

called up for refusing to take up active service, offences committed in military uniform.

Section 128 of the Act for the Defence of the State provides for the cases when the Government by an order is permitted to extend the jurisdiction of military courts to civilians:

1. According to Sec. 128 of the Act for the Defence of the State /1st chapter/ the jurisdiction of military courts can be extended by a governmental order to civilians for the following offences:

- (a) for offences against the Act for the Defence of the Republic;
- (b) for offences against the Act for the Defence of the State;
- (c) for all offences against the Army Act;
- (d) for grave offences committed through acts falling under (a) and (b).

2. According to Sec. 128 of the Act for the Defence of the State / chapter 3rd/, civilians are in war time subjected to the jurisdiction of military courts for a number of crimes /such as murder, manslaughter, rape, arson/, if these acts were committed during war, in a territory in which the competent district court had to stop its activities - in consequence of the war - and if the offender was arrested in this territory. According to the above regulation the jurisdiction of military courts is ended as soon as the competent District Court resumes its activities.

3. According to Sec. 128 of the Act for the Defence of the State /chapter 4/ the following civilian persons are subjected during war to the jurisdiction of military courts:

- (a) for all offences committed abroad in the territory occupied by Czechoslovak or Allied Forces during the occupation if arrested anywhere.
- (b) for offences indicated ad a/, if the offenders were arrested in the territory occupied by Czechoslovak or Allied Forces and if they committed the offence either on Czechoslovak territory or abroad, but should be punished according to Czechoslovak penal law.

(c) On the whole, it can be said that the scope of the jurisdiction of military courts over civilians is rather limited in Czechoslovak law. The limitations are: 1/ of a formal character/ the cessation of the activities of civil courts: see sec. 128 par. 3 of the Act for the Defence of the State/ or 2/ of a material character/ the jurisdiction of military courts is limited only to certain offences/.

With the above mentioned exception /occupation of enemy territory by Czechoslovak or Allied Forces/ the territorial principle is applied in military law to the same extent as in civil penal law.

- (4) In case the law of your country does not authorise civil or/and military tribunals to exercise jurisdiction in respect of crimes committed abroad, what are the legal and political difficulties in the way of a change in the existing law in the direction of conferring such jurisdiction upon military or civil tribunals or both?

From the legal point of view there are no major difficulties in the way of a change in the existing law in order to confer upon military or civil tribunals the authorisation to exercise jurisdiction in respect of crimes committed abroad. Such change abroad would have to be made by means of a decree of the President of the Republic issued according to the "Constitutional Decree" regarding "the temporary exercise of legislative power /Czechoslovak Official Gazette, 1940 No.2 /. From the constitutional point of view the position of the Czechoslovak Government is similar to the position of other Allied Governments residing in London and the negation of their legislative power would be - there is no doubt - contrary to the acts of recognition of the respective Governments by the Government of His Majesty.

- (5) Does the law of your country adequately provide for the punishment of all war crimes which have been committed in your country?

The penal law of Czechoslovakia - though in a lesser degree than that of other occupied states - does not adequately provide for the punishment of all war crimes which have been committed in our country.

- (6) In case the answer to question 5 is in the negative, what are the legal and political difficulties in the way of a change of the existing law in the direction of making such adequate provision?

From the legal point of view there are no difficulties in the way of a change of the existing law in order to provide for adequate punishment of all war crimes /see ad 4/.

INTERNATIONAL COMMISSION FOR PENAL RECONSTRUCTION AND DEVELOPMENT

Dr de BAER'S SUB-COMMITTEE

NATIONAL LAWS AND JURISDICTIONS

HOLLAND
(Dr de Moor)

- (1) In what circumstances, if any, does the law of your country confer upon courts jurisdiction to punish criminal acts committed abroad:

(a) by nationals; (b) by aliens?

A. Dutch criminal law applies to Dutch nationals outside the European part of the Kingdom if

- Art. 3 Pen. Cod. 1) the Dutch national commits a crime on board of a Dutch ship;
Art.4-5 Pen.Cod. 2) he commits a crime against the security of the State (attempt upon the Head of the State; relations with a foreigner or a foreign corporation with a view to cause a revolution, etc.) or against the royal dignity;
Art.4 Pen.Code. 3) he commits the crime of adulteration of money or a similar crime;
Art.4 Pen.Code. 4) he commits forgery of Bons etc., issued by the Government, a Provincial Body, etc., or a similar crime;
Art.4 Pen. Cod. 5) he commits piracy or a similar crime;
Art.5 Pen. Cod. 6) he incapacitates himself for military service, commits bigamy or privateering;
Art.6 Pen. Cod. 7) he - being an official - commits as such crimes relating to his function.

Note: A(2) and A(6) apply also to those who after having committed the crime obtained the Dutch nationality.

- Art.7 Pen. Cod. B. Dutch criminal Law applies to foreigners outside the European part of the country in the cases A.1), A.2) (with certain restrictions), A.3), A.4) and A.5);

Art.4 Pen.Cod.
Art.8 Pen.Cod.

Note: Both in cases A and B the application is restricted by the exceptions acknowledged by the law of nations.

- C. The competent domestic court for these cases is either the
Art.2 Code of Criminal Procedure. court within whose jurisdiction the criminal is domiciled or happens to be or had his last domicile.

In case of crimes on board of Netherlands ships, the domicile of the ship.

- (2) To what extent, if any, does the territorial principle of your criminal law confer upon your courts jurisdiction in respect of criminal acts committed by aliens on the high seas or from the air above the high seas against ships or persons on board ships flying the flag of your country?

The Netherland Criminal Law applies to everybody outside the European part of the country, committing acts of piracy, or connected with piracy. (art.381-385 Penal Code).

- (3) What law do the military courts of your country apply? Do they apply a special military code or the ordinary municipal criminal code? Are they authorized to apply "martial law", "the law of war" or "international law"? With regard to what categories of persons have they jurisdiction? Does the latter embrace both soldiers and civilians? In the matter of jurisdiction over civilians, what is the position with regard to enemy nationals: (1) in national territory, (2) in enemy territory in the event of your armed forces occupying parts of enemy territory? To what extent is the jurisdiction of military courts in your country affected by the territorial principle (if any) of your criminal law, i.e., the principle that courts have jurisdiction to punish such acts only as are committed in national territory? (The object of this question is to elicit to what extent, if any, the general terms of the jurisdiction conferred upon military courts in respect of war crimes exclude or modify the application of the territorial principle).

The military courts of the Netherlands are only authorised to apply the special military code, which largely depends on and refers to the ordinary municipal criminal code.- (International law is only recognised in art.38 of the Military Penal Code no punishment, if acted conform the general accepted rules of the law of war or conform the rules of international treaties accepted by the Netherlands) and art.8 of the municipal penal code and articles 3 and 13a of the Law A.B. (15 May, 1829, p.28).

Martial law is not recognised in any of our penal codes. For an occupying army in enemy territory the same rules apply to own nationals and enemy nationals; that is to say, that in time of war the Netherlands military courts in occupied territory are competent for all crimes mentioned in the Netherlands military penal code in connection with the municipal penal code, as far as Netherlands interests are concerned.

- (4) In case the law of your country does not authorise civil or/and military tribunals to exercise jurisdiction in respect of crimes committed abroad, what are the legal and political difficulties in the way of a change in the existing law in the direction of conferring such jurisdiction upon military or civil tribunals or both?

As follows from the answer 1, 2 and 3 the law of the Netherlands only authorises civil and military tribunals to exercise jurisdiction in respect of crimes committed abroad to a limited scope. However it would be not very difficult to change the existing law in so far as to declare the Netherlands tribunals also competent for

all the crimes, mentioned in the Netherlands military and municipal codes, committed in German and Axis territory during the war, in so far as Netherlands nationals or interests are concerned. In the given circumstance this would not give great difficulties from a point of view of legislation. The same proposal is made by Lord Maugham for English Law.

- (5) Does the law of your country adequately provide for the punishment of all war crimes which have been committed in your country?

The existing law does not adequately provide for the punishment of all war crimes; only for those already mentioned in the military and municipal penal codes.

- (6) In case the answer to question 5 is in the negative, what are the legal and political difficulties in the way of a change of the existing law in the direction of making such adequate provision?

A special legal arrangement for those war-crimes not covered by the existing military and municipal penal codes and the extension described 4, would be possible on the basis of an international treaty, accepted by the Netherlands legislator and arranged by this legislator as the basis of that treaty.

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INTERNATIONAL COMMISSION FOR PENAL RECONSTRUCTION AND DEVELOPMENT

Dr de BAER'S SUB-COMMITTEE

NATIONAL LAWS AND JURISDICTIONS

Answers to Questionnaire

LUXEMBOURG
(Monsieur V. Bodson)

- (1) In what circumstances, if any, does the law of your country confer upon courts jurisdiction to punish criminal acts committed abroad:

(a) by nationals; (b) by aliens?

According to Article 4 of the Luxembourg Penal Code "an offence committed outside Luxembourg territory, whether by Luxembourg nationals or by foreigners, is punishable in the Grand Duchy only in cases specified by law".

The governing principle is that Luxembourg criminal law is applicable to Luxembourg nationals having committed a crime abroad only if the case is provided for by a special law.

The cases provided for are the following:

1. As to offences committed abroad by Luxembourgers:

- (a) Any Luxembourg subject who, outside the territory of the Grand Duchy, has committed a crime punishable by Luxembourg law, may be prosecuted and tried in Luxembourg.

As to a Luxembourg subject guilty of an act termed delinquency (délit) he is liable to be prosecuted and tried before Luxembourg courts if the offence is punishable according to the law of the country in which he committed the offence.

The law provides, however, that a Luxembourg national cannot be tried if he is not present, nor can he be tried for a political offence, (Art. 5 of the Code d'Instruction Criminelle).

- (b) Members of the Luxembourg Forces can be dealt with by the Luxembourg Military Penal Code whether they reside on national territory or abroad.

2. As to offences committed abroad by foreigners:

The law of January 18, 1879, quoted in Art. 7 of the Luxembourg Code d'Instruction Criminelle, provides that any foreigner who has committed abroad any of the following

offences, either as a principle or as an assessor, may be prosecuted and tried according to the provisions of the Luxembourg laws after he has been arrested, or after the authorities have obtained his extradition.

- (a) Any crime against the security of the State
 - (b) Any crime concerning the counterfeiting of the Luxembourg State seal
 - (c) Any crime concerning the counterfeiting of Luxembourg currency
 - (d) Any crime concerning the counterfeiting of bank notes authorised by the Law
 - (e) Any crime concerning the counterfeiting of Luxembourg State papers
 - (f) Any crime specified in international conventions such as white slave traffic, narcotics, etc.
 - (g) Misdemeanours in matters of forestry, fishing, game customs, and indirect taxation laws, committed on the territory of a neighbouring country
 - (h) According to the Emigration Law of March 13, 1870, every person, whether a Luxembourg subject or a foreigner, commits a punishable offence who is guilty of the enlistment or transport of emigrants without previously obtaining the authorisation of the Government, and can be tried before the Luxembourg courts.
- (2) To what extent, if any, does the territorial principle of your criminal law confer upon your courts jurisdiction in respect of criminal acts committed by aliens on the high seas or from the air above the high seas against ships or persons on board ships flying the flag of your country?

As the frontiers of Luxembourg do not extend to the coast, the question does not apply to the Grand Duchy.

- (3) What law do the military courts of your country apply? Do they apply a special military code or the ordinary municipal criminal code? Are they authorised to apply "martial law", "the law of war" or "international law"? With regard to what categories of persons have they jurisdiction? Does the latter embrace both soldiers and civilians? In the matter of jurisdiction over civilians, what is the position with regard to enemy nationals: (1) in national territory, (2) in enemy territory in the event of your armed forces occupying parts of enemy territory? To what extent is the jurisdiction of military courts in your country affected by the territorial principle (if any) of your criminal law, i.e., the principle that courts have jurisdiction to punish such acts only as are committed in national territory? (The object of this question is to elicit to what extent, if any, the general terms of the jurisdiction conferred upon military courts in respect of war crimes exclude or modify the application of the territorial principle).
- (1) The Grand Duchy has a Military Penal Code (20.7.1814, Art.1 to 14 inclusive)
 - (2) The law of 16 February, 1881, on the organisation of the Luxembourg armed forces (comprising since the Treaty of London, 1867, only 125-300 volunteers) provides in Art.12 in respect of members of the forces:

"Members of the forces come under the jurisdiction of ordinary courts and of the Court of Assizes for infringements of common law; they come under the jurisdiction of the military tribunals for infringements provided for by the military laws and regulations."

(3) CODE: On 1 November, 1892, the Military Penal Code was revised, and since that time it is applied to members of the forces only, to the exclusion of all other persons.

All those persons, however, who are forming hostile and riotous assemblages with a view to opposing the execution of the laws by violent means, are considered as armed rebels and are assimilated to the enemy as far as the application of the Military Penal Code is concerned.

COURTS: The Luxembourg Military Court is a permanent institution, although it exercises its functions but on very rare occasions on account of the limited number of Luxembourg soldiers. It was created on 9 June, 1843, the date at which the High Military Court (Haute Cour Militaire) was organised.

Moreover, there exists in Luxembourg a War Council (Conseil de Guerre) which is responsible for the prosecution of all offences which come under its jurisdiction. On the other hand, no sentence by the War Council can be accepted without having been ratified previously by the High Military Court, which also functions as a court of appeal.

Although Luxembourg Military Penal Law confers upon courts jurisdiction over members of the forces only, it does not distinguish between offences committed on Luxembourg territory or abroad.

- (4) In case the law of your country does not authorise civil or/and military tribunals to exercise jurisdiction in respect of crimes committed abroad, what are the legal and political difficulties in the way of a change in the existing law in the direction of conferring upon military or civil tribunals or both?

I have read with great interest the statement made by General de Baer regarding question 4 and I agree with his answer.

- (5) Does the law of your country adequately provide for the punishment of all war crimes which have been committed in your country?

I do not think so. The Luxembourg Penal Code, even amended as it will be in a short time, will be inadequate. In this connection the setting up of international courts by the Allied nations seems very desirable.

- (6) In case the answer to question 5 is in the negative, what are the legal and political difficulties in the way of a change of the existing law in the direction of making such adequate provision?

The answer to this question is the same as that given by General de Baer under question 4.

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D. 14.

INTERNATIONAL COMMISSION FOR PENAL RECONSTRUCTION AND DEVELOPMENT

Dr de BAER'S SUB-COMMITTEE

NATIONAL LAWS AND JURISDICTIONS

Answers to Questionnaire

POLAND
(Professor Glaser)

- (1) In what circumstances, if any does the law of your country confer upon courts jurisdiction to punish criminal acts committed abroad:

(a) by nationals; (b) by aliens?

With regard to jurisdiction for crimes committed abroad, the Polish Criminal Criminal Code contains the following regulations:

Art. 4 sec. 1. The Polish penal law is applicable to Polish citizens who have committed an offence abroad.

sec. 2. The Polish penal law is applicable also to foreigners who at the time of the commission of an offence abroad were citizens of the Polish State; it is applicable likewise to persons who, after the commission of an offence abroad, have obtained Polish citizenship.

Art. 5. The Polish penal law is applicable to foreigners who have committed an offence abroad, directed against the welfare or interests of the Polish State, of a Polish citizen, or of a Polish juridical person.

Art. 6 sec.1. As a condition to criminal responsibility for an act done abroad, the act must have been one made an offence by the law in force in the place where it was committed.

sec.2. If differences exist between the two laws involved, then the judge applying the Polish law may take such differences into consideration in favour of the defendant.

sec.3. Measures of security shall be applied by the Polish court independently of the law of the place where the offence was committed.

Art.7. The provisions of Article 6 do not apply:

- (a) to officials who while in service abroad have there committed an offence,
- (b) to persons who have committed an offence in a place which does not lie within the jurisdiction of any state.

Art.8. Independently of the law of the place where the offence is committed, and of the citizenship of the offender, the Polish penal law is applicable to persons who have committed abroad the following offences:

- (a) An offence against the internal or external security of the Polish State,
- (b) An offence against offices or officials of the Polish State,
- (c) The making of a false deposition in an office of the Polish State.

Art.9. Independently of the law of the place where an offence is committed, the Polish penal law is applicable to a Polish citizen, or to a foreigner whose extradition has not been passed upon, who has committed abroad one of the following offences:

- (a) Piracy,
- (b) Counterfeiting of money, public securities, or bank notes,
- (c) Slave trade,
- (d) Trade in women or children,
- (e) The use of an instrumentality capable of producing a public danger with intent to produce such danger,
- (f) Trade in narcotics,
- (g) Trade in pornographic publications,
- (h) Any other offence specified in international conventions concluded by the Polish State.

Art.10, sec.1. The Polish penal law is applicable to a foreigner who has committed abroad any offence which is not specified in Articles 5, 8 and 9, if the offender is within the territory of the Polish State, and if his extradition has not been passed upon, and if the conditions of Articles 6 and 7 are fulfilled.

sec.2. The prosecution takes place on order of the Minister of Justice.

- (2) To what extent, if any, does the territorial principle of your criminal law confer upon your courts jurisdiction in respect of criminal acts committed by aliens on the high seas or from the air above the high seas against ships or persons on board ships flying the flag of your country?

Our Code contains a rule which allows the punishment by national courts of crimes committed by aliens even where such took place on the high seas or from the air above

the high seas against ships or persons on board ships flying the flag of Poland.

This results from Art. 3 of our Code which reads:

- sec.1. The Polish penal law is applicable to all persons who have committed an offence within the territory of the Polish State, or on a Polish vessel or aircraft. Internal waters, border waters and the air above all of this territory, are territory of the State.
- sec.2. An offence is deemed to have been committed within the territory of the Polish State, or on a Polish vessel or aircraft, if the offender has committed thereon the criminal act or omission, or if the criminal consequence resulted thereon, or was intended by the offender to result thereon.

- (3) What law do the military courts of your country apply? Do they apply a special military code or the ordinary municipal criminal code? Are they authorized to apply "martial law", "the law of war" or "international law"? With regard to what categories of persons have they jurisdiction? Does the latter embrace both soldiers and civilians? In the matter of jurisdiction over civilians, what is the position with regard to enemy nationals: (1) in national territory, (2) in enemy territory in the event of your armed forces occupying parts of enemy territory? To what extent is the jurisdiction of military courts in your country affected by the territorial principle (if any) of your criminal law, i.e., the principle that courts have jurisdiction to punish such acts only as are committed in national territory? (The object of this question is to elicit to what extent, if any, the general terms of the jurisdiction conferred upon military courts in respect of war crimes exclude or modify the application of the territorial principle).

The Polish military courts apply both the ordinary municipal criminal law and the special military code. They are not authorized to apply any other law than the law included in both Codes and in other Statutory regulations. Generally speaking they do not apply as such "the martial law", "the law of war", or "the international law", but they may apply such principles of these laws as are included in the codes or other statutes.

The Polish military courts have exclusive jurisdiction over all members of the Polish Forces. Civilians are in principle not submitted to the jurisdiction of Military courts (except for some offences against the enlistment).

During the war or mobilisation or when necessary for the sake of the defence of the State the Council of Ministers is authorized to submit by Order to the jurisdiction of military courts civilians (nationals and foreigners, incl. enemy nationals) charged with having committed offences endangering the defence of the State. During the war the Commander in Chief of the Forces is authorized to issue

the same Orders. During the present war such Orders were not yet issued.

As regards the jurisdiction over enemy nationals in Polish territory - see above.

In event of the Polish Armed Forces occupying enemy territory the Commander in Chief is authorized to submit to the jurisdiction of the Polish Military Courts civilians (nationals and foreigners, incl. enemy nationals) charged with having committed offences endangering the defence of the State.

- (4) In case the law of your country does not authorize civil or/and military tribunals to exercise jurisdiction in respect of crimes committed abroad, what are the legal and political difficulties in the way of a change in the existing law in the direction of conferring such jurisdiction upon military or civil tribunals or both?

This case does not arise as our penal Code, as it was said, authorizes our tribunals to exercise jurisdiction also in respect of crimes committed abroad (Arts.4ss).

- (5) Does the law of your country adequately provide for the punishment of all war crimes which have been committed in your country?

In my opinion, no. There are crimes, committed by the invader, which are not covered by our Code. For example it would be difficult to apply our Code to such acts as e.g. compelling young women to become pregnant against their will, physical and mental torture, transfer of population, establishment of ghettos, causing mass starvation, illegal judgments, plunder or destruction of cultural property (monuments and so on), privation of medical assistance (help) and of medicaments, and so on. But even could our Code be so interpreted as to cover such crimes, which is not the case, the punishments provided therein are not sufficient to meet such crimes.

- (6) In case the answer to question 5 is in the negative, what are the legal and political difficulties in the way of a change of the existing law in the direction of making such adequate provision?

There are no difficulties as we have already amplified our Code by an additional bill containing some new forms of crimes invented by the invader. This bill covers crimes committed since 31 August, 1939. It is not yet promulgated in our Official Journal.

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D.15.

INTERNATIONAL COMMISSION FOR PENAL RECONSTRUCTION AND DEVELOPMENT

Dr de BAER'S SUB-COMMITTEE

NATIONAL LAWS AND JURISDICTIONS

NORWAY
(Mr Peter Stabell)

- (1) In what circumstances, if any, does the law of your country confer upon courts jurisdiction to punish criminal acts committed abroad:

(a) by nationals (b) by aliens?

(a) The question is dealt with in Section 12(3) of the ordinary Municipal Criminal Code of Norway of the 22nd May, 1902. Norwegian jurisdiction applies:-

(i) In cases of crimes and misdemeanours against the Norwegian State or a Norwegian State authority, the deciding factor in this connection being the character of the offence as defined by statute and not whether the action happens to harm Norwegian interests.

(ii) In cases where the offence is also punishable under the law of the country where it has been committed.

(iii) Furthermore, a number of enumerated offences are made amenable to the jurisdiction in question. For the sake of convenience, these may be divided into three groups. The first comprises specified crimes or misdemeanours against the Norwegian State or a Norwegian State authority; the second group comprises actions the general character of which makes them punishable in all civilized countries; the third group comprises crimes or misdemeanours regarding which the Norwegian Criminal Code would not be adequate unless its provisions were also made applicable to actions committed abroad.

Regarding the jurisdiction of Norwegian courts-martial see the answer to question (4) below.

(b) Section 12(4) of the ordinary Municipal Criminal Code of Norway covers acts committed abroad by foreigners. Such acts are amenable to Norwegian jurisdiction:-

(i) In a large number of cases which are enumerated in the provisions concerned. This enumeration is, of course, different from the enumeration of

offences relating to Norwegian citizens or persons domiciled in Norway, the difference being caused, inter alia, by the fact that those persons are not supposed to be bound by any allegiance to the Norwegian State.

(ii) When the offences in question are crimes proper (in contradistinction to misdemeanours) which are punishable also under the law of the country where they have been committed, and the offender is resident in or visiting Norway. The possibility of transporting the offender to Norway by means of extradition will not be sufficient to make him amenable to Norwegian jurisdiction when he is not resident in or visiting the country.

In this connection it should be noted that an act must not only be punishable in the sense that it is covered by a penal provision of the country concerned; punishment must not be excluded by general principles regarding criminal responsibility. These principles exempt from such responsibility in certain cases where what would otherwise have been an offence has been committed in an emergency, in execution of a superior order, or in accordance with the rules of public international law, e.g. relating to warfare.

It is provided that in the cases concerned, sentences must not be harsher than they would have been under the law of the country where the act took place. The practical application of this rule will, of course, involve great difficulties in cases where the different kinds of punishment are not commensurable.

In the cases referred to in Section 12(4), institution of proceedings requires a decision by the King.

Regarding the jurisdiction of Norwegian courts-martial see the answer to question (4) below.

- (2) To what extent, if any, does the territorial principle of your criminal law confer upon courts jurisdiction in respect of criminal acts committed by aliens on the high seas or from the air above the high seas against ships or persons on board ships flying the flag of your country?

By virtue of Section 12(1) of the Code I have referred to above, a Norwegian ship on the high seas is, for the purpose of criminal jurisdiction, assimilated to Norwegian territory. Consequently, Norwegian criminal law applies in toto, irrespective of the nationality of the offender.

The same Code further provides that an offence shall also be considered as committed where the effect is produced. It is considered that by virtue of this provision, a criminal act committed from the air above a Norwegian ship will come under Norwegian jurisdiction if the effect is produced on board that ship.

- (3) What law do the military courts of your country apply? Do they apply a special military code or the ordinary municipal criminal code? Are they authorized to apply "martial law", "the law of war" or "international law"? With regard to what categories of persons have they jurisdiction? Does the latter embrace both soldiers and civilians? In the matter of jurisdiction over civilians, what is the position with regard to enemy nationals: (1) in national territory, (2) in enemy territory in the event of your armed forces occupying parts of enemy territory? To what extent is the jurisdiction of military courts in your country affected by the territorial principle (if any) of your criminal law, i.e., the principle that courts have jurisdiction to punish such acts only as are committed in national territory? (The object of this question is to elicit to what extent, if any, the general terms of the jurisdiction conferred upon military courts in respect of war crimes exclude or modify the application of the territorial principle).

The question is covered by Sections 6 & 7 of the Norwegian Code dealing with procedure of courts-martial. In this connection it should be noted that Norwegian courts-martial only function in wartime. In peacetime the cases concerned are referred to the ordinary civil courts.

The said Section 6 provides that cases dealing with acts punishable under the Military Criminal Code shall come under the jurisdiction of courts-martial.

Section 7 further provides that certain acts punishable under the ordinary Municipal Criminal Code shall also be dealt with by courts-martial.

Military persons on active service will be tried by military courts for all offences, irrespective of whether they are offences under the Military Criminal Code or the ordinary Municipal Criminal Code. The same applies to prisoners of war under military guard and to civilians who are attached, in any capacity, to military units.

Martial law in the ordinary continental sense is a conception alien to Norwegian law. There is no provision of Norwegian law whereby a state of siege may be declared and more or less arbitrary powers conferred upon military commanders.

International law is not directly applicable by Norwegian military courts in a positive sense. The regulations concerned are not penal provisions proper. However, they will be taken into consideration as part of the general principles concerning criminal responsibility. These principles will exempt from such responsibility acts which would otherwise have been liable to punishment, when they are in accordance with the rules of public international law relating to warfare. It follows that Norwegian military courts, as well as ordinary civil courts, may, in certain cases, have to take cognizance of provisions of international law.

The jurisdiction of military courts embraces both soldiers and civilians. The position with regard to the latter is that the said jurisdiction only covers cases of civilians serving with or attached to the armed forces and cases of civilians committing certain specified offences against the Military Criminal Code considered

especially prejudicial to the interests of the armed forces.

The relative provisions do not distinguish between enemy nationals and other civilians, nor between offences committed on national and other territory.

Section 11 of the Military Criminal Code provides that the said Code is applicable also to acts committed abroad. Consequently, the territorial principle does not obtain where such offences are concerned. It is clear, however, that it is only in exceptional cases that this extra-territorial jurisdiction will make foreigners amenable to a Norwegian military court. It should be considered in the nature of a provision of the municipal law of Norway to give effect to the generally accepted principle that armed forces abroad are subject to the exclusive jurisdiction of their own courts-martial.

In the answer to Question 3 are set forth the cases to which a military court will apply also the ordinary Municipal Criminal Code. When penal provisions of this Code are concerned, the rules contained in Section 12 thereof obtain. Regarding these, see the information given above in answer to Question (1).

It will appear from the answers given above that the jurisdiction of Norwegian courts is relatively extensive, but it may still be inadequate for the purpose concerned. The Norwegian Government is authorized to legislate in so far as this is necessitated by the present emergency. This gives a fairly wide scope for changes in the existing law. It is considered that, politically, legislation of the kind in question would not be very difficult if it could be proved to be necessary in order to implement important measures connected with enforcement of justice and reconstruction.

- (5) Does the law of your country provide for the punishment of all war crimes which have been committed in your country?

A survey of Norwegian criminal legislation tends to show that nearly all the important war crimes are covered by provisions which have been in force since hostilities began.

- (6) In case the answer to question (5) is in the negative, what are the legal and political difficulties in the way of a change of the existing law in the direction of making such adequate provision?

The answer given under (4) regarding the possibility of changing the existing law also applies here.

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INTERNATIONAL COMMISSION FOR PENAL RECONSTRUCTION AND DEVELOPMENT

Dr de BAER'S SUB-COMMITTEE

NATIONAL LAWS AND JURISDICTIONS

Answers to Questionnaire

GREECE
(Monsieur C. Stavropoulos)

- (1) In what circumstances, if any, does the law of your country confer upon courts jurisdiction to punish criminal acts committed abroad:

(a) by nationals; (b) by aliens?

(a) Section 3 of the Greek Criminal Procedure Act confers upon Greek Courts jurisdiction to punish any criminal act (crime or delit) committed abroad by any Greek National, the Greek Law being applied in precisely the same manner as if the act had been committed on Greek territory.

(b) Section 2 of the Greek Criminal Procedure Act confers upon Greek Courts jurisdiction to punish any alien, provided that he has been extradited to, or arrested in Greece, for any of the following criminal acts committed abroad:-

- I. For any criminal act (crime or delit) committed against any Greek National.
- II. For high treason against the Greek State, for forging or counterfeiting national currency in circulation in Greece or the official seal of the State and for being a party to any of these offences.
- III. For highway robbery in a neighbouring country.

- (2) To what extent, if any, does the territorial principle of your criminal law confer upon your courts jurisdiction in respect of criminal acts committed by aliens on the high seas or from the air above the high seas against ships or persons on board ships flying the flag of your country?

Greek Law confers upon Greek Courts jurisdiction in respect of any criminal act committed by any person on board Greek ships.

Greek Law does not provide specifically for criminal acts committed by aliens on the High Seas or from the air above the High Seas against ships or persons on board ships flying the Greek flag.

Nevertheless, the aforementioned Section II of Greek Criminal Procedure Act applies if the offence is committed against a Greek national. If the offence is committed against an alien on board a Greek ship it rests with the Greek Courts to consider themselves competent, on the ground that the effect of the offence has been produced on board a Greek vessel, even though the perpetrator of the offence may have been on a foreign vessel or aircraft (objective Territorial jurisdiction).

- (3) What law do the military courts of your country apply? Do they apply a special military code or the ordinary municipal criminal code? Are they authorised to apply "martial law", "the law of war" or "international law"? With regard to what categories of persons have they jurisdiction? Does the latter embrace both soldiers and civilians? In the matter of jurisdiction over civilians, what is the position with regard to enemy nationals: (1) in national territory, (2) in enemy territory in the event of your armed forces occupying parts of enemy territory? To what extent is the jurisdiction of military courts in your country affected by the territorial principle (if any) of your criminal law, i.e., the principle that courts have jurisdiction to punish such acts only as are committed in national territory? (The object of this question is to elicit to what extent, if any, the general terms of the jurisdiction conferred upon military courts in respect of war crimes exclude or modify the application of the territorial principle).

The Greek Military Courts are not authorised to apply "Martial Law" "The Law of War" or "International Law". They apply the Military Criminal Code (Compulsory Law No. 2803, 1941) which lays down the nature of military offences and the constitution, jurisdiction and procedure of the Military Courts.

As a general rule, the jurisdiction of the Military Courts is limited to members of the Greek Armed Forces. Such Courts, however, also have jurisdiction over:

- (a) Prisoners of War, and
- (b) persons belonging to the Military Services of the enemy who are arrested when not in uniform in Greek territory, or in territory occupied by the Greek Armed Forces.

The jurisdiction of the Courts extends to any person (soldiers and civilians):

- (1) if a state of emergency has been declared.
- (2) in enemy country occupied by the Greek Armed Forces.

In both these cases all persons without exception residing in the occupied country, come under the jurisdiction of the Military Courts, and are answerable to them for any act, provision for which is made in the Military Criminal Code and/or for any other act liable to prejudice the security of the country or the armed forces, or to disturb the public order. In the latter case they apply the ordinary Municipal Criminal Code.

The Military Code confers jurisdiction in respect of military offences wherever

committed, whether within or without the national territory.

- (4) In case the law of your country does not authorise civil or/and military tribunals to exercise jurisdiction in respect of crimes committed abroad, what are the legal and political difficulties in the way of a change in the existing law in the direction of conferring such jurisdiction upon military or civil tribunals or both?

This question has already been covered by the previous paragraphs.

- (5) Does the law of your country adequately provide for the punishment of all war crimes which have been committed in your country?

Greek Law (The Military Code) provides for the punishment of certain violations of the recognised Rules of Warfare, such as, ill-treatment of Prisoners-of-War, or wounded, and sick persons, desecration of corpses, attacks on, or seizure of hospital ships, etc., but only in cases where such violations have been committed by members of the Greek Armed Forces.

War crimes committed by the enemy should, therefore, be dealt with under the Municipal Criminal Code. War Crimes, such as systematic terrorism, wanton devastation, destruction of property, pillage, illegal execution, deportation of civilian populations in occupied territories, forced labour, murder of hostages, indiscriminate bombardment, will have to be treated as common criminal acts, namely, murder, robbery, theft, etc.

- (6) In case the answer to question 5 is in the negative, what are the legal and political difficulties in the way of a change of the existing law in the direction of making such adequate provision?

There are no political difficulties in the way of enacting such changes in the existing Law as may be deemed necessary. Any change, however, should take into consideration Art. 7 of the Greek Constitution, which reads:

"No penalty shall be imposed in the absence of a law previously determining such penalty, in respect of offences committed before the enactment of such law."

Dr de MOOR'S SUB-COMMITTEE

THE DEFENCE OF SUPERIOR ORDERS

Position under Municipal Law in:

Belgium,
United States of America,
Poland,
Norway,
Luxembourg
Czechoslovakia,
Great Britain,
France,
Greece,
Holland.

CONFIDENTIAL

INTERNATIONAL COMMISSION FOR PENAL RECONSTRUCTION AND DEVELOPMENT

COMMITTEE CONCERNED WITH CRIMES AGAINST INTERNATIONAL PUBLIC ORDER

Sub-Committee on the Defence of Superior Orders

Dear

It will be of great assistance to the Sub-Committee if you will be good enough to prepare a statement as to the position of the law of your country on the following questions:

- (1) To what extent does the criminal law of your country recognise the plea of superior orders as a justification for illegal acts?
- (2) To what extent, if any, does your military law differ in this respect from the general criminal law of your country?
- (3) What qualifications, if any, with reference to the lawfulness of superior order, does the law of your country recognise with regard to the duty of the soldier to obey the orders of superior officers?
- (4) Is there any information available with regard to the practice, during the first World War, of the military courts of your country with respect to the plea of superior orders put forward by members of enemy armed forces accused of a war crime?

Yours sincerely,

J.M. de MOOR.

CONFIDENTIAL: NOT FOR PUBLICATION

INTERNATIONAL COMMISSION FOR PENAL RECONSTRUCTION AND DEVELOPMENT

Dr de MOOR'S SUB-COMMITTEE
THE DEFENCE OF SUPERIOR ORDERS

Answers to Questionnaire

BEIGIUM
(Dr de Baer)

- (1) To what extent does the criminal law of your country recognise the plea of superior orders as a justification for illegal acts?

In the Belgian criminal law the general principle on the matter is stated in art. 70 and 71 of the Penal Code which are worded as follows:

"Article 70. Il n'y a pas d'infraction lorsque le fait était ordonné par la loi et commandé par l'autorité".

There is of course no difficulty when the act was allowed by law and ordered by the authorities. The difficulty begins when one must make a choice between obeying the law and obeying the authorities and for private persons the general rule is that when such a choice must be made it is the law that must be obeyed. But for persons who by their position have a duty to obey their superior, such conduct is not always practicable. The rules by which they are to be governed in such a case are the following:

The seat of the matter of superior orders is in art. 66, section 3 of the Penal Code: according to this provision the person who gives an order to commit an offence is a partner in the offence:

"seront punis comme auteurs d'un crime ou d'un délit ceux qui, par abus d'autorité ou de pouvoir auront directement provoqué a ce crime ou a ce délit".

so that the person in whom the illegal order originated is punishable in the same way as the person who executed the order.

There is however no liability unless the crime was committed or at least attempted. Moreover the person who gave the order is not liable unless he had in view the specific crime which was, in fact, committed; not only must the order refer to the species of crime which was, in fact, committed (so that a person ordering a theft will not be liable for a murder which might have been committed on that occasion; likewise a

person who gave the order to poison another would not be a partner in the crime if the victim had been stabbed), but the person who gave the order (of murder for instance) must have willed the death of the specific person whose death was intended. (e.g.: A gives B the order to kill X: whilst doing this B kills Y; A will not be liable for the death of Y).

From this follows that the order must have been a special order (e.g. to kill a specific individual) and that, as a rule, a general order (e.g. to kill "anybody") would not be construed as criminal.

A superior order is, in some instances, a form of compulsion or coercion. As to coercion the Belgian law provides:

"Article 71. Il n'y a pas d'infraction lorsque l'accusé ou le prevenu..... a été contraint par une force a laquelle il n'a pu résister".

In other words there can be no offence committed when the agent acted under such compulsion that he was unable to resist. The question of knowing whether the compulsion was sufficiently serious is a matter of fact which must in each particular case be DECIDED BY THE COURT: liability shall be incurred unless compulsion was of such a nature that resistance was humanly impossible. Coercion can of course be either physical or moral. Moral coercion can be exercised by the fact of a superior giving an order to a subordinate: if the offender gives evidence that he only acted upon an order of his superiors, for matters which were within their sphere of authority, and for which they had power to give him orders, and his duty was to obey, only those who have ordered the act will be punishable, and the person who executed the order cannot be punished. This principle is stated in art. 152 and following, and in art. 260 of the Penal Code.

Article 152 provides that:

"Si l'inculpé justifie qu'il a agi par ordre de son supérieur pour des objets du ressort de celui-ci et sur lesquels il lui était dû obéissance hiérarchique, les peines portées par les articles précédents seront applicables seulement aux supérieurs qui auront donné l'ordre".

Article 260.

Lorsqu'un fonctionnaire ou officier public un dépositaire ou agent de la force publique aura prdonné ou fait quelque acte contraire a une loi ou a un arrêté royal, s'il justifie qu'il a agi par ordre de ses supérieurs, pour des objets du ressort de ceux-ci et sur lesquels il leur était dû une obéissance hiérarchique, il sera exempté de la peine, elle ne sera, dans ce cas, appliquée qu'aux supérieurs qui auront donné l'ordre".

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From this follows that, according to ordinary Belgian criminal law, any public officer or civil servant or soldier who does an act which is contrary to law cannot be punished if he can prove that he acted on superior order, provided that the act which was ordered (1) one which was within the field of competence of the superior who gave the order, and (2) one in respect of which the person who carried out the order had the duty to obey.

It has been held by the Belgian Court of Errors (Cassation belge 27. 7. 1891. Pas. 1891, vol I, p.228) that this article covers any illegal act whether it be a trespass, a misdemeanor or even a felony, provided the other requirements of article 260 are fulfilled.

The principle of the non-liability of the inferior who has carried out a superior order has thus been extended to its extreme limit by Belgian jurisprudence. In practice, the Belgian Courts have never been called upon to decide in a case where a heinous felony had been committed, and it is very doubtful whether, in such a case, the ruling of the Cour de Cassation would be upheld.

(N.B. The person who has committed an act contrary to law must, in some cases, after having obeyed his superior, denounce the fact to the competent authorities, otherwise he may be held personally liable for the offence which he has, by order, committed).

Conflicts of duty may of course arise in some of these cases, but the Penal Code neither defines nor considers conflicts of duty as such.

(2) To what extent, if any, does your military law differ in this respect from the general criminal law of your country?

(a) There is no fundamental difference between the military law (Code Pénal Militaire) and the general criminal law. If anything, the military law more specifically upholds the duty of the soldier to obey the orders of his superior officer, provided the order is one which concerns a military service. In this respect, art. 28 of the Military Penal Code provides:

"Le militaire qui refusera d'obéir aux ordres de son supérieur ou s'abstiendra à dessein de les exécuter, lorsqu'il est commandé pour un service, sera puni de destitution s'il est officier, de l'emprisonnement militaire de trois mois à trois ans s'il est sous-officier, caporal-brigadier ou soldat".

In time of war or in the presence of the enemy, the punishment is more severe and can even be death. When the refusal to obey is made by more than three soldiers it is described as a revolt.

(b) As to the discipline Regulations (Reglement de discipline) it is provided in art. 3 that:

"Tout militaire est obligé, dans le service d'obéir promptement et sans répliquer aux ordres de ses superieurs et de les exécuter fidèlement, sauf le droit d'en porter ensuite ses plaintes, lorsqu'il se trouve loco. La discipline faisant la force principale des armées, en service* il importe que tout supérieur exige et obtienne de ses subordonnées une obéissance entière et une soumission de tous les instants; que les ordres soient exécutés littéralement, sans hésitation ni murmure; l'autorité qui les donne en est responsable et la réclamation n'est permise à l'inférieur que lorsqu'il a obéi".

So that here again the rule is fundamentally the same; complete obedience is required, orders should be executed, the inferior may only lodge a complaint after he has executed the order, and the superior is responsible for the consequences. But this only applies to acts which are comprised within the scope of military duties, i.e. "on service".

- (3) What qualifications, if any, with reference to the lawfulness of superior order, does the law of your country recognise with regard to the duty of the soldier to obey the orders of superior officers?

One may say that any order which is not connected with the service must not be carried out, a fortiori when such order is illegal.

It is obvious, for instance, that if a superior gave to an inferior an order such as "shoot yourself" or "pull out one of your teeth" or "marry this woman", such an order, as it is not connected with any military duty, should not be carried out. (Goedseels Droit Pénal Nos. 81-82). A Flanders Court Martial (C.de G.Fl.Or. 14 avril 1900 P.P. 1900-520) held that an inferior must carry out a superior order, provided that the order concerns a military duty, but that this rule applies to any military duty, whatever it may be.

The Cour Militaire of Belgium upheld this principle in a decision delivered on 23 August 1907 (Rev. Dr Pénal 1908 p. 133) and the Cour de Cassation did the same. (Pas. 1878.I.384 and Pas. 1879. I. 34).

*

Un militaire est en service lorsque, revêtu de son uniforme ou en costume civil, il remplit ou se trouve dans l'obligation de remplir un des devoirs militaires de son grade ou de sa fonction.

On August 10th, 1901, the Antwerp Court Martial (Pas. 1902. III. 94) held the same view when it decided that a soldier who had refused to comply with the order of an officer who commanded him to sign a legal document had committed no offence, on the ground that signing a document is not a military duty. In the same connection, a quarter master sergoant would be justified in refusing to comply with an order given to him by the company Commander to the effect of falsifying the company's accounts in view of concealing a deficit (Goedseels loc. cit. 82).

From this may be drawn the conclusion that, in Belgian military law, when given by a superior officer,

- an order which concerns neither the military service nor a military duty, need not be obeyed. (C.M. 6 mars 1916 aff. Davidts),
- an order which is directly concerned with military service or a military duty, must be obeyed even if it is unlawful (Goedseels loc. cit. 82).

There is in the Belgian Code, no provision similar to art. 47 of the new German Military Penal Code of December 1st, 1940 (RB G.L.-I-1347).

As has been said above the only requirement is that the order must be connected with the service. It is, of course, for the Court to decide whether the order was - or not - connected with the military service or duty. In time of war an order to kill civilians would probably be construed as an order relating to a military duty. There is no doubt that members of a firing squad could not be prosecuted for having obeyed a superior order. Liability would probably depend on the respective situations of the persons who gave - and who executed - the order, and on the amount of discretion which the latter could reasonably be expected to exercise.

There are no special legal qualifications with respect to the lawfulness of the order, so that the rules laid down in the answer to question(1) are applicable. But of course the order must be a command to do (or not to do) a specific act and not merely a request or an advice. The form of the order is immaterial, it may be given in writing or by word of mouth; the question of deciding of what is an order belongs to the court. It is probable that a court would not consider words such as "houses may be looted" or "prisoners may be killed" as an order, but rather as an option or permission. On the other hand a specific prohibition such as "no prisoners shall be made" would most certainly be construed as an order.

- (4) Is there any information available with regard to the practice, during the first World War, of the military courts of your country with respect to the plea of superior orders put forward by members of enemy armed forces accused of a war crime?

There is no information available on that subject. No members of enemy armed forces accused of a war crime were tried during the first world war by Military Courts of Belgium. The only German who was indicted (N.C.O. Randohr) was tried by the Supreme Court of Leipzig - and was acquitted - the question of superior order was not raised in this case.

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D. 17.

INTERNATIONAL COMMISSION FOR PENAL RECONSTRUCTION AND DEVELOPMENT

Dr de MOOR'S SUB-COMMITTEE
THE DEFENCE OF SUPERIOR ORDERS

Answers to Questionnaire

BELGIUM
(Monsieur Ch. Tschoffen)

A. Question

- (1) To what extent does the criminal law of your country recognize the plea of superior orders as a justification for illegal acts?

Appliquée aux crimes de guerre, cette question peut se reprendre comme suit:

"Au cas où on leur appliquerait le code pénal national belge, les allemands, coupables de crimes de guerre, sur le territoire belge, pourraient-ils invoquer la cause de justification ou d'excuse comme sous le nom de "exception de l'ordre reçu".

B. Réponse Générale.

Les dispositions du code pénal belge a cet égard sont contenues dans les articles 70, 71, 152 et 260 dont ci-dessous copie et analyse.

Elles constituent ce qui est appelé en droit belge "cause de justification" en exprimé par la formule "il n'y a pas d'infraction lorsque....."

Notons que lws art. 70 et 71 se trouvent dans le Livre I / "Des infractions et de la répression en général", l'art. 152 au Titre II du Livre II "Des crimes et délits qui portent atteinte aux droits garantis par la Constitution" en l'art. 260 au Totre IV du Livre II "Des crimes et délité contre l'ordre public".

Ajoutons que le code pénal militaire ne contient aucun article spécial en ce domaine. D'autre part, l'article 58 du code pénal militaire (Loi du 27 mai 1870) porte que les dispositions du Livre premier du code pénal ordinaire (donc les art. 70 et 71) aux quelles il n'est pas dérogé par la présente loi, seront appliquées aux infractions militaires". Rien dans ce code pénal ne portant dérogation aux art. 70 et 71 du C.P. ils doivent s'appliquer aux infractions militaires dans la mesure et l'esprit ci-apres exposées.

C. Art. 70.

Cet article dispose qu' "il n'y a pas d'infraction lorsque le fait était ordonné par la loi et commandé par l'autorité".

L'on remarque que pour que cette disposition puisse être invoquée, il faut deux éléments conjoints:

(a) le fait doit être ordonné par la loi; (ordonné veut dire ici order ou simplement autorisé; ex. arrestation préventive).

(b) et commandé par l'autorité.

Loi et autorité doivent s'entendre à toute évidence de loi et autorité belges.

L'art. 70 n'est donc pas applicable aux crimes commis par les allemands en territoire belge.

L'on sait toutefois que par une ordonnance du 10 mai 1940, l'autorité allemande a introduit le Code pénal allemand en Belgique.

L'article 1er de cette ordonnance dit que:

"Pour autant qu'un agissement punissable sous le droit allemand sera jugé par les par les tribunaux ou par les tribunaux spéciaux, militaires le droit pénal allemand sera appliqué."

L'autorité occupante a elle-même limité à ses tribunaux l'application de cette ordonnance.

Indépendamment du point de savoir si elle est conforme au règlement annexé aux Conventions de la Haye, elle n'est pas applicable au cas qui nous occupe.

D. Art. 71

Cet article dispose qu'il n'y a pas d'infraction lorsque l'accusé ou le prévenu était en état de démence au moment du fait ou l'orsque il a été contraint par une force à laquelle il n'a pas pu résister".

Nous pouvons évidemment négliger les cas de démence et devons simplement nous demander si le sujet allemand répondant à un ordre allemand "a été contraint par une force à laquelle il ne peut résister?"

La contrainte peut être physique ou morale.

Les cas de contrainte physique sont très rares et "l'ordre reçu" ici envisagé ne peut éventuellement rentrer que dans les cas de contrainte morale.

La contrainte morale est celle qui résulte de l'imminence actuelle d'un mal

qui met dans l'alternative ou de subir ce mal, ou de faire tel ordre illicite qu'on vous impose (Nypels et Servais). Mais elle doit être d'une gravité telle que l'intéressé "na pu résister". La contrainte morale résulte de la menace d'un mal plus ou moins grave. Pour qu'elle soit élisive de l'infraction "il ne suffirait pas d'une menace ou d'une violence qui serait de nature à faire impression, que la loi civile admet comme suffisante pour vicier le consentement dans les conventions" (Nypels et Servais). Il faut avoir "égard au sexe, à l'âge et à la condition des personnes.

Il est certain que cet article 71 s'applique au cas qui nous occupe mais avec toute latitude d'appréciation des circonstances pour déterminer quand la contrainte a été telle que l'intéressé "n'a pu résister".

Cet article a l'avantage de ne pas impliquer ipso facto, et loin de là, l'exception de l'ordre reçu ce qui aboutirait pratiquement, à supprimer toute répression pour la plupart des actes les plus graves.

D'autre part, il a l'avantage de permettre le non poursuite ou l'acquiescement de ceux qui ont agi sur ordre donné, dans des circonstances de fait telles qu'il ne pouvait humainement y résister, étant entendu que le fait de refus d'obéissance pouvait entraîner pour lui des conséquences très graves, n'est donc point a priori suffisant. Ce risque ne suffit pas, en principe, pour se permettre de poser des actes criminaux.

L'article est rédigé d'une façon très large de telle sorte que le juge devra tenir compte concomitamment de la nature de l'acte de son immoralité intrinsèque, des liens hiérarchiques, du degré de personnalité et d'intellectualité de l'inculpé, etc.

E. Art. 152

L'article 151 (sequel se rattache l'art. 152) est libellé comme suit:

"Tout autres actes arbitraires et attentatoires aux libertés et aux droits garantis par la Constitution, ordonnés ou exécutés par un fonctionnaire ou officier public, par un dépositaire ou agent de l'autorité ou de la force publique, seront punis d'un emprisonnement de 15 jours à un an".

L'article 152 dispose que: "si l'inculpé justifie qu'il a obéi par ordre de ses supérieurs, pour des objets du ressort de ceux-ci et sur lesquels il aurait dû obéissance hiérarchique, les peines portées dans les articles précédents, seront appliquées seulement au supérieur qui aura donné l'ordre".

Une observation essentielle:

Les actes arbitraires attentatoires aux libertés et aux droits garantis par la Constitution ici envisagés, sont ceux qui seraient ordonnés ou exécutés par un fonctionnaire ou officier public belge, un dépositaire ou agent de l'autorité ou de la force publique belge. On n'a pu avoir en vue, dans le code pénal belge, un fonctionnaire ou officier public, agent, etc. dépendant d'une autorité étrangère.

Cette considération nous dispense de signaler que dans une certaine mesure, il résulte de l'exposé des motifs, que l'exception de l'ordre reçu, dans le cadre ici envisagé, n'est pas péremptoire si le subordonné a connu l'illégalité de l'ordre.

F. Art. 260.

(Crimes et délits contre l'ordre public)

Cet article dispose: "lorsqu'un fonctionnaire ou officier public, un dépositaire ou agent de la force publique aura ordonné ou fait quelque acte contraire à une loi ou à un arrêté royal, s'il justifie qu'il a agi par ordre de ses supérieurs, pour des objets du ressort de ceux-ci, et sur lesquels il leur était dû une obéissance hiérarchique, il sera exempt de la peine qui se sera dans ce cas appliquée qu'un supérieur qui aura donné l'ordre".

Nous nous en référons à ce que dit ci-dessus au sujet de l'article 152.

G. Conclusion

A mon avis, seul l'article 71 du code pénal tel qu'analysé ci-dessus est applicable aux crimes et délits commis en Belgique par les militaires allemands. Il règle: à leur égard, la question de l'ordre reçu.

-
- (2) To what extent, if any, does your military law differ in this respect from the general criminal law of your country?

B. Réponse

I.

Rien dans le code pénal militaire ni dans le code de procédure pénale militaire ne touche explicitement à la question soulevée.

Mais il y a lieu d'observer que l'article 58 du code pénal militaire (loi 27 mai 1870) porte que "les dispositions du premier Livre du C.P. ordinaire auxquelles

il n'est pas dérogé par la présente loi seront appliquées aux infractions militaires". Parmi ces dispositions se trouvent les articles 70 et 71 du code pénal ci-dessus analysés.

Rien, a notre connaissance, dans le code pénal militaire ne portant dérogation a ces deux articles, ils doivent s'appliquer aux infractions militaires.

La situation d'un militaire - quand il s'agit d'invoquer la cause de justification tirée d'un ordre reçu - est plus favorable encore que celle du fonctionnaire car l'obéissance est dans certaines limites (art. 28 du code pénal militaire) imposée au militaire sous sanctions pénales ce qui n'est jamais le cas pour le fonctionnaire.

Le tout dans le cadre et les limites que nous avons exposés en étudiant les articles 70 et 71 du code Pénal.

II

Remarquons aussi qu'un militaire peut, dans certaines circonstances, être un "agent de la force publique" au sens de la loi. De toute évidence il pourrait en ce cas, si on l'inquiétait du chef d'un acte accompli en exécution d'un ordre reçu, invoquer la cause de justification établie par les articles 158 ou 260 du code pénal (à condition bien entendu, que le fait qui lui est reproché rentre dans les prévisions de l'un ou de l'autre de ces articles). Quand les militaires posent - ils la qualité d'agents de la force publique? Il y aurait à cet égard des recherches à faire (doctrine et jurisprudence). Je me rappelle que lors des grèves de juin 1936, les tribunaux ont reconnu cette qualité aux militaires agissant comme forces supplétives de la gendarmerie.

Cependant la question ne doit pas être ici approfondie, car comme nous l'avons exposé plus haut, les articles 152 et 260 du code pénal ne peuvent concerner que des autorités belges et non pas des autorités étrangères.

- (3) What qualifications, if any, with reference to the lawfulness of superior order, does the law of your country recognize with regard to the duty of the soldier to obey the orders of superior officers?

B. Réponse

Il résulte de la réponse a la deuxième question qu'il n'y a point de qualification spéciale en ce qui concerne les actes accomplis par des soldats en exécution d'ordres reçus et qu'il faut simplement appliquer l'art. 71 du code pénal s'il échet.

- (4) Is there any information available with regard to the practice, during the first World War, of the military courts of your country with respect to the plea of superior orders put forward by members of enemy armed forces accused of a war crime?

B. Réponse

Je ne possède pas de documentation a ce sujet.

Voici d'autre part ce que peuvent apporter mes souvenirs personnels: La justice belge, a poursuivi, sur la base du droit commun, certains officiers allemands du chef d'assassinat ou de meurtre (exécution de civils en août 1914 notamment). Ils furent tous jugés (et, la plupart de temps condamnés) par défaut et n'ont jamais été livrés. Ils n'ont donc pas eu l'occasion d'opposer l'exception de l'ordre reçu. Elle n'a pas été, a ma connaissance, soulevée par les parquets et les cours.

CONFIDENTIAL: NOT FOR PUBLICATION

D.18.

INTERNATIONAL COMMISSION FOR PENAL RECONSTRUCTION AND DEVELOPMENT

Dr de MOOR'S SUB-COMMITTEE
THE DEFENCE OF SUPERIOR ORDERS

Answers to Questionnaire

UNITED STATES OF AMERICA
(Professor A.L. Goodhart)

In the United States there is a conflict in theory between civil and military law on the validity of the defence of superior order, although in practice this causes no difficulty.

According to military law an officer or soldier may plead in his defense that he has acted in obedience to an order given by a superior officer, provided that the order is not patently illegal.

On the other hand in civil law obedience to an order which in fact is illegal is not a defence, even though the order was reasonably believed to be legal. It must be pointed out, however, that the civil courts in the various states are not unanimous on this point, but the weight of authority supports the view expressed here.

The leading case is U.S. v. Carr, 1 Woods 480, in which it was held that a shooting by one soldier of another, resulting in the death of the latter, at the order of an officer, is "murder both in the officer and the soldier".

It is for the Executive to exercise its powers of pardon in such cases, and not for the Court to weaken a fundamental constitutional principle.

At times of crisis the survival of democracy may depend on the recognition of the rule that an illegal superior order is not a defence in law. In American law the principle extends even to unconstitutional statutes which, although enacted by the proper legislative authority, do not excuse action taken under their provisions. It may therefore be stated that American civil law is in consonance with English law on this point.

Attached hereto is an extract from Winthrop's Military Law and Precedents which is the authoritative book on this subject. Particular attention is called to notes 52 and 54. Owing to the absence of American law reports it has not been possible to cite cases in support of the views which have been expressed above.

Winthrop's Military Law and Precedents - Second Edition

Vols. 1 and 2 - Reprint 1920

p. 886

Liability of inferior when acting under orders - Relative amenability of superior and inferior. The material question has not unfrequently been raised as to how far an inferior officer or soldier, sued or prosecuted on account of an act done by him in his military capacity, may justify under an order given him by a military superior. Of course where the authority of the superior is complete it shields all who duly act under him.

An inferior in duly executing a valid authority or order is protected much as is a sheriff by his precept, and if he proceeds upon probable cause and without malice, will in general be justified though he commit error.⁽⁴⁸⁾

But where the order of the superior is illegal, how far, if at all, can it serve as a defence to the subordinate who, ignorant of its illegality, executes it in good faith? At military law, indeed, the inferior, bound as he is at his peril to obey all orders not palpably illegal upon their face, may, if brought to trial for an act committed in obedience to an order, apparently legal but illegal in fact, plead in defence his obligation to obey, and such defence will in general be accepted as a sufficient answer to the charge.

In some civil cases a similar view has been taken; the order of the superior when apparently regular and valid being held to protect the inferior because he was bound to obey it.⁽⁴⁹⁾⁽⁵⁰⁾

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In some other civil cases the inferior is considered to be justified on the ground that he is, under the circumstances, acting under duress or a quasi compulsion, much as a wife is supposed to act by the compulsion of her husband.⁽⁵¹⁾

(47) Teagarden v. Graham, 31 Ind., 422. (48) Despan v. Olney, 1 Curtis, 506; Wilkes v. Dinsman, 7, Howard, 89; Hawley v. Butler, 54, Barb., 490; Ruan v. Perry, 3 Caines, 120.

(49) See Digest, 28 - "The Twenty-First Article".

(50) See Riggs v. Stato, 3 Cold., 85; Trammell v. Bassett, 24, Ark., 499; Taylor v. Jenkins, Id. 337; These indeed were cases occurring in time of war, when the obligation of the inferior to obey is more imperative than in peace. See Bates v. Clark, 95, U.S., 204.

(51) McCall v. McDowell. Deady, 233; Witherspoon v. Woody, 5 Cold., 149; But see U.S. v. Greiner, 4 Philad., 396.

But in the great majority of the adjudications it has been held that an order which is in fact illegal - which commends the doing of an act which is unlawful or legally unauthorized - can, however regular, proper, or just what it may appear on its face, protect no one concerned in the performance; that the superior who gives it and causes its execution, and the inferior who actually executes it as ordered, will both, or either, be liable in damages as for a trespass to any person aggrieved ⁽⁵²⁾. That the illegal order may have proceeded from the highest authority of the government - may have been in fact given directly by the President as Commander-in-chief - cannot render it of any greater efficacy in protecting the subordinate who acts upon it. ⁽⁵³⁾

In this class of cases, however, the inferior, if he has acted in good faith, will ordinarily be charged with but slight or normal damages. ⁽⁵⁴⁾

On the other hand the superior, if sued, will, as the principal offender, be held to a stricter accountability ⁽⁵⁵⁾, and made liable for all such acts of the inferior or inferiors of the command, by whom his orders were executed, as were within the scope of such orders ⁽⁵⁶⁾. A superior, however, cannot be made responsible for the personal negligence of a subordinate in executing 1387 an order ⁽⁵⁷⁾ or for acts done by the latter on his own responsibility ⁽⁵⁸⁾. If, indeed, he expressly ratifies the same by his own action, he will be liable. ⁽⁵⁹⁾

(52) Harmony v. Mitchell, 1 Blatchford, 356; Clay v. U.S. Devereaux, 25; Holmes v. Sheridan, 1 Dillon, 351; Bates v. Clark, 95, U.S. 204; U.S. v. Carr, 1 Woods, 480; Com. v. Blodgett, 12 Met., 56; U.S. v. Greiner, 4 Philad., 396; Skeen v. Monkheimer, 21, Ind., 4; Griffin v. Wilcox, 27 Id., 391; State v. Sparks, 27 Texas, 632; Koonce v. Davis, 72 No. Ca., 218; Stanley v. Schwalby, 85, Texas, 348. So, at criminal law, a shooting without sufficient cause (as for disrespectful words merely), by one soldier of another, resulting in the death of the latter, at the order of an officer, is "murder both in the officer and the soldier". U.S. v. Carr, 1 Woods, 480.

(53) Little v. Barreme, 2 Cranch, 179; U.S. v. Buchanan, 8 Howard, 105; Eifort v. Bevins 1 Bush, 460; Richardson v. Crandall, 47, Barb., 335; Griffin v. Wilcox, 27 Ind., 391; Cooley, Prins, Const. Law 119, 157. And see Head v. Porter, 48, Fed., 481, cited ante.

(54) State v. Sparks, 27 Texas, 632. It may be otherwise, however, in a criminal case. Thus where a soldier fires and takes life in obedience to an unlawful order, the homicide is not reduced to manslaughter, but is murder. U.S. v. Carr, 1 Wood, 480.

(55) Trammell v. Bassett, 24 Ark., 499; State v. Sparks, 27 Texas, 617.

(56) Ela v. Smith, 5 Gray, 122; Taylor v. Jenkins, 24 Ark., 337.

(57) See Regina v. Hutchinson, 9 Cox, 655; State v. Sutton, 10 R.I., 159 - cases of homicide caused by negligence on the part of subordinates in executing orders.

(58) Nicholson v. Mounsey, 15 East, 383. ⁽⁵⁹⁾ Smith v. Shaw, 12 Johns., 257.

In justifying himself by the order of a superior, in a civil suit instituted against him, the inferior need not show that the order was a written one: a verbal order if explicit will be of equal effect⁽⁶⁰⁾. Nor need he exhibit the commission of his superior or prove his appointment as such: it will be sufficient to show that the superior publicly acted and was recognised in the capacity ascribed⁽⁶¹⁾.

Liability for mode of executing an order. An order may be legal, but its mode of execution the reverse. Thus, in the case of an arrest, only the proper degree of force should be employed; otherwise the officer or soldier executing it becomes civilly amenable⁽⁶²⁾. So an unduly severe or inappropriate confinement may, of itself or with other circumstances, constitute ground of action. Thus a civil prisoner is not in general to be subjected to the same restraint or exactions as a soldier,⁽⁶³⁾ nor a political prisoner to the same as a criminal⁽⁶⁴⁾. So holding a prisoner confined for an unreasonable or illegal period will render the responsible official liable to suit⁽⁶⁵⁾.

p.889 Liability for injuries in time of war. For an act done jure belli, or for the exercise of a belligerent right, an officer or soldier cannot be called to account in a civil proceeding⁽⁷⁰⁾. Thus an officer is not properly liable

(60) Pollard v. Baldwin, 22 Iowa, 328.

(61) Rex v. Gardner, 2 Camp., 513; Labanon v. Heath, 47, N.H., 359; Hardage v. Coffmann, 24 Ark., 256. "This rule of evidence applies with more force to military than to civil officers. Soldiers in many cases are placed under the command of officers of whom they know nothing; they are continually being changed from one command to another; and should they be required to produce the commissions of their commanding officers, or even to prove that they had ever been commissioned, they could rarely indeed sustain a plea of justification for any act done in obedience to orders." Jones v. Johnson, 24 Ark., 260.

(62) McCall v. Dowell, Deady, 233. (63) Waters v. Campbell, 5 Sawyer, 17 ante.

(64) McCall v. McDowell, ante.

(65) Hawley v. Butler, 48, Barb., 10; In re Carr, 3 Sawyer, 316; Waters v. Campbell, ante.

(70) Com. v. Dolland, 1 Duvall, 182; Doyle v. Armstrong, 2 Id., 533; Price v. Poynter, 1 Bush., 387; Bell v. L.N.R.R. Co., 33, 40; Safford v. Mercer, 42 Ga., 556; Ford v. Surget, 46 Miss.; Coolidge v. Guthrie, 8 Am., L.Reg. (N.S.), 22; 1 Opins. At. Gen., 255. The common law will not "undertake to rejudge acts done flagrante bello in the face of the enemy". Tyler v. Pomeroy, 8 Allen, 484. "Ever since the case of Dow v. Johnson, 100 U.S., 158, the doctrine has been settled in the courts that in our late civil war, each party was entitled to the benefit of belligerent rights, as in the case of public war, and that, for an act done in accordance with the usages of civilized warfare, under and by military authority of either party, no civil liability attached to the officers or soldiers who acted under such authority". Freeland v. Williams, 131, U.S. 416.

1389 to a suit for the seizure or destruction, in an adequate emergency of war, or in the course of the performance of military duty in war, of the private property of individual citizens⁽⁷¹⁾. So it has been held that a soldier was not liable to prosecution for shooting and killing, under proper orders, a "bushwhacker" or guerilla, in the late war, in Tennessee⁽⁷²⁾. The existence, however, of war will not, as heretofore indicated under Part II - justify wanton trespasses upon the persons or property of civilians, or other injuries not sanctioned by the laws or usages of war⁽⁷³⁾, nor will it justify wrongs done by irresponsible unauthorized parties⁽⁷⁴⁾. For such acts the offending officer or soldier may be made liable in damages. But in general, in time of war, a greater discretion is conceded to commanders, and to military persons executing orders⁽⁷⁵⁾. Obligated as they are to act promptly upon emergencies⁽⁷⁶⁾ it would not be fair to hold them to the same strict accountability before the courts as for acts in disregard of private right in time of peace.

(71) Harmony v. Mitchell, 1 Blatchford, 549; Do., 13 Howard, 115; Holmes v. Sheridan, 1 Dillon, 351; Yost v. Stout, 4 Cold., 205; Thomasson v. Glisson, 4 Heisk., 615; Drehman v. Stifel, 41 Mo., 184; Bryan v. Walker, 64 No. Ca., 141; Koonce v. Davis, 72 Id., 218; Broadway v. Rhem, 71 No. Ca. 195.

(72) Ex parte Hurst, 2 Flippin., 510.

(73) Hough v. Hoodless, 35 Ills., 166; Christian Co. Ct. v. Rankin, 2 Duv., 502; Terrill v. Rankin, 2 Bush, 453; Lewis v. McGuire, 3 Id., 202; Dills v. Hatcher, 6 Id., 606; Riggs v. State, 3 Cold., 85; Merritt v. Mayor, 5 Id., 95; Bowles v. Lewis, 48 Mo., 32; Williamson v. Russell, 49 Id., 185.

(74) Worthy v. Kinamon, 44 Ga., 297; Hogue v. Penn., 3 Bush, 663; Branner v. Felkner, 1 Heisk., 228; Cochran v. Tucker, 3 Cold., 186.

(75) Sutton v. Johnstone, 1 Terme, 493; Wall v. McNamara, Id., 536; Olmstead's Case, Brightly, 9; Hefferman v. Porter, 6 Cold., 391.

(76) In war "military commanders must act to a great extent upon appearances. As a rule they have but little time to take and consider testimony before deciding." U.S. v. Diekelman, 92 U.S., 527.

INTERNATIONAL COMMISSION FOR PENAL RECONSTRUCTION AND DEVELOPMENT

Dr de MOOR'S SUB-COMMITTEE
THE DEFENCE OF SUPERIOR ORDERS

Answers to Questionnaire

POLAND
(Professor S. Glaser, LL.D.,)

- (1) To what extent does the criminal law of your country recognise the plea of superior orders as a justification for illegal acts?

The Polish Penal Code of 1932 has no ruling on this problem. No reference to it is to be found here. With regard to the general rules on responsibility/liability/, in particular those applicable to fault/ intention/, the "order" should be considered irrelevant for liability, if he who executes it realises the lawlessness of the act. On the other hand, he could be exempt from punishment/ his act remains lawless, but he is not punishable;/, if he can invoke as a defence the "state of necessity". Article 22 of the Polish Code applies to this:

"Sec. 1. A person shall not be punished who acts to avert a direct danger which menaces his own interest or that of another if the danger could not have been otherwise avoided.

Sec. 2. A person does not act under such higher necessity who has a special duty to expose himself to danger.

Sec. 3. The interest destroyed shall not represent an obviously greater value than the protected interest.

Sec. 4. In the case of exceeding the limits of higher necessity the court may apply extraordinary diminution of penalty."

- (2) To what extent, if any, does your military law differ in this respect from the general criminal law of your country?

With regard to military law, Article 9 of the Polish Military Penal Code of 1932 reads as follows:

"par. 1. A soldier who commits an act which is to be considered as an execution of an order in official matters is not punishable.

par. 2. The rule foreseen in par. 1. is not applicable (a) if the offence resulted from a violation/ transgression of an order, or (b) if the doer knew that the order concerned an act regarded as crime or felony".

In the above mentioned cases the court may apply an extraordinary diminution of penalty.

- (3) What qualifications, if any, with reference to the lawfulness of superior order, does the law of your country recognise with regard to the duty of the soldier to obey the orders of superior officers?

Besides the attitude of our Military Code, the following regulation is contained in par. 28 of the rules applicable military service/ Part I & II, Great Britain 1941, p. 37 /:

"It is the duty of a subaltern not to execute only such orders as command an action prohibited and prosecuted by criminal law. In such a case the subaltern is moreover obliged to report the command at once to the next common superior officer".

- (4) Is there any information available with regard to the practice, during the first World War, of the military courts of your country with respect to the plea of superior orders put forward by members of enemy armed forces accused of a war crime?

As regards the practice during the first World War, it is known that the defence of a superior order was only considered a reason for extraordinary diminution of penalty.

CONFIDENTIAL: NOT FOR PUBLICATION.

D.20.

INTERNATIONAL COMMISSION FOR PENAL RECONSTRUCTION AND DEVELOPMENT

Dr de MOOR'S SUB-COMMITTEE
THE DEFENCE OF SUPERIOR ORDERS

Answers to Questionnaire

NORWAY
(Mr A. Aulie)

- (1) To what extent does the criminal law of your country recognise the plea of superior orders as a justification for illegal acts?

The Norwegian civil penal code contains no special provision which allows the plea of superior order as a justification for illegal acts, but our jurisprudence accepts the fact that officials of certain public services - the police for example - will sometimes have to act in accordance with a superior order without questioning the legality of the resultant action. If, however, it must have been quite patent to the person concerned that his superior had no right to give him the order, the subordinate would not be bound to obey and the plea of superior would not then be valid.

- (2) To what extent, if any, does your military law differ in this respect from the general criminal law of your country?

A provision of the Norwegian military penal code stipulates that:-

"Orders given by a superior in military matters shall exonerate the subordinate, provided that he does not exceed the order and that it has not been or ought not to have been evident to him that in carrying out the order he was committing an unlawful act."

This same principle, though not mentioned in the civil penal code, is recognized for every domain of Norwegian penal legislation. It is supplemented by another, common to both the civil and the military penal codes, which can be expressed as follows:-

"An act which normally would be considered a crime may be legal when it is performed with the intention of saving a person or property which could not otherwise be saved and when the danger was such that the damage or harm it involved was far greater than that which could result from the act in question".

- (3) What qualifications, if any, with reference to the lawfulness of superior order, does the law of your country recognise with regard to the duty of the soldier to obey the orders of superior officers?

When discussing whether a superior order should or should not be considered a defence for war criminals, we must keep in mind the fact that the same principle of law which we would like to apply to our enemies must also be applicable to members of our own armed forces. We must thus take into consideration the fact that it would impair the efficiency of our war machine if we were to impart to our fighting men principles which would detract from the authority of our military commanders. If the plea of superior order were not generally deemed a defence, then lower ranks would have to judge every order given to them and decide for themselves whether or not the execution of such an order would be a violation of the law. If, for example, during street fighting a platoon was ordered to blow up a building occupied by civilians and in which an enemy sniper was alleged to be hiding, each member of the platoon would have to consider the legal aspect of the action, and, consequently, refuse to obey the order if, taking all the circumstances into account, they deemed it an illegal act, i.e. the massacre of civilians. It will certainly be generally agreed that this result of the application of such a legal principle would be impossible.

The plea of superior order must, to a great extent, be allowed as a defence, not only when the man who carried out an order acted under compulsion, but also in many cases because, as a member of the armed forces, it was his duty to obey, without hesitation or criticism, orders given to him by his superior officer. On the other hand, however, there will be cases where the plea of superior order could never be admitted as a defence. If, for instance, the officer commanding a battalion were to receive from his divisional head-quarters an order to the effect that all the male population of a certain village was to be shot or that all the civilians in a certain district were to be rounded up and placed at the head of troops in a battle zone, he could not possibly entertain any doubts as to the criminal nature of such an action, and even if he knew that he would be treated as a mutineer if he did not comply with the order, such an excuse would not exonerate him should he be an accomplice in the massacre. The same view must be taken of the case of a private soldier who had received and executed an order to bind and bayonet prisoners of war.

It can be seen that according to Norwegian law there will be cases where the plea of superior order will serve to exonerate the accused, but there will be other cases where it will not. There are various considerations to be reckoned with when trying to formulate a general principle in this matter, and the circumstances

attaching to each individual case will require examination. The Court will have to ascertain whether, on account of his subordinate position, the accused could not possibly have been expected to realize the illegality of his action, or, if the crime was of such a heinous nature that he could not avoid realizing its illegality, whether he was acting under compulsion or in order to avert danger which it was his duty to avert even at a heavy cost.

The various points which the Court will have to take into account may be enumerated as follows:-

Orders given by a superior officer shall exonerate his subordinate provided that:-

- (a) the latter did not exceed the order;
- (b) it was not or ought not to have been evident to him that in executing the order he was committing an illegal act;
- (c) he committed an otherwise illegal act with the intention of protecting highly valuable interests from imminent danger when there was no other course to be adopted and the danger was such that the damage or harm it involved was far greater than that which could result from the act in question.

Working on this principle, there would be no fear that persons guilty of heinous crimes, such as those I mentioned above, would ever be acquitted, even were they to plead that their action was committed as a military duty or under irresistible compulsion. The plea of self-preservation would thus never serve as justification for heinous acts such as mass murder of the civilian population.

- (4) Is there any information available with regard to the practice, during the first World War, of the military courts of your country with respect to the plea of superior orders put forward by members of enemy armed forces accused of a war crime?

Norway has no experience of this matter from the first World War.

INTERNATIONAL COMMISSION FOR PENAL RECONSTRUCTION AND DEVELOPMENT

Dr de MOOR'S SUB-COMMITTEE
THE DEFENCE OF SUPERIOR ORDERS

Answers to Questionnaire

LUXEMBOURG

(Monsieur Victor Bodson)

- (1) To what extent does the criminal law of your country recognize the plea of superior orders as a justification for illegal acts?

In the Luxembourg criminal law the general principle on the matter is stated in art. 70 and 71 of the Penal Code which are worded as follows:

Art. 70. Il n'y a pas d'infraction, lorsque le fait était ordonné par la loi et commandé par l'autorité légitime.

Jurisprudence: Cet article est applicable lorsqu'il y a pour le prévenu présomption de légitimité des ordres qu'il avait reçus.

Art. 71. Il n'y a pas d'infraction, lorsque l'accusé ou le prévenu était en état de démence au moment du fait, ou lorsqu'il a été contraint par une force à laquelle il n'a pu résister.

Jurisprudence: (1) La démence passagère, produite par l'ivresse complète qui, elle-même, est le résultat d'une faute, ne détruit pas la responsabilité pénale de l'auteur d'un délit non-intentionnel.

(2) Ne saurait être considéré comme ayant été contraint par une force à laquelle il n'a pas pu résister le prévenu qui a été entraîné à une action criminelle par des désirs pervers, alors que cependant ces désirs criminels n'ont pas été accompagnés de démence.

Spécialement ne saurait être considéré comme contraint au sens de l'art. 71 du C.P., l'auteur d'un attentat à la pudeur qui a été reconnu être anormal par rapport au sexe, mais normal et responsable d'esprit.

(3) Le dol général, c'est-à-dire la liberté et la conscience de l'agent sont une condition essentielle de tout délit, à moins que le contraire ne résulte d'une disposition formelle du code ou de la nature même du délit; cependant le législateur n'exprime formellement cette condition que dans des cas exceptionnels, alors qu'il croit devoir y appeler l'attention du juge pour éviter une fausse application de la loi; dans les autres cas elle est sousentendue dans la définition de la loi et par conséquent aussi dans la décision du juge qui constate le délit dans les termes de

INTERNATIONAL COMMISSION FOR PENAL RECONSTRUCTION AND DEVELOPMENT

Dr de MOOR'S SUB-COMMITTEE
THE DEFENCE OF SUPERIOR ORDERS

Answers to Questionnaire

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la définition légale.

As Mr de Baer points out, the seat of the matter of superior orders is in art. 66, section 3 of the Belgian Penal Code which is the same in the Luxembourg Penal Code:

"seront punis comme auteurs d'un crime ou d'un délit:

ceux qui, par abus d'autorité ou de pouvoir auront directement provoqué à ce crime ou à ce délit."

Thus the person in whom the illegal order originated is punishable in the same way as the persons who executed the order.

Art. 152 and Art. 260 are also identical in the Belgian and Luxembourg Penal Codes:

Art. 152:

"Si l'inoulté justifie qu'il a agi par ordre de son supérieur pour des objets du ressort de celui-ci et sur lesquels il lui était dû obéissance hiérarchique, les peines portées par les articles précédents seront applicables seulement aus supérieurs qui auront donné l'ordre."

Art. 260:

"Lorsqu'un fonctionnaire ou officier public, un dépositaire ou agent de la force publique, aura ordonné ou fait quelque acte contraire à une loi ou un arrêté (royal) grand-ducal, s'il justifie qu'il a agi par ordre de ses supérieurs, pour des objets du ressort de ceux-ci et sur lesquels il leur était dû une obéissance hiérarchique, il sera exempt de la peine, qui ne sera, dans ce cas, appliqué qu'aux supérieurs qui auront donné l'ordre."

Having before me the answers of Dr de Baer who deals with the position clearly and thoroughly, I accept his explanations as valid for Luxembourg Law too.

- (2) To what extent, if any, does your military law differ in this respect from the general criminal law of your country?

Art. 26 of the Luxembourg Military Penal Code being similar to Art. 28 of the Belgian Military Penal Code, I agree with Dr de Baer's statement that "there is no fundamental difference between the military and the criminal law. If anything, the military law more specifically upholds the duty of the soldier to obey the orders of his superior officers, provided the order is one which concerns a military service".

Art. 26:

"Le militaire qui refusera d'obéir aux ordres de son supérieur ou s'abstiendra à dessein de les exécuter, lorsqu'il est commandé pour un service, sera puni de destitution, s'il est officier; s'il n'a pas ce grade, d'un emprisonnement de six mois à deux ans."

"En temps de guerre l'officier sera puni de la détention de cinq ans à dix ans; le militaire qui n'a pas ce grade, de l'emprisonnement de trois ans à 7 ans. Si le fait a eu lieu en présence de l'ennemi, le coupable, quel qu'il soit, sera puni de mort."

Art. 27:

"Est qualifiée révolte, toute résistance simultanée aux ordres de leurs chefs, par plus de trois militaire réunis, lorsque l'ordre est donné pour un service."

- (3) What qualifications, if any, with reference to the lawfulness of superior order, does the law of your country recognise with regard to the duty of the soldier to obey the orders of superior officers?

Only orders connected with the service must be carried out. There are no decisions of the Luxembourg Military Court available which could shed more light on this question. It is understood that orders must be worded as orders and not leave people in doubt as to what to do or leaving them free to do as they like.

- (4) Is there any information available with regard to the practice, during the First World War, of the military courts of your country with respect of the plea of superior orders put forward by members of enemy armed forces accused of a war crime?

There is no information available on that subject.

CONFIDENTIAL: NOT FOR PUBLICATION

D.22.

INTERNATIONAL COMMISSION FOR PENAL RECONSTRUCTION AND DEVELOPMENT

Dr de MOOR'S SUB-COMMITTEE
THE DEFENCE OF SUPERIOR ORDERS

Answers to QUESTIONNAIRE

CZECHOSLOVAKIA
(Dr Benes)

- (1) To what extent does the criminal law of your country recognise the plea of superior orders as a justification for illegal acts?

The general criminal law of Czechoslovakia does not know the plea of superior orders as a justification for illegal acts. Art. 2 of the Criminal Code of 1852 - valid in the Western part of the country - which mentions different reasons justifying an act otherwise illegal, does not mention superior orders as such a reason. This can, besides, be gathered indirectly from Art. 5 of the Code which provides that not he who commits a crime - the same applies to misdemeanours according to Art. 239 - is guilty, but also he who causes the crime by order, advice, etc. From that it follows that he who obeys an order to commit a crime or misdemeanour is not excused from it by having received the order to commit it. It may, of course, be that an order, considering all circumstances, may amount to one of the reasons recognized by Art. 2 as justifying an act which otherwise would be a crime, e.g. mistake (Art. 2, lit. o) or necessity (Art. 2 lit. g). It goes without saying and is confirmed by the general practice of Czechoslovak Jurisdiction, that no one can be punished for exercising his official function (executioner for murder, jailer for restriction of personal freedom etc.).

- (2) To what extent, if any, does your military law differ in this respect from the general criminal law of your country?

The military criminal law of Czechoslovakia, based on the Military Criminal Code of 1855, has an express provision excluding in general the plea of superior orders as justification for illegal acts. Art. 8 of this Code runs as follows: "The order of a superior does not justify a crime or a misdemeanour unless the law expressly provides for an exception." An exception of this general rule is

to be found in Art. 158 dealing with insubordination. According to this article a member of the army who disobeys an order does not commit insubordination if "the order refers to an act or an omission in which a crime or a misdemeanour can clearly be seen". It follows from this that the general rule of Art. 8 excluding the plea of superior orders is a justification for illegal acts - if the soldier does not clearly see the illegality of the ordered act or omission. If, on the other hand, the soldier is not only entitled, but bound to disobey the order of his superior; in such a case the general rule expressed in Art. 8 applies.

It should be mentioned that the Military Criminal Code applies to all delicts - not only to those of a military character - if committed by members of the army.

- (3) What qualifications, if any, with reference to the lawfulness of superior order, does the law of your country recognise with regard to the duty of the soldier to obey the orders of superior officers?

See sub. 2.

- (4) Is there any information available with regard to the practice, during the first World War, of the military courts of your country with respect to the plea of superior orders put forward by members of enemy armed forces accused of a war crime?

Nothing is known.

CONFIDENTIAL: NOT FOR PUBLICATION.

D.23.

INTERNATIONAL COMMISSION FOR PENAL RECONSTRUCTION AND DEVELOPMENT

Dr de MOOR'S SUB-COMMITTEE
THE DEFENCE OF SUPERIOR ORDERS

Answers to Questionnaire

GREAT BRITAIN
(Professor Lauterpacht)

- (1) To what extent does the criminal law of England recognise the plea of superior orders as a justification for illegal acts?

It is a well established principle of English law that when a member of the armed forces of the Crown is tried before a civil tribunal on a criminal charge obedience to superior orders is not in itself a defence. The soldier is bound to obey lawful orders of his superiors, and he is liable to punishment by the summary process of a Court-martial in case of disobedience. Nevertheless, if an order which on the face of it is lawful turns out to have been illegal the soldier who obeyed it is answerable before ordinary courts if obedience to the order involved a crime.

It is probable, however, that obedience to an order which was on the face of it lawful would be regarded as an extenuating circumstance in assessing liability. In addition, there always remains in the background the power of the Crown either to grant a pardon in respect of a conviction following upon an unavoidable conflict between military duty and the ordinary criminal law or to enter a nolle prosequi. But there is little doubt that obedience to a superior order which is clearly unlawful will afford no ground at all for relief from liability. (From this principle there must be distinguished the rule apparently laid down in Buron v. Derman (2 Ex.167) to the effect that an English Court will not assume jurisdiction in respect of an unlawful act done to an alien in a foreign country in discharge of a superior order. Such acts are probably acts of war not cognisable before British Courts).

2. To what extent, if any, does English Military Law differ in this respect from general criminal law?
3. What qualifications, if any, with reference to the lawfulness of superior orders, does English law recognize with regard to the duty of the soldier to obey the orders of superior officers?

It is convenient to answer these two questions together.

According to English military law the soldier is bound to obey lawful commands only. The wording of the Section 9 of the Army Act is explicit on the matter. The law on the subject has undergone significant changes. The military Code of 1715 provided that "any officer or soldier who should refuse to obey the military orders of his superior officer" shall be liable to capital punishment. The Code contained no qualifications as to the lawfulness of the command. But in 1749 the wording of the Military Act was changed so as to render criminal disobedience to any lawful command.

Judicial decisions show the same tendency. Thus in Sutton v. Johnstone (1, T.R. 493, 784) we still find Lord Mansfield saying: "A subordinate officer must not judge of the danger, propriety, expediency, or consequence of the order he receives - he must obey - nothing can excuse him but a physical impossibility". It will be noted that notwithstanding the apparent rigidity of this statement, there is no reference in this passage to the question of the legality of the order. In any case this pronouncement must now be read in the light of the express wording of statutory enactments like the Army Act and of subsequent decisions. Thus the case of Warden v. Bailey (4 Taunt, 67) is described in Chapter VIII of the Military Manual as discountenancing the duty of absolute obedience in a soldier enunciated in Sutton v. Johnstone. As pointed out, according to English military law the duty of obedience, far from being absolute, extends only to lawful orders. There is a significant passage on the subject in Stephen's History of Criminal Law of England (vol.I. pp.205-206). He says: "The doctrine that a soldier is bound under all circumstances whatever to obey his superior officer would be fatal to military discipline itself, for it would justify the private in shooting the colonel by the orders of the

captain, or in deserting to the enemy on the field of battle on the order of his immediate superior".

It would therefore appear, with regard to question (3) that no warrant can be found in the British Military Law for the view that the existence of any duty of absolute obedience gives colour to an unqualified recognition of the plea of superior orders.

The foregoing remarks have reference to the "Military Law" in the narrow sense of the word as indicating the law mainly laid down in the Army Act, The Naval Discipline Act, and the Air Force Act which governs the conduct of officers and soldiers of the British armed forces in time of peace and war, both at home and abroad. Breaches of that law are triable before courts-martial - regimental, district, or general - established under these Acts. From the "Military Law" and from courts-martial in the above sense there must be distinguished "martial law" and "military courts under martial law". These are connected either with the suspension of the operation of the ordinary law in case of invasion, of riots, and of insurrections or with the application and enforcement of the laws and customs of war by the armed forces of the Crown in occupied territory or in the theatre of war operations generally. The first aspect of "martial law", which is independent of any "proclamation of martial law", and the difficult constitutional questions connected therewith are not relevant to the subject of this note. We are concerned with "martial law" and "military courts under martial law" in connection with the application and enforcement of the laws and customs of war as propounded in Chapter XIV of the Manual of Military Law (1929) (Amendments No.12) notified by Army Council in Army Orders for January 1936. These laws and customs of war are applied by military courts under martial law constituted under the authority of the principal commanding officer either in occupied enemy territory or, generally, in the theatre of military operations. The view has occasionally been passed, as in U.S. v. Dickelman, that the law applied by these courts "is the law of military necessity in the actual presence of war", or, in the words of the Duke of Wellington that martial law is "neither more nor less

than the will of the general who commands the army". However, the discretion of the commanding officer and of the military courts established under his authority is circumscribed by the duty to follow the laws and usages of war. It is significant that in the 1936 edition of the Military Manual certain passages in the previous editions of the Manual, which emphasised the discretion of the occupying general, have been omitted.

It does not seem to be essential that military courts engaged in applying the laws and usages of war (including the prosecution of war crimes) should be established either within occupied territory or within the immediate vicinity of military operations. The view has been widely held that when Great Britain is at war any portion of its territory is, in relation to enemy aliens, within the "zone of operations." It would appear therefore that the operation of military courts in the wider sense (i.e., courts applying the laws and usages of war) is not necessarily confined to occupied territory or to the area of military operations. Similarly courts-martial established under the Army Act (or the Naval Discipline Act and Air Force Act) may have conferred upon them by statute jurisdiction over persons, or in respect of acts, otherwise not liable to military law in the narrower sense. Thus in 1914 the Defence of the Realm Consolidation Act (5 Geo. 5.c.8) provided for punishment by courts-martial of certain categories of persons assisting the enemy as if they were subject to military law and had on active service committed an offence under the Army Act. The Treachery Act, 1940, which provided for death penalty for acts "designed or likely to give assistance to the naval, military or air operations of the enemy, to impede such operations of His Majesty's Forces, or to endanger life, "laid down that an alien enemy may be prosecuted for such offences before a court-martial as if he were at the time of the commission of the offence subject to military law. According to the Naval Discipline Act there are subject to the Act "spies and persons on board H.M. ships endeavouring to seduce persons subject to the Naval Discipline Act from their duty of allegiance".

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Chapter XIV of the Manual of Military Law contains an exposition of the laws and usages of war. It does not appear to have been given statutory force, but, published as it is by the War Office and under the authority of the Army Council, it may be fairly regarded as representing the authoritative British view. With regard to the defence of superior orders S.443 says: "Members of the armed forces who commit such violations of the recognized rules of warfare as are ordered by their government or their commander are not war criminals and cannot therefore be punished by the enemy. He may punish the officials or commanders responsible for such orders if they fall into his hands, but otherwise he may only resort to the other means of obtaining redress which are dealt with in this chapter." This view of the law was disapproved of by the Commission on Responsibilities, including a British representative, set up by the Peace Conference, 1919. But it appears, unaltered, in the 1936 edition of the Military Manual. It is at variance with the corresponding principles of English criminal and constitutional law. It is not believed to represent a sound principle of the Law of War, and it is in no sense binding upon Great Britain in the international sphere. But it is clear that, unless the scope of prosecutions for war crimes is to be drastically and unduly curtailed, any British enactment relating to the prosecution of war crimes by British Courts, military and other, will have to free them, by means of an express provision, of the shackles of the rule as at present formulated.

4. I have not been able to trace any published information with regard to the practice, during the War of 1914-1918, of British Military Courts with regard to the plea of superior orders put forward by members of enemy armed forces accused of a war crime.

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4. I have not been able to trace any published information with regard to the practice, during the War of 1914-1918, of British Military Courts with regard to the plea of superior orders put forward by members of enemy armed forces accused of a war crime.

CONFIDENTIAL: NOT FOR PUBLICATION.

D.24.

INTERNATIONAL COMMISSION FOR PENAL RECONSTRUCTION AND DEVELOPMENT

Dr de MOOR'S SUB-COMMITTEE
THE DEFENCE OF SUPERIOR ORDERS

Answers to Questionnaire

FRANCE
(Monsieur Simon)

- (1) To what extent does the criminal law of your country recognise the plea of superior orders as a justification for illegal acts?

L'Article 327 du Code Pénal prévoit que:-

"Il n'y a ni crime, ni délit lorsque l'homicide, les blessures et les coups étaient ordonnés par la loi et commandés par l'autorité légitime."

On voit par là que pour effacer le caractère illicite de l'acte, le législateur exige une double condition :-

- (1) que l'acte soit ordonné ou autorisé par la loi.
- (2) qu'il soit exécuté sur l'ordre de l'autorité légitime.

L'exception tirée de l'art. 327 ne sera donc pas, en général, applicable, aux criminels de guerre, puisque s'ils ont reçu l'ordre d'un supérieur, l'acte commis n'en aura pas moins été contraire aux lois écrites,

On peut dire en France, l'ordre du supérieur ne couvre pas les subordonnés qui exécutent un acte puni par la loi. Il n'existe, dans tout le système pénal français que deux cas où l'inférieur est légalement couvert par l'ordre du supérieur; ce sont ceux qui sont prévus par les articles 114 et 190 du Code Pénal.

Art. 114. - "Lorsqu'un fonctionnaire public, un agent ou un préposé du Gouvernement, aura ordonné ou fait quelque acte arbitraire ou attentatoire soit à la liberté individuelle, soit aux droits civiques d'un ou de Plusieurs citoyens, soit à la Charte (à la Constitution), il sera condamné à la peine de la dégradation civique.

Si néanmoins, il justifie qu'il a agi par ordre de ses supérieurs pour des objets du ressort de ceux-ci, sur lesquels il leur était dû l'obéissance hiérarchique, il sera exempt de la peine, laquelle sera, dans ce cas, appliquée seulement aux supérieurs qui auront donné l'ordre."

Art. 190. - "Les peines énoncées aux articles 188 et 189 ne cesseront d'être applicables aux fonctionnaires ou préposés qui auraient agi par ordre de leurs supérieurs, qu'autant que cet ordre aura été donné par ceux-ci par des objets de leur ressort, et sur lesquels il leur était dû obéissance hiérarchique; dans ce cas, les peines portées ci-dessus ne seront appliquées qu'aux supérieurs qui les premiers auront donné cet ordre."

Dans les cas prévus ci-dessus, l'agent inférieur est exempt de peine s'il justifie (c'est) à-dire s'il prouve)

- (1) qu'il a reçu un ordre du supérieur hiérarchique auquel il devait obéissance;
- (2) que cet ordre concernait un objet du ressort de ce supérieur.

La loi a voulu par là, pour un motif d'ordre politique, que le subordonné se rapportât à son supérieur sans discussion.

Cette excuse ne peut être étendue à d'autres délits.

Dans les cas qui ne sont pas expressément prévus par les art. 114 et 190, l'ordre donné par le supérieur peut être considéré par le juge comme une circonstance atténuante, mais laisse subsister la responsabilité pénale certaine de l'exécutant.

"L'exception de l'ordre reçu" ne couvre donc pas les crimes de guerre, en dehors des attentats contre la liberté individuelle, et les droits civiques de l'art.

Néanmoins, il ne faut pas oublier que l'art. 64 du Code Pénal absout l'exécutant qui peut prouver qu'il a été contraint par une force à laquelle il ne pouvait résister.

Cette disposition pourrait être invoquée par un grand nombre d'agents subalternes qui, craignant de perdre la vie ou la liberté par leur refus d'obéir, pourront se déclarer en état de "contrainte", et invoquer la force irrésistible.

Le militaire ou le policier allemand mis en cause répondra presque toujours qu'il n'a agi que sous la crainte des sanctions prévues par le code de justice militaire allemand qui, le cas échéant, auraient puni sa désobéissance de peines sévères et même de mort.

- (2) To what extent, if any, does your military law differ in this respect from the general criminal law of your country?

La loi militaire ne diffère pas à ce sujet du droit commun. L'ordre du supérieur militaire ou civil ne peut certes pas justifier l'acte accompli au mépris du droit. Il reste un délit bien qu'il soit ordonné par l'autorité légitime.

L'ordre d'un supérieur quelque élevé qu'il soit, dans la hiérarchie, ne modifie pas le caractère délictueux de l'acte imposé. Néanmoins, comme nous l'avons déjà indiqué précédemment, les militaires allemands pourront invoquer l'excuse absolutoire de l'article 64, ce qui revient à leur assurer l'impunité.

- (3) What qualifications, if any, with reference to the lawfulness of superior order, does the law of your country recognise with regard to the duty of the soldier to obey the orders of superior officers?

Il a déjà été dit que l'article 327 du Code Pénal pose deux conditions pour que le caractère illicite de l'acte soit effacé:-

- (1) que l'acte soit ordonné ou autorisé par la loi;
- (2) qu'il soit exécuté sur l'ordre de l'autorité légitime.

Si l'on appliquait strictement ces conditions, le militaire exécutant un ordre illégal de ses chefs ne pourrait pas se réclamer du bénéfice de l'article 327. Mais l'article 205 du Code de Justice Militaire punit de peine grave "tout militaire qui refuse d'obéir". Il est donc évident que le militaire se trouvera presque toujours exposé à une contrainte irrésistible lui rendant difficile, voire même impossible, la désobéissance à un ordre illégal émanant de l'autorité supérieure. La doctrine prévalente en la matière, résulte d'un passage d'un réquisitoire du procureur général Ronjat, sur la subordination militaire (cassation du 25 novembre 1886), que nous citons ci-après:-

"Il existe un principe général et d'intérêt supérieur qui domine toute la matière, celui de la subordination, inscrit en tête des Décrets réglementaires et qui s'y trouve formulé en ces termes: la discipline faisant la force principale des armées, il importe que tout supérieur obtienne de ses subordonnés une obéissance entière et une soumission de tous les instants, que les ordres soient exécutés littéralement, sans hésitation ni murmure; l'autorité les donne en est responsable et la réclamation n'est permise à l'inférieur que lorsqu'il a obéi."

Toutefois, d'autres auteurs tels que Duguit (Traité de droit constitutionnel) sont d'avis que l'individu a le droit de résister à tout ordre contraire à la loi en ne l'exécutant que si la contrainte est employée contre lui ou en protestant même contre ce qu'il considère comme une violation du droit.

La question est donc de savoir si le fait délictueux est imputable à l'agent qui a seulement obéi. Il est des hypothèses où la loi reconnaît une exception

absolutoire au profit des fonctionnaires qui ont agi par ordre de leurs supérieurs hiérarchiques. Tels sont les cas prévus par les articles 114 et 190 du Code Pénal. Il s'agit d'attentat à la liberté individuelle, aux droits politiques des citoyens ou à la Constitution et de la réquisition ou de l'emploi de la force publique pour empêcher l'exécution des lois, décisions judiciaires et ordres de l'autorité légitime.

L'agent inférieur est exempt de peine, s'il prouve:-

- (1) qu'il a reçu un ordre du supérieur hiérarchique auquel il devait obéissance;
- (2) que cet ordre concernait quelque objet du ressort de ce supérieur.

Mais cette excuse ne peut être étendue à d'autres délits et dans les cas qui n'ont pas été prévus par la loi. La question de savoir si le délit commis par un inférieur sur l'ordre de son supérieur lui est imputable est, avant tout, une question d'intention qui ne peut être résolue à priori ni dans un sens ni dans l'autre.

L'ordre du chef civil ou militaire sera pour le subordonné une cause d'irresponsabilité quand il aura conduit l'agent à la croyance qu'il ne commettait point de délit, mais si malgré l'ordre qu'il a reçu, le subordonné a eu conscience qu'il servait d'instrument à un délit, il est difficile de ne pas l'en déclarer responsable.

Sauf les cas d'excuses prévus par la loi, la question de la recevabilité de l'exception de l'ordre donné reste donc, en droit français largement soumise à l'appréciation des juges.

Il est évident, par ailleurs, que l'autorité civil ou militaire ne peut donner des ordres contraires à la loi, sans que celui qui en est l'auteur ne s'expose à des sanctions.

- (4) Is there any information available with regard to the practice, during the first World War, of the military courts of your country with respect to the plea of superior orders put forward by members of enemy armed forces accused of a war crime?

La jurisprudence française ne cite, à notre connaissance, aucun cas où des militaires allemands ayant eu à répondre de crimes ou délits commis pendant l'occupation aient fait usage pour leur défense, de l'exception de l'ordre donné.

En effet, l'armée allemande ayant évacué les territoires français avec armes et bagages, les criminels de guerre allemands se sont soustraits, de ce fait, à la justice française.

CONCLUSIONS

Il résulte de l'exposé qui précède:-

(a) Le droit pénal français ne reconnaît la validité de l'exception de l'ordre donné que dans les cas prévus par les articles 327, 114 et 190 du Code Pénal. Dans toutes les autres hypothèses cette défense ne peut être valablement invoquée. Ceci résulte de l'article 65 du Code Pénal dont les termes suivent:-

"Nul crime ou délit ne peut être excusé, ni la peine mitigée que dans les cas et dans les circonstances où la loi déclare le fait excusable, ou permet de lui appliquer une peine moins rigoureuse."

(b) Toutefois, l'excuse absolutoire de l'article 64 c.p. permettra presque toujours aux militaires allemands d'échapper à la punition de leurs crimes.

Le système pénal français ne permet donc pas de punir avec efficacité les auteurs des atrocités innombrables commises par les agents de la puissance occupante en France.

France Libre,
Service des avis Juridiques.

CONFIDENTIAL: NOT FOR PUBLICATION

D.25.

INTERNATIONAL COMMISSION FOR PENAL RECONSTRUCTION AND DEVELOPMENT

Dr de MOOR'S SUB-COMMITTEE
THE DEFENCE OF SUPERIOR ORDERS

Answers to Questionnaire

GREECE
(Monsieur Stavropoulos)

- (1) To what extent does the criminal law of your country recognise the plea of superior orders as a justification for illegal acts?

The Greek Criminal Law (section 97 of the Penal Code) recognises the plea of superior orders as a justification for illegal acts only on the following conditions:-

- (1) that the order has been given by a public servant or authority to a subordinate public servant or authority.
(2) that the order is within the lawful competence of the person issuing it.
(3) that the order complies with the formalities laid down by the law,
and (4) that the act, for the commission of which the order has been given, is punishable only as an ordinary abuse or disregard of public duties.

In the absence of the above-mentioned conditions, responsibility for the act lies with both the person issuing the order and the person carrying it out.

- (2) To what extent, if any, does your military law differ in this respect from the general criminal law of your country?

Greek Military Law contains no special provision of this kind, the above provision of the General Criminal Law being followed in this matter.

- (3) What qualifications, if any, with reference to the lawfulness of superior order, does the law of your country recognise with regard to the duty of the soldier to obey the orders of superior officers?

Greek Military Law contains no special provision of this kind, the above provision of the General Criminal Law being followed in this matter.

- (4) Is there any information available with regard to the practice, during the first World War, of the military courts of your country with respect to the plea of superior orders put forward by members of enemy armed forces accused of a war crime?

There is no information available with regard to the practice during the first World War of the Greek Military Courts with regard to the plea of superior order.

CONFIDENTIAL: NOT FOR PUBLICATION.

D.26.

INTERNATIONAL COMMISSION FOR PENAL RECONSTRUCTION AND DEVELOPMENT

Dr de MOOR'S SUB-COMMITTEE
THE DEFENCE OF SUPERIOR ORDERS

Answers to Questionnaire

NETHERLANDS
(Dr J.M. de Moor)

1. (1) To what extent does the criminal law of your country recognise the plea of superior orders as a justification for illegal acts?

In Dutch law these points are covered by Section 114, sub-sections 1 and 2, and section 1 of the Military Criminal Code, and by sections 40 and 43 of the Civil Criminal Code.

These sections read as follows:

Section 114, sub-sections 1 and 2 of the Military Criminal Code:

A member of the armed forces who refuses, or deliberately omits to obey an order given him by a superior officer, or who arbitrarily exceeds the same, is guilty of deliberate disobedience, and shall be liable to imprisonment not exceeding one year and nine months (M.C.C. 60-63, 65, 75, 89, 115, 127, 128, 135, 140. - C.C.C. 184 - W.K. 2, no. 2a, 71).

If the act is committed in time of war, he shall be liable to imprisonment not exceeding four years.

Section 1 of the Military Criminal Code:

In applying the present code regard shall be had to the provisions of the ordinary criminal code, including the ninth chapter of the First Book, except in cases where the civil and military codes differ (C.C.C. 91).

Section 40 of the Civil Criminal Code:

No one shall be liable to punishment for committing an offence under the influence of irresistible compulsion.

Section 43 of the Civil Criminal Code:

No one shall be liable to punishment for committing an offence while executing an order given by a competent authority.

APPENDIX III

An order not given by a competent authority shall not exempt from punishment, unless the subordinate believed in good faith that it was given by a competent authority, and unless its execution lay within the sphere of his normal duties.

- (2) To what extent, if any does your military law differ in this respect from the general criminal law of your country?

There is no difference between the military and the civil code. In this respect the military code is based entirely on the ordinary criminal law.

- (3) What qualifications, if any, with reference to the lawfulness of superior order, does the law of your country recognise with regard to the duty of the soldier to obey the orders of superior officers?

See answer to Question (1)

- (4) Is there any information available with regard to the practice, during the first World War, of the military courts of your country with respect to the plea of superior orders put forward by members of enemy armed forces accused of a war crime?

The Netherlands have no experience of this matter dating from the first world war.

The above provisions of Dutch law illustrate the possible conflict between the duty of obedience incumbent on all members of the armed forces and the responsibility of the citizen for his own acts, even when performed at the command of a superior authority. From this no one can be wholly relieved, as even soldiers and public functionaries remain responsible human beings, and do not become mere instruments in the exercise of their duties.

The military and civil codes take note of the conflict. Hence the restrictions to be found in the various legal enactments with regard to the duty of obedience to superior orders on the one hand, and the immunity from punishment or grounds for justification on the other. Thus Section 14 of the Netherlands Military Criminal Code states with regard to the duty of obeying an order given by a superior officer that such an order must be obeyed if given in the interest of the service, but not, if it merely affects the private interest of the superior officer. In the latter case, according to Van Dijk's Commentary on the Netherlands Military Criminal Code, a subordinate can refuse to obey. In doing so he acts on his own responsibility.

He cannot plead afterwards that he erred in good faith.

Moreover the authority of a superior officer to give the order in question must ultimately be based on a 'legal enactment', whilst the order itself must be reasonable and equitable. As a rule, however, it cannot be left to the discretion of a subordinate to decide whether an order is lawful and reasonable, and the superior must be held liable for having issued it. But this principle is not intended to lead to blind obedience. In special cases an order may be disregarded with impunity on the ground that its execution would violate another duty, would prove injurious to another interest, or would expose the subordinate to punishment.

The subordinate has on occasions not only the right to disregard an order. It may be his duty to do so, for instance if, in carrying out the order, he would commit an indictable offence, or in other words, in the case of an order which the superior officer was not authorized to give.

This brings us to the second aspect of the problem, namely, the plea of superior orders as a ground for justification or immunity. With regard to this Dutch law expressly stipulates that an order must have been given by a competent person, or by a person whom the subordinate regarded in good faith as competent, and that its execution was within the sphere of the normal duties of the subordinate. In practice the court will naturally take into account the difficulty of the subordinate in a decision, and the compelling authority of the superior officer. Accordingly, the court will generally be inclined to assume good faith on the part of the subordinate, unless there is sufficient proof to the contrary. The court has even greater liberty of action in cases where the subordinate pleads irresistible compulsion (Section 40, Netherlands Military Criminal Code). Both these sections, 43 (lawful order) and 40 (irresistible compulsion) are expressly declared applicable in Section 1 of the Netherlands Military Criminal Code.

In the case of acts which clearly violate unchallenged rules of international law, it will in my opinion be impossible to assume that the subordinate believed in good faith that the superior officer was competent to order their commission. In these cases it will generally be impossible to speak of irresistible compulsion, unless a refusal to obey would place the life or the safety of the subordinate in immediate and serious jeopardy.

In every case of this kind the Courts will necessarily have substantial liberty of action. An International Criminal Court may find it possible to give a lead and to create a message of unity. To this end, some general rules and principles along the lines indicated above, to be embodied in the general armistice terms, may prove of value.

F.1.

INTERNATIONAL COMMISSION FOR PENAL RECONSTRUCTION AND DEVELOPMENT

THE EXTRADITION OF WAR CRIMINALS

by

Dr V. BENES

INTERNATIONAL COMMISSION FOR PENAL RECONSTRUCTION AND DEVELOPMENT

THE EXTRADITION OF WAR CRIMINALS

(By Dr V. BENĚŠ)

IThe Importance of Extradition for a Satisfactory Solution of the
Problem of Retribution

1. The question of the extradition of war criminals is very often omitted in discussions on the question of a just retribution for war crimes. It may be true that the problem of extradition compared with other questions relating to the very foundations of penal law, both formal and material - is first of all a technical one. However it is necessary to realize that it is not enough to incriminate and to prosecute by sanctions; it is of equal importance to provide a means guaranteeing that the perpetrators of war crimes are arrested and brought to trial.

This is not a new problem. It already appeared after the last war. Then, it was obvious that the provisions of positive international law could not guarantee the arrest and trial of war criminals.

The aim of my report is to discuss the problem as it presents itself to us today and to consider what steps may be necessary in order to avoid the danger of legal provisions being an obstacle to justice.

2. It is not the purpose of my report to deal with the problem of extradition in its full extent. I shall first of all deal with the problem of delivery of war criminals as a part of the conditions which will be imposed on the defeated powers in consequence of the unconditional surrender (Chapter IV) and with the problem of extradition from neutral and Allied States (Chapter V). To this I have added a brief (as far as is required by the scope of my report) survey concerning extradition in peace-time (Chapter II and III). The report is concluded by conclusions (Chapter VI).

Extradition in Peace-time

Extradition is the delivery of an accused or a convicted individual to the State on whose territory he is alleged to have committed or to have been convicted of a crime, by the State on whose territory the alleged criminal happens to be at the time*. According to the prevalent opinion of international lawyers the delivery of criminals is not a duty based on international law. In the beginning its only basis was one of good will and of international friendship (*comitas gentium*) of the extraditing State to the requesting State. From the beginning of the last century special treaties of extradition were concluded between all the members of the Family of Nations stipulating the duty of mutual delivery of criminals for certain offences and after the fulfilment of certain formalities. Treaty obligation became the basis of extradition which was granted only if asked for and it was at the discretion of the requested State to determine whether a case for extradition had arisen according to the terms of the treaty. A large number of similar treaties have been concluded. In addition to extradition treaties a number of States (f.i. Great Britain, France, Sweden, Germany, etc.) have passed special extradition laws, constituting a framework for international extradition treaties or serving as basis^{for} extradition in default of a treaty.

On the whole it can be said that the international extradition law, which found its expression in treaties and domestic legislation, is governed by the following principles:

- (1) Extradition treaties are constructed on the basis of absolute recognition of the sovereignty of States. They do not form a limitation of it but the execution of a right belonging solely to the requested State. This is most apparent in the rule that it is up to the requested State to determine whether according to the treaty a case for extradition has arisen and that nationals of the requested States are not extradited (with the exception of the Anglo-Saxon and American practice).
- (2) As a rule individuals who escaped abroad in order to find there an asylum against persecution in their own States (the right of asylum) are never extradited.

* See Oppenheim, Vol.I, p. 554, par.327.

This is connected with the universally accepted principle of international law - embodied practically in all extradition treaties and laws - of non-extradition for offences of a political nature. It may be true that this principle has undergone a certain development which has led to its restriction and limitation; still, it is considered to be the main principle of modern extradition law.

(3) A further condition is - almost in all treaties - the claim of double criminality (the so-called double criminality rule), i.e. that the offence for which extradition is asked is punishable according to the law of both countries.

(4) Then certain minimum conditions concerning the extradition procedure must be respected. There is first of all the principle of judicial control over the extradition procedure thus giving the possibility of examining the admissibility of the extradition. In Anglo-Saxon countries judicial control is considered to be one of the principal guarantees of individual freedom. Furthermore there is the condition that the person whose extradition is requested should not be tried for any offence than that for which the extradition was granted.

Though a number of extradition treaties and laws contained from the legal point of view perfect material and formal provisions and though the practice between certain States proved successful, it must be admitted that international collaboration in this important sphere was still very imperfect. Its main defect consisted in the complete diversity of the individual extradition treaties which differed in provisions of a fundamental nature as well as in the extradition practice. From the point of view of the requesting State the system of judicial control was very unsatisfactory as it caused considerable delay and as the question of evidence (different conceptions of "prima facie evidence") created great difficulties.* The same applied to the question of classification of the individual offences from the point of view of different legal systems of the two States.

The greatest defect, however, was considered to consist in a different conception of the so-called political offence. In many cases individuals who committed common crimes were protected as political offenders. So far, a common criterion for determining what is and what is not a political offence has not been found.

* See the case of Samuel Insull whose apprehension and arrest has been asked for by the U.S.A. The Greek Court of Appeal did not examine the requisition from the point of view of the "prima facie evidence" in the sense of the Anglo-Saxon law, but from the point of view of material guilt and released Samuel Insull.

III

Extradition of War Criminals after this War.

As was explained above the provisions of international law show serious defects and there is a danger that many war criminals might escape abroad, thus evading just punishment. It may be doubted whether it will be at all possible to make use of these provisions for the solution of the problem of the criminals of the present war. It is obvious that the institution of extradition in peace-time cannot suit the emergency cases that will arise after this war. In my opinion it cannot be expected that a mechanism which in many respects proved unsatisfactory in peace-time should prove satisfactory in such extraordinary conditions as will prevail immediately after the cessation of hostilities when the extradition of thousands of people will be requested. Considered from the point of view of our present efforts and with regard to the experiences of the last war* the principles of international law relating to extradition (namely the principle of non-extradition of political offenders and the complexity of the extradition procedure) undoubtedly would become rather a protection for war criminals than an objective means for their arrest. When speaking of extradition I have in mind the delivery of those war criminals who, after the cessation of hostilities, took refuge on the territory of neutral or even Allied States which might be less interested. However, if we are to deal with the problem of the apprehension and arrest of all war criminals in its full extent, we must, I believe, deal also with the problem of the delivery of those offenders who at the time of the end of the war will remain on the territory of the defeated States. I am fully aware of the fact that this is not extradition in the technical sense**

* After the last war - though the vast majority of civilized nations desired the punishment of the Kaiser as the author of the war and as the perpetrator of war crimes - the German Emperor escaped punishment by escaping to Holland. It may be true that the extradition of the Kaiser has not been asked for ordinary crimes, such as murder etc... - this was quite possible - but for "a supreme offence against the sanctity of treaties and the morality of nations" (Art. 227 of the Treaty of Versailles), i.e. for an offence which was not covered by any extradition treaty and which was unknown to the Dutch Penal Law. Undoubtedly this made it easier for the Dutch Government to refuse the extradition "on such vague grounds", pointing out that otherwise extradition would constitute a breach of Dutch Law. Very often it has been affirmed that the situation would have been different if the extradition would have been asked for ordinary crimes which are known to the Dutch Penal Law and the Dutch extradition treaties. Taking into account the Dutch extradition law and extradition treaties it must be assumed that even then the issue would have been very controversial.

** It will be a condition imposed unilaterally on the defeated State - the acceptance of which will be the condition of the cessation of hostilities.

and that this question is closely connected with the terms of the unconditional surrender. From the political point of view both problems are closely linked and a successful execution of retribution as consequence of the unconditional surrender undoubtedly will facilitate the collaboration of neutral States in the delivery of those war criminals who manage to escape on neutral territory.

The application of the international law of extradition being impracticable, it is necessary to provide other means which would reduce to a minimum the danger that the criminals of this war should escape just punishment. To recommend a permanent change in the existing rules of international extradition would, in my opinion, be quite unpractical. Such a change would mean a step backwards both from the political and legal point of view; moreover, it would be incompatible with the ideals for the preservation of which we are fighting today. On the other hand, it cannot be admitted that perpetrators of most heinous crimes should escape penalty through the application of enlightened and liberal principles - principles for which they had nothing but contempt and which they have rejected in their own countries.

As in many other legal spheres, here too the lack of positive provisions or their application to facts which could not be foreseen at the time of their promulgation, would serve the purposes of the enemies of the international legal order. I believe, therefore, that it will be necessary to find a new solution which would correspond to the exceptional character of the situation. The present extradition treaties and laws should remain valid as well as the principles governing the international extradition law and policy; only for the extradition of criminals of this war there should be accepted special provisions the validity of which should be limited.

IV

The Problem of the Extradition of War Criminals in the Terms of the Unconditional Surrender.

As explained above the problem of extradition is closely connected with the question of the delivery of war criminals by the defeated States. I believe therefore that it is appropriate to deal also with this question - so that the problem of the delivery of war criminals (either in consequence of the unconditional surrender or as

extradition in the technical sense) is clarified.

As General de BAER explained in his paper on the meaning of "Unconditional Surrender", this does not imply that the victor should be unable to lay down certain conditions. The necessity of the imposition of such conditions is explained that otherwise unconditional surrender - interpreted as capitulation - would make it impossible to impose on the defeated power anything but the general principles of international law. Thus, the victorious powers would be in a less favourable position, being unable - without flagrant breach of international law - to take the necessary steps for the preservation of peace.

I agree with this interpretation of "Unconditional Surrender". However, I think that the resolution proposed by General de BAER must be considered only as a frame for the detailed solution of particular questions. It will be necessary to complete the general principles by provisions dealing at length with problems such as the evacuation of invaded territories, the surrender of all arms, collaboration of German authorities during the occupation etc... In order to guarantee the execution of retribution it will be necessary to include also detailed provisions relating to the delivery of war criminals.

Conditions imposed on the defeated powers in consequence of the unconditional surrender should include as far as the delivery of war criminals is concerned, the following terms*:

1. The German Government recognizes the right of the Governments of the United Nations to bring to trial before an International Criminal Court (if such a court is created), regular, military and special tribunals of the individual United Nations persons who in the period between October 1st, 1938 and the day of the acceptance of the unconditional surrender have committed war crimes.

The term war crime implies not only war crimes but also offences against an Allied State, against the life, freedom, health and the property of its inhabitants which - according to the criminal law of the State concerned - are punishable by death or by a penalty of 5 years or more provided that they were committed in connection with the preparation of war, with its conduct or with the occupation or domination of an Allied territory. This complement appears to be necessary as the

* The same conditions should apply to the Italian Government, etc....

term "crime de guerre" - though it has no definite contents - excludes a number of offences which even if we accept a very extensive interpretation do not fall under this term. Yet there are many other offences which by their nature, aim and execution are analogous to war crimes in the technical sense and are at least as reprehensible and deserve therefore to be dealt with in the same way.

Persons indicated by the individual Governments in lists of war criminals - which will be submitted to the "Commission Militaire d'Armistice" within 3 years after the cessation of hostilities at the latest - shall be delivered unconditionally to the individual United Nations.

2. The German Government will provide all documentary evidence the submission of which will be necessary for the complete cognizance of facts, the finding out of the guilty and of the responsible. The German Government will put at the disposal of the tribunals of the United Nations witnesses whose examination will be necessary for the complete cognizance of facts.

3. The provisions mentioned under 1. will affect the perpetrator without regard to where the punishable act was committed and without regard to the perpetrator's nationality.

4. The German Government has the duty to deliver the perpetrator without regard to any prosecution or procedure before the domestic (German) courts and without regard to the punishability of the offence according to German law.

5. The German authorities have no right to examine whether the act is punishable according to the law of the requesting State or whether the suspicion of the incriminating act is justified.

6. The German Government and all State, autonomous, Reich, military and civil authorities have the duty to extradite all individuals who - being accused of offences mentioned under 1. - would be indicated either by name, rank and function or by their profession.

7. All German authorities and organs mentioned under 6. have the duty immediately and without the right of examination to comply with all requests of the competent organs of the United Nations relating to the apprehension, arrest and delivery of individuals mentioned under 5.

8. Not only the German Government, but also the officials who are competent "*ratione loci et materiae*" are responsible for the execution of the obligation mentioned under 7.

9. In order to secure the application of the penal responsibility of the individual officials mentioned under 8, the German Government has the duty of providing for the Governments of the United Nations lists of military and civil officials who in various districts were entrusted with the execution of the above provisions. If in the opinion of any of the United Nations any of the officials indicated appear to be unacceptable, it is the duty of the German Government to nominate another official without delay. The German Government has the duty of informing the Governments of the United Nations of any changes in the personal composition of the organs and authorities entrusted with the execution of the above provisions. The penal responsibility of the official remains as long as the Allied Government concerned does not take notice of the nomination of the successor.

10. The Governments of the United Nations concerned have the right to send their representatives to all Reich, provincial and autonomous, civil and military organs of security, in order to control the extradition procedure, the provision of legal documents and other evidence and the securing of witnesses. The German authorities are bound by the provisions and orders of the representatives of the Governments of the United Nations.

11. Whoever intentionally aids and abets a person whose extradition has been asked for in accordance with the provisions of article 1, in evading apprehension, arrest or delivery, whoever destroys or conceals documentary evidence mentioned in article 2., whoever makes impossible the examination of witnesses, commits a crime.

12. An official, in particular a person mentioned in article 9, commits a crime also if by negligence he makes possible the escape of an individual who is being prosecuted in accordance with article 1.

13. Any incitement against the provisions relating to the punishment of war criminals and their delivery is forbidden. Whoever publicly, in press or through broadcast incites against these provisions commits a crime.

14. Persons responsible for the organisation of public performances, broadcasting, the publication of periodicals or non-periodical publications commit a crime if through their negligence they allow in an assembly which they organize, in a periodical which they edit or publish or in broadcasts which they organize, incitement against the provisions relating to the punishment and extradition of war criminals.

15. The punishment of war criminals in accordance with the articles 9 - 14 belongs to the competence of the State which has asked for the extradition. Provisions relating to the extradition of war criminals apply also to this category of offenders.

16. The German Government has the duty to promulgate according to German law all provisions and orders which will appear necessary for the execution of the above obligations - so that they become part of the German legal system.

The disadvantage of my proposals consists in the fact that they take for granted that the United Nations will come to agreement on the definition of the "war crime". The provision of a list of war crimes (which will have to be interpreted extensively) will create great difficulties. Yet, I believe that a general agreement on this most important question is necessary. We cannot interpret "war crimes" in the restricted sense of the positive international law. Such interpretation would mean that the majority of crimes the punishment of which is demanded by the civilized nations would not belong to the category of war crimes at all.

If there is to be a special solution of the problem of the delivery of war criminals at all, it can be attained only* by a strict limitation of cases which require special procedure (war crimes) and those which, being of a regular character, can be solved by the application of the existing law.

Obviously, also in the case of the punishment of war criminals negotiations with the defeated States cannot be conducted separately by the individual States, but through the intermediary of the "Commission Militaire d'Armistice". This Commission will undoubtedly act only on the basis of dispositions and instructions given by other organs of the United Nations. As far as the punishment of war criminals is concerned the "Fact Finding Commission" in London could perform this function. In my opinion also this Commission - with the exception of cases coming under the jurisdiction of an International Criminal Court - should have a purely technical function.

V

Extradition as an Institution of International Law

Far greater difficulties will arise in such cases where war criminals will escape into the territory of neutral States or of an Allied State against whose nationals they have not committed any offences. It might seem that this problem relating only to that smaller part of war criminals who will succeed in escaping abroad, is less important, particularly if the punishment of those apprehended on the territory of their own States will be guaranteed. Yet, the experience of the last war proves that also today there will be grave danger lest the principal representatives of the totalitarian régimes escape to neutral States.

In most cases there will appear a number of obstacles which might seriously endanger, if not make impossible, the delivery of war criminals. Here, we must talk of extradition in the technical sense of international law. According to the existing legal arrangement this kind of delivery of offenders should be governed by the existing extradition laws and treaties as well as by international custom relating to the extradition of criminals.

It has been pointed out (Chapter III) that there is danger lest the application of these provisions - through their liberal and enlightened character - should not make it possible for the most ignominious criminals to escape just punishment.

Obstacles of a judicial character preventing the extradition of the Head of State who escaped to a neutral country have not been removed yet. The same situation as in 1918 would arise if for instance Hitler escaped to one of these lands. According to the existing extradition treaties the Government of the neutral country would be justified in refusing his extradition. The same applies to other war criminals. If, before the end of the war, there will be no change or modification of the existing extradition law it is very doubtful whether the principal war criminals will be at all punished and there is no hope whatsoever that their extradition might be effected through legal means. For, in spite of all international agreements (in particular the Pact of Paris), "waging of war" can hardly be considered as a crime in the technical sense, i.e. from the point of view of penal law and the existing extradition

treaties. It may be true that the majority of war criminals can be accused of concrete offences punishable according to the Criminal Codes of all civilized States, but the incompleteness and vagueness (the possibility of different interpretations) could serve for the neutrals as an opportunity of evading the extradition, even without any violation of treaties. We cannot believe - even if we are very optimistic - that the neutral States will have the same sense of urgency of the punishment of war criminals as those States who participated in war. A part of the public of neutral States will consider war crimes - partly because of a sense of false objectivity, partly for direct sympathy with the nationals of the defeated States - more mildly than the participants in war.

It is necessary to admit that the same applies to a certain extent also to all Allied States. We must not forget that very soon after the last war differences of opinion have arisen between various Allied States, in certain cases even grave conflicts (as f.i. between Italy and Yugoslavia). This time, I believe, there will be greater determination to achieve and preserve collaboration, yet it will be impossible to prevent the various States and Governments from having different opinions as far as the solution of certain international questions is concerned, such as for instance the question of their relation to Germany. This will undoubtedly influence their attitude in regard to the problem of war criminals. Thus, it might easily happen - particularly in those cases where the requested offenders might be nationals of one of the less important States of the Axis (for ex. Hungary, Finland or Bulgaria) - that even an Allied State, making use of the very elastic provisions of the extradition law or treaty, would decline their extradition.

If we are to avoid - at least to a certain degree - these difficulties, it is necessary for the Governments of the United Nations to agree already now on a united extradition policy.

1. As far as the neutral States are concerned it is of the utmost importance that the United Nations should by a public appeal or through diplomatic channels warn the neutral countries against granting asylum to the nationals of the States of the Axis who before or after the end of the war should try to find refuge on their territories.

2. Even if there will be a collective warning of the neutral States, many offenders will manage to escape to neutral countries or to remote and less interested Allied States.

For these cases it is necessary to find a new and rather exceptional solution which, if it is to be efficient, must be agreed upon before the end of the war. It must be accepted first by the United Nations and then submitted to the neutrals. At the same time we must bear in mind that even then it will be difficult, if not altogether impossible, to induce the neutral States to give up the application of the existing extradition treaties.

(a) The neutral States will be probably more inclined to renounce the application of their extradition treaties in the case of those criminals who will be asked for by the International Criminal Court. If an International Criminal Court will be created (as it appears from the results of the present negotiations), then the convention which will constitute its basis shall have to contain certain provisions concerning the extradition of war criminals (the Convention for the Suppression of Terrorism accepted through the initiative of the L.N. in 1937 had similar provisions). The signatories of this treaty will be bound by its terms relating to the extradition and will deliver war criminals without regard to the existing extradition treaties. It should be expected that also neutral States would accede to this Convention, particularly if the International Criminal Court should be entrusted with the prosecution of all offences against International Public Order. But even if the neutrals would not accede to this Convention they would most probably comply with the request for the extradition of a war criminal if it came from the International Criminal Court.

(b) As far as those war criminals are concerned whose prosecution will be in the competence of the individual States, it will be necessary that the Allied States conclude a special extradition treaty which would stipulate unified provisions for the extradition of war criminals.

It will be necessary to make it possible also for neutral States to accede to this Convention. I believe that this can be achieved only when the special extradition convention will be connected with the convention for the creation of an International Criminal Court.

The extradition from neutral and Allied States should be governed by the following principles:

- (1) The provisions relating to the extradition of war criminals will not mean a change of the existing international law of extradition which will remain valid as far as other crimes are concerned. For this reason - with the exception of war crimes for which the penalty is death - their validity should be limited to the period of three years. As far as war crimes for which the death penalty is imposed are concerned, a longer time-limit should be recommended.
- (ii) The extradition will apply to all war crimes. The definition of war crimes is the same as in Chapter IV under 1. The extradition can be granted only under the condition that according to the laws of the requesting States valid at the time of the requisition, the act for which the extradition is asked is punishable by death or by the penalty of deprivation of liberty for two years or more.
- (iii) War crimes can never be considered as crimes of a political nature ("political offences").
The requested State cannot refuse the extradition on these grounds.
- (iv) The same applies to military offences. The requested State cannot refuse the extradition of the offender because he is sought for an offence which is of a military character.
- (v) The requested State shall not decline to extradite a person claimed only because such person is a national of the requested State.
- (vi) When a requested State receives several requisitions for the extradition of the same person for the same or different offences it will proceed in the following manner:
 - (a) if it receives the requisition of one or more States and that of the International Criminal Court, the requisition of the International Criminal Court will have priority;
 - (b) if it receives requisitions from two or more States, the requested State, having taken the necessary steps, reports the case to the International Criminal Court.

- (vii) In order to respect the rule "non bis in idem" the requested State may decline to extradite a war criminal claimed if he had been prosecuted or convicted for the same crime for which the extradition is asked and acquitted or convicted.
- (viii) The postponement of the extradition is possible only when the war criminal has been convicted and has to serve his penalty for another crime than the one for which he is to be extradited. This applies only under the condition that this penalty is higher than the minimum penalty which can be imposed for the crime for which the extradition was asked.
- (ix) The requested State before it grants the extradition can - if there are doubts whether the requisition concerns a war crime - ask for the decision of a special senate of the International Criminal Court. The requested State is bound by this decision.

The Principles of the Extradition Procedure

- (x) The extradition procedure should be as simple as possible. The extradition will be effected directly between the competent organs of the requesting and the requested States. The extradition should be in the competence of a special organ which would deal with all questions relating to the delivery of war criminals.
- (xi) In the requisition there should be the description of the person (for the purpose of its identification); a declaration that a warrant of arrest or other document of equivalent importance has been issued; a statement of the war crimes for which it is intended to prosecute the person claimed, together with the punishment which may be imposed for such acts by the law of the requesting State.
- (xii) After receiving the requisition the requested State will undertake all what is necessary for the speedy apprehension of the war criminal and for the delivery of his property.
- (xiii) After receiving the requisition and after the apprehension of the war criminal the requested State in a special procedure decides about the extradition.

In this procedure questions concerning the identity of the offender, the question whether the same person has not been punished for the same crime for which he should be extradited and whether the crime concerned belongs to the category of war crimes are dealt with.

- (xiv) If during the procedure it is decided that the requisition is justified and that the extradition should be granted, it will take place immediately. At the same time the property of the war criminal is delivered to the requesting State.
- (xv) The requested State cannot refuse the extradition of a war criminal on the grounds that he is to be tried by a special court created for the prosecution and punishment of war criminals.

VI

Conclusions

1. Among the conditions imposed upon the defeated powers in consequence of the unconditional surrender there should be detailed provisions relating to the delivery of war criminals and guaranteeing to the full extent their trial before ordinary or extraordinary tribunals of the United Nations or before the International Criminal Court.
2. According to these conditions the German Government should undertake all legal steps for the execution of the provisions relating to the punishment and delivery of war criminals;
3. The Governments of the neutral States should be warned either by a public appeal of the responsible representatives of the United Nations or through diplomatic channels against granting asylum to the nationals of the defeated nations who have committed war crimes;
4. Already before the end of the war the United Nations should accept a convention relating to an International Criminal Court;
5. This document should be presented to the neutral States in order to secure their accession;

6. Already before the end of the war the United Nations should accept a convention regulating the extradition of war criminals which will take refuge in their territory or neutral territory;
7. This convention should apply only to war crimes, and it should be presented to the Governments of the neutral States in view of securing their accession;
8. This convention should be connected with the convention relating to the International Criminal Court.

INTERNATIONAL COMMISSION FOR PENAL RECONSTRUCTION AND DEVELOPMENT

Memorandum on the establishment of an International Tribunal

(by Dr M. de BAER)
BELGIUM.

We all agree that war crimes should be punished by National Courts whenever a United Nations' Court has jurisdiction to try the criminal. But there seems to be instances where the importance of the case demands the prestige of an International Court rather than a trial by a National Court (e.g. Mussolini, Hitler, etc...). There are also instances where the circumstance that the accused has committed crimes in several countries makes a trial by an International Court or by an inter-Allied Court preferable to a trial by a purely National Court. Finally there are cases where no Allied Court will have jurisdiction (namely for crimes committed within Axis territory), for some countries have not yet extended the jurisdiction of their National Courts to crimes committed abroad by foreigners.

National Courts will also find some difficulty in laying hands upon the criminals. The Chairman's report is based on the assumption that the United Nations can lay hands upon the criminals and bring them for trial before their Courts. But this will not be an easy matter for if during the occupation of Germany, German law is to be respected in conformity with the prescriptions of the Hague Conventions and the British Manual of Military Law (section 364), the German Courts will be justified in refusing the extradition of their own nationals.

But let us even suppose that legislation has been passed extending the jurisdiction of National Courts to crimes committed abroad by foreigners, let us suppose that the Allied Court can lay hands on the accused, the question arises how this Allied Court will obtain the necessary evidence, the presence of German witnesses, etc... and in this respect it seems that inter-Allied Courts functioning within Axis countries would not experience the same difficulties.

I am in complete agreement with the Chairman when he writes that the vast majority of crimes committed by enemy nationals within United Nations territory are within the jurisdiction of Courts of the United Nations, but I do not very well understand the

7 lines on page 4 of the report beginning with the words "Undoubtedly, many atrocious acts" and finishing with the words "recognised by national laws".

In this respect I would like to point out that acts committed within enemy territory will not come within the scope of jurisdiction of most of the United Nations' Courts unless the legislation of each one of them is extended to give to home Courts jurisdiction to try crimes committed abroad by foreigners. This will certainly be the case in respect of crimes committed against nationals of the United Nations who have been deported into Germany for forced labour.

As to acts committed by members of enemy armed forces in connection with the conduct of hostilities, I agree with the Chairman that the commanders of United Nations Forces may punish them as offences against the laws of war wherever they may be committed. I do not believe however that such action of a military commander, administering martial law, would be justifiable whenever the crimes had been committed.

In other words I very much doubt whether the commander of, let us say, a French army marching into Germany in 1943 or 1944 would be justified in punishing the commander of a German internment camp who had, in 1940 or 1941, tortured French prisoners of war in Germany. The jurisdiction in Military Courts in this respect is justified by the necessity to protect the rights and safety of the troops: martial law may only be administered in the case where the actual safety of the Forces would be jeopardized by the lack of immediate trial and punishment. The same applies to inhabitants of Axis countries who have committed crimes against Allied Nationals: thus in 1919 an Allied Court in Rhineland was justified in assuming jurisdiction to try any inhabitant who had attacked, harmed, injured or robbed an Allied soldier there, but had no jurisdiction, in respect of those same inhabitants, for crimes or violations of the law of war which they might previously have committed against the population of occupied Belgium, at the time when they were in that country. This was expressly stated in art.6 of the Armistice Terms of 11 November, 1918. Therefore, if an inhabitant had been accused of such a crime, he should have been sent to the Leipzig Court, by virtue of the agreements of May-July 1920, to be tried there.

I respectfully submit that it is not for the sake of a somewhat theoretical universality that I am in favour of an International Criminal Court, but mainly to

ensure the punishment of crimes for which, in the actual state of legislation, no other court than an Axis court has jurisdiction.

As to the law which the International Court should apply, in order to conform with the maxim "nullum crimen sine lege" and thus avoid retrospective application of a new criminal code, it would suffice to provide that no act may be tried as an offence unless it is specified as a criminal offence either in the national law of the accused, or in the law of his residence at the time of the commission of the crime, or in the law of the place where the crime was committed.

29 July, 1943.

INTERNATIONAL COMMISSION FOR PENAL RECONSTRUCTION AND DEVELOPMENT

Memorandum on the establishment of an International Tribunal.

(Dr J.M. de Moor)

(HOLLAND)

In respect to Sir Arnold McNair's exposé of this question I should like to make the following remarks:

I. Opinions on this point have gradually changed. In the first two years of this war a large group, perhaps even a majority of those interested in this subject, took the view that the judging of war-crimes in its entirety should take place through the medium of an International Criminal Court. Another group, urged mainly by practical considerations, wanted to leave the trial for the greater part to the National Courts.

They argued, in my opinion rightly, that the national courts are already competent to deal with a large number of war crimes committed in their territory (as did Sir Arnold McNair), that they are adequately equipped for the purpose, and that they are moreover more likely to satisfy the national sense of justice rapidly and completely than any other.

No doubt, every allied nation should have to give the strongest possible guarantee of its absolute impartiality, but this could be arranged rather simply. For instance the fullest publicity of trial and the highest standard of the integrity and ability of the national judges should be insisted upon.

On the other hand to deal with all war crimes which amount to thousands and tens of thousands would far exceed the capacity of any International Court. Even in the most favourable circumstances, with a large number of judges sitting at the same time and in several countries, trials would drag on for years. And yet speed is of the first importance.

Moreover, there is the very real difficulty of co-ordinating the different legal codes - and more particularly the Anglo-Saxon and the Continental - for the jurisdiction of the International Court.

I think these arguments were so strong, that now a very great group of experts is convinced, that all War-Crimes which can be tried by Municipal Courts of the United

Nations, should be judged by such Courts, in conformity with their laws, and that it should be left to the national regulations whether the National Courts should be military, civil or mixed, so that a repetition of the mistake, made in this respect in 1919, should be obviated.

II. In connection with the above mentioned, it should be pointed out, that several of the Governments of the United Nations are already occupied in meeting a serious objection connected with the judging of war-crimes by national courts, and that is that in many countries these Governments were not empowered to judge crimes committed outside their own territories, for instance in German concentration camps.

International Law does not forbid such an extension of the competency of national courts of justice, even with "retrogressive effect"; neither do some national legislatures, I know of.

III. There is something more that makes the judgment of the great majority of the war-criminals by national courts more acceptable and advisable. I mean the so-called "Factfinding Commission", as proposed by Lord Simon in the House of Lords on the 28th September, 1942, and on the 7th September, 1942 by President Roosevelt and Mr Churchill.

They declared that it was intended to set up with the least possible delay a "United Nations Commission for the Investigation of War-Crimes", whose task it would be to collect evidence of war-crimes already during the war, and to take steps to produce the criminals for trial.

If it is the intention to take the last words in a broad sense, then there are indeed great possibilities here in.

For then this Commission would not only have to consider which particular cases shall be heard, and whether there is already sufficient evidence, or if such evidence requires amplifying; but, among other things, it would also have to decide in how far an eventual appeal to the Plea of Superior Order would make the trial by a National Court advisable. This latter would have the advantage that a certain unity would have been achieved in respect of such a matter of principle, even without any alteration having been made in this connection to the national legislations. In addition, so

long as an International Court does not exist, it would be obvious that this commission would have to decide - in the event of concurrent competence - which one of the United Nations would be designated for the trial.

With respect to those cases which have already been sufficiently investigated before the Armistice, the Commission could hand a List containing the names of the suspects to the Allied Governments in order to ensure their being handed over immediately, actual hostilities had come to an end. With regard to charges which might come in and would have to be investigated later, the Commission would obviously have to possess the authority independently to trace the suspects in the occupied and ex-enemy territories, there to collect the requisite evidence, hear witnesses and prepare the cases for judgment by the National Courts, and if necessary also to demand the extradition of the suspects, in order to hand them over to such Courts.

The Allied Council for Control of Germany proposed in the Memorandum of the Post-War Policy Group of Conservative M.P.'s and Peers might be linked up with this. But the War Crimes Commission would have to retain its complete independence, and if possible would even have to have its own tracing and police services. A special arrangement with the "neutrals" would have to be set up.

In this way the United Nations Commission for the Investigation of War Crimes would assume the position of a great INTERNATIONAL PUBLIC PROSECUTING OFFICE, (Un grand parquet du Procureur-Général International). When that had been instituted, the question of the punishment of War Criminals, would at any rate to a considerable extent, be solved, and in this manner, a compromise would be found: "the prosecution of war-criminals being on an international basis and the judgment on a national".

IV. Nevertheless even so, there will remain always cases which can better be tried before an international court. I mean those cases in which the whole world,^{or} in every case, many united nations, are interested. Those are the cases of the heads of State and of the leaders of the Nazis and the Fascists and of the German Army, who committed or ordered the most terrible war crimes.

The Court could have then, in my opinion, (as is proposed by Commission I of the London International Assembly) jurisdiction on the following categories of war crimes

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The Court could have then, in my opinion, (as is proposed by Commission I of the London International Assembly) jurisdiction on the following categories of war crimes:

- (a) crimes in respect of which no United Nations' Court has jurisdiction (e.g. crimes committed in Germany against Jews and stateless persons and possibly against Allied nationals);
- (b) crimes in respect of which a United Nations' Court has jurisdiction but which the State concerned elects not to try in its own Courts (for reasons such as the following:
 - where a trial in the country concerned might lead to disturbances,
 - where a Municipal Court would find it difficult to obtain evidence);
- (c) crimes which have been committed or which have taken effect in several countries or against nationals of different countries;
- (d) crimes committed by Heads of States;

Other questions would still have to be settled, such as language, composition of the Court, the procedure to be followed and the material law to be applied. These are all exceptionally difficult problems, which still require some work and study, even though we have some models, for instance in the project submitted by the International Law Association at Vienna in 1926, and in the Scheme for an International Court of Justice presented by the League of Nations in 1937, at the Conference regarding the Repression of Terrorist Deeds.