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9th December, 1947.

UNITED NATIONS WAR CRIMES COMMISSION.

CONTROL COMMISSION COURTS IN
THE BRITISH ZONE OF GERMANY.

Military Government - Germany.

Ordinance No.68 - Control Commission Courts.

Ordinance No.72 - Criminal Procedure in
Control Commission Courts.

Control Commission Courts were established in the British Zone of Germany by Ordinance No.68 (published in the Military Government Gazette Germany, British Zone of Control, Nos. 15 and 17.)

Ordinance No.72 (published in the Military Government Gazette Germany, British Zone of Control No.17), regulated the criminal procedure in these courts.

Both ordinances came into force on the 1st January 1947.

I. Preceding Events.

Control Commission Courts replaced Military Government Courts.⁽¹⁾ The latter were established by Ordinance No.2 issued on 18th September 1944 by General Eisenhower, as Supreme Commander, Allied Expeditionary Force, for the territory occupied by the forces under his command. When, on 14th July 1945 the Commander-in-Chief of the British Zone of Control assumed all authority and power previously possessed and exercised by the Supreme Commander Allied Expeditionary Force within the British Zone, all enactments and orders issued by or under the authority of the Supreme Commander Allied Expeditionary Force and effective within the British Zone of Control on 14th July 1945 were confirmed by Ordinance No.4 of the same date, which provided that they were to continue in force throughout the British Zone until repealed or amended. Thus, Ordinance No.2 which constitutes the legal basis for the Military Government Courts remained in force in the British Zone of Control until it was repealed by Ordinance No.68 (Art.XXVI, paragraph 47).

II. Organisation of the Control Commission Courts.

The Control Commission Courts are:

- (a) the Supreme Court comprising the High Court exercising original criminal and civil jurisdiction and the Court of Appeal, and
- (b) the Summary Courts.

The Control Commission Courts differ considerably in their composition from the Military Government Courts. The members of the Military

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- (1) Military Government Courts, their Jurisdiction, Rules of Procedure, etc., have been dealt with in Doc. C.132.

Government Courts are officers of the Allied Forces (Art.IV, paragraph 4 of Ordinance No.2).⁽¹⁾ Any judge of the Supreme Court, established by Ordinance No.68, i.e. the Chief Judge, the Judges of the Court of Appeal, and the Judges of the High Court, must be qualified to practice as an advocate in a Court having unlimited jurisdiction either in civil or criminal matters in any part of the British Empire and must have been qualified for not less than 10 years⁽²⁾ to practice as an advocate or solicitor or must have held judicial office there. (Art.IV, paragraph 5 of Ordinance No.68).

A Summary Court consists of a single magistrate. The Ordinance contains no provision with regard to the magistrate's legal qualification.

III. Jurisdiction of the Control Commission Courts.⁽³⁾

The Control Commission Courts (like Military Government Courts) have jurisdiction over all persons in the British Zone except persons other than civilians who are subject to Military, Naval or Air Force law and are serving under the command of the Commander-in-Chief of the British Forces of Occupation or any other commander of any forces of the United Nations. (Art.II, paragraph 2 of Ordinance No.68).

They have jurisdiction to try:

- (a) All offences against the laws and usages of war. (Art.III, 3(a));
- (b) All offences under any proclamation, law, Ordinance, Notice or Order issued by or under the authority of the Allied Control Council for Germany in force in the British Zone, or by or under the authority of the Supreme Commander of the Allied Forces or of the Commander-in-Chief. (Art.III, 3(b));
- (c) All offences against German law (Art.III, 3(c)).⁽⁴⁾

Ad (a): Jurisdiction over offences against the laws and usages of war is exercised in the British Zone by both the Control Commission Courts and the British Military Courts established under Royal Warrant dated 14th June 1945.⁽⁵⁾

The jurisdiction of the British Military Courts is limited to offences against the laws and usages of war. For instance, in trials of members of the staff of concentration camps, British Military Courts can take into account solely offences against allied nationals which were committed during the war. The jurisdiction of Control Commission Courts, on the other hand, covers not only violations of the laws and customs of war, but, as will be shown below, all war crimes in the wider sense of the word. In cases such as the concentration camp cases mentioned before, Control Commission Courts can, therefore, deal also with offences committed before the outbreak of war or against persons who are not allied nationals.

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- (1) Art.IV, paragraph 4 of Ordinance No.2 was amended in the British Zone by Ordinance No.27 of the 30th March 1946 which provided that members of Military Government Courts may also be civilian officers of Military Government.
 - (2) In the case of a "Commissioner of the High Court" a practice of 5 years as an advocate in one of the courts specified in Art.IV, para.5 is sufficient. (Art.IX, para.12 of the Ordinance No.68.)
 - (3) The present paper does not deal with the jurisdiction of the Control Commission Courts in civil matters.
 - (4) Cf. Art.II, para.2 of Ordinance No.2 and Doc.C.132, Section IV.
 - (5) The Army Order No.81/45 (Regulations for the Trial of War Criminals) has been dealt with in Doc.C.131; the first and second amendments to the Army Order No.81/45 (Army Orders Nos. 127/45 and 8/46 have been dealt with in Doc.Misc. No.13.

Ad (b): The jurisdiction of the Control Commission Courts over all offences under any law issued by the Allied Control Council includes the jurisdiction over offences defined in Art. II of Control Council Law No. 10, namely crimes against peace, war crimes, crimes against humanity and membership in a group or organisation declared criminal by the International Military Tribunal.⁽²⁾

Ordinance No. 47 dated 30th August 1946⁽³⁾ authorises the German Ordinary Courts to exercise jurisdiction over crimes against humanity as far as they were committed by German citizens against other German citizens or Stateless persons. This jurisdiction of the German courts, is, however, not an exclusive one but concurrent with that of the Control Commission Courts (Art. II, paragraph 3(d) of Ordinance No. 20 of 1st January 1946.)

The Control Commission Courts, on the other hand, do not share their jurisdiction over all other crimes against humanity and over crimes against peace with any other court established in the British Zone.

Ad (c): The extent to which German law remained in force after the occupation of Germany by the Allied Forces and especially after the Declaration regarding the defeat of Germany and the assumption of supreme authority with respect to Germany by the Governments of the United Kingdom, the United States of America, the U.S.S.R. and the Provisional Government of the French Republic dated 5th June 1945⁽⁴⁾ has been discussed in connection with the Military Government Courts which also exercised jurisdiction over offences against German law. (Art. II, 2(c) of Ordinance No. 2).

IV. Power to make an Order in the Nature of Habeas Corpus.

Pursuant to Art. VIII paragraph 11 of Ordinance No. 68, Control Commission Courts are empowered to make an order that any person illegally or improperly detained in public or private custody within the limits of the British Zone be set at liberty. A petition for such order is to be heard and determined by a judge of the High Court.

V. Criminal Procedure in Control Commission Courts.

The criminal procedure in Control Commission Courts is regulated by Ordinance No. 72⁽⁵⁾. The procedure in Control Commission Courts corresponds in general to that in Military Government Courts.⁽⁶⁾

Whereas there is no appeal against the decision of a Military Government Court, Art. XI paragraph 20 of Ordinance No. 68 provides that the Court of Appeal shall review the record of every case in which

- (1) The jurisdiction of the Control Commission Courts over war crimes, i.e. the violations of the laws and customs of war, is based on Art. III paragraph 3 (a) and (b) of Ordinance No. 68.
- (2) A paper on the jurisdiction over membership of criminal groups or organisations is in preparation.
- (3) The text of Ordinance No. 47 has been circulated in Doc. Misc. No. 56.
- (4) Doc. C. 132, page 4, Art. (iii).
- (5) The less detailed rules of procedure of the Military Government Courts were repealed by Ordinance No. 72.
- (6) With regard to the procedure in Military Government Courts and in particular to the rights of the accused, cf. Doc. C. 132, pp 5 - 6.

(a) a sentence of death has been passed⁽¹⁾ or (b) a petition for review has been presented by or on behalf of a person convicted by a High Court, or (c) a decision of the High Court is certified by the Registrar of the Supreme Court or a decision of a Summary Court is certified by the Chief Legal Office of a region as fit for review by the Court of Appeal.

Moreover, the Court of Appeal may review from time to time all sentences of penal servitude and imprisonment (Art.XI paragraph 24 of Ordinance No.68).

The record of every case in which a person has been convicted by a Summary⁽²⁾ Court is to be reviewed by an officer appointed for this purpose.

VI. The Activities of the Control Commission Courts.

The Secretariat has not yet had at its disposal a comprehensive report on the actual working of the Control Commission Courts. The information so far available shows that at least some trials concerning violations of the laws and customs of war have taken place before Control Commission Courts.⁽³⁾

Thus, in February and March 1947, the trial of former members of the staff of the Esterwegen Penal Camp accused of causing the death of and ill-treatment of a number of political prisoners mainly of Belgian nationality during 1943/45⁽⁴⁾ was held before the High Court of Oldenburg.

A number of trials concerning crimes against humanity committed by Germans against Germans or Stateless persons were conducted in the British Zone by Military Government Courts,⁽⁵⁾ and later by Control Commission Courts.

VII. Summary.

The Control Commission Courts established by Ordinance No.68 replaced on the 1st January 1947 the Military Government Courts in the British Zone.

Their jurisdiction covers crimes against peace, war crimes, crimes against humanity and membership in criminal groups or organisations as defined by Control Council Law No.10. Their jurisdiction over war crimes (violations of the laws and customs of war) is concurrent with that of the British Military Courts established under the Royal Warrant of 14th June 1945, and their jurisdiction over crimes against humanity committed by Germans against German citizens and Stateless persons with that of the German Ordinary Courts.

- (1) No sentence of death must be executed unless and until it is confirmed in writing by the Commander-in-Chief or his deputy (cf. Art.VII, para.11 of Ordinance No.2 which contains a similar provision regarding death sentences passed by Military Government Courts.)
- (2) Cf. Art.VI paragraphs 9 and 10 of Ordinance No.2.
- (3) The Military Government Courts established in the British Zone which also exercised jurisdiction over war crimes in the narrower sense of the word, (Cf. Section III above) actually exercised this jurisdiction only exceptionally if at all. The Secretariat has received no report on such trials before Military Government Courts in the British Zone of Germany.
- (4) Monthly Report of the Control Commission for Germany (British Element) Vol.II, No.6, June 1947.

(Footnotes Continued on Page 5.)

The jurisdiction of Control Commission Courts is not limited to war crimes in the narrower sense of the word (like that of the British Military Courts) and to certain types of crimes against humanity (like the jurisdiction of the German Ordinary Courts) but covers all war crimes in the wider sense of the word. These courts can, therefore, try cases where the accused are charged with war crimes and/or crimes against humanity (such as members of the staff of concentration camps).

A judge of the Supreme Court (Court of Appeal and High Court) must be qualified to practice as an advocate in any part of the British Empire or must have held judicial office there. Such or a similar legal qualification was not required for the appointment as judge of a Military Government Court.

The rules of procedure of the Control Commission Courts provide for an extensive review of the decisions of both the High Court and the Summary Courts. The procedure of the Control Commission Courts differs mainly in this respect from the procedure in Military Government Courts which gives no right of appeal.

The Military Government Courts established in the British Zone dealt with offences against the laws and customs of war only exceptionally if at all. A number of such cases have been tried by Control Commission Courts.

Footnotes Continued from Previous Page.

- (5) Cf. Col. Rathbone's report in the meeting of the Commission held on the 16th October 1946 (Doc. M. 114 page 2, per ultimate paragraph, page 4 last paragraph and page 5 paragraph 3.) According to Colonel Rathbone's report such trials were held before Military Government Courts "in order that some precedents of sentences might be set for German courts when they take them over."