

III. Art. 47 Mil. Penal Code was maintained under the  
Nazi Regime

During the war, the doctrine of Art. 47 Military Penal Code was sometimes criticized. Professor Schwinge in his book exclaims<sup>1</sup>

"It is the spirit of Liberalism which has molded Art. 47.... The provision as it now stands - it goes back to the initiative of Congressman Lasker<sup>2</sup> - waters down the duty of obedience, and stretches the responsibility of the subordinate too far. It contains the danger of counteracting the prompt execution of orders, and that is why it was introduced only against the objections of the military..... It honors our judiciary, that they have recognized the dangers which lie in the broadness of the wording of the law, and have pared them through a limiting interpretation."<sup>3</sup>

Therefore, writing in 1940, he intends to limit the significance of Art. 47 - which, it is true, was inserted in the German Military Penal Code in 1872 at the insistence of the Liberals. But, he does not maintain that Art. 47 does not apply in World War II.

If Professor Schwinge blamed the spirit of "Liberalism" for inserting Art. 47 into the German Military Penal Code, he was, as we have seen, not correct. The criminal responsibility of a subordinate for carrying out unlawful orders was not an innovation of the Military Criminal Penal Code of 1872 and not even of its model, the Prussian Military Penal Code of 1845. Similar provisions were contained, e.g., in 1) the bill prepared by a commission to draft a Prussian Military

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1) l.c., p. 119

2) Eduard Lasker (1829-1884), member of the Liberal Party in Bismarck's Parliament and one of the most stalwart opponents of German Militarism.

3) This was largely wishful thinking on the part of Schwinge. He polemizes against many Court Decisions. See, particularly, the "Mental Fitness Examination" Case of 1925 in which the Supreme Court declared to uphold the generally accepted interpretation of Art. 47, as laid down in Court decisions and in the literature.

Penal Code in 1830;<sup>1</sup>

2) the draft of a Penal Code for the Royal Prussian Army of 1835;<sup>2</sup>

3) the draft prepared by the Prussian Ministry of War, of a Military Penal Code for the Royal Prussian Army in 1841.<sup>3</sup>

The Prussian oath of allegiance to the flag did not contain a pledge of unconditional obedience; prior to the ceremony at which the recruits had to give the oath, they were instructed: "you must not obey an order which would demand from you the commission of a crime or a shameful act."<sup>4</sup>

During the war, the question as to whether Art. 47, Military Penal Code, should be kept on the Statute Book was publicly discussed. It is interesting to note that in the Volume of 1942-43, the leading National Socialist Journal on military law contains an article by a German Military judge<sup>5</sup> on this question and concludes in the affirmative. He interpretes Art. 47 as meaning that the subordinate has to obey, but he has to obey only orders which pertain to the service, that is, if the

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1) According to the Bill of 1830, the subordinate would be punishable if carrying out, under orders, the crime of high treason, treason, laesio majestatis, military treason, rebellion, and desertion.

2) Art. 137 of the Draft of 1835 provided: "A military order is only binding if it refers to the service but not to private interest, and if it does not violate the acts or omissions which are the express duties of a soldier."

3) Art. 50 of the Draft of 1841 read: "If by carrying out an order pertaining to the service, a criminal law is violated, the superior issuing the order is responsible. [However,] knowing collaboration in violating the criminal law, shall be punished as participant in the crime of the superior who gives the order."

4) Constantin von Dietze, Der Zerfall der Wahrheit im Dritten Reich, (The Collapse of Truth in the Third Reich), Novalis-Verlag, Freiburg im Breisgau, 1946.

5) Kalberlah, l.c.

order

"keeps within the frame of what a superior, after conscientious examination, could duly order at all"....."Whether an order is lawful depends on whether the superior had the jurisdiction to issue such an order. Furthermore, the order must be justified."

"The duty to obey is the basis of manly discipline..../but/ under German Military Law, blind obedience does not exist."

"An order is a pronouncement of a will which demands a behaviour or the omission of a behaviour from another person." The recipient of this pronouncement must think it over. He has to think it over, if for no other reason, in order to carry out, duly and efficiently, what has been demanded from him. It necessarily follows from this 'thinking over' that consideration must be given to the fact as to whether what is ordered can be carried out at all, and whether he who demands from another a behaviour or an abstaining from a behaviour actually has the right to make such demands, and whether, if he has the right to demand a behaviour, he can demand it just in the specific form in which he did. This 'examination'..... is only natural. It is impossible to deny to a subordinate to make such an 'examination' even if one recognizes that it is difficult.

Furthermore, it is recognized that uncorrect and contradictory orders, changed circumstances or public considerations may make it a duty for the subordinate to ask for clarification or have new orders. To make a counter suggestion is a right of old standing.<sup>1</sup>

This results from the examination. If the subordinate believes that he is not permitted to do what he is asked to do, either by order or a directive, either in writing or orally, or that he should, in fairness, not be asked to do it because it violates, in his opinion, the duties of a soldier, especially service regulations, instructions, ordinances, or laws, then he has to ask the superior to examine as to whether the order, etc., should be maintained or changed. This counter proposal must however, not aim at a refusal to obey. If the order is maintained, then the subordinate has to decide what he wants to do. This proves that an examination of the order which is received cannot be excluded, and also that blind obedience does no longer exist.<sup>2</sup>

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1) Here the author quotes the <sup>S</sup>Service Regulations of the Royal Prussian Infantry of 13 September 1788.

2) Kalberlah, l.c., p.304, 307, 308.

That the German Courts, the author says, only very rarely punished subordinates for carrying out unlawful orders, because German superiors very rarely issued unlawful orders in the first place. But, he emphasizes that

"cases of violation against military loyalty (for example, high treason, treason, desertion, going over to the enemy), as well as incitement to make a wrong report, mistreatment of subordinates, are recognizable [as crimes] even to the simple soldier, after the education he receives in the German Army. If such offenses are committed, it is undisputed that the subordinate is responsible and that he can be prosecuted for them. This is self-evident. In such cases there can be no excuses, even for a subordinate."<sup>1</sup>

After having restated that, in general, the superior will be responsible for the orders carried out by a subordinate, the article ends with a warning that Art. 47 of the German Military Penal Code should be maintained, as "a counter-balance against blind obedience which is un-German."<sup>2</sup>

The Principle of the Criminal Responsibility of the Obeying Subordinate was upheld by German law during World War II

The Military Penal Code of 1872 was repeatedly amended under the Monarchy, but its art. 47 was not changed under it; nor was it changed in 1926 when the Parliament of the Republic considerably amended and simplified the Code<sup>3</sup>.

But most noteworthy is the fact, it is submitted, that art. 47 was not touched upon by the Nazi regime until 1940, and only insignificantly in 1940. Other provisions of the Military Penal Code of 1872 were changed in Nov. 1934 and March 1935:

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1) Kalberlah, - p. 310

2) Kalberlah, - p. 311

3) Law of 30 April 1926, Reich Law Gazette I, p. 197

"After [Hitler's] ascent to power, the Military Penal Code had to be assimilated to the reforms that had taken place in the field of criminal law. This assimilation was brought about through the law of 23 Nov. 1934 amending the Military Penal Code. New changes were necessitated, a few months later, by the re-establishment of German military sovereignty [the Law of 16 March 1935 reestablishing universal compulsory military training] " 1)

In July 1935, Hitler's Government amended the Code a third time (Law of 16 July 1935, Reich Law Gaz. I, p. 1021). None of these amendments touched upon art. 47, and this is also true of the Decree of 17 October 1939 (Reich Law Gaz. I, p. 2107) which extended the Military Penal Code to the SS.

In 1940, the Code was again thoroughly revised (Decree of 10.10.1940 Reich Law Gaz. I, p. 1347). The revision was very carefully done. But Art. 47 was only changed, very slightly, in two ways:

(a) the previous text which went back to 1872 was only changed linguistically. From the passage "if he went beyond the order given to him", the words "to him" were omitted; and the words "civil or military crime or offense" were changed into "general or military crimes or offense". 2)

(b) the revised text added the following section 2

Art. 47, sect. 2: "If the guilt of the subordinate is small, then his punishment may be dispensed with." 3)

If anything, this discretion granted to the German Military Courts in insignificant cases shows that the Nazi Government wanted grave cases to be prosecuted and punished.

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- 1) Schwinge, p. 1
  - 2) This latter change, if anything, widened the criminal responsibility of the obeying subordinate, because "general" offenses can be construed as covering also offenses only recognized by administrative penal law - something which had been often demanded by writers on the subject.
  - 3) "Ist die Schuld des Untergebenen gering, so kann von seiner Bestrafung abgesehen werden."

Prof. Schwinge calls this

" a commendable innovation which takes account of the grave collision of duties in which the subordinate in the cases contemplated in Art. 47 sees himself involved." 1)

Thus, the nazi commentator correctly pointed out that the " collision of duties" duties the superior and duties to conscience and law -- continued to be recognized at a time when the "leader " principle was at its peak.

The National Socialist Government did not, even in the midst of war, consider the " grave collision of duties" an excuse, if the obeying subordinate was involved in a major crime or offense, and did not unconditionally forgive him, even if the matter was of small significance.

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1) "Begrüessenswerte Neuerung, die der Schwere der Pflichten-Kollision Rechnung traegt, an die sich der Untergeben in den Faellen, die Para. 47 betrifft, verstrickt sieht." ( 2. Nachtrag zum Militaerstrafgesetzbuch, erlaeutert von Prof. Dr. Erich Schwinge ( 2nd appendix) Berlin 1941, page 42.

The German "Army Act" (Act concerning the organization of the German Army of 1921 provided that soldiers be instructed on international law.

When the Weimar Republic was about to give itself an "Army Act" the Reichstag Committee discussing the bill proposed to insert a provision to the effect that the soldiers have to receive instruction on international law. "The reason given for the motion was that in Art. 1 of the Hague Convention respecting the laws and customs of war (Reich Law Gazette 1910, p.107), Germany and the other parties to the treaty undertook the obligation to issue instructions to their armed land forces which shall be in conformity with the Regulations respecting the Laws and Customs of War on Land annexed to the present Convention" (Reich Law Gazette, 1910, p. 132). In addition to this Convention, the education of the soldiers on international law will, in the main, have to take into account the Conventions adopted at the Second Hague Peace Conference which are mentioned under No. 3 and 5 of the Proclamation of 25 Jan. 1910 (Reich Law Gazette 1910, p.275), as well as the Geneva Convention (Reich Law Gazette 1907, p.279.)<sup>1</sup>

Hence, in the Army Act of March 21, 1921 (Reich Law Gazette 1921, p. 329) the following provision was inserted:

"Art. 35. The instruction of the soldiers shall cover their civic obligations and their obligations under international law in peace and war."<sup>2</sup>

A commentary to the Army Act, written in 1921 by Paul Semler, Privy Counsellor of War and Ministerial Counsellor in

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1) Martin Rittau, Wehrgesetz -- Army Law, Berlin, 1924, p.95

2) "Art. 35. Die Ausbildung der Soldaten erstreckt sich auf ihre staatsbuergerlichen und voelkerrechtlichen Verpflichtungen im Kriege und Frieden."

On the introduction of the Hague Regulations in the German Army in 1911, see Appendix I.

the Reich Army Ministry, explained:<sup>1</sup>

"Also, he shall be instructed, in detail, about his obligations, under international law, in war, which refers, first of all, to the provisions of the Hague Convention on Land Warfare (Reich Law Gazette 1910, p.107 ff) and of the Geneva Convention (Reich Law Gazette 1907, p.279), so that he knows how to behave if the emergency case arises."

The Army Act of 1921 was in force until 21 May 1935 when it was superseded by Hitler's Army Act.<sup>2</sup>

The latter did not contain a analogous "provision". However, it may be pointed out that during the 14 years when the Army Act of 1921 was in force, all German soldiers had to receive instruction on the international law of war; and that, evidently, the soldiers recruited after 1935 <sup>also</sup> received such instruction, if for no other reason than for being able to avail themselves of all possibilities of protection offered by it when they themselves were prisoners of war or in other circumstances. (e.g., when they were wounded, when they buried their dead, when acting as or accompanying a parliamentair (Art. 32-34 Hague Regulations), how to behave when they or the adversary hoisted a flag of truce, etc.) In fact, the Allies made the experience, during the war, that German soldiers and officers were excellently briefed, e.g. on all regulations concerning the protection of prisoners of war, because in captivity the German soldiers would refer to the Geneva Convention and the Hague Regulations.

Officers always received instruction on the international law of war in the German officer schools. During the war, they would constantly refer to it, e.g. when in captivity, or when answering questions of delegates of the International Red Cross Committee, on conditions of allied prisoners of war in German hands, or when

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- 1) Paul Semler, Geheimer Kriegsrat und Ministerialrat am Reichswehrministerium, Wehrgesetz - Army Law, Berlin 1921, p.100.  
"Auch ueber seine voelkerredhtlichen Verpflichtungen im Kriege, womit in erster Linie die Bestimmungen der Haager Landkriegsordnung (RGBl.1910, p.107 ff) und der Genfer Konvention (RGBl.1907, S.279) gemeint sind, soll er eingehend belehrt werden, damit er weiss, wie er sich im Ernstfall zu verhalten hat."
  - 2) Law of 21 May 1935, Reich Law Gazette I, p.609

answering complaints of inhabitants of occupied territories,  
etc,