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

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**DRAFT CODE OF CRIMES AGAINST THE PEACE
AND SECURITY OF MANKIND**

[Agenda item 4]

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by Mr. Doudou Thiam, Special Rapporteur**

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Introduction

1. In his eighth report,¹ the Special Rapporteur completed the list of offences constituting crimes against the peace and security of mankind, which are classified in the draft Code as "crimes against peace", "crimes against humanity" and "war crimes". The Special Rapporteur considers that at a later stage, probably on second reading, this tripartite division, which he had adopted on a purely provisional basis for the purposes of analysis, should be eliminated. In his third report, a section entitled "Unity of the concept of offences against the peace and security of mankind"² was devoted to an account of the doctrinal debate on the unity and homogeneity of this concept, which concluded thus:

To sum up, the expression "peace and security of mankind" has a certain unity, a certain comprehensiveness, linking the various of-

¹ *Yearbook... 1990*, vol. II (Part One), p. 27, document A/CN.4/430 and Add.1.

² *Yearbook... 1985*, vol. II (Part One), pp. 67-68, document A/CN.4/387, paras. 26-39.

fences. Although each offence has its own special characteristics, they all belong to the same category, and are marked by the same degree of extreme seriousness.³

2. The first part of the present report deals with a complementary aspect of the draft Code: consideration of the penalties applicable to the offences referred to in the Code.

3. The second part concerns the question of the establishment of an international criminal jurisdiction. This is in response to General Assembly resolution 45/41 of 28 November 1990, in which the Assembly:

Invites the International Law Commission, as it continues its work on the elaboration of the draft Code of Crimes against the Peace and Security of Mankind, to consider further and analyse the issues raised in its report concerning the question of an international criminal jurisdiction, including the possibility of establishing an international criminal court or other international criminal trial mechanism.

³ *Ibid.*, p. 68, para. 38.

PART ONE. PENALTIES APPLICABLE TO CRIMES AGAINST THE PEACE AND SECURITY OF MANKIND

4. The principle *nulla poena sine lege* requires that provision be made for penalties in the draft Code. Such an undertaking, however, entails certain difficulties. Some difficulties stem from the diversity of legal systems; others are related to procedural problems.

A. Diversity of legal systems

5. In domestic law, there exists within each State a certain uniformity of moral and philosophical approach which justifies a single system of punishment applicable to all offences. In international law, on the other hand, the diversity of concepts and philosophies is hardly conducive to a uniform system of punishment.

6. Certain penalties which are current in some countries are unknown in others, as in the case of the death penalty, which has been variously applied in different countries and at different times. Some countries have successively abolished and reinstated it according to circumstances, often in response to the emotion aroused by specific criminal acts at a given time. Thus, the movement to abolish the death penalty has suffered various fates according to time and place.

7. In France, the death penalty was limited at one point to certain crimes under ordinary law (such as murder, parricide, kidnapping and subsequent death of a minor, arson committed on inhabited premises) and was no longer applicable to political offences except in the case of crimes against national security. The death penalty was not totally abolished until 1981.

8. In the United Kingdom, the first step in abolishing the death penalty was partial abolition, which was progressively extended until 1965. In that year, the death penalty was temporarily abolished for a five-year period pending a parliamentary vote on its definitive abolition, which occurred in 1970. Sweden had also partially abolished the death penalty in 1921, before opting for total abolition in 1972.

9. Switzerland and the Federal Republic of Germany abrogated the death penalty with no intermediate stage of partial abolition, in 1937 and 1949 respectively.

10. However, in those European countries which have abolished the death penalty there have from time to time been calls for its reinstatement, often because of circumstances related to the commission of crimes that have strongly influenced public opinion. In Europe there is nonetheless a general trend towards abolition of the death penalty, as illustrated by the adoption of Protocol No. 6 to the Convention for the Protection of Human Rights and Fundamental Freedoms concerning the Abolition of the Death Penalty, of 28 April 1983.⁴

11. On the other hand, the death penalty has not been completely abolished in the United States of America, where it is still in force in 36 out of the 50 States. It does not yet appear to have been abolished or completely abolished in Eastern Europe.

⁴ Council of Europe, *European Treaty Series*, No. 114.

12. As to the African countries, a recent report by Amnesty International⁵ shows that, although the death penalty is still in force in many of them, there is a growing trend in favour of abolishing it. Thus, following the example of Cape Verde, which abolished it after acceding to independence in 1975, Namibia, Sao Tome and Principe and Mozambique each abolished the death penalty in 1990. Other African countries, although they have not completely abolished the death penalty in law, no longer apply it in practice. This is true of the Comoros, Côte d'Ivoire, Madagascar, Niger, Senegal and Togo. In 1981, Côte d'Ivoire even abolished the death penalty in law for political crimes. In Seychelles, the death penalty has remained in force only for the crime of treason.

13. In Asia, the death penalty is still in force in many countries.

14. It may thus be affirmed that there is a universal trend towards abolition, as is shown by the report by Amnesty International cited above.⁶ It appears from that report that by the end of 1990 the death penalty had been abolished, either *de jure* or *de facto* in almost half the countries of the world, and that it remained in force and was applied in 92 countries. In this connection, it should be remembered that on 15 December 1989 the General Assembly adopted the Second Optional Protocol to the International Covenant on Civil and Political Rights, aiming at the abolition of the death penalty.⁷ The Protocol was adopted by 59 votes to 26, with 48 abstentions.

15. However, it is still difficult to institute a single, internationally and uniformly applicable system of penalties. It is not only the death penalty that is at issue, but also other penalties involving corporal punishment or personal restraint, particularly those consisting of physical mutilation, which are still applied in some regions of the world.

B. Procedural difficulties

16. The difficulties relating to the diversity of legal systems are compounded by procedural difficulties. Should a penalty be laid down for each crime against the peace and security of mankind or, since all such crimes are characterized by the same degree of extreme gravity, should the same penalty be laid down, under a general formula, for all cases, with a minimum and a maximum according to whether or not there are extenuating circumstances?

1. THE DEBATE IN THE INTERNATIONAL LAW COMMISSION AT ITS 1954 SESSION

17. It should be noted that the 1954 draft Code did not lay down any penalties. This was not an oversight but an intentional omission. At its third session the Commission had adopted the following draft article 5:⁸

Article 5

The penalty for any offence defined in this Code shall be determined by the tribunal exercising jurisdiction over the individual accused, taking into account the gravity of the offence.

18. This draft article was similar to article 27 of the Charter of the Nürnberg Tribunal⁹ in that it assigned to the judge the responsibility for determining the applicable penalty, but it nevertheless respected the principle *nullum crimen sine lege*, because the draft Code specified the crimes to which the penalties were applicable. It was, however, strongly criticized by the Governments which submitted comments to the Commission.

19. For example, the Government of Bolivia¹⁰ expressed the opinion that "in deference to the generally accepted principle *nulla poena sine lege* it will be necessary to lay down in the code, in a separate article, that the competent tribunal will be authorized to impose the most adequate penalty, taking into consideration not only the gravity of the offence but also the personality of the offender." Apart from the reference to the personality of the offender, this proposal does not appear to differ from that of the Commission.

20. The view of the Government of Costa Rica¹¹ that if article 5 "was allowed to stand as drafted, the code would be open to the same criticisms as were levelled against the Nürnberg Tribunal, which had to institute and apply penalties that had not been previously determined by any rule of positive law." In addition, according to that Government, the principle *nulla poena sine lege* presupposed "a clear determination beforehand of the penalty applicable to each category of offence".

21. In the opinion of the Egyptian Government,¹² under draft article 5 "the power to determine the penalty for each offence is delegated to the competent court". It saw in that delegation of power "a real danger, given that the judges' evaluation could be influenced by various circumstances not necessarily related to the law". It believed that it was "preferable to try to establish an adequate penalty for each crime, with a minimum and maximum if necessary".

22. In the view of the Government of the United Kingdom,¹³ draft article 5 was completely inappropriate in the context of the draft Code. In so far as the various crimes mentioned in the Code constituted crimes or would be considered as such under the domestic legislation of the various countries, it was for the legislatures of those countries to establish the penalty appropriate to each crime. In so far as the question of punishment and penalties to be imposed was governed by an international con-

⁹ Charter of the International Military Tribunal 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). Article 27 reads:

"The Tribunal shall have the right to impose upon a Defendant, on conviction, death or such other punishment as shall be determined by it to be just."

¹⁰ See the third report of Mr. J. Spiropoulos, *Yearbook . . . 1954*, vol. II, p. 121, document A/CN.4/85, sect. XVI (b) (Comments of Governments).

¹¹ *Ibid.*

¹² *Ibid.*

¹³ *Ibid.*

⁵ Amnesty International, "Africa—Towards abolition of the death penalty" (May 1991), AI INDEX:AFR 01/01/91, pp. 1 and 3.

⁶ *Ibid.*, p. 2.

⁷ General Assembly resolution 44/128, annex.

⁸ See *Official Records of the General Assembly, Sixth Session, Supplement No. 9*, p. 14, para. 59.

vention, it would be for the convention to prescribe the penalties to be imposed. In the view of that Government, it seemed more judicious to omit article 5.

23. In the end, the Commission was deterred by the difficulties involved, judging that it seemed inappropriate to address the question of penalties.

2. THE CURRENT SITUATION

24. If the Commission takes the view that it is appropriate to return to the question of penalties, it should be aware of the fact that two approaches are open to States for adoption of the Code, and that the solution of the problem of penalties depends on the approach selected.

25. The first approach would be to incorporate the provisions of the Code directly in domestic law and, at the same time, to establish appropriate penalties. This solution could, of course, have the disadvantage of creating an imbalance by instituting different penalties for the same crime, especially between States where the death penalty has been abolished and those where it still exists, or between States which impose certain forms of corporal punishment—under the shariah for example—and those which do not.

26. The second approach would be to include the penalties in the Code itself and to adopt it by means of an international convention. This solution would clearly be conducive to some uniformity in sentencing. The only problem would be to determine whether a separate penalty is to be provided for each crime in the Code, or whether a single penalty, applicable to all the crimes, would suffice.

27. He would favour the latter solution. In effect, the crimes in the Code are, by reason of their extreme gravity, foremost in the hierarchy of international crimes, whether they be crimes against peace, crimes against humanity or even war crimes. Actually, as regards the latter, the Commission had considered as crimes against the peace and security of mankind only the most serious war crimes.

C. Draft article on applicable penalties

28. In the light of the above considerations, the Special Rapporteur is proposing a single draft article, covering all crimes against the peace and security of mankind.

1. DRAFT ARTICLE Z

29. The Special Rapporteur proposes the following draft article Z:

Any defendant found guilty of any of the crimes defined in this Code shall be sentenced to life imprisonment.

If there are extenuating circumstances, the defendant shall be sentenced to imprisonment for a term of 10 to 20 years.

[In addition, the defendant may, as appropriate, be sentenced to total or partial confiscation of stolen or misappropriated property. The Tribunal shall de-

cide whether to entrust such property to a humanitarian organization.]

2. COMMENTS

First paragraph

30. Despite the reservations concerning life imprisonment voiced by those who believe that it makes the prisoner's rehabilitation and reintegration into society impossible, it is difficult to imagine how the maximum penalty for crimes such as those in question could be imprisonment for a definite period of time, a sentence sometimes imposed for ordinary offences. Inasmuch as the death penalty has been ruled out, it seems difficult to rule out life imprisonment as well.

Second paragraph

31. This paragraph, however, proposes an exception to the principle established in the first paragraph, in cases where pertinent extenuating circumstances make it more acceptable to impose a prison sentence for a definite period of time.

Third paragraph

32. This paragraph is placed in square brackets. It proposes a supplementary and optional penalty, such as that provided for in article 28 of the Charter of the Nürnberg Tribunal.¹⁴ It must be noted however that, other than for economic offences and threats to national security, this penalty is viewed with some disfavour, because it is felt that it punishes not only the convicted person but also sometimes his relatives (a spouse who has joint ownership of property, and heirs). It will be for the Commission to decide whether or not to include it.

33. The other problem raised by this supplementary penalty is that of deciding to whom the confiscated property will be awarded. In domestic law, it is generally given to the State but the problem is more complex regarding international crimes referred to an international tribunal. The Charter of the Nürnberg Tribunal had decided, in article 28, that property would be delivered "to the Control Council for Germany", the Allied body that had instituted the tribunals under its law No. 10¹⁵ to try war criminals other than the major criminals referred to the International Military Tribunal.

34. In the present case, it will be up to the Commission, if it retains the provision regarding confiscation of property, to decide to which body confiscated property should be entrusted. This might be, for example, ICRC, UNICEF, or an international body set up to combat illegal drug trafficking.

¹⁴ Article 28 provides:

"In addition to any punishment imposed by it, the Tribunal shall have the right to deprive the convicted person of any stolen property and order its delivery to the Control Council for Germany."

¹⁵ 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)).

PART TWO. QUESTION OF THE ESTABLISHMENT OF AN INTERNATIONAL CRIMINAL JURISDICTION

A. Introductory remarks

35. As indicated above (para. 3), resolution 45/41 invited the Commission "to consider further and analyse the issues raised in its report concerning the question of an international criminal jurisdiction, including the possibility of establishing an international criminal court or other international criminal trial mechanism". The General Assembly thus refrained, at least at that stage, from choosing between the various options proposed by the Commission. Moreover, the Assembly failed to take a position on the possible options and main trends evidenced in the Commission with regard to some very specific and significant areas related to the establishment of an international criminal court, an account of which was given in the Commission's report on its forty-second session.¹⁶

36. The Special Rapporteur is therefore not submitting in the present report a draft statute for an international criminal court. The aim of the report is to provoke detailed discussion of two major issues that must be resolved in order to provide him with the necessary guidance. The issues in question are the court's jurisdiction and the requirements for instituting criminal proceedings.

37. Thus, the two provisions submitted below do not represent draft articles for referral to the Drafting Committee or for incorporation, as they stand, into the draft statute of a court. They are simply intended to provide a basis for discussion and perhaps to reveal an overall trend that would be a useful guide for the Special Rapporteur.

B. Jurisdiction of the court

1. POSSIBLE DRAFT PROVISION

38. For the purposes indicated in the preceding paragraph, the Special Rapporteur has drafted the following text:

1. The Court shall try individuals accused of the crimes defined in the code of crimes against the peace and security of mankind [accused of crimes defined in the annex to the present statute] in respect of which the State or States in which the crime is alleged to have been committed has or have conferred jurisdiction upon it.

2. Conferment of jurisdiction by the State or States of which the perpetrator is a national, or by the victim State or the State against which the crime was directed, or by the State whose nationals have been the victims of the crime shall be required only if such States also have jurisdiction, under their domestic legislation, over such individuals.

3. The Court shall have cognizance of any challenge to its own jurisdiction.

4. Provided that jurisdiction is conferred upon it by the States concerned, the Court shall also have cognizance of any disputes concerning judicial competence that may arise between such States, as well as of applications for review of sentences handed down in respect of the same crime by the courts of different States.

5. The Court may be seized by one or several States with the interpretation of a provision of international criminal law.

2. COMMENTS

Paragraphs 1 and 2

39. Since paragraph 1 refers to the code of crimes against the peace and security of mankind or a text defining such crimes annexed to the statute, it observes the principle of *nullum crimen sine lege*. It takes into account the comments by some members of the Commission who expressed their opposition to the concept of a crime under international law or to any reference to the general principles of law in order to define crimes. This provision will perhaps meet with their approval.

40. Moreover, the purpose of the alternative wording in square brackets, namely the words "accused of crimes defined in the annex to the present statute", is to avoid limiting the choice of States to the crimes specified in the draft code, thus making the court's rules on jurisdiction *ratione materiae* more flexible, which could make it more readily acceptable to States.

41. Paragraph 1 makes the court's jurisdiction *ratione personae* subject to the consent of the States concerned. Here again, the Special Rapporteur has thus taken account of the comments of the members of the Commission who expressed concern that the criminal jurisdiction of States should be respected. It would, of course, be of no avail to draw up a rule that would remain a dead letter, or to set up an institution that would be incapable of taking any action right from the outset.

42. On the issue of the number of States whose conferment of jurisdiction is required, the revised draft statute prepared by the 1953 Committee on International Criminal Jurisdiction¹⁷ provides in article 27 that: "No person shall be tried before the Court unless jurisdiction has been conferred upon the Court by the State or States of which he is a national and by the State or States in which the crime is alleged to have been committed." While using that draft article as a basis, the present Special Rapporteur has departed from it in a number of respects.

¹⁷ See the report of the 1953 Committee on International Criminal Jurisdiction, *Official Records of the General Assembly, Ninth Session, Supplement No. 12 (A/2645)*, annex.

¹⁶ *Yearbook . . . 1990*, vol. II (Part Two), p. 24, para. 155.

43. First, in paragraph 1 of his draft provision the Special Rapporteur has made conferment of criminal jurisdiction upon the court subject to the consent of the State or States in which the crime is alleged to have been committed. In his view, although in international law there is no general rule limiting criminal jurisdiction to the law of the place where the crime is committed, it has to be acknowledged that the principle of the territoriality of criminal law is the principle generally applied. The trend towards having crimes tried in the place where they are committed was confirmed by the Nürnberg¹⁸ and Tokyo¹⁹ charters. It is thus the principle of the territoriality of criminal law that is confirmed in paragraph 1.

44. Secondly, the Special Rapporteur is aware that there are other principles, including the principle of personality under criminal law, that have been applied in the field of criminal law. However, that principle has several aspects, of which the 1953 draft statute takes only one into account, namely the aspect giving jurisdiction to the court of the country of which the perpetrator is a national and excluding the jurisdiction of the court of the country of which the victim is a national and the jurisdiction of the court of the victim State. This latter system, which, depending on the particular case in question, is also referred to as the system of passive personality or real protection, has also been applied in the area of war crimes, for example in the French statute of 28 August 1944,²⁰ which gave the French courts jurisdiction over war crimes committed abroad against French nationals or French-protected persons, or against foreign soldiers or stateless persons serving in the French armed forces. Similarly, article 7 of the former French code of criminal procedure,²¹ now article 694 of the new Code of Criminal Procedure,²² gives the French courts jurisdiction over crimes against the security of the State and crimes involving the counterfeiting of the State seal, coins, securities or bank notes committed outside French territory by foreigners. This system was also applied, immediately after the Second World War, under the legislation of other countries, as in the case of the Danish Act on the Punishment of War Crimes of 12 July 1946,²³ the Norwegian provisional decree of 4 May 1945²⁴ and Act of 13 December 1946²⁵ on the punishment of foreign perpetrators of war crimes.

45. This trend also took hold in international law. In 1927 the first International Conference for the Unification of Penal Law, held at Warsaw, adopted model texts, article 5, paragraph 1, of which recognized the jurisdic-

tion of the victim State over a crime or an offence against the security of that State or one involving counterfeiting of the State seal, marks, imprints or stamps.²⁶ The text in question is virtually identical to that of the French code of criminal procedure just mentioned.

46. The trend was also confirmed in the *Lotus* case. According to PCIJ, there is no rule of international law preventing a State from exercising jurisdiction over foreigners in respect of offences committed abroad against the State in question.²⁷

47. In view of the background to which reference has just been made, it might be asked why the 1953 draft statute required only conferment of jurisdiction by the State where the crime is committed or by the State of which the victim is a national, thus restricting the range of States that can claim jurisdiction over the offences in question. In paragraphs 1 and 2 of the possible draft provision, the Special Rapporteur has therefore combined the territoriality system, the active and passive personality system, and the so-called real-protection system, thus better demonstrating the complexity of the matter and better reflecting the state of existing law.

48. The Special Rapporteur is aware, however, of the reservations to which an excessive broadening of the range of States whose conferment of jurisdiction would be required could give rise. Such a broadening would lay down a set of conditions to which the court's jurisdiction would be subject, conditions which would constitute a veritable obstacle course. It could, moreover, give rise to numerous jurisdictional disputes among all the States whose consent would be required. Even if, under paragraphs 3 and 4 of the possible draft provision, the court had jurisdiction over such disputes, it would seem pref-

²⁶ Resolution on international penal law, adopted by the first Conference (Warsaw, 1-5 November 1927), see *Conférence internationale pour l'unification du droit pénal, Actes de la Conférence* (Paris, Sirey, 1929), p. 132.

²⁷ The Court, in its judgment of 7 September 1927, stated the following:

"... the first and foremost restriction imposed by international law upon a State is that—failing the existence of a permissive rule to the contrary—it may not exercise its power in any form in the territory of another State. In this sense jurisdiction is certainly territorial; it cannot be exercised by a State outside its territory except by virtue of a permissive rule derived from international custom or from a convention.

"It does not, however, follow that international law prohibits a State from exercising jurisdiction in its own territory, in respect of any case which relates to acts which have taken place abroad, and in which it cannot rely on some permissive rule of international law. Such a view would only be tenable if international law contained a general prohibition to States to extend the application of their laws and the jurisdiction of their courts to persons, property and acts outside their territory, and if, as an exception to this general prohibition, it allowed States to do so in certain specific cases. But this is certainly not the case under international law as it stands at present..."

"Though it is true that in all systems of law the principle of the territorial character of criminal law is fundamental, it is equally true that all or nearly all these systems of law extend their action to offences committed outside the territory of the State which adopts them, and they do so in ways which vary from State to State. The territoriality of criminal law, therefore, is not an absolute principle of international law and by no means coincides with territorial sovereignty." (PCIJ, *Collection of Judgments, Series A, No. 10*, Judgment No. 9, pp. 18-20).

¹⁸ See footnote 9 above.

¹⁹ Charter of the International Military Tribunal for the Far East (*Documents on American Foreign Relations*, vol. VIII (July 1945-December 1946) (Princeton University Press, 1948), pp. 354 *et seq.*).

²⁰ France, *Journal officiel de la République française*, 30 August 1944, p. 780.

²¹ *Code d'instruction criminelle*, 51st ed., *Jurisprudence générale Dalloz* (Paris, 1959), pp. 6-7.

²² *Code de procédure pénale*, 23rd ed., *Jurisprudence générale Dalloz* (Paris, 1981), p. 381.

²³ *Lovtidende for Kongeriget Danmark for Aaret 1946*, (Copenhagen, J.H. Schultz, 1947), No. 395, pp. 1376 *et seq.*

²⁴ *Registre til Norsk Lovtidend* (Oslo, Grondahl & Sons Boktrykkeri, 1952), pp. 445 *et seq.*

²⁵ *Ibid.*, pp. 679 *et seq.*

erable to reduce to the extent possible the likelihood of disputes occurring in the first place. It must be acknowledged that, apart from the system of the territoriality of criminal law, which is the general rule governing domestic criminal law, basically the systems in question are simply exceptions resulting from the realism of States. It is, however, in order to take account of such realism that, in addition to the principle of territoriality, formulated without any restrictions in paragraph 1 of the draft provision, the active and passive personality system and the real-protection system have been included in paragraph 2, but only to the extent that the domestic legislation of the States concerned requires their application in a specific case.

49. This solution is not without drawbacks. Conferring jurisdiction upon a State of which the perpetrator is a national is, in some cases, tantamount to entrusting a State that may have ordered the commission of a criminal act, or may have organized or tolerated such an act, with trying the crime in question. Moreover, conferring jurisdiction upon the victim State or upon the State whose nationals have been the victims of a crime does not always appear to provide sufficient guarantees of impartiality and objectivity.

50. Furthermore, in general it must be recognized that the principle of conferment of jurisdiction is a makeshift solution, a necessary concession to State sovereignty. It is a principle that makes the court's jurisdiction subject to a requirement that is difficult to meet, and that will not facilitate access to the court. It is therefore to be hoped that the requirement in question will be of an entirely temporary nature, no more than a stage in the process of establishing a body of international criminal law free of ties to domestic law and less subject to its rules.

Paragraph 3

51. Paragraph 3 lays down a commonplace rule whereby any court before which a case is brought shall decide whether it has jurisdiction when faced with a challenge to its jurisdiction, unless an appeal in respect of its decision is lodged with a higher court, where appropriate. However, since the international criminal court would be regarded as the highest criminal court at the international level, it would be normal that it should decide on its own jurisdiction, without any possibility of appeal.

Paragraph 4

52. Paragraph 4 deals with another example. In this case it is not the court's jurisdiction that is being challenged, as in the hypothesis dealt with in the preceding paragraph. Instead, it is a question of a dispute between two or more States concerning the jurisdiction of one of the States concerned, or a dispute in which the States challenge one another's jurisdiction. This is a very familiar kind of dispute. Such disputes arise from the fact that each State sets its own rules governing criminal jurisdiction; conflicts between different forms of domestic legislation inevitably arise as a result. States attempt to settle

such disputes by means of agreements, which are often difficult to reach.

53. The solution proposed in paragraph 4 would make it possible to overcome such difficulties because, as just indicated, the court would have jurisdiction over such disputes. Furthermore, it would facilitate the standardization of judicial practice in the area of conflicting laws and jurisdiction.

54. Lastly, the hypothesis must not be excluded whereby the courts of two or more States would institute proceedings in respect of the same crime and hand down decisions resulting in either a conviction or an acquittal; this would be contrary to the *non bis in idem* principle. In such a case, the court could review or rescind the most recent of the decisions.

Paragraph 5

55. Paragraph 5 is based on the idea that the court could also play a very important role in the unification of international criminal law, a new and currently fast-developing field of law. It could help to remove some uncertainties regarding terminology and the definition of concepts such as complicity and conspiracy and the attempt to commit such crimes, which vary in content from one national legal system to another. It could also facilitate clarification of the meaning and the content under international law of a number of principles, such as the principles *nullum crimen sine lege* and *nulla poena sine lege* or the *non bis in idem* rule.

C. Criminal proceedings

1. POSSIBLE DRAFT PROVISION

56. For the purposes indicated in paragraph 37 above, the Special Rapporteur proposes the following text:

1. Criminal proceedings in respect of crimes against the peace and security of mankind shall be instituted by States.

2. However, in the case of the crimes of aggression or the threat of aggression, criminal proceedings shall be subject to prior determination by the Security Council of the existence of such crimes.

2. COMMENTS

57. It is possible to envisage that the Security Council, the guardian of international peace and security, might itself be competent to institute criminal proceedings directly. However, such an interpretation of the Security Council's role would exceed the powers vested in the Council by the Charter of the United Nations. The Council's role is either to take preventive measures to forestall a breach of the peace or to take steps to restore peace. However, all such measures are political and are not of a judicial nature at all. It is therefore hard to see what basis there would be for sole jurisdiction for the Security

Council in the area of criminal proceedings instituted in respect of the crimes in question.

58. However, it is legitimate to ask whether in some cases criminal proceedings should not be made subject to the Security Council's prior consent. Some of the crimes covered by the draft Code constitute significant violations of international peace. This is so particularly in the case of the crimes of aggression and the threat of aggression. Under Article 39 of the Charter of the United Nations, the Security Council has the power to "determine the existence of any threat to the peace, breach of the peace, or act of aggression". It must therefore be

agreed that in such cases criminal proceedings should depend on the determination by the Security Council of the existence of an act of aggression or a threat of aggression. Consequently, should a State attempt to refer a case to the court directly, without the prior consent of the Security Council, the court should in turn refer the complaint to the Security Council for its prior consideration and consent.

59. Where other offences are concerned—war crimes, crimes against humanity and, in particular, genocide or international trafficking in narcotic drugs—the consent of a United Nations organ would, on the contrary, appear to be unnecessary.