

ADDITIONAL CRIMES PROPOSED BY MEMBERS OF THE COMMISSION FOR INCLUSION IN THE DRAFT CODE

Proposals submitted by Mr. Hsu.¹⁵

107. The CHAIRMAN, accepting that motion, invited observations on the proposals submitted by Mr. Hsu.

108. Mr. HSU suggested that the Commission should first examine proposals Nos. 1, 2 and 3 which referred to subversive activities. He had no objection to their incorporation in a single text, if that was the Commission's desire. At the same time he hoped that the draft code would take account of subversive activities as construed in his proposals.

109. Mr. HUDSON said he did not understand the meaning of the term "subversive". If Mr. Hsu meant activities designed to overthrow a government, he thought they were already covered by the various crimes which had just been adopted by the Commission.

110. Mr. BRIERLY thought that those activities were identical with activities designed to provoke civil strife.

111. Mr. HSU disagreed, citing the example of the organization of fifth columns and their activities. None of the provisions so far adopted by the Commission covered those subversive activities and such provisions as might apply to them were not strict enough. The traditional terminology was inadequate to cover new acts.

112. Mr. YEPES, while agreeing with the principles stated in Mr. Hsu's proposals 1, 2 and 3, thought that the acts mentioned were already included under Crime No. III which concerned the fomenting of civil strife in another State. He was prepared to accept Mr. Hsu's proposals if Mr. Hsu could convince the Commission that they related to something new.

113. Mr. HSU replied that the Commission was continually using outmoded formulas, which should be modified and adapted to the new circumstances and new facts that had arisen. The draft code as it stood would be inadequate to punish the activities with which his proposals dealt.

114. The CHAIRMAN was convinced that there were new elements in Mr. Hsu's proposals. He agreed that fifth column activities were a new departure and might lead to civil strife, or even to war. For example, a military arsenal in France had had an overseer of German nationality, naturalized French. On the declaration of war that overseer had donned a German captain's uni-

form, stating that he was a German after all and it was his duty to behave as such. Such special cases, which Mr. Hsu seemed to have in mind, were frequent and might be connected with war preparations or subversive movements. Mr. François could undoubtedly supply many similar examples.

115. Mr. FRANÇOIS, confirming the Chairman's observation, agreed that reference should be made to such cases. But he pointed to the danger inherent in a principle which was not clearly expressed. For instance, what would be the position with regard to anti-Communist propaganda carried out by agents in Communist countries? Would such propaganda be subversive or not?

116. The CHAIRMAN moved the adjournment and proposed that the next meeting of the Commission should be devoted to the deletion from the draft code of all provisions which might be submitted in the form of a draft convention. He added that it was outside the Commission's competence to suggest the procedure to be adopted for putting the code into effect.

117. Mr. SPIROPOULOS thought that it lay with the Commission to define the tasks it had to perform. He himself had merely drawn up a list of crimes and bases of discussion. If the Commission's present intention was to prepare, not a draft convention, but only a list of crimes, he was inclined to believe that the General Assembly would be surprised to receive a text which it had itself to complete. A draft convention would be of value as the only practical means of applying the provisions contained in the draft code. At the same time the Commission, if it intended to prepare a draft convention, should confine itself to decisions of principle and not go into further details.

118. Mr. HUDSON thought it was no part of the Commission's functions to prepare a draft convention.

The meeting rose at 6.10 p.m.

61st MEETING

Wednesday, 5 July 1950, at 10 a.m.

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¹⁵ Additional crimes proposed by Mr. Hsu (A/CN.4/R.1):

- " 1. The waging by a State of subversive propaganda against another State or the encouragement or toleration of such an activity within its territory.
2. The giving by a State of aid, moral, political and economic, to subversive elements in another State or the encouragement or toleration of such an activity within its territory.
3. The maintenance of subversive agents by a State in another State.
4. The application of coercion, psychological or economic, by a State against another State.
5. The planning by a State of an aggressive war against another State."

Chairman: Mr. Georges SCELLE.

Rapporteur: Mr. Ricardo J. ALFARO.

Present:

Members: Mr. Gilberto AMADO, Mr. James L. BRIERLY, Mr. Roberto CÓRDOVA, Mr. J. P. A. FRANÇOIS, Mr. Shuhsi HSU, Mr. Manley O. HUDSON, Mr. Faris el-KHOURY, Mr. A. E. F. SANDSTRÖM, Mr. Jean SPIROPOULOS, Mr. Jesús María YEPES.

Secretariat: Mr. Ivan KERNO (Assistant Secretary-General in charge of the Legal Department); Mr. Yuen-li LIANG (Director of the Division for the Development and Codification of International Law, and Secretary to the Commission).

Letter from the Vice-President of the International Red Cross Committee

1. The CHAIRMAN stated that he had received a letter from Mr. Léopold Boissier, Vice-President of the International Red Cross Committee, to the effect that the members of the Commission would receive individual invitations for a reception to be held on Thursday, 13 July. Mr. Bossier hoped that this meeting would provide an opportunity for an entirely unofficial exchange of views on subjects of common interest to the Commission and the International Red Cross Committee and, in particular, for a fruitful discussion of ways and means of bringing the proposals studied by the Commission and the Geneva Conventions of 1949 into harmony. He would be glad to know in advance what subjects the Commission would like to discuss.

1 a. He proposed that to initiate this brief discussion, which should not take more than an hour, Mr. Spiropoulos should make a short statement on the Commission's method of work, after which the members of the International Red Cross Committee could ask questions.

2. Mr. HUDSON considered that the discussion should be kept on an unofficial basis. Mr. Huber wished to know what the members of the Commission thought. He might be told that the draft code of offences against the peace and security of mankind would not be finished until next year and that, for the final draft, the Commission would take into consideration the four Geneva Conventions and, in particular, the penalties provided for therein.¹

3. The CHAIRMAN agreed with this standpoint, and thought it probable that the members of the International Red Cross Committee would adopt the method of asking questions. In his opinion, it would not be possible to introduce the four Conventions into the draft code. The conversations would be of an unofficial and informal nature. Mr. Huber would probably preside over the discussion.

Preparation of a draft Code of Offences against the Peace and Security of Mankind: report by Mr. Spiropoulos (General Assembly resolution 177(II) (item 3 of the agenda) (A/CN.4/25) (continued)

ADDITIONAL CRIMES PROPOSED BY MEMBERS OF THE COMMISSION FOR INCLUSION IN THE DRAFT CODE

(a) Proposals by Mr. HSU (continued)²

4. Mr. HSU remarked that, in his statement on aggression against Southern Korea, President Truman had used the word "subversion". "The attack on Korea," he said "makes it plain beyond all doubt that the Communists have passed beyond the use of subversion to conquer independent nations and will now use armed invasion and war." These words showed that subversion was a crime that could be committed independently of the use of armed forces or of war. The objection had been raised that it was redundant to include this new crime, as it had already been provided for by other definitions. He had, however, studied the list of crimes so far agreed upon, and had found that the addition of this crime was really necessary. What had been provided for so far in this connexion was inadequate, as it did not answer to the existing situation. It was true that the fomenting of civil strife and of terrorist activities was covered by the text he proposed, but this text had a far wider application than definitions Nos. III and IV. Conquest was not the direct object of civil war or of terrorist activities, but it was the object of subversive activities.

4 a. He was prepared to submit his proposal in the form of a single item to be worded as follows: "The use of subversion, including subversive propaganda, aid given to subversive elements, and maintenance of subversive agents in another State".

5. Mr. el-KHOURY suggested that as Mr. Hsu was pressing for the inclusion of subversive activities in the draft code, it should be left to the Drafting Committee to decide on the place in the code where these activities should appear.

6. Mr. HSU considered that this suggestion did not meet the case. Subversive activities were too important to be included amongst minor provisions. They should be dealt with in a principal clause to which other questions should be related.

7. Mr. el-KHOURY thought that subversive activities could be related to the fomenting of civil strife.

8. The CHAIRMAN asked whether the Commission wished to list these activities as a separate crime.

9. Mr. HUDSON wished to know whether Mr. Hsu could reply to the very pertinent question put to him by Mr. François on the preceding day.

10. Mr. FRANÇOIS repeated his question. He asked whether this item could not equally be applied to anti-Communist propaganda. If so, the Pope had rendered himself guilty of this crime, as he indulged in anti-Communist propaganda. His aim was the abolition of the Communist regime. That was subversive activity di-

¹ See International Committee of the Red Cross, *The Geneva Conventions of August 12, 1949*, second revised edition, Geneva, 1950.

² See summary record of the 60th meeting, footnote 15.

rected against the regime existing in some countries. He considered that the proposed text went too far.

11. Mr. HSU replied that that was a very important question. Obviously, propaganda did not in itself constitute the whole of the problem. But it might be said that in the same way as there was at times legitimate occasion for the use of force, there could be good propaganda. Therefore, if the Pope indulged in propaganda, it might be considered that it was good. A distinction must be made between good and subversive propaganda, and he did not see why the Holy See's propaganda should be regarded as subversive.

12. Mr. FRANÇOIS felt that the Pope's words might also be considered as offending against item 2, which spoke of "moral aid".

13. Mr. HSU did not attach particular importance to the word "moral". If the Pope's propaganda was good, it was not subversive.

14. The CHAIRMAN said that, if Mr. Hsu was agreeable, the Commission might adopt Mr. el-Khoury's suggestion and leave it to the Drafting Committee to decide what part of Mr. Hsu's proposal was of special importance and should therefore be included. In his opinion, it applied in particular to the practice of maintaining a fifth column.

15. Mr. HSU agreed to this suggestion on condition that the Drafting Committee gave careful consideration to this question which, in his opinion, was of the very greatest importance.

16. The CHAIRMAN thought that the acts to which the above items referred had already been dealt with in the draft Code. Item 4 also fell within the sphere of the use of force in the form of a blockade, which the Commission had decided not to include as a separate crime. Item 5 was covered by the terms of Crime No. I.

17. Mr. el-KHOURY considered that the proposals went too far. According to item 4, a blockade and the breaking off of economic relations constituted international crimes. He was unable to share this view.

18. Mr. HSU did not feel so strongly about this crime as about the others, but he pointed out that they did not involve the use of force. A country could be brought to heel solely by an interruption of economic relations. Small countries were always vulnerable to measures of coercion. Nevertheless, he would not press for the adoption of item 4.

19. Mr. SPIROPOULOS pointed out that as far as item 5 was concerned, the Commission had already decided to deal separately with the act of preparing for an aggressive war in the definition of Crime No. I.³

20. Mr. HSU agreed to the elimination of item 5.

(b) *Proposal by Mr. Sandström⁴*

21. Mr. SANDSTRÖM pointed out that a State might indulge in the destruction of property in the territory of another State for a political purpose. Obviously, the

value of the Code did not depend on the number of crimes listed therein. Did any of his colleagues think there were good reasons for inserting this provision in the draft?

22. The CHAIRMAN remarked that there was a connexion between Mr. Sandström's and Mr. Hsu's proposals.

23. Mr. SANDSTRÖM pointed out that Mr. Hsu's proposal was mainly concerned with propaganda. The acts to which his own proposal referred were perhaps related to those which Mr. Hsu had in mind, but they would have a physical effect.

24. The CHAIRMAN asked Mr. Sandström whether he desired the inclusion in the Code of a special article defining the crime which he had in mind.

25. Mr. SPIROPOULOS considered that, generally speaking, the crimes listed in the draft Code consisted of concrete acts as, for instance, invasion. Other actions, such as those to which Mr. Hsu's and Mr. Sandström's proposals referred, were less serious. It was a very delicate matter to decide whether they constituted crimes under international law. The question of propaganda had been discussed when the Convention on Genocide was being drawn up. At that time it was considered that the term was too vague. Sabotage or propaganda were not sufficiently concrete acts to be considered as constituting international crimes. Nevertheless, he would not oppose the proposal.

26. Mr. SANDSTRÖM felt that acts of sabotage were quite sufficiently concrete. However, the point at issue was whether they were sufficiently important to constitute international crimes. It was on this point that he wished to have his colleagues' opinions.

27. Mr. ALFARO considered that the Commission should approve Mr. Sandström's proposal. There could be no doubt that the citizens of certain countries were at the present time fanatically attached to an ideology, and were prepared to use all weapons against countries which did not adhere to it. He recalled the acts of sabotage committed by the Germans in the United States during the First World War. Sabotage and the activities of a fifth column were crimes of which the Commission should take account, even though the agents employed therein were natives. Sabotage differed from the crimes which had been dealt with so far, and should be included in the Code.

28. Mr. KERNO (Assistant Secretary-General) was doubtful whether it were possible to define sabotage. In all penal codes, crimes were precisely defined. He was aware that it was not possible to achieve the same degree of precision in international law. But where should the line be drawn as regards sabotage? Must it be committed with a certain intention? Must it be bound up with preparations for war? If sabotage could be defined with a certain amount of precision, which he doubted, he thought that it could be brought into the Code.

29. Mr. el-KHOURY proposed to speak about sabotage in time of peace, as it was permissible for belligerents to practise it in time of war. He could not see any difference between sabotage in time of peace and

³ See *ibid.*, paras. 80 and 81.

⁴ Additional crime proposed by Mr. A. E. F. Sandström (A/CN.4/R.1): "Acts of sabotage carried out by one State in the territory of another State."