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CRIME AGAINST HUMANITY

European Views on Its Conception and Its Future

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He is now director of the *Revue de Droit Penal & de Criminologie* and was *rapporteur general* on the Definition of Crime against Humanity at the VIIIth Conference for the Unification of Penal Law, held at Brussels, July 10 and 11, 1947.

I

In its judgment, rendered on December 22, 1947, in the case of Friedrich Flick et al., count 3, the U.S.A. Military Tribunal of Nurnberg, court 4, quotes the definition of crime against humanity, formulated by the VIIIth Conference for the Unification of Penal Law, to support its own restrictive conception of the crime. We cannot approve the Tribunal's interpretation. We believe the court was not exactly informed as to the aim, the meaning and the extent of that definition.

In order to make our position clear, we briefly summarize the case. The defendant Flick was charged with crime against humanity because, previously to the war, he acquired through sales, some of the industrial property owned by Jews, who were expropriated by general governmental decree, dated December 3, 1938.

The Court states first that the fact—if a crime—is not a war-crime, because it was committed before the war and wholly unconnected with the war. It thus makes a finding of lack of jurisdiction, based not only on Law 10 of December 20, 1945, but also on the Moscow Declaration of October 30, 1943, and the London Agreement of August 8, which constitute, taken together, its chartering legislation.

And the Court adds: "Under these circumstances, we make the following statements on the merits relating to this count, (crime against humanity) with full appreciation that statements as to the merits are pure dicta where a finding of lack of jurisdiction is also made." Introduced in this way, the discussion is purely theoretical and cannot have the slightest influence on the authority of the sentence.

The question was to know whether deprivation of property on racial grounds was a crime against humanity. The answer of the Court is "no": "We believe that the proof does not establish a crime against humanity, recognized as such by the Law

of Nations, when defendants were engaged in the property transactions here under scrutiny.”

We cannot but agree with the Court. When the accused acted, unlawful deprivation of property, on racial or religious grounds, was not a crime against humanity because—prior to the Charter—no Law of nations did qualify it as such—nor did it qualify any deed as such.

To support its opinion, the Tribunal quotes an article: “The Judgment of Nurnberg and the Principle of Legality of Offenses and Penalties” by Professor Donnedieu de Vabres, the eminent penalist and French member of the I.M.T., in which he expresses the view that: “The theory of crimes against humanity is dangerous; dangerous for the peoples by the absence of precise definition; dangerous for the States because it offers a pretext to intervention by a State, in the internal affairs of weaker States.”¹

And, indeed, in the trial of the major war-criminals, crimes against humanity were held to have been committed “only when the proof also fully established the commission of war crimes.”²

II

But the Court also quotes the definition adopted by the VIIIth Conference, and, there, it was obviously misinformed.

In fact, the definition quoted by the Court is but an excerpt of the resolution adopted by the Conference which was never published, but as a whole³ and which ought to be interpreted as such.

Here is the translation of that resolution in its integral, original text:

1

Whereas, on the one hand, respect of the rights and the dignity of the human person is the very foundation of civilization;

Whereas protection of those rights and that dignity against any unlawful infringement has been progressively organized in the internal legislations which punish those infringements as offenses;

Whereas a tribute must be paid to the national legislators who endeavoured to secure that protection by the provisions of the positive law or by national drafts;

¹ *Revue de Droit pénal & de Criminologie*, Brussels 1946-47, p. 813.

² Biddle, Judge Francis: The Nürnberg Trial—Proceedings of the American Philosophical Society—vol. 91, No. 3, August, 1947, p. 301.

³ *Huitième Conférence internationale pour l'Unification du Droit pénal—Actes de la Conférence*—Paris, Pedone 1949, p. 227 and also: *Rev. Dr. pén. & Crim.* Brussels 1947-48, p. 83; *Revue de Droit international de Sciences diplomatiques & politiques* (Sottile) Genève 1947, p. 273.

The U.S.A. Military Tribunal could not have access to the acts which were only published in November 1948; but from the quotation of definitions proposed by Mr. Aroneanu and Pfr. Lyra (Brazil) we infer that the Court examined our general report which was published: *Rev. Dr. pén. & Crim.* Brussels 1947-48, p. 47 and *Rev. Dr. intern.* (Sottile) 1947, p. 294—Acts, p. 47.

Whereas, owing to the general evolution of Law and of the social relation and to the nature of those offenses, it is not only desirable but necessary that this protection should be organized on an international scale;

Whereas it is especially necessary to protect against any offense the cause of which is race, nationality, religion or opinions, the rights of man of which protection is granted by the internal law or which, for the future, will be determined by the competent international bodies;

2

Whereas, on the other hand, until a law is passed which will punish as an offense against humanity any infringement of the fundamental rights of man, especially the rights to life, health, corporal integrity and freedom, it is necessary to yield to the imperative wish of the universal conscience, to secure, from this very moment, the repression of manslaughter and any deed the result of which is subversion of human life, either committed against individuals, against human groups, because of their race, their nationality, their religion or their opinions;

Whereas the repression ought to be organized on an international scale and secured by an international Tribunal, when the accused are rulers, agents or proteges of the State and also in the absence of repression by the internal repressive law;

The EIGHTH CONFERENCE FOR THE UNIFICATION OF PENAL LAW:

RECOMMENDS:

establishment as an offense *sui generis* against common law and inclusion in the international penal Code and in all the internal repressive Codes, from this moment and at the least, of a provision to punish the deeds related to in the following text:

Any manslaughter, or act which can bring about death, committed in peace time as in war time, against individuals or groups of individuals, because of their race, nationality, religion or opinions, constitutes a crime against humanity and must be punished as murder. (Italics ours.)

The Conference Expresses the Wish:

That the States should punish propaganda aiming at commission of crimes against humanity.

III

When the U.S.A. Military Tribunal, in its opinion, limits the quotation to the definition which we emphasized and adds: "But from the report of the proceedings, this seems to have been the extent of agreement," it makes an obvious error, because agreement was reached not only on the definition but on the resolution as a whole.

And indeed, the preamble cannot be separated from the definition. Both were discussed at once. Drafted by a small committee, of which the author was a member, to express the views of a large majority in the second symposium, it was successively adopted by the symposium itself and by the general assembly,

after a thorough debate, the report of which is to be found in the Acts.⁴

Even taken alone, the definition has no restrictive sense whatsoever, because it is not a definition of *the* crime against humanity, but of *a* crime against humanity. Genocide is also *a* crime against humanity and the wickedest of all, but who could assert that a definition of genocide could be restrictive, with regard to the conception of crime against humanity?

From the preamble and from the discussion, it is clear beyond any doubt, that the limiting definition, the advocates of which were Mr. Boissarie, Pfr. Pella and Pfr. Rollin, president of the Belgian senate, was passed but a *minimo* and based only on opportunity and sense of possibility. The definition could support and broaden altogether the bill on genocide which was, at the time, to be put to the general assembly of the U.N.O.

It is clear also that a large majority of the Conference supported a much broader conception, which is to be found in the first sentence of the second part of the preamble. Crime against humanity is "any infringement of the fundamental rights of man, committed against individuals, or against groups of individuals, because of their race, their nationality, or their opinions." And referring to the second sentence, we may add: "by abuse of the sovereign authority of the State."

The reports for the Holy See (Pfr. Bondue), for Luxemburg (quoting Mr. Aroneanu), for Poland (Mr. Sawicki), for France (Mr. Herzog), for Switzerland (Pfr. Graven), for the Netherlands (Pfr. Pompe and Mr. Kazemier) and the general report itself were much in favor of a broad conception of the crime and the statements of these jurists, during the debate, cannot but reinforce that conclusion.

We must confess that, at the time, the aforesaid definition was but of slight value because of the absence of an effective universal declaration of human rights. But since the international bill of the rights of man was passed by the general assembly of the U.N.O., at Paris, in the night of December 10, 1948, an important step was made toward an inclusive and adequate definition of *the* crime against humanity. And indeed, there is between human rights and crime against humanity a direct bond already emphasized by most of the members of the VIIIth Conference, the full extent of which jurists may now realize and formulate.

The right to property being recognized by Article 17 of the

⁴ Acts, p. 208.

Bill, is it still true that arbitrary deprivation of property by the State on racial grounds, is not a crime against humanity?

Moreover, the views of the judges of the U.S.A. Military Tribunal and those of the members of the VIIIth Conference were quite different. The Military Tribunal could not sentence beyond its chartering legislation, nor even, in the expression of its own theoretical conception of crime against humanity, base its opinion on other grounds than the provisions of the Law of Nations, at the time when the defendants acted.

On the other hand, the definition aimed at by the VIIIth Conference was to secure a foundation for the future "codification of the offenses against the peace and security of mankind, to which President Truman invited the best jurists in the world to cooperate and which he entitled 'an enormous task.'"⁵

The jurist who, in Europe, has most contributed to the study of crime against humanity is Mr. Eugene Aroneanu.⁶ He, too, was a member of the VIIIth Conference and took part in the debate on the resolution.

His belief is that crime against humanity is *the* international crime. Not only genocide, but even war of aggression and war crimes *stricto sensu* are but species of crime against humanity because they, too, involve first, a mischievous infringement of the fundamental and imprescriptible rights of numerous human beings, not because of themselves, as in the internal repressive law, but because of their nationality and also an abuse of the sovereign power of the State.

We also emphasize that in its very conception, and also in the definition by the VIIIth Conference, which are both free of the rather artificial bounds given to the conception by the Charter and by the judgment of the I.M.T., crime against humanity may be "committed in peace time as in war time."

The juridical conception of crime against humanity is a new one and its future cannot be restrained within arbitrary bounds, based on its application by military tribunals whose jurisdiction was strictly confined to crimes committed during the war or in connection with the war.

Although dangerous before it was clearly defined, the conception of crime against humanity may soon prove itself to be the key of universal penal law.

⁵ His letter to acknowledge the reception of Judge Francis Biddle's report on the Nürnberg trial, dated November 12, 1946.

⁶ Donnedieu de Vabres Henry: *Le Jugement de Nuremberg et le principe de Légalité des Délits et des Peines*—Rev. Dr. Pén. & Crim. Brussels 1946-47, p. 823.

IV.

What is universal penal law? *It is the whole of provisions which protect the universal public order, by definition and repression of the offenses against that order.*⁷

But why not "international penal law?"

We believe that even with reference to the principles of the Charter and "a fortiori" with reference to the law of the future, "international" is both inadequate and ambiguous, thus unfit for scientific purposes.

Inadequate, because neither the law of Nurnberg, nor the penal law of Nations which we are groping for, are basically grounded on agreement between States, on treaties or conventions but on the imperatives of the universal conscience, an authentic interpreter of which may be an assembly of representatives of the States, if only, the governments of those States are freely elected, in a country where freedom of opinion and election is granted.

Ambiguous because the name of "international penal law" was already given by Pfr. Donnedieu de Vabres to a quite different branch of repressive law, namely: "the science which determines the competency of the repressive courts of the State with respect to the foreign jurisdictions, the application of its criminal laws in relation with the places and the persons whom they rule, the authority on its territory, of foreign repressive sentences."⁸

With reference to the appellation of that new branch of laws, Pfr. Pella, who may be considered as its pioneer, gave up the epithet: *interétatique*—(interstatic), and proposed "*supranational*,"⁹ which may be adequate but sounds also rather artificial.

We believe that a "*universal penal law*" expresses better than any other expression that this law, the source of which is to be found in the deepest conscience of men and which is intended to protect the universal public order against its worst evils: crime against humanity and war, is not only superior to the State and its internal laws, but also, binds all the States and Nations on earth; each man individually, each group of men and mankind as a whole.

⁷ Dautricourt Joseph Y.: *Le Droit pénal dans l'Ordre public universel*, *Revue de Sciences criminelles*, Paris 1948, p. 481 and *Inleiding tot het positief Wereldstrafrecht—Tijdschrift voor Strafrecht*, Leiden (Netherlands) 1948 XXI. Deel LVII, Afl. 3-4, p. 293.

⁸ Donnedieu de Vabres H.: *Introduction à l'Etude du Droit pénal international*—Paris, Sirey, 1922, p. 6.

⁹ Pella Pfr. Vespasian V.: *Fonctions pacificatrices du Droit pénal supranational et Fin du Système traditionnel des Traités de Paix-Communication à l'Académie des Sciences morales et politiques de l'Institut de France* (February 17, 1947)—Paris, Pédone 1947, p. 15.