BRITISH LAW CONCERNING TRIALS OF WAR CRIMINALS BY MILITARY COURTS

(1947)

I. JURISDICTION OF THE BRITISH MILITARY COURTS

The jurisdiction of the British Military Courts for the trial of war criminals is based on the Royal Warrant dated 14th June, 1945, Army Order 81/45, with amendments. The Royal Warrant states that His Majesty "deems it expedient to make provision for the trial and punishment of violations of the laws and usages of war" committed during any war "in which he has been or may be engaged at any time after the 2nd September, 1939." It is His Majesty's "will and pleasure" that "the custody, trial and punishment of persons charged with such violation of the laws and usages of war shall be governed by the Regulations attached to the Warrant."

The Royal Warrant is based on the Royal Prerogative, which, in English law, is "nothing else than the residue of arbitrary authority which at any given time is legally left in the hands of the Crown " (Dicey's definition).

The constitutionality and legality of the Royal Warrant and of its individual provisions have so far not been challenged in any British Superior Court as have its American counterparts, the orders of the American executive authorities appointing Military Commissions for the trial of war criminals under the law of the United States. The latter have been reviewed by the Supreme Court of the United States in the so-called Saboteur Case, *ex parte Quirin and others* (1942) and in the cases *in re Yamashita* (1946) and in re Homma (1946).

Provisions similar to those contained in the Royal Warrant have in the Commonwealth of Australia been made by an Act of Parliament (War Crimes Act, 1945, No. 48/1945), and in the Dominion of Canada by an Order in Council, made under the authority of the War Measures Act of Canada, and entitled *The War Crimes Regulations* (*Canada*) (P.C. 5831 of 30th August, 1945 ; Vol. III, No. 10, Canadian War Orders and Regulations).

II. DEFINITION OF " WAR CRIME " IN THE ROYAL WARRANT

Regulation 1 of the Royal Warrant provides that "war crime" means a violation of the laws and usages of war committed during any war in which His Majesty has been or may be engaged at any time since the 2nd September, 1939. The jurisdiction 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 MILITARY COURT

Regulation 2 of the Royal Warrant gives to certain Senior Officers power

p.106

to convene Military Courts for the trial of persons charged with having committed war crimes. 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. (Regulation 6.)

IV. COMPOSITION OF THE MILITARY COURT

Regulation 5 (1) of the Royal Warrant provides that a Military Court shall consist of not fewer than two officers in addition to the President. If the accused is an officer of an enemy or ex-enemy Power, the Convening Officer should, so far as practicable, appoint or detail as many officers as possible of’ equal or superior relative rank to the accused. He is, however, under no obligation so to do. If the accused belongs to the naval or air force of an enemy or ex-enemy Power, the Convening Officer should appoint or detail if available at least one naval officer or one air force officer as a member of the Court, as the case may be.

It was under this last provision that naval officers were appointed to sit on the bench, *inter alia*, in the *Peleus* and the *Scuttled U-boats* cases (Nos. 1 and 5 of this Volume).

V. MIXED INTER-ALLIED MILITARY COURTS

Under Regulation 5, paragraph 3, the Convening Officer may, in a case where he considers it desirable so to do, appoint as a member of the Court, but not as President, one or more officers of an Allied Force serving under his command or placed at his disposal for the purpose, provided that the number of such officers so appointed shall not comprise more than half the members of the Court, excluding the President. It is left to the discretion of the Convening Officer to appoint or not to appoint Allied officers as members of the Court.

In law, a mixed Court constituted under Regulation 5 paragraph 3 of the Royal Warrant remains, of course, a British municipal court.

In the *Peleus* case (No. 1 of this Volume) and in the *Almelo* case (No. 3), Greek and Dutch officers respectively were appointed to serve on the Military Court; in the first case because a Greek ship and 18 Greek nationals were involved as the victims of the crime; in the second case because the crime had been committed on Dutch territory and one of the victims was a Netherlands national. In other cases, where the number of Allied nations involved was obviously too large, as, e.g., in the concentration camp cases, no Allied officers were appointed.

In many cases, national observers from all nations interested were invited to attend. That the appointment of Allied members of the Military Courts is not compulsory is strikingly demonstrated by the trial by a British Military Court at Singapore of W/O Tomono Shimio of the Japanese Army. In that case the accused was charged, found guilty and sentenced to death by hanging, by a Court consisting of British officers only, for having unlawfully killed *American* prisoners of war at Saigon, *French* Indo-China. The locus delicti commissi was French territory, the victims were United States nationals.

VI. THE JUDGE ADVOCATE

A Judge Advocate may be deputed to assist a British Military Court by

the Judge Advocate General of the Forces or in default of such deputation may be appointed by the officer convening the Court. The duties of the Judge Advocate, according to Rule 103 of the Rules of Procedure, an Order in Council (S.R. & 0.989/1926 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. 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.

If no Judge Advocate is appointed the Convening Officer must appoint at least one officer having legal qualifications as President or as member of the Court, unless in his opinion no such officer is necessary (Rule of Procedure 103 and Regulation 5, paragraph 2, of the Army Order 81 of 1945, as amended). Since the Legal Member, unlike the Judge Advocate, is a member of the Court, he has the right to vote.

VII. RULES OF PROCEDURE AND RULES OF EVIDENCE

The Royal Warrant provides in Regulation 3 that, except in so far as therein otherwise provided, the Rules of Procedure applicable in a Field General Court Martial of the British Army shall be applied so far as applicable to the Military Courts for the trial of war criminals. These rules are contained in the British Army Act and the Rules of Procedure made under the Act by an Order in Council, the latter being a piece of delegated legislation enacted by the Executive in 1926 (S.R. & O. 989/1926).

According to Section 128 of the Army Act, the rules of evidence of a British Court Martial, and under the Royal Warrant also of Military Courts, are the rules applicable in English Civil Courts. By "Civil Courts" is meant Courts of ordinary criminal jurisdiction in England, including Courts of summary jurisdiction (Rule 73 of the Rules of Procedure, 1926).

The rules of evidence referred to include for instance the maxim that the accused is innocent until he is proved guilty. In the *Dreierwalde* case (No. 7 of this volume) for example this principle was underlined and elaborated by the Counsel for the Defence, in his final address, thus: ". . . it is for the Prosecution to establish beyond reasonable doubt that which is alleged in the charge before you; it is not for the accused to clear himself. On the other hand, it is not for the Prosecution to establish that they have proved their case beyond all sort of doubt, they need only establish it beyond that sort of doubt which would be left in the mind of an ordinary reasonable man." The Judge Advocate in his summing up said to the Court, "It is for you to decide whether the prosecution have made out their case . . . if you have a reasonable doubt as to what happened on that pathway; that you think the evidence is consistent possibly with a murdering or possibly consistent with a shooting after a genuine attempt to escape you must acquit the accused."

The rules of Civil Courts in England and, under the provisions quoted above, also of British Military Courts, differ in certain respects from the

rules of procedure under which Courts of continental countries exercise jurisdiction. One of the main differences is that in English Courts the accused is allowed, if he so chooses, to give evidence on his own behalf as a witness under oath. The *Dreierwalde* trial again provides an example. There, the Judge Advocate told Amberger that, should he decide to give evidence on oath, he would be sworn and would no doubt be questioned to find whether his words were true. Should he decide not to do so, it would be permissible instead for him simply to make a statement, and in such a case his words could not be questioned as to their truth. In either event, his Counsel would be able to address the Court and call any witnesses, but, the Judge Advocate pointed out, if Amberger decided to take the latter course, so that his story could not be tested by questioning, it would not carry the same weight as would the former. The accused decided to give evidence on oath. Both the defending Counsel and the Judge Advocate subsequently pointed out to the Court that the evidence on oath which he gave must be treated in the same way as that of any of the other witnesses.

There are, of course, also differences in the way in which witnesses are examined, on the one hand, in the law of most Continental countries, where it is the President of the Court who primarily directs the examination, and, on the other hand, in English law, where it is mainly the responsibility of Counsel for the Prosecution and for the Defence to examine the witnesses "in chief," to cross-examine and to re-examine them.

VIII. SPECIAL RULES OF EVIDENCE APPLICABLE IN MILITARY COURTS ONLY

In the interest of the reliability of the fact-finding of the Court, English procedure, very like most continental codes of procedure, excludes certain types of evidence, e.g., written statements in circumstances where the person can be examined *viva voce*.

In view of the special character of the war crimes trials and the many technical difficulties involved, the Royal Warrant, by Regulation 8, has introduced a certain relaxation of the rules of evidence otherwise applied in English Courts.

Under Regulation 8 (i) a Military Court may take into consideration any oral statement or any document appearing on the face 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 in evidence in proceedings before a Field General Court Martial. It is under this provision that Military Courts are entitled to admit, e.g., affidavits or statutory declarations, i.e., written statements made under oath, which otherwise would not be received as evidence in an English Court.

Regulation 8 enumerates as examples certain types of documents which may be received as evidence.

IX. PROCEDURE REGARDING CRIMES COMMITTED BY UNITS OR GROUPS OF MEN

Regulation 8 (ii) of the Royal Warrant; as amended, provides: "Where there is evidence that a war crime has been the result of concerted action upon the part of a unit or group of men, then evidence given.

p.109

upon any charge relating to that crime against any member of such unit or group may be received as *prima facie* evidence of the responsibility of each member of that unit or group for that crime. In any such case all or any members of any such unit 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."

X. REPRESENTATION BY COUNSEL

Regulation 7 of the Royal Warrant 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 appropriate provisions of the Rules of Procedure, 1926, apply accordingly.

Rule 88 provides that Counsel shall be allowed to appear on behalf of the Prosecutor and accused at General and District Courts-Martial:

(1) when held in the United Kingdom ; and

(2) when held elsewhere than in the United Kingdom, if the Army Council or the Convening Officer declares that it is expedient to allow the appearance of Counsel.

The Rules of Procedure, 1926, provide that English and Northern Irish barristers-at-law and Solicitors, Scottish Advocates or Law Agents, and the corresponding members of the legal profession in other British territories, are qualified to appear before a Court Martial.

Regulation 7 also provides that, in addition to these persons qualified in British law, any person qualified to appear before the Courts of the country of the accused, and any person approved by the Convening Officer of the Court, shall be deemed to be properly qualified as Counsel for the Defence.

In practice accused persons tried as war criminals are defended either by advocates of their own nationality or by British serving officers appointed by the Convening Officer, who may or may not be lawyers.

XI. PUNISHMENT OF WAR CRIMES

The punishment of a war crime consists in any one or more of the

following:

(1) Death (either by hanging or shooting).

(2) Imprisonment for life or for any less term.

(3) Confiscation.

(4) A fine.

The Court may also order the restitution of money or property taken or destroyed by the accused. (Regulation 9.)

XII. APPEAL AND CONFIRMATION

No right of appeal in the ordinary sense of that word exists against the decision of a 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 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 defect or objection, technical or other. An exception exists only in the case where it appears that a substantial miscarriage of justice has actually occurred.

No action has yet been taken before British civil courts similar to that taken in the United States in the *Quirin*, *Yamashita* and *Homma* cases, where the proceedings of United States Military Commissions were made the subject of judicial review (see para. I, *supra* and Annex II, pp. 111, 112-13 and 121).

XIII. THE AUTHORITY OF DECISIONS OF MILITARY COURTS

The Military Courts are not superior courts and their decisions are therefore not endowed with that special binding authority which Anglo-American law attaches to judicial decisions as precedents. Their relevance for the development of International Law may rather be compared with the relevance of judicial decisions in countries whose legal systems are not based on the Anglo-American doctrine of the binding character of precedents. Although the findings and sentences of British Military Courts trying war criminals do not lay down rules of law in an authoritative way, they are declaratory of the state of the law and illustrative of actual State practice.

*[Page numbers precede text.]