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July 10th, 1945.

UNITED NATIONS WAR CRIMES COMMISSION,

COMMITTEE I.

REPORT ON THE YUGOSLAV CASE NO. 940. (Italian
Courts in Dalmatia).

By Mr. E. Schwelb, Legal Officer.

At its meeting of June 20th, 1945 (Minutes No. 15), Committee I adjourned the case No. 940 (against Giuseppe BASTIANINI and 36 other persons), because it wished to obtain additional information about the character of the courts to which some of the accused belonged, their procedure, and the substantive law which they were called upon to administer.

The Yugoslav delegate has now submitted a memorandum concerning the organisation and working of Italian Tribunals in occupied Yugoslav territory adding that it will appear from the memorandum, that the Italian judicial machinery established in Yugoslavia was one of the instruments used by Fascist Italy to enforce the denationalisation of the Yugoslav population. In his accompanying letter, Dr. Marković asks to hand this Memorandum to Committee I. The memorandum was distributed to the members of Committee at its meeting held on July 4th, 1945.

The following is a summary of the position as it appears from the charge, as supplemented by the Memorandum.

I.

The persons named under numbers 1 to 21 are alleged to be responsible for either the actual commission of, or the participation in, mass murders, ill-treatment, arrest or internment of citizens, as well as the pillage and burning down of entire villages; as a particular example, the ill-treatment of the Orthodox Bishop of Sibenik is mentioned. The accused Nos. 14, 15 and 16, are, in addition, charged with the responsibility for the shooting of 48 hostages. (Part 3 of the charge).

The evidence of these crimes has, it is stated, been collected by the local Yugoslav authorities investigating war crimes in Dalmatia, and has been transmitted to the Yugoslav State Commission. The charge refers to a number of documents. Although these documents are not placed before the Committee, it will be in accordance with the usual procedure to place these persons (items 1 to 21) on 'A', no novel question either of law or of fact being involved.

II.

MAGALDI (No. 2) is further charged with having set up in Sibenik an "Extraordinary Court" which he used as an instrument for committing "ordinary" i.e. common crimes. This court, under Magaldi's chairmanship and with SERRENTINO (No. 3) and CARRUSO (No. 4) as member judges, is accused of having pronounced sentences on innocent people in summary and arbitrary proceedings without any kind of legal provision for the accused. Two examples of such sentences, passed on October 13, 1941, and October 29, 1941, are given which led to the shooting of six and eleven innocent Yugoslav citizens.

Part III of the Yugoslav Memorandum deals with the Tribunale Straordinario della Dalmazia, which seems to be the "Extraordinary Court" mentioned in part 2 of the charge, accusing Magaldi, Serrentino and Carruso.

The Tribunale Straordinario della Dalmazia is stated to have been formed by a Decree of the Governor of Dalmatia, Bastianini, in October 1941 (Decree No. 34). The Yugoslav Memorandum states that this Decree was enacted on October 12, 1941, but was antedated so as to cover a death sentence passed on October 11, 1941.

According to the Memorandum, an agent of the Italian police was killed in Sibenik, the perpetrator of this act was not found, a large number of Yugoslav youngsters were arrested and the ante-dated decree was meant as a "legal basis" for putting these youngsters to death.

This case seems to be different from a case described in the charge which deals with a death sentence passed on the 13th October, 1941, against six men, described as perfectly innocent farmers, who were sentenced by the Extraordinary Court on the basis of mere suspicion of their unreliability vis-à-vis the Italian authorities.

If this interpretation of the charge on the one hand, and the Memorandum on the other, be correct, the three members of this court are accused of having committed murder in three concrete cases:

- (a) the case of the youngsters condemned to death even before the Decree was actually promulgated (11th October 1941);
- (b) the case of the six farmers (13th October 1941); and
- (c) the case of the eleven innocent inhabitants (October 29th, 1941).

The Memorandum goes on to state that the court in the four cases above sentenced over fifty people to death. It is not clear whether these four cases include the three cases mentioned above, or whether they are in addition to them.

The Court had no permanent seat but functioned mostly in Sibenik (Sebenico) and in Split (Spalato). The three cases mentioned above are all located in Sibenik.

If the statements contained in the Yugoslav charge and in the Yugoslav memorandum are accepted as prima facie evidence, then it is submitted that it is not necessary to analyse the provisions regarding the setting up of the Tribunale Straordinario della Dalmazia, because on this evidence, the three sentences passed on 11th, 13th and 29th October, 1941, do not seem to have been passed in bona fide exercise of the judicial office, whatever the contents of the enactment setting up the court may have been.

From this point of view, it would not be necessary for Committee I to commit itself to a definite pronouncement whether the setting up of the Tribunale Straordinario and accepting office to sit on it as such constitute a crime and Committee I would have a sufficient justification for charging the three members of the court for the (three) actual judgments cited.

If this be correct, the case of the Tribunale Straordinario differs from the Czechoslovak cases regarding Sondergerichte and Standgerichte (Nos. 389, 424 and 464; see my Report dated April 3rd, 1945), in that here it is not necessary to have recourse to the general provisions of the enactments concerned, the actual results arrived at in several proceedings of the court establishing prima facie evidence of the commission of crimes clothed in the form of judicial process.

III.

If Committee I would like to base its decision not on the actual facts of the three trials mentioned respectively in the charge and the

Memorandum, but on the wider ground that the setting up of the Tribunale Straordinario and accepting office in it as such constitute a war crime, it would have to consider the following peculiarities of the Decree establishing the Tribunal, which are pointed out by the Yugoslav memorandum:

- (a) only one sentence could be passed: the death sentence;
- (b) the organisation and procedure of this court were regulated by three articles only;
- (c) in regard to the proceedings the Decree provided only that the accused could have a counsel;
- (d) the sentence was to be carried out forthwith and without delay;
- (e) everything else was left to the arbitrary will of the chairman.

By way of comparison it may be said that neither the Military Government Courts set up by the Western Allies in Italy (the provisions are published in the British Yearbook of International Law, 1944, pp. 156 et seq.), nor the Military Government Courts set up by the Western Allies in Germany (see Doc. C. 132), nor the British Military Courts set up in the British zone under the Royal Warrant (see Doc. C. 131) suffer from the defects (a) to (e) supra. But in spite of that, I personally very much doubt whether the mere setting up of similar courts and the mere acting as a member of them is criminal, provided that the occupation in the course of which the courts are being set up is not illegal and provided that the courts exercise their judicial office properly and bona fide, i.e. passing sentences only on persons who are convicted of having committed crimes falling under the jurisdiction of these courts.

IV.

In addition to the three members of the Tribunale Straordinario, the Yugoslav charge also accuses several persons responsible for the activities of a new court, called "Special Court" set up at Sibenik for the same criminal purposes.

The charge states that the persons responsible for the activities of this "Special Court" are the persons named under Nos. 4 to 19.

This statement seems to be erroneous. The person charged under No. 4 (Carruso) was a member of the Tribunale Straordinario and is charged as such, while the persons charged under Nos. 5 to 19 do not seem to have had any connection at all with either type of court. They are charged, in part 1, as responsible for terrorism unconnected with judicial proceedings, as e.g. Ferretti (No. 17), Pividori (No. 18) and Canazzoni (No. 19) with the ill-treatment of the bishop and his valet and with looting the bishop's belongings, and Sestilli (No. 14), Bungaro (No. 15) and Terranova (No. 16) with the shooting of hostages.

It is the persons named under Nos. 22 to 34 who are stated to have been judges of the Special Court, the persons named under Nos. 36 and 37 to have been prosecutors before the court and No. 35 to have been chief prosecutor in Zadar (Zara).

V.

As to the "Special Court", the charge states that it was established in 1942, that it tried over 5000 people, over 400 of whom it sentenced to death. The cases were invariably tried without a proper investigation being made, the sentences were often decided upon even before the trial took place, thus revealing, according to charge No. 940, the fact that the Court was carrying out sheer judicial crimes.

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The charge mentions one concrete case, i.e. the putting to death of 26 innocent inhabitants on January 29, 1942. Particular circumstances of this case are not given.

The Yugoslav memorandum, on the other hand, states that the Tribunale Speciale della Dalmazia was formed not, as is stated in the charge, in 1942, but by a proclamation by Mussolini dated October 24, 1941. It is not clear, therefore, whether the "Special Court" mentioned in the charge and the Tribunale Speciale, mentioned under IV in the Memorandum, are the same institution and whether, what is said in the Memorandum about the latter applies also to the former.

About the constitution and procedure of the Tribunale Speciale della Dalmazia, the following is said in the Memorandum:

- (a) It was designed as "the opposite number" of the Special Court for the Defence of the State (Tribunale Speciale per la Difesa di Stato) in Rome;
- (b) In spite of the fact that Articles 11 to 15 of the relevant Decree provided for civil as well as military judges, all the members of the Court were military;
- (c) The organisation was in every respect analogous to the organisation of the Tribunali Militari di Guerra;
- (d) It was a political tribunal, important powers being reserved to the Governor of Dalmatia;
- (e) The tribunal was competent to try offences against "War discipline", which included anything from the non-delivery of wool to murder;
- (f) There was no guarantee that the accused could defend himself, the maxim in dubio pro reo was not applied, motions put forward by the prosecutor were accepted, he was an omnipotent personality and it was he who determined the type and severity of the punishment:

The reasons summarised under (a) to (d) do not appear to make the establishment of, and the acceptance of service on, such courts as such a criminal offence, although the Tribunali Militari di Guerra (c) applied the procedure called "guidizio direttissimo" which appears to have had a somewhat too summary character. The circumstance listed under (d) brings the Tribunale Speciale perilously near the German Sondergerichte and (e) throws also a light on them in which they appear to have been from the very beginning designed not as courts fulfilling bona fide judicial functions, but as instruments of political repression.

In spite of that I personally would rather hold that the description of the general provisions applicable to, and applied by, these tribunals is not precise enough to be classified as prima facie evidence of the criminality of their mere setting up.

VI

We are, therefore, also with regard to these Tribunali Speciali thrown back on the amount of evidence produced as to their actual functioning.

It was already pointed out that the charge mentions one case only, where the "Special Court" sentenced 26 innocent inhabitants to death, (January 29, 1942). (See supra V).

The Memorandum mentions a number of other cases, without giving dates, names or a description of actual circumstances:

(a) Pronouncement of sentences as a result of vague indications, such as friendly relations from childhood or professional relations (apparently with actual perpetrators of alleged crimes), photographs showing cheerful picnic parties;

(b) A person was held guilty because he had belonged, before the war, to a certain political party, or had been a member of a national organisation;

(c) Many of the accused were sentenced merely because, during the trial, they refused to give the fascist salute;

(d) In one case the Court accepted as conclusive evidence of membership of a "subversive organisation" the fact that all the accused persons who were all young girls from Sibenik wore the same shoes;

(e) The court acted upon hearsay evidence, given by the occupying authorities or their agents.

Particularly the circumstances indicated under (a) to (c) taint the courts with a character which is at least very near the borderline between the exercise of military jurisdiction on occupied territory and the commission of a war crime. The difficulty which arises for Committee I comes from the fact that the Memorandum obviously has not been compiled in order to substantiate a criminal charge, but its purpose is to give a general picture of the activities of certain types of Italian courts as instruments of denationalisation. The Memorandum therefore omits any concretisation and documentisation of its allegations, it does not give either names, or dates, or places and it is, therefore, a matter for Committee I to decide whether it accepts the general statements contained in the Memorandum, as prima facie evidence of the occurrences alluded to.

If it does, the further question will have to be decided, whether the persons named under Nos. 22 to 37 should be put on 'A' or on 'S'. Nos. 22 to 34 (13 persons) were judges of the Special Court. From the foregoing it appears that no data about the trials being given, it is also not stated which of the 13 judges have taken part in those trials where the irregularities pointed out supra under (a) to (e) occurred. From this, according to the usual practice of Committee I, it would follow that the Chairman of the Court (Maggiore; No. 22) and the prosecutors (Nos. 35 to 37) should go on 'A', the rest (Nos. 23 to 34) on 'S'.

Against this, it might be pointed out that, according to the charge, the Special Court has tried no less than over 5000 people and sentenced to death over 400, from which it could fairly be argued that probably all the 13 judges must have taken part in this great number of proceedings. In view of this also a decision to put all the judges on 'A' could reasonably be made.

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The evidence of these crimes has, it is stated, been collected by the local Yugoslav authorities investigating war crimes in Dalmatia, and has been transmitted to the Yugoslav State Commission. The charge refers to a number of documents. Although these documents are not placed before the Committee, it will be in accordance with the usual procedure to place these persons (items 1 to 21) on A, no novel question either of law or of fact being involved.

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If it does, the further question will have to be decided, whether the persons named under Nos. 22 to 37 should be put on A, or on S. Nos. 22 to 34 (13 persons) were judges of the Special Court. From the foregoing it appears that no data about the trials being given, it is also not stated which of the 13 judges have taken part in those trials where the irregularities pointed out supra under (a) to (e) occurred. From this, according to the usual practice of Committee I, it would follow that the Chairman of the Court (Maggiara; No. 22) and the prosecutors (Nos. 35 to 37) should go on A, the rest (Nos. 23 to 34) on S.

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