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I. JURISDICTION OF CANADIAN MILITARY COURTS

The jurisdiction of the Canadian Military Courts for the trial of war criminals is based on the Act respecting War Crimes of 31st August, 1946 (10 George VI Chap. 73). This re-enacts the War Crimes Regulations (Canada) which were made by Order in Council on 30th August, 1945, and Section 2 of the Act states that : " This Act shall be deemed to have come into force on the thirtieth day of August, one thousand nine hundred and forty-five, and everything purporting to have been done heretofore pursuant to the said Regulations shall be deemed to have been done pursuant to the authority of this Act." The Act is to continue in force until a day fixed by proclamation of the Governor in Council. The actual Regulations are contained in a Schedule to the Act, and Regulation 3 lays down that : " The custody, trial and punishment of persons charged with or suspected of war crimes shall, on and after the date hereof, be governed by these Regulations. "

The Regulations are similar in many respects to those attached to the British Royal Warrant of 14th June, 1945, Army Order 81/45, (Footnote: [See Volume I of this series, pp. 105-118.](#)) but also include some features of their own. For instance no equivalents of Regulation 10 (4) and (5) (see pp. 128-9) are contained in the British enactment.

II. DEFINITION OF WAR CRIME IN THE REGULATIONS

Regulation 2 (f) provides that : " ' War crime ' means a violation of the laws or usages of war committed during any war in which Canada has been or may be engaged at any time after the ninth day of September, 1939."

It follows, therefore, that the jurisdiction of Canadian Military Courts for the trial of alleged war criminals, like that of the British Military Courts, is, as far as the scope of the crimes subject to their jurisdiction is concerned, narrower than the jurisdiction of, e.g., the International Military Tribunal established by the Four-Power Agreement of 8th August, 1945, which, according to Article 6 of its Charter, has jurisdiction not only over violations of the laws and customs of war (Art. 6 (b) but also over what the Charter calls " crimes against peace " and " crimes against humanity " (Art. 6 (a) and (c).

III. CONVENING OF A CANADIAN MILITARY COURT

Regulation 4 (1) gives certain Canadian Senior Officers power to convene Military Courts for the trial of alleged war criminals, and to confirm the findings and sentences of such Courts, with the proviso that no military court shall be convened for the trial of any person for a war crime unless the case has been certified by the Judge Advocate General, or a representative of his appointed by him for that purpose, as approved for trial.

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According to Regulation 8, the accused is not entitled to object to the President or any member of the Court or the Judge Advocate, or to offer any special plea to the jurisdiction of the Court.

IV. COMPOSITION OF A MILITARY COURT

Regulation 7 provides that a Military Court shall consist of not less than two or more than six officers in addition to the President. . . . If the accused is an officer of the naval, military or air forces of an enemy or ex-enemy power the Convening Officer should, so far as practicable, but shall be under no obligation to do so, appoint or detail as many officers as possible of equal or superior relative rank to the accused. If the accused belongs to the naval, military or air forces of an enemy or ex-enemy power, or if Canadian naval, military or air force personnel are in any way affected by the alleged war crime, the Convening Officer should appoint or detail, if available, at least one naval, military or air force officer as a member of the Court, as the case may be.

V. MIXED INTER-ALLIED MILITARY COURTS

According to Regulation 7 (4), where any war crime appears to affect the interest of any Allied power, including any member of the British Commonwealth of Nations, a Convening Officer may invite one or more officers of the naval, military or air forces of such Allied power to become a member or members of the Military Court convened to try the person or persons charged with having committed the offence or appoint as a member of the Court one or more officers of an Allied force serving under his command, provided that in no case shall the number of such Allied officers on a Military Court comprise more than half the members of the Military Court excluding the President.

In law, such a mixed court remains, of course, a Canadian Military Court.

VI. THE LEGAL MEMBER

Regulation 7 (7) states that the Convening Officer shall normally appoint at least one officer having legal qualifications as President or as a Member of the Court.

VII. THE JUDGE ADVOCATE

If no such legal member is appointed, and in default of a person deputed to act as Judge Advocate by the Judge Advocate General, or any representative of his appointed by him for that purpose, the Convening Officer shall by order appoint a person having legal qualifications to act as Judge Advocate at the trial. The duties of the Judge Advocate, according to Rule 103 of the Rules of Procedure, an Order in Council (S.R. & O. 989/1926 as amended) promulgated under the authority of Section 70 of the Army Act, consist mainly in advising the Court on matters of substantive and procedural law. He must also, unless both he and the Court think it unnecessary, sum up the evidence before the Court deliberates on its findings...

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Paragraph (h) of Rule 103 lays down that, " In fulfilling his duties the Judge Advocate will be careful to maintain an entirely impartial position." The Judge Advocate has no voting powers. The Members of the Court are judges of law and fact, and consequently the Judge Advocate's advice need not be accepted by them, though in practice it carries very great weight.

VIII. RULES OF PROCEDURE AND RULES OF EVIDENCE

Regulation 5 states that, except as provided otherwise in the Regulations either expressly or by implication, the provisions of the Army Act and the Rules of Procedure, so far as they relate to field general courts martial and to any matters preliminary or incidental thereto or consequential thereon, shall apply so far as applicable or practicable to military courts and to any matters preliminary or incidental thereto or consequential thereon in like manner as if military courts were field general courts martial and the accused were persons subject to military law charged with having committed offences on active service.

After specifying those provisions of the Army Act and the Rules of Procedure which are not to apply to Military Courts, the Regulation then goes on to state that no departure from any procedural rule or other provision contained in the Army Act or the Rules of Procedure shall affect the jurisdiction of, or the validity of any proceedings by or before, any military court, or of any proceedings preliminary or incidental thereto or consequential thereon, unless in the opinion of the court, or of the confirming authority, substantial injustice has thereby been done to the accused.

For the purposes of these Regulations, " Army Act " means the Army Act of the United Kingdom as made applicable from time to time to members of the Canadian military forces ; and " Rules of Procedure " means the Rules of Procedure made pursuant to the Army Act, as made applicable from time to time to members of the Canadian military forces. (Regulation 2 (b) and (e).)

IX. SPECIAL RULES OF EVIDENCE APPLICABLE IN PROCEEDINGS BEFORE CANADIAN MILITARY COURTS

In general the rules of evidence followed by a Canadian Military Court are those followed in the ordinary criminal courts, but in view of the special character of war crime trials, and the exceptional circumstances under which they are often held, Regulation 10 introduces a certain relaxation in the rules regarding the admissibility of evidence.

Thus, Regulation 10 (1) provides that, " at any hearing before a military court convened under these Regulations the court may take into consideration any oral statement or any document appearing on the fact of it to be authentic, provided the statement or document appears to the court to be of assistance in proving or disproving the charge, notwithstanding that such statement or document would not be admissible as evidence in proceedings before a field general court martial." The paragraph then proceeds to set out some examples of the possible operation of this general provision,

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while making it clear that these examples do not prejudice the generality of the principle just quoted ; for instance, the following provisions are made :

" (a) if any witness is dead or is unable to attend or to give evidence or it is, in the opinion of the court, not practicable for him to do so, the court may receive secondary evidence of statements made by or attributable to such witness ; . . .

" (d) the court may receive as evidence of the facts therein stated any depositions or any record or report of any military court or military court of inquiry or of any examination made by any officer detailed for the purpose by any military authority ; . . .

" (g) any statement made prior to trial by an accused or by any witness at such trial, whether or not such statement was made on oath, and whether made before or after or without the giving of any caution, shall be admissible in evidence for all purposes."

Regulation 10 (2) provides that it shall be*the duty of the court to judge of the weight to be attached to any evidence given in pursuance of this Regulation which would not otherwise be admissible. The result is that a wide variety of evidence is admissible, yet no injustice is done to the accused, since the Court has the final responsibility of judging the weight to be placed on every item of evidence put before it.

X. SPECIAL RULES OF EVIDENCE LAYING DOWN CERTAIN LEGAL PRESUMPTIONS

Regulations 10 (3), (4) and (5) lay down that, in certain stated circumstances, the proof of offences committed by groups of persons shall constitute *prima facie* evidence of responsibility on the part of certain individuals. Of these provisions, Regulation 10 (3), of which the effect is substantially the same as that of Regulation 8 (ii) of the British Royal Warrant, (Footnote: See *War Crime Trial Law Reports*, Vol. I, pp. 108-109.) runs as follows :

" Where there is evidence that a war crime has been the result of concerted action upon the part of a formation, unit, body, or group of persons, evidence given upon any charge relating to that crime against any member of such a formation, unit, body, or group may be received as *prima facie* evidence of the responsibility of each member of that formation, unit, body, or

group for that crime ; in any such case all or any members of any such formation, unit, body, or group may be charged and tried jointly in respect of any such war crime and no application by any of them to be tried separately shall be allowed by the court."

The Canadian Regulations 10 (4) and (5) make the following provisions :

" (4). Where there is evidence that more than one war crime has been committed by members of a formation, unit, body, or group while under the command of a single commander, the court may receive that evidence as *prima facie* evidence of the responsibility of the commander for those crimes.

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" (5). Where there is evidence that a war crime has been committed by members of a formation, unit, body, or group and that an officer or non-commissioned officer was present at or immediately before the time when such offence was committed, the court may receive that evidence as *prima facie* evidence of the responsibility of such officer or non-commissioned officer, and of the commander of such formation, unit, body, or group, for that crime."

Reliance was placed by the Prosecution in the [Trial of Kurt Meyer](#) upon Regulations 10 (3), (4) and (5), and the views expressed by the Judge Advocate and by Counsel in that trial are recorded elsewhere. (Footnote: See [pp. 107-8](#) and [110-12](#))

It is clear that these provisions do not purport to define the extent to which a commander is legally liable for offences committed by the troops under his command ; they relate to matters of evidence and not substantive law. Furthermore, they provide discretionary powers and are not mandatory in nature.

XI. REPRESENTATION BY COUNSEL

Regulation 9 provides that Counsel may appear on behalf of the Prosecutor and accused in like manner as if the military court were a General Court Martial. The Regulation adds, however, that in addition to the persons deemed to be properly qualified to act as Counsel before a General Court Martial, any person qualified to appear before the courts of the country of the accused and any person approved by the Convening Officer shall be deemed to be properly qualified as Counsel for the Defence.

XII. SUPERIOR ORDERS

Regulation 15 makes a provision regarding the plea of superior orders which, while it does not appear explicitly in the Regulations attached to the British Royal Warrant, does correspond to the general practice followed in the war crime trials conducted by various Allied nations, in so far as it recognises the plea not as a complete and universally valid defence but only as a matter which the Court *may* consider in suitable instances as a defence or as a mitigating circumstance :

" The fact that an accused acted pursuant to the order of a superior or of his government shall not constitute an absolute defence to any charge under these Regulations ; it may, however,

be considered either as a defence or in mitigation of punishment if the military court before which the charge is tried determines that justice so requires."

XIII. PUNISHMENT OF WAR CRIMES

Under Regulation 11 (1) a person found guilty of having committed a war crime may be sentenced to any *one* or more of the following :

- (a) Death (either by hanging or by shooting) ;
- (b) imprisonment for life or for any less term ;
- (c) confiscation ;
- (d) a fine.

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The Court may also order the restitution of any money or property taken, distributed or destroyed by the accused, and award an equivalent penalty in default of complete restitution (Regulation 11 (2)). It is also provided, in Regulation 11 (3), that sentence of death shall not be passed on any person by a military court without the concurrence of all those serving on the court if the court consists of not more than three members, including the President, or without the concurrence of at least two-thirds of those serving on the court if the court consists of more than three members, including the President.

XIV. APPEAL AND CONFIRMATION

No right of appeal in the ordinary sense of that word exists against the decision of a Canadian Military Court. The accused may, however, within 48 hours give notice of his intention to submit a petition to the Confirming Officer against the finding or the sentence or both. The petition must be submitted within 14 days. If it is against the finding it shall be referred by the Confirming Officer to the Canadian Judge Advocate General or to his deputy. The finding and any sentence which the Court had jurisdiction to pass, if confirmed, are valid, notwithstanding any deviation from the Regulations or the Rules of Procedure or any technical or other defect or objection. An exception exists only in the case where it appears that a substantial miscarriage of justice has actually occurred. These provisions are made by Regulations 12 and 13 ; Regulation 14, however, adds that : " When a sentence passed by a military court has been confirmed, the senior combatant officer of the Canadian forces in the theatre in which the trial took place not below the rank of major-general or its relative rank, or any officer not below the rank of brigadier, or its relative rank, authorised by him, shall have power to mitigate or remit the punishment thereby awarded or to commute such punishment for any less punishment or punishments to which the offender might have been sentenced by the said court : Provided that this power shall not be exercised by an officer holding a command or rank inferior to that of the officer who confirmed the sentence."