III/15.
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UNITED NATIONS WAR CRIMES COMMISSION.

Note on the Criminality of "Attempts to Denationalise the Inhabitants of Occupied Territory" (Appendix to Doc.C.1. No. XII) - Question Referred to Committee III by Committee I.

By Mr. E. Schwelb.

I. On 29th August, the Yugoslav National Office submitted to the Commission the charge No.1434 against 24 Italian war criminals accused of a large number of common war crimes, e.g. murder, massacres, systematic terrorism, putting hostages to death, etc.

Committee I at its meeting, held on 5th September 1945, decided to put 20 out of the 24 accused persons on A. The cases of 4 of the 24 accused: Bettini (No.6), Inchiostri (7), Ciubelli (9) and Nicoletti (20), were adjourned and Committee I decided to put the question of law, relevant to the case of these four persons, before the Legal Committee (III)

II. The four persons mentioned are accused of the war crime mentioned in the list of war crimes annexed to Doc. C.1. para XII, "Attempts to Denationalise the Inhabitants of Occupied Territory."

The following particulars are stated in the Yugoslav charge No. 1434 about the four persons: "Apart from killing, deporting and interning innocent persons, the Italians started a policy, on a vast scale, of denationalisation. As a part of such a policy, they started a system of "re-education" of Yugoslav children. This re-education consisted of forbidding children to use the Serbo-Croat language, to sing Yugoslav songs and forcing them to salute in a fascist way, become members of the G.I.L. (Gioventu italiana del Littoria) and spend a certain time in camps for "education." In all these actions aimed at the denationalisation of Yugoslav children, Dr, Binna took a very active part. He brought Italian teachers from Italy and posted them all over the province of ZADAR. Amongst those Italian teachers who insisted on the italianisation of Yugoslav children, BETTINI, Education Inspector and INCHIOSTRI, head-master of a secondary school at SIBENIK took a prominent part. Dr. Tulio NICOLETTI Trustee for Education at SIBENIK, and Edoardo CIUBELLI, Education Inspector at ZADAR, were also prominently associated with this policy. NICOLETTI organised special courses for teachers to learn Italian and Italian "methods" and he threatened all those who would not attend the courses. Dr. BINNA is also responsible for forbidding the edition of any newspaper printed in the Serbo-Croat language, and for forcing Yugoslavs to hoist Italian flags." It may be added that Prefetto Binna, who is mentioned in the paragraph quoted, is accused of a great number of other crimes, the character of which as war crimes is beyond doubt and he has, therefore, been put on A.

III. The opinion of Committee I both on the principle to be applied in deciding the case of these four persons, and on the application of this principle to the particular facts of the case, was divided. Some members of Committee I expressed doubt whether what these four persons were charged with, constituted war crimes. One member of Committee I pointed out that there must be made a distinction between violations of International law on the one hand and war crimes on the other.

Only such acts should be treated as war crimes as shocked the conscience of humanity. Another member, on the other hand, expressed the opinion that, as the Commission had accepted the attempt to denationalise the inhabitants of occupied territory as a war crime (Appendix to Doc.1. No. XII) it could not be denied that, in the present case, there was prima facie evidence of this crime.

IV. Without expressing an opinion of my own, I venture to place before Committee III some material which might be considered relevant for the decision of the question.

V. In the report of the sub-committee, as adopted at the second unofficial meeting of the United Nations War Crimes Commission, held on the 2nd December 1943, (Doc C.1.) it was pointed out in paragraph 6 that "in the opinion of the sub-committee it will be better for the Commission not to attempt to draw up any list of war crimes which will tie the hands of the Governments of the United Nations," but it was said in paragraph 7 that "it will be convenient, both to the Commission and to the National Offices which will prepare the individual cases and transmit them to the Commission that there should be a working list, enumerating the various headings under which war crimes should be grouped." The sub-committee went on to recommend that the list framed by the Responsibilities Commission of the 1919 Conference should be adopted by the Commission as the working list for the above purpose. (Paragraph 9) In paragraph 10 of the report, it was pointed out that it would be necessary to add to this list one or two items which seemed to be inadequately covered by the language employed in framing the list. Simultaneously it was said that it would be necessary to disregard certain items - such as No.21 - as these referred to acts which in the present war the forces of the United Nations have themselves been obliged to commit.

According to paragraph 12 of the report, the advantage of working, as far as possible, on the basis of the 1919 list is that of the present Axis powers, Italy and Japan were parties to its preparation and, so far as the sub-committee was aware, Germany had never questioned the inclusion of any particular item in the list. Furthermore it diminishes the risk of criticism on the ground that the United Nations are inventing new war crimes after the acts have been perpetrated. It may be quoted in this connection that, at the meeting of the 2nd December 1943, Lord ATKIN considered the 1919 list of war crimes to be too long; some of the offences contained in it would, in his opinion, have to be dropped. The Commission, however, considered that for present purposes, no change should be made in the list.

From what has been said so far, it follows that the adoption of the 1919 list as the working basis for the activities of this Commission, does not constitute a binding decision on what to consider and what not to consider a war crime, and that, therefore, this Committee and the Commission, in deciding the present case, may proceed entirely unfettered by what was done at the meeting of 2nd December 1943.

VI. The problem raised in this case goes to the root, not only of the jurisdiction of the United Nations War Crimes Commission, but of the fundamental problems of delinquency in International Law in general. The notion of an International Crime or of a crime in International Law has been controversial for a very long time. It is interesting to note that it is particularly the German literature on the subject which holds that every contravention of International Law amounts to an International Crime; not only acts which are shocking from the moral point of view are under this doctrine International Crimes, but also

every breach of contract or agreement. This doctrine is particularly upheld by STRUPP in his book "Das völkerrechtliche Delikt, 1920". He says "Völkerrechtliches Delikt ist eine von einem Staate ausgehende, die Rechte eines anderen Staates verletzende Handlung, die nur dann auf staatliches Verschulden zurückzuführen sein muss, wenn ein staatliches Unterlassen in Frage steht". This definition has not been accepted by other writers. FAUCHILLE distinguishes between "délits internationaux" and the breach of contractional obligations. RIVIER, Principes du droit des gens, 1896, says: "Tout acte qui viole un droit essentiel est une infraction au droit des gens, un crime au délit international." It is interesting to note that Rivier speaks of the violation of an <u>essential</u> right as constituting an international crime.

VII. It is submitted that the fact that acts constituting what corresponds to civilian wrongs (torts) and breach of contract were, by writers on international law, put on the same footing as acts corresponding to crimes in municipal law, was mainly due to the fact that, until very recent times, only States were considered to be subjects of International law. This alleged nature of the Law of Nations excluded the possibility of "punishing" a state for an international delinquency and of considering the latter in the light of a crime and led to the conclusion that the only legalconsequences of international delinquency were such as create reparation of the moral and material wrong done. The equation of acts morally shocking with acts constituting merely contraventions of contractual obligations was due to the fact that even atrocious crimes led not to the punishment of the guilty individual, but only to a claim against the State for reparation and damages.

At a stage in the development of International law which has so far culminated in the conclusion of the Four-Power Agreement, dated 8th August 1945, a doctrine which does not distinguish between crimes in the sense of criminal law and mere civil or administrative wrongs must be considered obsolete in Internation law to the same extent as it has been obsolete in the municipal law of civilised states for hundreds of years. At a time when International Law assumes the responsibility for punishing international crimes, it is necessary to establish a delimitation between crimes in the sense of criminal law and other illegal acts which, without constituting a crime, are mere contraventions of customary or conventional International Law.

VIII. It may even be that it is necessary to draw this line of delimitation between punishable crimes on the one hand, and what may correspond to civil wrongs and breach of contract on the other, straight across the facts described in the list appended to Doc. C.1. Professor H. LAUTERPACHT in his article "The Law of Nations and the Punishment of War Crimes" (British Year Book of International Law, 1944, page 58 and following) has hinted on this necessity of distinguishing between violations of rules of warfare and war crimes. He says, <u>inter alia;</u>

" In particular, does every violation of a rule of warfare constitute a war crime? It appears that, in this matter, textbook writers and, occasionally, military manuals and official pronouncements have erred on the side of comprehensiveness. They make no attempt to distinguish between violations of rules of warfare and war crimes. The Commission on Responsibilities set up by the Paris Conference in 1919 included under the list of charges of war crimes such acts as "usurpation of sogereignty during military occupation", "attempts to denationalize the inhabitants of occupied territory", "confiscation of property", "exaction of illegitimate or exhorbitant contributions and requisitions", "Debasement of the currency and issue of spurious currency", "imposition of collective penalties", and "wanton destructionof religious, charitable, educational and historic buildings and monuments." In view of the comprehensiveness of this list it is in the nature of an anti-climax to note that the number of persons whose delivery the Allied States

eventually demanded was inconsiderable. It is possible that one of the reasons for the failure to give effect to the decision to prosecute war criminals after the first World War was the extent of the list of offences as adopted by the Conference and the absence of a distinction between violations of international law and war crimes in the more restricted sense of the term...."

" It must be a matter for serious consideration to what extent an attempt to penalise by criminal prosecution at the hand of the victorious belligerent all and sundry breaches of the law of war may tend to blur the emphasis which must be placed on the punishment of war crimes proper in the limited sense of the term. These may be defined as such offences against the law of war as are criminal in the ordinary and accepted sense of fundamental rules of warfare and of general principles of criminal law by reason of their heinousness, their brutality, their ruthless disregard of the sanctity of human life and personality, or their wanton interference with rights or property unrelated to reasonably conceived requirements of military necessity. There is room for the view that the punishment of war crimes by the victorious belligerent ought to be limited to offences of this nature - offences which, on any reasonable assumption must be regarded as condemned by the common conscience of mankind...."

" The task of defining, from this point of view, the scope of violations of the laws of war which ought to fall within the purview of punishment by the victorious belligerent is one of considerable difficulty. A seemingly administrative act of a political nature, like deportation or segregation of large sections of the population of the occupied territory, may, in its effects upon human life and in the cruelty of its execution, be indistinguishable from the common crime of deliberate murder. But it is a task which ought to be attempted. The result of the differentiation thus established between the two categories of violations of the law of war would not necessarily be to render immune from punishment or from the duty of compensation the less heinious manifestations of lawlessness...."

" Pillage, plunder and arbitrary destruction of private and public property may, in their effects, be no less cruel and deserving of punishment than acts of personal violence. There may, in effect, be little difference between executing a person and condemning him to a slow death of starvation and exposure by depriving him of shelter and means of sustenance. "

IX, It will be noted that Professor Lauterpacht does not purport to lay down existing rules of International law. On the contrary, he proposes, as a matter of policy, to restrict the procedure applied to the punishment of war crimes, to such acts and omissions as are not only illegal but, in addition, shock the conscience of mankind. It is a matter left to the discretion of the United Nations in general and to the Governments represented on the United Nations War Crimes Commission in particular to adopt or to reject Professor Lauterpacht's view, which, as has been pointed out, was also shared by Lord Atkin in December 1943.

If Committee III should see its way towards adopting Professor Lauterpacht's distinction for the purposes of the work of the United Nations War Crimes Commission, the further question would arise, viz, where to draw the line and try to distinguish the mere contravention of rules of International law from war crimes in the narrower sense. The problem becomes particularly acute in such matters as "debasement of currency", (see Doc. I/22) or "attempts to denationalise the population" or "usurpation of sovereignty".

X. It is submitted that the following considerations would, perhaps, be relevant when attempts are made to distinguish war crimes proper from mere contraventions of rules of Internations law. (a) First it is necessary to ascertain whether the act in question constitutes, quite apart from all considerations of International law and legitimate warfare, a criminal offence. (b) If the question put under (a) is answered in the negative, the case is at an end. If it is answered in the affirmative, the further question arises, viz, whether the rules of International law afford to the perpetrator of the act immunity from his criminal liability, e.g. whether the act be excused as an act of legitimate warfare, or as an act falling within the lawful authority of a belligerent occupant. If the activities are not covered by the rules of International law as to warfare or belligerent occupation, the case for the criminal liability of the perpetrator is made out.

If, for instance, the authorities of the occupant illegally declare the annexation of certain territory and the inhabitants of the occupied territory are imprisoned or put to death only because of their disobedience to the constitutional situation brought about in this way, we have, applying what has been said in the preceeding paragraph, to consider whether the particular imprisonment or shooting as such constitutes an offence, irrespective of questions of International law. The answer to this question is obviously in the affirmative, the acts constitute either false imprisonment or homicide, as the case may be. We then proceed to examine whether international law affords any defence for this behaviour of an accused person, and, finding that the illegal annexation is outside the legitimate scope of the activities of belligerent occupants, we come necessarily to the conclusion that there is prima facie evidence that a war crime has been committed.

In the case of "attempts at denationalisation", we have to consider whether acts, such as depriving Yugoslav children of the possibility of being educated in the Serbo-Croat language, or compelling Yugoslav children to receive instruction only in a foreigh language, constitute criminal offences. The answer to this question will, in my opinion, mainly depend on the positive municipal law applicable to the case. There are a great many municipal legal orders which protect the population against denationalisation, inter alia, by declaring acts aiming at such denationalisation criminal offences. But even in such legal orders as do not contain special criminal sanctions against acts of denationalisation, such activities will more often than not be criminal under general provisions prohibiting and punishing violence, blackmail, menaces, and similar offences.

It is submitted that each case will have to be judged on its own merits. The "denationalisation" may be either effected or accompanied by acts on the part of the occupying authorities, which are criminal per se. There may, on the other hand, exist circumstances which do not let the activities appear criminal, though they, no doubt, are illegal. An example of the latter type of "attempts at denationalisation may exist where the occupation authorities do not close the existing schools and do not prevent parents from sending their children to them either by actual violence, or by threat, but where they try to bribe parents into sending children to schools instituted by the occupant by offering various advantages, like better school meals, clothing, etc.

XI. In the present case it would seem necessary to ask the Yugoslav National Office for further particulars both with regard to the actual facts and with regard to the municipal law to be applied. The result will probably be that at least certain acts of denationalisation of inhabitants of occupied territory committed by some of the accused, constitute a criminal offence. This being so, the second question

arises whether the criminality is cancelled by provisions of International law. This question must obviously be answered in the negative, because the Hague Regulations definitely forbid such interference on the part of the occupant.

It is the duty of belligerent occupants to respect, unless absolutely prevented, the laws in force in the country (Art. 43 of the Hague Regulations). Inter alia, family honour and rights and individual life must be respected (Art. 46). The right of a child to be educated in his own native language falls certainly within the rights protected by Article 46 ("individual life"). Under Art. 56, the property of institutions dedicated to education is privileged. If the Hague Regulations afford particular protection to school buildings, it is certainly not too much to say that they thereby also imply protection for what is going to be done within those protected buildings. It would certainly be a mistaken interpretation of the Hague Regulations to suppose that while the use of Yugoslav school buildings for Yugoslav children is safe-guarded, it should be left to the unfettered discretion of the occupant to replace Yugoslav education by Italian education.

It is the rationale of Art. 56 to protect spiritual values. And in order to afford this protection to spiritual values the provision protects the property of institutions dedicated to public worship, charity, education, science and art as a means to a certain end: to make public worship, charity, education, science and art possible even under belligerent occupation. If the belligerent occupant must not confiscate, seize, destroy, or wilfully damage the property of educational institutions, he is the less entitled to interfere with the spiritual and intellectual life of the schools, the only possible legitimate exception being considerations of the safety of the occupying forces.

XII. What has been said so far concerns the problem as a general proposition only. It is a different question to decide to what extent there is in the charge No. 1434 a prima facie case against the four persons whose listing is proposed by the Yugoslav National Office.

In the case of Nicoletti (No.20) who is described as Educational Trustee, it appears that he was a kind of Commissioner in chargeof the administration and Italianisation of the schools in the district. In his case it seems to be conceivable to fasten upon him the individual responsibility for the whole Italianisation scheme. The case of the three other persons who were mainly teaching personnel, seems prima facie to be different.