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EIGHTH REPORT ON THE DRAFT CODE OF CRIMES AGAINST THE PEACE AND SECURITY OF MANKIND

by

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INTRODUCTION

1. This report consists of two parts.

2. Part I concerns the "related offences" or "other offences" which the Special Rapporteur had occasion to discuss in his fourth report 1/ i.e. complicity, conspiracy (complot), and attempt. This report proposes draft articles on these offences, accompanied by commentaries thereto.

3. Part II of this report was prepared pursuant to the request of the International Law Commission, recorded in paragraph 210 of its report on the work of its forty-first session, 2/ that the Special Rapporteur prepare for the current session a draft provision on international drug trafficking. In the light of the views expressed by several members of the Commission, reflected in paragraphs 205 to 209 of the Commission's report, the Special Rapporteur deemed it necessary to prepare two draft articles, one defining international drug trafficking as a crime against peace and the other defining it as a crime against humanity. The two draft articles are accompanied by commentaries.

1/ See Yearbook of the International Law Commission 1986, vol. II (Part One), p. 53, doc. A/CN.4/398, paras. 89-145.

2/ Official Records of the General Assembly, Forty-fourth Session, Supplement No. 10 (A/44/10).

I. PART ONE - COMPLICITY, CONSPIRACY (COMPLOT) AND ATTEMPT

A. Complicity

1. Draft article 15

4. The Special Rapporteur proposes the following draft article:

> The following constitute a crime against the peace and security of mankind:
>
> 1. Being an accomplice in 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. Commentary

(a) Remarks on methodology

5. First, 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 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.

6. That question having been resolved, the draft article on complicity proposed above will now be examined.

(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.

11. Thus, the French Ordinance of 26 August 1944 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 committed. A similar approach is taken in the Luxembourg Act of 2 August 1947 (art. 3), the Greek Constitutional Act No. 73 on the punishment of war criminals, and the Chinese Act of 24 October 1956 on the trial of war criminals.

12. 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 operations of the members of his command, leading to serious violations of the laws and customs of war. 3/

13. Along the same lines, one may also cite the judgement of the Tokyo Tribunal, 4/ which extended this complicity to members of the Government and to all officials concerned with the well-being of protected persons. 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". 5/

14. 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

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3/ 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.

4/ See Law Reports of Trials of War Criminals, ..., vol. XV, pp. 72-73.

5/ 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.

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 (c) of the Charter of the Nürnberg Tribunal and art. 5 (c) of the Charter of the International Military Tribunal for the Far East); 6/ 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). The 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

15. 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. Article 22 of the Canadian Criminal Code, for example, defines counsel as the act of procuring, abetting or leading a person to commit an offence.

16. Concerning another aspect of the question, it may be observed that in some legislations 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 prosecution of war criminals).

17. In other legislations abstention is defined as a crime. This is the case in German law.

18. 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.

19. Sometimes, this characterization has evolved over time within the same system of law. For example, the French Penal Code classified the concept of concealment in one way from 1810 to 1915, but has classified it differently since 1915; concealment was characterized as an act of complicity in the 1810 Napoleonic Code but since 1915 it has been considered an autonomous offence.

20. 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 and others, article 86 of Additional Protocol I to the 1949 Geneva Conventions defined

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6/ Hereinafter referred to as the "Tokyo Charter"; published in Documents on American Foreign Relations (Princeton University Press), vol. VIII (July 1945-December 1946) (1948), pp. 354 et seq.

complicity by a military commander as an autonomous offence. These successive and diverse characterizations demonstrate the complexity and evolutionary character of the content of the concept of complicity.

(iii) The actors

21. 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. The observer must steer an uncertain course among the concepts of principal perpetrator, co-perpetrator, direct perpetrator, indirect perpetrator and accomplice.

22. 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.

23. Other legislations, on the other hand, do define the perpetrator: these include the 1867 Belgian Code (art. 66), the 1879 Luxembourg Code (art. 66), the 1891 Netherlands Code (art. 47), the 1886 Portuguese Code (art. 20), the 1832 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).

24. 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 subject under consideration. As we have just seen, situations arise where it is hard to tell who is the principal and who is the accomplice. In acts of an intellectual or moral character (counsel, incitement, order, abuse of authority), it is not easy to say who is the principal and who is the accomplice. In these situations, 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 situations are sometimes separated from complicity and characterized separately. This is the case as regards a military commander who is held responsible for crimes or offences committed by his subordinates, as we have already seen.

25. It should also be noted that the giving of orders and counsel is sometimes difficult to prove when this 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). 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.

26. The International Military Tribunals 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. 7/ 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.

27. 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, and is replaced by the concept of participant, which is applied to all those involved in a crime committed through participation. This is the principle of placing all participants in a crime on an equal footing.

28. In its broadest sense the concept of criminal participation encompasses not only the traditional concept of complicity but also that of conspiracy (complot), and both concepts could have been covered in a single provision under the heading of criminal participation. However, it seemed preferable in the present report to devote separate articles to complicity and conspiracy (complot). It should be remembered, however, 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).

29. 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 the present draft article.

7/ Entscheidungen des Obersten Gerichtshofes für die Britische Zone in Strafsachen (O.G.H. br. Z) (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 No. 10 du Conseil de contrôle allié (Paris, Librairie générale de droit et de jurisprudence, 1960), p. 373).

(c) Paragraph 2

30. 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.

31. 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. We do not intend to undertake a comparative law study, but simply to choose here and there examples which illustrate our point. Thus, the Canadian Criminal Code devotes a specific provision to the accessory after the fact. Article 21 of this Code states: "An accessory after the fact is one who, knowing that a person participated in the offence, receives, comforts or assists him for the purpose of enabling him to escape".

32. This "post factum" offence is based on the idea that participation is not limited only 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.

33. This concept, today too closely linked to the common law, derives from ancient law, which drew a distinction between various phases in the "cursus plurium delictum": "antecedens, concomitans, subsequens". We have seen that as late as 1810, the French Penal Code 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 robbers (art. 61, para. 1) remains a crime of complicity.

34. 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 also includes acts committed later. There is, rather, a diversity of approaches in this domain.

35. Contemporary continental law refers also to acts of complicity committed after the principal offence. Thus, article 22 of the 1975 Penal Code of the German Democratic Republic states: "Any person who provides the perpetrator of an offence, after its commission, with assistance promised beforehand, shall be criminally responsible for that offence". According to French judicial practice, aiding or abetting after the commission of an offence constitutes complicity if it results from a prior agreement. 8/ The Penal Code of the Federal Republic of Germany states in article 257 that "whoever renders assistance to a person who has committed an unlawful act with the intention of securing for him the fruits of that

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8/ Court of Cassation, Criminal Chamber, 30 April 1963, Bulletin Crim. 1963, p. 137.

crime" shall be prosecuted for complicity. Article 258 of the same Code states: "Whoever, acting intentionally or knowingly, obstructs, either altogether or partially, the imposition of criminal punishment on another for an unlawful act" shall be prosecuted. Soviet penal law acknowledges a form of complicity subsequent to the principal offence. According to Igor Andrejew, 9/ this concept is based on the idea of "contact", that is, on a direct link between the subsequent act and the offence committed previously.

36. 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, which delivered to the bank the gold and valuables that had belonged to murdered Jews, in particular spectacle frames and false teeth. The Nüremberg 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. The judgement stated in this connection: "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". 10/

37. These examples prove that we are dealing with a subject-matter which makes any attempt at rigid classification a risky undertaking. It would probably be preferable to simplify in this area, in one way or another.

38. The VII International Congress of Penal Law, held at Athens in 1957, considered that subsequent acts involving the provision of aid, which do not result from a prior agreement, in particular concealment, should be punishable as special offences. 11/

39. It is true that legal writers tend to detach this "post factum" participation from complicity.

40. 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. The present report cannot propose a single rule without denying the coexistence of these two tendencies. The Special Rapporteur therefore felt it preferable to propose a draft article which took that coexistence into account. That is the purpose of paragraph 2 of this draft article, which is placed in square brackets.

9/ I. Andrejew, Le droit pénal comparé des pays socialistes, Paris, Pédone, 1981, pp. 61 et seq.

10/ 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 7 above), p. 377.

11/ See Compte-rendu des discussions, Athens, 1961, p. 350.

(d) Conclusion

41. 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

42. The Special Rapporteur proposes the following draft article:

> 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.
>
> Second alternative
>
> Each participant shall be punished according to his own participation, without regard to participation by others.

2. Commentary

(a) Paragraph (1)

43. 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.

44. 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.

45. 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.

46. Mere agreement to formulate a criminal plan is, in and of itself, a crime against the peace and security of mankind. Such a solution 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

47. This paragraph 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.

48. This twofold responsibility of participants was laid down in article 6 (c) in fine of the Charter of the Nürnberg Tribunal. 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 article 6 (c) in fine of the Charter of the Tribunal, which was based on the definition of the theory of conspiracy put forward by Chief Prosecutor Jackson. 12/ 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.

49. The provision in question 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 type of participation occurring in our time. Leaders and organizers are not always visible. They give orders and conceive of the crime, but they 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 committed by those who execute their orders, particularly since 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 Charter not only for the conception and organization

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12/ With regard to Chief Prosecutor Jackson's closing statement, see the fourth report by the Special Rapporteur (A/CN.4/398 (see footnote 1 above)), para. 123.

of the criminal activity but also for every individual crime committed in execution of the plan formulated by them.

50. This particular responsibility of organizers was clarified in particular by the ideas put forward by A. N. Traïnin, a Soviet professor, in a study entitled "Hitlerite responsibility under criminal law". He became a member of the Soviet delegation to the 1945 London Conference. In the study, whose English version was published in 1945, he distinguishes between two categories of responsible individuals: direct perpetrators and indirect perpetrators of the crime, namely, responsible government officials, members of a military command, financial and economic leaders and others. Such individuals 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.

51. Article 6 in fine of the Charter of the Nürnberg Tribunal is based on this idea. However, 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.

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

53. The solution chosen by the 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) in fine of the Nürnberg 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.

54. In its 1954 draft 13/ the International Law 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 ... paragraphs of this article". That represents a considerable extension.

55. 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.

56. 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, since other entities exist. Crimes perpetrated against the entities in

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13/ 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.

question constitute crimes against humanity. These entities are, for example, of an ethnic, religious and cultural nature. 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.

57. It should be pointed out, furthermore, that the Nürnberg Tribunal's restrictive interpretation was not uniformly followed by all of the international military tribunals. For example, the concept of collective responsibility was applied in a situation that did not involve a crime against peace. In the Pohl case, Pohl had been accused of having conserved and accounted for loot taken from dead concentration-camp inmates. As a defence, Pohl had invoked the fact that he had not actually transported the stolen goods or removed the gold from the dead inmates' teeth. The United States Military Tribunal stated in the judgement it rendered (case No. 4): "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 ... in the after-phases [of the action] makes him particeps criminis in the whole affair." 14/ (Emphasis added by the Special Rapporteur).

58. Today, there is an 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. That need 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.

59. Major crime 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.

60. It was above all the twofold responsibility implied by the concept of conspiracy that gave rise to reservations by some members of the Tribunal. The French member of the Tribunal, Prof. Donnedieu de Vabres, indicated in this connection that it was "an interesting but somewhat far-fetched construction". The view expressed by that eminent author would perhaps be different today.

61. Studying the phenomenon of collective crime, Messrs. Merle and Vitu indicate that: "the legal problems to which these collective offences give rise no longer occur in entirely 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

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14/ American Military Tribunals (see footnote 5 above), case No. 4, vol. V, p. 989.

the two 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 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. 15/

62. 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. 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.

63. 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

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

65. Article 22, paragraph 3, of the Penal Code of the German Democratic Republic goes further, in that it introduces many more nuances. Under the provision in question, the extent of 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 contains more differentiations than the one just referred to, is to determine the precise extent of the responsibility of the individual. The question is, however, whether it is really applicable in the case of crimes such as those under consideration, and whether it

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15/ Merle and Vitu, Traite de droit criminel, Paris, Cujas, p. 622.

is suited to modern criminology and meets the need for punishment of the offences involved.

(c) Conclusion

66. 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. As in the case of conspiracy, the concept of complicity implies agreement and a concordance of intentions. The two concepts therefore often produce the same phenomenon, namely, group crime. That is why, moreover, article 6 of the Charter of the Nürnberg Tribunal included organizers and accomplices in the same text in situations where accomplices participated in a common plan.

C. Attempt

1. Draft article 17

67. The Special Rapporteur proposes the following draft article:

> The following constitute crimes against the peace and security of mankind:
>
> Attempt to commit a crime against the peace and security of mankind.

2. Commentary

68. 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 International Law Commission.

69. On the other hand, attempt is included in article 2, paragraph 13 (iv), of the 1954 draft code. However, the 1954 draft still merely referred to attempt without defining it.

70. 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. With regard to the controversies in question, the Special Rapporteur refers the reader to his fourth report. 16/

16/ A/CN.4/398 (see footnote 1 above), paras. 142-145.

71. Unquestionably, the theory of attempt can be applied only to a limited extent in the area of the crimes under consideration. 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?

72. A whole range of examples can be put forward to prove that the concept of attempt can be applied in the field under consideration only to a limited extent, owing to the nature of the offences involved.

73. 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.

II. PART TWO - INTERNATIONAL ILLICIT TRAFFIC IN NARCOTIC DRUGS

A. Illicit traffic in narcotic drugs, a crime against peace

1. Draft article X 17/

74. The Special Rapporteur proposes the following draft article:

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. Commentary

(a) Paragraph (1)

75. 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.

76. Such trafficking can give rise to a series of conflicts, for example, between 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 to a certain extent itself becomes the perpetrator of the internationally illicit act.

17/ The Commission will have to decide where this draft article is to be inserted definitively among the crimes against peace.

(b) Paragraph (2)

77. Paragraph (2) concerns substances in which trafficking is considered to be illicit. The substances in question are listed in the conventions in force. It seems unnecessary to list them once again here. The main instruments are the 1961 Single Convention on Narcotic Drugs, as amended by the 1972 Geneva Protocol, 18/ and the 1971 Convention on Psychotropic Substances. 19/

(c) Relationship between the draft Code and the conventions in force

78. In defining traffic in narcotic drugs as a crime against the peace and security of mankind, the Code meets the requirements of the current trend towards regarding the phenomenon in question more and more as one of the greatest scourges of mankind.

79. The Convention of 26 June 1936 already required contracting States to undertake 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.

80. The Vienna Convention of 19 December 1988 20/ calls upon the contracting parties to establish as criminal offences the offences referred to in the provisions of article 3, entitled "Offences and sanctions". In particular, the Convention calls upon the parties to 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; the fact that the offender holds a public office and that the offence is connected with the office in question". All the aggravating circumstances referred 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.

18/ United Nations, Treaty Series, vol. 976, No. 14152.

19/ Ibid., vol. 1019, No. 14956.

20/ E/CONF.82/15.

B. Illicit traffic in narcotic drugs, a crime against humanity

1. Draft article 1 21/

81. The Special Rapporteur proposes the following draft article:

The following constitute crimes against humanity:

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

2. Commentary

82. This draft article does not call for lengthy comments. 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.

21/ The Commission will have to decide where this draft article is to be inserted definitively among the crimes against humanity.