime; this is the case in German law.

<sup>5</sup> See *Law Reports of Trials . . .*, vol. XV, pp. 72-73.

<sup>6</sup> See *Trials of War Criminals before the Nuernberg Military Tribunals under Control Council Law No. 10* (Nuernberg, October 1946-April 1949) (15-volume series, hereinafter referred to as “American Military Tribunals”) (Washington, D.C., U.S. Government Printing Office, 1949-1953), case No. 7, vol. XI, p. 1303.

<sup>7</sup> Hereinafter referred to as the “Nuernberg Charter”, annexed to the London Agreement of 8 August 1945 for the prosecution and punishment of the major war criminals of the European Axis (United Nations, *Treaty Series*, vol. 82, p. 279).

<sup>8</sup> See *Documents on American Foreign Relations* (Princeton University Press), vol. VIII (July 1945-December 1946) (1948), pp. 354 *et seq.*

<sup>9</sup> Law relating to the punishment of persons guilty of war crimes, crimes against peace and against humanity, enacted at Berlin on 20 December 1945 (Allied Control Council, *Military Government Legislation* (Berlin, 1946)).

16. This diversity is also reflected in the actual characterization of the act of complicity. An act regarded as an act of complicity in one legal system will be considered a separate offence in another system. The typical example is concealment.

17. Sometimes, the characterization has evolved over time within the same system of law. For example, the French Penal Code, between 1810 and 1915, then from 1915 to the present day, has made various changes in the classification of the concept of concealment: in the 1810 Code concealment was characterized as an act of complicity, then in 1915 as an autonomous offence.

18. Generally speaking, when an act of complicity has certain specific features or attains a certain degree of seriousness, there is a tendency to detach it from complicity and make it a separate offence. This rule also applies in international law. Thus, following the judicial precedents set in the *Yamashita* case<sup>10</sup> and others, complicity by a military commander was made an autonomous offence under article 86, paragraph 1, of Additional Protocol I to the 1949 Geneva Conventions.<sup>11</sup> These successive and diverse characterizations demonstrate the complexity and evolutionary character of the content of the concept of complicity.

(iii) *The actors*

19. On turning to the actors in the drama, those who play a role in complicity, we again note the existence of grey areas, areas of uncertainty. To find a way among the concepts of principal perpetrator, co-perpetrator, direct perpetrator, indirect perpetrator and accomplice is a most uncertain undertaking.

20. The laws of some countries do not define the perpetrator: for example, the 1810 French Penal Code, the 1871 German Code, the 1889 Finnish Code, the 1902 Norwegian Code, the 1930 Danish Code, the 1930 Italian Code, the 1932 Polish Code, the 1937 Chinese Code, the 1940 Icelandic Code, the 1950 Greek Code, the 1951 Yugoslav Code and the 1954 Greenland Code.

21. The penal codes of other countries, however, do define the perpetrator: these include the 1867 Belgian Code (art. 66), the 1879 Luxembourg Code (art. 66), the 1881 Netherlands Code (art. 47), the 1886 Portuguese Code (art. 20), the 1932 Philippine Code (art. 17), the 1936 Cuban Code (art. 28), the 1951 Egyptian Code (art. 39), the 1944 Spanish Code (art. 14), the 1951 Bulgarian Code (art. 18), the 1957 Ethiopian Code (art. 32), the 1961 Soviet Code (art. 17), the 1961 Hungarian Code (art. 13), and the 1961 Czechoslovak Code (art. 9).

22. This uncertainty regarding definition becomes perplexity if one seeks to assign the actors to one category or another and to determine the precise role played by each. Reduced to its simplest terms, complicity involves two actors: the physical perpetrator of the offence (thief, murderer etc.), called the principal, and the person who assists the principal (by aiding, abetting, provision of

means etc.), who is called the accomplice. But this simple schema does not reflect the complex reality of the phenomenon of complicity in the context of the topic under consideration. As we have just seen, situations may arise in which it is hard to tell who is the principal and who is the accomplice, especially when acts of an intellectual or moral character (counsel, incitement, order, abuse of authority) are involved. There, the hierarchical relationship which sometimes exists between the actual perpetrator of the act and his superior makes it difficult to conceive of the latter as the accomplice of the former, in so far as the role of the accomplice is acknowledged to be a secondary one. That is the reason why such offences are sometimes separated from complicity and characterized separately. This is so in the case of a military commander who is held responsible for crimes or offences committed by his subordinates, as we have already seen.

23. It should also be noted that the giving of orders and counsel is sometimes difficult to prove when it has not been done in writing. Moreover, those who have given an order are very often not present when it is carried out; sometimes, as in the case of leaders or organizers, they are not even informed of every offence committed in application of the general plan which they drew up and which guided the conduct of those who committed the offences. This case will be analysed at greater length in connection with draft article 16, on conspiracy (*complot*) (para. 46 below). As regards the offences under discussion here, the traditional moulds are broken. The classic dichotomy of principal and accomplice, which is the simplest schema, is no longer applicable because of the plurality of actors. The dualistic classification gives way to the broader concept of participants, which encompasses both principals and accomplices. It might sometimes be wondered whether all the actors should not be defined as participants, without it being necessary to determine the precise role played by each of them.

24. In their decisions, military tribunals have sometimes refused to draw a distinction between principals and accomplices. For example, the Supreme Court of the British Zone considered that the act of complicity and the principal act were both crimes against humanity and that consequently accomplices should be sentenced for having committed a crime against humanity and not for being accomplices in the commission of such a crime.<sup>12</sup> The acts in question—whether principal acts or accessory acts—are all acts of participation and are not subordinate to each other in any way. They are equivalent as regards responsibility, even if certain subjective considerations, such as intent or degree of awareness, come into play in the imposition of the penalty.

25. At this level of analysis, the distinction between principal act and accessory act disappears completely and the two concepts merge in the more general concept of criminal participation, which encompasses both. The distinction between the concepts of principal and accomplice likewise disappears, giving way to the concept of participant, which is applied to all those involved in a crime

<sup>10</sup> See footnote 4 above.

<sup>11</sup> Protocol relating to the protection of victims of international armed conflicts, adopted at Geneva on 8 June 1977 (United Nations, *Treaty Series*, vol. 1125, p. 3).

<sup>12</sup> *Entscheidungen des Obersten Gerichtshofes für die Britische Zone in Strafsachen* (Berlin, 1949), vol. 1, p. 25 (cited in H. Meyrowitz, *La répression par les tribunaux allemands des crimes contre l'humanité et de l'appartenance à une organisation criminelle en application de la loi n° 10 du Conseil de contrôle allié* (Paris, Librairie générale de droit et de jurisprudence, 1960), p. 373).

committed through participation. This is the principle of placing all participants in a crime on an equal footing.

26. In its broadest sense, the concept of criminal participation encompasses not only the traditional concept of complicity, but also that of conspiracy (*complot*), so that both concepts could have been covered in a single provision under the heading of criminal participation. The Special Rapporteur has nevertheless preferred to devote separate articles to complicity and conspiracy (*complot*), while bearing in mind that the content of these concepts changes as soon as they are transposed to international law, because of the mass nature of the crimes involved and the plurality of acts and actors (which makes it difficult to define the roles played by the various actors).

27. The complexity of the concept of complicity is also reflected in the links of causality between the act of complicity and the commission of the principal offence. This raises the problem of whether the act of complicity was committed before or after the offence, which is dealt with in paragraph 2 of draft article 15.

### (c) Paragraph 2

28. Paragraph 2 concerns the question whether the act of complicity was committed before or after the principal act. Is the concept of complicity limited to acts committed prior to or concomitantly with the principal act? Can it also encompass acts committed after the principal act? Here again the solutions vary according to the legal system.

29. For certain legal systems, acts committed after the principal act constitute autonomous offences, even if they are linked to the principal act. This is the case with concealment of persons or property or non-denunciation of the offence. This method is generally said to be that of the Continental legal systems, as opposed to the common-law systems. It is not the intention here to undertake a comparative law study but simply to choose some examples which illustrate the point. Thus, the Canadian Criminal Code<sup>13</sup> contains, in section 23 (1), a specific provision concerning the accessory after the fact, which reads:

23. (1) An accessory after the fact to an offence is one who, knowing that a person has been a party to the offence, receives, comforts or assists him for the purpose of enabling him to escape.

30. This *post factum* offence is based on the idea that participation is not limited to a link to an offence to be committed in the future or in the course of being committed, but may also be linked to an offence already committed. It is therefore not absolutely necessary that there should be a causal relationship between the act of the accomplice and the offence itself.

31. This concept, today too closely linked to the common law, derives from Roman law, which drew a distinction between various phases in the *cursus plurium delictum*: *antecedens*, *concomitans*, *subsequens*. We have seen that in 1810 the French Penal Code still made concealment an offence of complicity. Not until a later stage was concealment of property defined as a specific crime. And

even today, concealment of wrongdoers (art. 61, first para.) remains a crime of complicity.

32. Today, there are no longer two separate legal systems, one of which limits the definition of complicity to prior or concomitant acts of participation, while the other includes also acts committed later. There is, rather, a diversity of approaches in this domain.

33. Contemporary Continental law refers also to acts of complicity committed after the principal offence. Thus, the 1975 Penal Code of the German Democratic Republic provides, in article 22, paragraph (2), 3, that "as a participant in a punishable act a person is criminally responsible who . . . renders the perpetrator previously promised assistance after the act (aiding and abetting)". According to French judicial practice, aiding or abetting after the commission of an offence constitutes complicity if it results from a prior agreement.<sup>14</sup> Under the Penal Code of the Federal Republic of Germany, "whoever renders assistance to a person who has committed an unlawful act with the intention of securing for him the fruits of that crime" (art. 257, para. 1) and "whoever, acting intentionally or knowingly, obstructs, either altogether or partially, the imposition of criminal punishment . . . on another for an unlawful act" (art. 258, para. 1) shall be prosecuted for complicity. Soviet penal law acknowledges a form of complicity subsequent to the principal offence. According to Igor Andrejew, this concept is based on the idea of "contact", i.e. on a direct link between the subsequent act and the offence committed previously.<sup>15</sup>

34. Turning to international criminal law, it should be recalled that the international military tribunals applied this extended concept of criminal participation in their decisions. In the *Funk* case, the accused, in his capacity as Minister of Economics and President of the Reichsbank, had signed an agreement with the SS under which they delivered to the Reichsbank the valuables and gold, including that obtained from spectacles and false teeth, that had belonged to murdered Jews. The Nürnberg Tribunal was of the opinion that there had been express or tacit consent on the part of Funk to acts of concealment of goods improperly acquired subsequent to the death of their owners. According to the Tribunal: "Funk has protested that he did not know that the Reichsbank was receiving articles of this kind. The Tribunal is of the opinion that he either knew what was being received or was deliberately closing his eyes to what was being done."<sup>16</sup>

35. These examples prove that any attempt at rigid classification in this matter is a risky undertaking. It would probably be preferable to simplify in this area, in one way or another.

36. The resolution on the question of the modern approach to the concepts of principal and participation in

<sup>14</sup> Judgment of 30 April 1963 of the Criminal Chamber of the Court of Cassation (*Bulletin des arrêts de la chambre criminelle de la Cour de cassation* (Paris), No. 157).

<sup>15</sup> I. Andrejew, *Le droit pénal comparé des pays socialistes* (Paris, Pedone, 1981), pp. 61 *et seq.*

<sup>16</sup> See *Trial of the Major War Criminals before the International Military Tribunal* (Nuremberg, 14 November 1945-1 October 1946) (official English text, 42 volumes) (Nürnberg, 1947-1949), vol. I, p. 306; cited in Meyrowitz, *op. cit.* (see footnote 12 above), p. 377.

<sup>13</sup> See *Revised Statutes of Canada 1970* (Ottawa, 1970), vol. II, p. 1505.

the offence adopted by the Seventh International Congress of Penal Law, held at Athens in 1957, stated: "Acts of subsequent assistance not resulting from a prior agreement, such as concealment, should be punished as special offences" (sect. B, para. 5).<sup>17</sup>

37. It is true that legal writers tend to detach this *post factum* participation from complicity. Despite this tendency, however, it must be acknowledged that in this area penal legislation is not yet uniform and that indeed, as we have seen, great diversity exists. Since the Special Rapporteur cannot propose a single rule without denying the coexistence of these two tendencies, he has felt it preferable to propose a text which takes that coexistence into account. That is the purpose of paragraph 2 of draft article 15, which is placed in square brackets.

(d) *Conclusion*

38. These comments lead to the conclusion that in international criminal law complicity is a very broad concept, not only because of the innumerable quantity and diversity of the acts and actors involved in criminal participation but also because of the scope of its application in time, which may cover both acts committed before the principal offence and acts committed afterwards. To use the terminology of the theatre, it may be said that, among the crimes under consideration, complicity is a drama of great complexity and intensity.

**B. Conspiracy**

1. DRAFT ARTICLE 16

39. The Special Rapporteur proposes the following draft article 16:

*Article 16. Conspiracy*

**The following constitute crimes against the peace and security of mankind:**

**1. Participation in a common plan or conspiracy to commit any of the crimes defined in this Code.**

**2 (FIRST ALTERNATIVE). Any crime committed in the execution of the common plan referred to in paragraph 1 above attaches criminal responsibility not only to the perpetrator of such crime but also to any individual who ordered, instigated or organized such plan, or who participated in its execution.**

**2 (SECOND ALTERNATIVE). Each participant shall be punished according to his own participation, without regard to participation by others.**

2. COMMENTS

(a) *Paragraph 1*

40. Paragraph 1 characterizes conspiracy, namely participation in a common plan with a view to committing a crime against the peace and security of mankind, as a crime.

41. There are two degrees of conspiracy. The first degree consists in agreement, namely a concordance of intentions or an accord between two or more individuals with a view to committing a crime. The second degree concerns physical acts to carry out the crime planned.

42. Paragraph 1 concerns agreement. If the draft code makes agreement a separate offence, regardless of any physical act, it will do so in order to act as a deterrent. The aim would be to prevent individuals from exonerating themselves on the basis of the argument that they did not participate in the physical act of implementing the proposed plan.

43. Mere agreement to formulate a criminal plan is, in and of itself, a crime against the peace and security of mankind. Such a characterization is not peculiar to the crimes under consideration. In many legal systems criminal agreement is a crime, in and of itself, even if it is not followed by a physical act.

(b) *Paragraph 2*

(i) *First alternative*

44. Paragraph 2 concerns the second phase of conspiracy, namely the execution of the common plan. It combines the concepts of collective responsibility and individual responsibility: any act by any of the participants with a view to executing the common plan simultaneously attaches criminal responsibility to the perpetrator of such act and to all the participants in the conspiracy.

45. This twofold responsibility of participants was laid down in the Nürnberg Charter (art. 6 *in fine*). Some members of the Nürnberg Tribunal entered major reservations in respect of this twofold responsibility. They considered it unacceptable to hold an individual responsible for crimes that he had not personally committed. Other members, on the other hand, were in favour of strict implementation of the last paragraph of article 6 of the Charter, which was based on the definition of the theory of conspiracy put forward by Chief Prosecutor Jackson.<sup>18</sup> According to the Chief Prosecutor, conspiracy implies a twofold responsibility: individual responsibility and collective responsibility. In a common plan, each individual is responsible not only for acts committed by him personally in execution of the plan but also for all acts committed by anyone else who participated in the plan, even if the person concerned was not present when the acts in question were committed and was not even informed of their commission.

46. The provision contained in the last paragraph of article 6 owes its existence to the emergence of a hitherto barely known category of participants, namely organizers. In this context, an organizer is regarded as the individual who conceived of, organized or directed the crime. This type of participation is unquestionably the most dangerous one occurring in our time. Leaders and organizers are not always visible. They conceive of the crime, give orders, but stay away from the theatre of operations. Since they are not present when the plan is executed, they do not have knowledge of every offence

<sup>17</sup> See *Actes du VI<sup>e</sup> Congrès international de droit pénal* (Athens, 26 September-2 October 1957), *Compte rendu des discussions* (Athens, 1961), p. 349.

<sup>18</sup> In this connection, see the fourth report by the Special Rapporteur, document A/CN.4/398 (footnote 1 above), para. 123.

committed by those who execute their orders, particularly when the offences in question are numerous and of a diverse and mass nature. That was so in the case of the major war criminals, who therefore had to be held responsible under the Nürnberg Charter not only for the conception and organization of the criminal activity but also for every individual crime committed in execution of the plan formulated by them.

47. This special responsibility of organizers was clarified in particular by the Soviet jurist A. N. Traïnin, who became a member of the Soviet delegation to the 1945 London Conference. In his study, published in Moscow in 1944,<sup>19</sup> Traïnin distinguishes between two categories of responsible individuals: direct perpetrators of the crime and indirect perpetrators—namely, responsible government officials, members of a military command, financial and economic leaders, etc. Those indirect perpetrators are organizers. Even although they bore a greater responsibility, they would have entirely escaped punishment if only the direct perpetrators of the crimes organized by them had been prosecuted. The last paragraph of article 6 of the Nürnberg Charter is based on this idea, but it was Chief Prosecutor Jackson who, where the Tribunal was concerned, linked the idea to the conspiracy theory and gave it the twofold content of individual responsibility and collective responsibility.

48. It should be noted that the words *complot* and *conspiracy* are synonymous in the Nürnberg Charter and that they correspond to each other in the English and French texts of the Charter.

49. The solution chosen by the Nürnberg Tribunal consisted in limiting the application of conspiracy to crimes against peace. The Tribunal was of the view that the crimes against peace referred to in article 6(a) of its charter, namely “planning, preparation or waging of a war of aggression, or a war in violation of international treaties, agreements or assurances”, could be committed only by responsible government officials linked with one another by collective responsibility.

50. In its 1954 draft code<sup>20</sup> the Commission, unlike the Nürnberg Tribunal, extended the concept of conspiracy to cover all crimes against the peace and security of mankind. Article 2, paragraph (13) (i), of the 1954 draft referred to “conspiracy to commit any of the offences defined in the preceding paragraphs of this article”. That represented a considerable extension.

51. In many legal systems, the concept of conspiracy has traditionally been applied more to crimes against the State. It is the State that is the target when crimes are directed against its institutions, its territorial integrity or its security.

52. This definition would appear to be too restrictive in the case of crimes against the peace and security of mankind. The State is not the only entity involved; there are others, including ethnic, religious and cultural entities. Crimes committed against those entities are precisely

those which constitute crimes against humanity. Genocide and *apartheid* are thus not directed against a State but against ethnic entities. Moreover, the concept of *complot* or conspiracy was included in the conventions on genocide and *apartheid*.

53. It should be pointed out, furthermore, that the Nürnberg Tribunal’s restrictive interpretation was not uniformly followed by all the military tribunals. For example, the concept of collective responsibility was applied in the *Pohl* case, which did not involve a crime against peace. The United States Military Tribunal stated in the judgment it rendered:

The fact that Pohl himself did not actually transport the stolen goods to the Reich or did not himself remove the gold from the teeth of dead inmates, does not exculpate him. This was a broad criminal program, requiring the co-operation of many persons, and Pohl’s part was to conserve and account for the loot. Having knowledge of the illegal purposes of the action and of the crimes which accompanied it, his active participation even in the after-phases of the action makes him particeps criminis in the whole affair\*.<sup>21</sup>

54. Today, the ever-greater need to deal more and more with the continuing growth of collective crime and with the new problems to which it gives rise must be met by means of legal solutions that are geared better to punishment requirements. The argument between those in favour of individual responsibility and those in favour of collective responsibility is thus gradually subsiding.

55. Major crimes can no longer be regarded as acts committed by isolated individuals. It is private individuals, organized in associations or groups in order to increase the impact of their action, and sometimes also officials holding a high political, civil or military position, who commit or abet the commission of the crimes under consideration. The law therefore responds to this new dimension of crime by providing a new definition of criminal responsibility, which in the cases in question takes a collective form, since it is becoming increasingly difficult to determine the role played by each participant in a collective crime.

56. It was above all the twofold responsibility implied by the concept of conspiracy that gave rise to reservations by some members of the Nürnberg Tribunal. Henri Donnedieu de Vabres, who had been the French member of the Tribunal, indicated in this connection that it was “an interesting but somewhat far-fetched construction”.<sup>22</sup> That eminent jurist would perhaps have a different opinion today.

57. Studying the phenomenon of collective crime, Roger Merle and André Vitu indicate that:

The legal problems to which these collective offences give rise no longer occur in quite the same criminological context as at the time of Napoleon, and the way of solving such problems naturally has a tendency to evolve. Faced with the two main alternatives that immediately come to mind, namely, the individual responsibility of each member of the group based on the role played by him in the action in question, or the collective responsibility of all participants, traditional specialists in criminal law were obviously won over to the first alternative, which, it seemed, was the only option in keeping with the principle of the individualization of the penalty, and rejected the second alternative, of which old forms of legislation had provided too many unfortunate examples. However, that laudable position of principle did not withstand the pressure exerted by the logical course of events for

<sup>19</sup> English translation: A. N. Traïnin, *Hitlerite Responsibility under Criminal Law* (London, Hutchinson & Co., 1945).

<sup>20</sup> Adopted by the Commission at its sixth session, in 1954 (*Official Records of the General Assembly, Ninth Session, Supplement No. 9* (A/2693), pp. 11-12, para. 54; reproduced in *Yearbook . . . 1985*, vol. II (Part Two), p. 8, para. 18).

<sup>21</sup> American Military Tribunals (see footnote 6 above), case No. 4, vol. V, p. 989.

<sup>22</sup> H. Donnedieu de Vabres, *Le procès de Nuremberg*, course of lectures (Paris, Domat-Montchrestien, 1948), p. 254.

long. . . . While continuing to show the same attachment to the principle of personal criminal responsibility, contemporary specialists in criminal law seem more tempted than their predecessors to draw more extensive consequences from the collective nature of the offence.<sup>23</sup>

58. Some authors who have studied the impact of specific laws on criminal law in general have reached the conclusion that "criminal law, which has traditionally been subjective, is increasingly taking the path of anonymity, risk and objectivization".<sup>24</sup> It is a fact that in order to respond to new situations resulting from developments in the field of criminology it is increasingly specific laws that meet the need for punishment, and such laws depart from the principles of traditional criminal responsibility.

59. Moreover, some codes now lay down the principle of collective responsibility. Article 23 of the Yugoslav Penal Code specifies: "Whoever creates or exploits an organization, a band, a conspiracy, a group or some other association for the purpose of committing criminal offences shall be punished for all criminal offences resulting from the criminal plan of such associations as if he himself had committed them".

(ii) *Second alternative*

60. The second alternative for paragraph 2 is based on the principle of individual responsibility, examples of which can be found in some penal codes. The Penal Code of the Federal Republic of Germany specifies, in article 29, that "each participant shall be punished according to his own individual guilt, without regard to the guilt of others".

61. The Penal Code of the German Democratic Republic goes further, in article 22, paragraph 3, in that it introduces more nuances. Under that provision, the extent of criminal responsibility is assessed on the basis of the seriousness of the act as a whole, the manner in which the participants took joint action, the extent and the effects of the individual's contribution to the act, and his motives, as well as the extent to which he brought about participation by other individuals. The purpose of the provision, which is very detailed, is to determine the precise extent of the responsibility of the individual. The question may be asked, however, whether it is really applicable in the case of crimes such as those under consideration, and whether it is suited to modern criminology and meets the need for punishment of the offences involved.

(c) *Conclusion*

62. It will be noted that although complicity and conspiracy are two separate concepts, they are very similar and sometimes overlap. The concept of conspiracy implies a certain degree of complicity among the members of the conspiracy, who support, aid and abet one another. Conspiracy, like complicity, implies agreement and a concordance of intentions. The two concepts therefore often produce the same phenomenon, namely group

crime, and that is why article 6 of the Nürnberg Charter included organizers and accomplices in the same text in situations where accomplices participated in a common plan.

C. **Attempt**

1. DRAFT ARTICLE 17

63. The Special Rapporteur proposes the following draft article 17:

*Article 17. Attempt*

**The following constitutes a crime against the peace and security of mankind:**

**Attempt to commit a crime against the peace and security of mankind.**

2. COMMENTS

64. It will be noted that the concept of attempt is not included in the charters of the international military tribunals; it is therefore understandable that the concept was also not included in the "Principles of international law recognized in the Charter of the Nürnberg Tribunal and in the judgment of the Tribunal", drawn up by the Commission in 1950.<sup>25</sup> On the other hand, the concept of attempt is included in article 2, paragraph (13) (iv), of the 1954 draft code, but it is not defined there.

65. Generally, attempt means any commencement of execution of a crime that failed or was halted only because of circumstances independent of the perpetrator's intention. This concept has given rise in the past and continues to give rise to interesting theoretical discussions.<sup>26</sup>

66. The theory of attempt can be applied only to a limited extent in the area of the crimes under consideration, owing to the nature of the offences involved. For example, what form does attempt to commit an act of aggression take? When can it be said that commencement of execution of an act of aggression exists? Can the borderline between commencement of the execution of an act of aggression and the act of aggression itself be established? If one considers the crime of threat of aggression, the situation is even more perplexing. Is it possible to speak of attempt to make a threat of aggression? Can one speak of attempt to prepare aggression, or of attempt to breach a treaty? Can one speak of attempt to implement *apartheid* or of attempt to commit genocide?

67. The concept of attempt must, however, not be disregarded; most crimes against humanity (for example, genocide and *apartheid*) consist in a series of specific criminal acts (for example, murders and assassinations), and attempt is altogether conceivable in such cases.

<sup>23</sup> R. Merle and A. Vitu, *Traité de droit criminel*, 6th ed. (Paris, Cujas, 1988), pp. 644-645.

<sup>24</sup> R. Legros, "L'influence des lois particulières sur le droit pénal général". *Revue de science criminelle et de droit pénal comparé* (Paris), vol. 23 (1968), p. 234.

<sup>25</sup> For the text, see *Yearbook . . . 1985*, vol. II (Part Two), p. 12, para. 45.

<sup>26</sup> See the fourth report of the Special Rapporteur, document A/CN.4/398 (footnote 1 above), paras. 142-145.

## PART II. INTERNATIONAL ILLICIT TRAFFIC IN NARCOTIC DRUGS

**A. Illicit traffic in narcotic drugs: a crime against peace**

## 1. DRAFT ARTICLE X\*

68. The Special Rapporteur proposes the following draft article X:

*Article X. Illicit traffic in narcotic drugs: a crime against peace*

The following constitute crimes against peace:

## 1. Engaging in illicit traffic in narcotic drugs.

2. Illicit traffic in narcotic drugs means any traffic organized for the purpose of the production, manufacture, extraction, preparation, offering, offering for sale, distribution, sale, delivery on any terms whatsoever, brokerage, dispatch, transport, importation or exportation of any narcotic drug or any psychotropic substance contrary to the provisions of the conventions which have entered into force.

## 2. COMMENTS

## (a) Paragraph 1

69. Paragraph 1 deals with traffic in narcotic drugs as a crime against peace. Naturally, that does not cover traffic in narcotic drugs constituting acts by isolated individuals that are punished by the legislation of the country in which they are perpetrated. What is being dealt with here is large-scale trafficking by associations or private groups, or by public officials, either as principals or accomplices in the trafficking.

70. Such trafficking can give rise to a series of conflicts, involving for example the producer or dispatcher State, the transit State and the destination State. The threat to peace is even greater when organized groups infiltrate Governments, with the result that the State itself becomes to a certain extent the perpetrator of the internationally illicit act.

## (b) Paragraph 2

71. Paragraph 2 concerns substances in which trafficking is considered to be illicit. It seems unnecessary to enumerate these substances in the draft, as they are listed in the conventions in force, mainly in the 1961 Single Convention on Narcotic Drugs, as amended by the 1972 Geneva Protocol amending the Single Convention<sup>27</sup> and in the 1971 Convention on Psychotropic Substances.<sup>28</sup>

## (c) Relationship between the draft code and the conventions in force

72. In defining traffic in narcotic drugs as a crime against the peace and security of mankind, the draft code meets the requirements of the international community,

which regards the phenomenon in question more and more as one of the greatest scourges of mankind.

73. In the 1936 Convention for the Suppression of the Illicit Traffic in Dangerous Drugs,<sup>29</sup> the contracting States undertook, in article 2, to punish illicit traffic in narcotic drugs, conspiracy, attempts and preparatory acts severely, particularly by imprisonment or other penalties of deprivation of liberty. The relevant provisions were included in the 1961 Single Convention on Narcotic Drugs.

74. The United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, adopted on 19 December 1988,<sup>30</sup> provides, in article 3 (Offences and sanctions), that the contracting parties shall adopt the measures necessary to establish as criminal offences the offences referred to in paragraph 1 of the same article. In particular, the parties must ensure that their courts and other competent authorities can take into account factual circumstances that make the commission of the offences particularly serious, such as the involvement of the offender in other international organized criminal activities; the involvement of the offender in other illegal activities facilitated by commission of the offence; the use of violence or arms by the offender; and the fact that the offender holds a public office and that the offence is connected with the office in question (art. 3, para. 5(b) to (e)). All the aggravating circumstances referred to in the Convention make the criminal nature of the offence more and more pronounced and thus give it the serious nature required for crimes covered by the draft code.

**B. Illicit traffic in narcotic drugs: a crime against humanity**

## 1. DRAFT ARTICLE Y\*

75. The Special Rapporteur proposes the following draft article Y:

*Article Y. Illicit traffic in narcotic drugs: a crime against humanity*

The following constitutes a crime against humanity:

Any illicit traffic in narcotic drugs, in accordance with the requirements laid down in article X of this Code.

## 2. COMMENTS

76. While constituting a threat to peace, drug trafficking also, and above all, constitutes a threat to humanity. It could be the downfall of mankind. The twofold characterization of illicit traffic in narcotic drugs as a crime against peace and as a crime against humanity is therefore fully justified.

\* The Commission will have to decide on the place of this article in the part of the draft devoted to crimes against peace.

<sup>27</sup> United Nations, *Treaty Series*, vol. 976, p. 105.

<sup>28</sup> *Ibid.*, vol. 1019, p. 175.

<sup>29</sup> League of Nations, *Treaty Series*, vol. CXCVIII, p. 299.

<sup>30</sup> E/CONF.82/15 and Corr.2.

\* The Commission will have to decide on the place of this article in the part of the draft devoted to crimes against humanity.

## PART III. STATUTE OF AN INTERNATIONAL CRIMINAL COURT

## A. Introductory remarks

77. This part of the report is a response to the approach taken by the Commission in draft article 4 (Obligation to try or extradite) adopted on first reading. It is stated in paragraph 3 of that article that the provisions of its paragraphs 1 and 2 do not prejudice the establishment and the jurisdiction of an international criminal court. Furthermore, the Commission indicated in the commentary (para. (5)) that paragraph 3 of article 4 deals with the possible establishment of an international criminal court and shows that the jurisdictional solution adopted in the draft article would not prevent the Commission from dealing, in due course, with the formulation of the statute of an international criminal court.<sup>31</sup>

78. In addition, part III is a response to paragraph 2 of General Assembly resolutions 43/164 of 9 December 1988 and 44/32 of 4 December 1989 on the draft Code of Crimes against the Peace and Security of Mankind. In that paragraph the Assembly notes the approach currently envisaged by the Commission in dealing with the judicial authority to be assigned for the implementation of the provisions of the draft code, and encourages the Commission to explore further all possible alternatives on the question.

79. Being of a preliminary character, this part III is rather in the nature of a "questionnaire-report". Its purpose is to offer the Commission some choices among the various possible solutions and to elicit responses. These choices deal mainly with the following points:

1. Competence of the court:
  - (a) Jurisdiction limited to crimes mentioned in the code or jurisdiction as to all international crimes?
  - (b) Necessity or non-necessity of the agreement of other States.
2. Procedure for appointing judges.
3. Submission of cases to the court.
4. Functions of the prosecuting attorney.
5. Pre-trial examination.
6. Authority of *res judicata* by a court of a State.
7. Authority of *res judicata* by the court.
8. Withdrawal of complaints.
9. Penalties.
10. Financial provisions.

## B. Statute of the international criminal court

## 1. COMPETENCE OF THE COURT

- (a) *Jurisdiction limited to the crimes mentioned in the code or jurisdiction as to all international crimes?*

*Versions submitted*

80. The Special Rapporteur submits the following versions:

<sup>31</sup> For the text of article 4 and the commentary thereto, provisionally adopted by the Commission at its fortieth session, see *Yearbook . . . 1988*, vol. II (Part Two), pp. 67-68.

## VERSION A

**There is established an International Criminal Court to try natural persons accused of crimes referred to in the Code of Crimes against the Peace and Security of Mankind.**

## VERSION B

**There is established an International Criminal Court to try natural persons accused of crimes referred to in the Code of Crimes against the Peace and Security of Mankind, or other offences defined as crimes by the other international instruments in force.**

*Comments*

81. The question is whether international criminal jurisdiction will be limited to the crimes referred to in the draft code of crimes against the peace and security of mankind, or whether it will also encompass other international crimes which are not referred to in the code. As is well known, the draft code does not cover all international crimes. Among those not mentioned therein are the dissemination of false or distorted news, or false documents, with the intention of adversely affecting international relations; insults to a foreign State; the counterfeiting of currency practised by one State to the detriment of another State, and the theft of national or archaeological treasures; the destruction of submarine cables; and international trafficking in obscene publications.

82. Accordingly, since the concept of an international crime is broader than that of a crime against the peace and security of mankind and covers a wider field, which includes all other international crimes in addition to those defined in the code, the question is whether the jurisdiction of the court is limited to crimes against the peace and security of mankind, or whether the court will deal with all international crimes.

83. It would seem preferable to confer the broadest possible jurisdiction upon the court; otherwise, it would be necessary to establish two international criminal jurisdictions, which would lead to complications.

- (b) *Necessity or non-necessity of the agreement of other States*

*Versions submitted*

84. The Special Rapporteur submits the following versions:

## VERSION A

**No person shall be tried before the Court unless jurisdiction has been conferred upon the Court by the State in which the crime was committed, or by the State of which such person is a national, or by the State against which the crime was directed, or of which the victims were nationals.**

## VERSION B

**Any State may bring before the Court a complaint against a person if the crime of which he is accused was**

committed in that State, or if it was directed against that State, or if the victims are nationals of that State. If one of the said States disagrees as to the jurisdiction of the Court, the Court shall resolve the issue.

*Comments*

85. Version A is based on article 27 of the revised draft statute prepared by the 1953 Committee on International Criminal Jurisdiction.<sup>32</sup> Is it appropriate? From the legal point of view, nothing prohibits a State from punishing crimes against its own security, even if such crimes are committed abroad by foreigners. Moreover, in the vast majority of cases this solution would lead to requesting the consent of Governments guilty of having organized or tolerated criminal acts.

2. PROCEDURE FOR APPOINTING JUDGES

*Versions submitted*

86. The Special Rapporteur submits the following versions:

VERSION A

**The judges shall be elected by the General Assembly of the United Nations, by an absolute majority of those present and voting, when convened by the Secretary-General of the United Nations.**

VERSION B

**The judges shall be elected by representatives of the States Parties to the Statute of the Court, by an absolute majority of the States present and voting.**

*Comments*

87. Version B is based on article 11 of the revised draft statute prepared by the 1953 Committee on International Criminal Jurisdiction.<sup>33</sup> However, the small college envisaged in this provision seems to be out of keeping with the nature of crimes against the peace and security of mankind, which concern the international community as a whole. It should also be noted that there is a contradiction in article 11, which entrusts the election to a small body while at the same time assigning to the Secretary-General of the United Nations the task of convening the meetings for this election.

3. SUBMISSION OF CASES TO THE COURT

*Versions submitted*

88. The Special Rapporteur submits the following versions:

VERSION A

**Cases may be brought before the Court by any State Member of the United Nations.**

VERSION B

**Cases may be brought before the Court by any State Party to this Statute.**

VERSION C

**Cases may be brought before the Court by any State Member of the United Nations subject to the agreement of the United Nations organ specified in the Statute of the Court.**

*Comments*

89. Should the organ referred to in version C be the General Assembly or the Security Council? In the opinion of some, it should be the General Assembly, since abuse of the veto in the Security Council could paralyse the court. On the other hand, the General Assembly, by an absolute majority or a qualified, two-thirds majority, could provide a guarantee against improper complaints as well as against abuse of the veto.

4. FUNCTIONS OF THE PROSECUTING ATTORNEY

*Versions submitted*

90. The Special Rapporteur submits the following versions:

VERSION A

**A jurisconsult appointed by the complainant shall assume the functions of prosecuting attorney. He shall draw up the indictment and shall be responsible for conducting the prosecution if the case is committed for trial before the full Court.**

VERSION B

**A prosecuting attorney-general assigned to the criminal court shall assume the functions of conducting the prosecution if the case is committed for trial before the full Court.**

*Comments*

91. Version A corresponds to article 34 of the revised draft statute prepared by the 1953 Committee.<sup>34</sup> This solution is simple, but it does not differentiate sufficiently between the interests of a State and those of the international community. The functions of prosecuting attorney call for a degree of specialization and technical expertise which a person appointed for a given occasion may not necessarily have for upholding the interests of a State. There is a risk of confusing the prosecuting attorney with the agent of a State.

5. PRE-TRIAL EXAMINATION

*Text submitted*

92. The Special Rapporteur submits the following text:

<sup>32</sup> For the report of this Committee, see *Official Records of the General Assembly, Ninth Session, Supplement No. 12 (A/2645)*, annex.

<sup>33</sup> *Ibid.*

<sup>34</sup> *Ibid.*

1. A committing chamber, composed of a number of members of the judiciary to be determined by the Statute of the Court, shall be responsible for the pre-trial examination. The members of this chamber shall be appointed for the term of office of the Court. Their appointment shall not be immediately renewable.

2. The committing chamber may order any preparatory inquiries or security measures that it deems necessary, such as summoning witnesses, issuing summonses, warrants of commitment and arrest warrants, appointing commissions of inquiry, issuing letters rogatory and requests for extradition and, if need be, requesting the co-operation of States.

#### 6. AUTHORITY OF *RES JUDICATA* BY A COURT OF A STATE

##### *Versions submitted*

93. The Special Rapporteur submits the following versions:

##### VERSION A

**The Court cannot try and punish a crime on which a final judgment in criminal law has been handed down by the court of a State.**

##### VERSION B

**The Court can try and punish a crime on which the court of a State has handed down a judgment, if the State in whose territory the crime was committed, or the State against which the crime was directed, or the State whose nationals were the victims, has grounds for believing that the judgment handed down by that State was not based on a proper appraisal of the law or the facts.**

##### *Comments*

94. Version A expresses a strict application of the *non bis in idem* rule.

95. However, there appeared to be some possible drawbacks to this principle. It seemed preferable to avoid reverting to certain precedents where defendants were shown a certain amount of leniency. That is the reason for version B.

#### 7. AUTHORITY OF *RES JUDICATA* BY THE COURT

##### *Text submitted*

96. The Special Rapporteur submits the following text:

**No court of a State party to this Statute may hear a case which has already been referred to the Court.**

##### *Comments*

97. This is the simplest and clearest solution. It avoids conflicts of jurisdiction between the court and national courts and, at the same time, enhances the authority of the court.

#### 8. WITHDRAWAL OF COMPLAINTS

##### *Versions submitted*

98. The Special Rapporteur submits the following versions:

##### VERSION A

**If a complaint is withdrawn, the proceedings shall be discontinued, *ipso facto*, so that criminal proceedings may be instituted before the Court, unless they are reopened by another State having the authority to do so.**

##### VERSION B

**Withdrawal of a complaint does not mean, *ipso facto*, that the proceedings shall be discontinued. The proceedings must continue until such time as the case is dismissed or there is a conviction or acquittal.**

##### *Comments*

99. Version A favours the principle that if a complaint is withdrawn the proceedings should be discontinued, provided no objection is raised by other States entitled to be heard by the court in some capacity, particularly as complainant or civil party.

100. Version B is based on the principle that prosecution for crimes against the peace and security of mankind should not be interrupted solely at the behest of the States directly concerned. Such crimes are of concern to the whole international community. There is a real danger that negotiations or arrangements may interrupt the prosecution of acts which, if particularly serious, transcend the subjective interests of the parties.

#### 9. PENALTIES

##### *Versions submitted*

101. The Special Rapporteur submits the following versions:

##### VERSION A

**The Court shall sentence defendants found guilty to whatever penalty it deems fair.**

##### VERSION B

**With the exception of the death penalty, the Court shall sentence defendants to whatever penalty it deems fair.**

##### VERSION C

**The Court shall sentence defendants found guilty to life imprisonment or prison terms, with or without the addition of fines and confiscation of property.**

##### *Comments*

102. Version A is based on article 27 of the Nürnberg Charter,<sup>35</sup> which did not exclude the death penalty.

<sup>35</sup> See footnote 7 above.

103. Version B excludes the death penalty. It takes into account developments in the criminal law of certain countries, particularly those in Western Europe.

104. Version C excludes not only the death penalty but also other forms of severe punishment the application of which is not unanimously accepted.

105. It should be noted that criminal penalties vary according to the times and the country, and they involve moral, philosophical or religious concepts. It therefore seems appropriate to select penalties on which there is the broadest agreement and whose underlying principle is generally accepted by the international community.

## 10. FINANCIAL PROVISIONS

### *Versions submitted*

106. The Special Rapporteur submits the following versions:

### VERSION A

**The General Assembly shall establish a fund which shall be financed and administered in accordance with rules to be established by it. The costs of the Court and of any other entity or institution under its authority shall be paid from this fund.**

### VERSION B

**The States Parties to the Statute of the Court and those which accede to it shall establish a fund to be financed and administered in accordance with the rules adopted by them. The costs of the Court and of any other entity or institution under its authority shall be paid from this fund.**

### *Comments*

107. Version A is based on the hypothesis that the court is established by the General Assembly.

108. Version B is based on the narrower hypothesis that the court is established only by the States parties to the statute.