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HEADQUARTERS
UNITED STATES FORCES
EUROPEAN THEATER
OFFICE OF THEATER JUDGE ADVOCATE

(Main -- APO 757)
16 October 1945

MEMORANDUM for the Theater Judge Advocate

SUBJECT: Organization for proceeding Against Axis War Criminals
and Certain Other Offenders.

1. Attention is particularly drawn to the following
basic documents:

- (a) the Moscow Declaration of 30 October 1943 on
German atrocities in Occupied Europe;
- (b) the Agreement by the Government of the United
States of America, the Provisional Government
of the French Republic, the Government of the
United Kingdom of Great Britain and Northern
Ireland, and the Government of the Union of
Soviet Socialist Republics for the prosecution and
punishment of the major war criminals of the
European Axis, signed at London on 8 August 1945;
and
- (c) the Directive to the Theater Commander on
the "Identification and Apprehension of Persons
Suspected of War Crimes or Other Offenses and
Trial of Certain Offenders", Annex to Appendix
"A" to Enclosure "B", JCS 1023/10 of 8 July 1945.

2. By letter, this hq., to the Theater Judge Advocate,
20 September 1945, sub: "Identification and apprehension of
persons suspected of war crimes or other offenses, and trial
of certain offenders", the Theater Judge Advocate was made re-
sponsible for the effective application of JCS 1023/10 within this
theater. This should be understood as imposing a responsibility
for initiating action which would distribute the burdens where they
may most appropriately be placed, and not as requiring that the
Judge Advocate's office carry JCS 1023/10 into effect by its own
proper means. The duty is to propose a proper allocation of
functions, whether to the War Crimes Branch under the Theater Judge
Advocate or to some other agency.

3. The crimes which, in conformity to JCS 1023/10, the
Theater Commander is to cause to be punished are the following:

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- (a) Atrocities and offenses against persons or property constituting violations of international law, including the laws, rules and customs of land and naval warfare;
- (b) Initiation of invasions of other countries and of wars of aggression in violation of international laws and treaties; and
- (c) Other atrocities and offenses, including atrocities and persecutions on racial, religious or political grounds, committed since 30 January 1933.

The enormous scope of category (c) above is especially to be noted. The words, if given their full literal meaning, embrace all the offenses committed in Germany since the Nazi regime came into power. Any permissible interpretation would include a very large number of crimes. In contrast, the WD letter of 25 December 1944 on "Establishment of War Crimes Offices," AG 000.5 OB-S-A-M, directed the collection of "Evidence concerning cruelties, atrocities and acts of oppression against members of the armed forces of the United States or other Americans". The "war crimes" which are the subject of WD Cir No. 256 of 22 August 1945 are similarly restricted. The proposal of the United States Advisers to the European Advisory Commission, Enclosure "C" to JCS 1023/10, provided (par. 3a) that

"As used in this directive, the term 'war crimes' includes all offenses against persons or property, whether or not committed under the orders or sanction of governments or commanders, which are violations of the laws and customs of war committed in connection with military operations or occupation, and which outrage common justice or involve moral turpitude."

But now the Theater Commander's responsibility extends generally to the punishment of other crimes committed in Germany since 1933, in addition to violations of international law in the course of the present war.

4. The London Agreement provides for the trial of "major" war criminals by an International Military Tribunal, and par. 6 of the annexed Charter of the Tribunal sets out a classification of crimes which substantially agrees with the categories of JCS 1023/10 above. What war criminals are "major" is not defined, being left rather to those who carry the Agreement into operation. The Charter contemplates (par.9) that the Tribunal may adjudge that a given group or organization was criminal, in which cases (par.10)

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"the competent national authority or any Signatory shall have the right to bring individuals to trial for membership therein before national, military or occupation courts. In such cases the criminal nature of the group or organization is considered proved and shall not be questioned."

If the Tribunal pronounces such a judgment upon a group, it will remain for the Theater Commander, by "courts" appropriate to the purpose, to work out the legal consequences of the Tribunal's condemnation.

5. Procedures now in operation take care of only a portion of the field of JCS 1023/10;

(a) By Execution Order No. 9547 of 2 May 1945 Mr. Justice Jackson was appointed the Representative of the United States and its Chief of Counsel in preparing and prosecuting charges of atrocities and war crimes against such of the leaders of the European Axis powers and their principal agents and accessories as the United States may agree with any of the United Nations to bring to trial before an international military tribunal. The International Military Tribunal has now been constituted, and an indictment has been drawn by the committee of prosecutors. The trial will be more protracted than was at first expected. So difficult has it proved to bring the four signatory governments into effective cooperation that those in a position to know advise that further trials on a quadripartite basis are not feasible and should not enter into planning for the future.

(b) The War Crimes Branch under the Theater Judge Advocate continues to discharge the functions assigned to it by the directive of 24 February 1945, AG OOO.5 Op JA, "Establishment of War Crimes Branches". In practice it is chiefly concerned with investigating and preparing for trial (1) cases of violations of the laws of war to the prejudice of United States nationals, notably prisoners of war, and (2) atrocities committed in the concentration camps uncovered by the United States forces. These cases are being brought to trial before either military commissions or military government courts. Responsibility in this matter being fixed, it only remains to press the investigation and trial of these cases with the utmost vigor.

6. In analyzing the problem of allocating responsibility for the prosecution of crimes within JCS 1023/10, the following

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groups of cases are to be noted:

(a) The "major" war criminals and the groups or organizations placed on trial before the International Military Tribunal. (Twenty-four leading Nazis and six groups or organizations are being indicted.)

(b) Proceedings "before national, military or occupation" courts against the individuals charged with membership in groups or organizations declared by the Tribunal to have been criminal. (Since the Reich Cabinet, the Leadership Corps of the Nazi Party, the SS including the SD, the Gestapo, the SA, and the General Staff and High Command are included in the indictment, it is at once apparent that the "membership problem" is of tremendous magnitude.)

(c) The specific violations of international law which fall within the scope of the War Crimes Branch of the Theater Judge Advocate's office: offenses against prisoners of war, atrocities in camps where alien enemies were concentrated, etc.

(d) Such other crimes as by reason of having been directed against the peace of the world or against any of the United Nations or their nationals, or because of their atrocious or systematic character, or because involving leading Nazis or the broad activities of the Nazi organizations, or for other reason, should be prosecuted by our own efforts and before our own military government courts.

(e) Crimes not punished above, particularly individual offenses of German against German, which will remain for trial in the German criminal courts as they are reestablished.

7. It is a matter of great urgency to prepare prosecution of cases within the mandate of JCS 1025/10 - other than those now before the International Military Tribunal and those being developed by the War Crimes Branch. Considerations of continuity of effort, expert knowledge, and public responsibility already established point to the Office of the U.S. Chief of Counsel as the organization upon which reliance should be placed. The reasons leading to this conclusion are numerous and weighty, and need not be labored here. Perhaps the present Chief of Counsel could be prevailed upon to accept this extended responsibility; or some member of his staff might be designated Chief Prosecutor by Theater appointment and established as head of a division in the Office of Military Government for Germany (U.S.); or some variation of this general idea might be devised. If it proves possible so to arrange, it is believed it would be most desirable for Mr. Justice Jackson to remain in this theater, extending

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his activities beyond the one big case brought in the International Military Tribunal, so that he would have direction over the prosecution of members of the criminal groups as well as for developing and presenting the cases against Nazi offenders other than those embraced within the judgment of the International Military Tribunal. (Since Execution Order No. 9547, under which Mr. Justice Jackson acts, is limited to prosecution "before an international military tribunal", that order would have to be extended.) The discussion herein proceeds henceforth upon the assumption that a way may be found whereby the present Chief of Counsel will carry on. If that assumption proves unfounded, then the plan which follows would have to be modified to provide for a new Office of Chief Prosecutor for Nazi Crimes.

8. The most serious cases of Axis criminality, not brought before the Tribunal under the London Agreement, should - insofar as the accused lie within reach of the American occupation authorities - be prosecuted before our own military government courts by the staff of the Chief of Counsel. These prosecutions should be sufficient in number and extent to demonstrate the earnestness of our condemnation of Axis crimes and to vindicate the interest of the international community in repressing atrocities and the organized persecution of racial, religious and political minorities. How far down the scale of criminality the prosecutor could go would depend upon the strength of his staff, the availability of adequate military government courts, and the time at his disposal. Conversely, the bidding for competent personnel should be made on the basis of an estimate of the number and difficulty of the cases whose prosecution would be undertaken. This is a matter of urgency, which must be taken in hand at once upon the approval of the general plan.

9. As German criminal courts are reestablished and staffed with suitable judges and prosecutors, free from Nazi taint, they should be allowed, experimentally and under supervision, to try old crimes which went unpunished under the Nazi regime, insofar as the Chief of Counsel does not wish to reserve them for trial before military government courts. This would afford an outlet for the many Germans who quite naturally are chafing to bring to justice those by whom they were victimized, and would enable the German people to have a share in punishing Nazi criminality. It would increase their sense of responsibility and aid in their regeneration. Upon this point I have consulted a number of persons with special knowledge of Germany and German psychology, and the recommendation is abundantly sustained by their advice. In any event, we could not possibly prepare by our own investigators and punish by our own courts the countless cases of wrongs which German committed against German during the Nazi regime. In the end most of these crimes must be punished, if at all, in the German courts; and if not among those which the Chief of Counsel intends to bring before a military government court, it is highly desirable from every point of view that they be tried expeditiously before acceptable German judges. Of course, it should be arranged that the Office of the Chief of Counsel would screen

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out those cases which it itself wished to prosecute. And of course the German criminal courts will at all times be under the supervision of the military government officers.

10. How to proceed against members of the organizations and groups adjudged to have been criminal is a special problem. The issue in every such case would be a simple one: the fact of membership. It would then be in order to permit the member to advance evidence to show the limited or qualified nature of his participation. It is believed that for this type of case a specialized type of proceeding before military government courts, particularly constituted for that purpose, should be developed. Such courts, being limited to this class of case, should soon acquire a discriminating awareness of the types of persons with whom they had to deal and an ability to arrive at results with a minimum of variation and error. Study and experience would enable them to draw sound inferences from such circumstances as the particular year when the member joined, the mode by which he was recruited, the grade he held, etc. Advisers of German nationality should be appointed to sit with the court to assist it in making an appropriate disposition of the case. (Advisers are already provided for by par. 6, Art. IV, Ordinance No. 2.) The setting up of these courts would be a responsibility of the military government; but the Office of Chief of Counsel would control the flow of cases as a part of its broad authority to direct the trial of Axis criminals. It is believed that proof of membership in a condemned organization should lead to some type of treatment - as yet to be worked out - which would have regard not only to the punishment and, if possible, the reform of the individual, but would also utilize this source of manpower and withdraw unregenerate Nazis from the political community long enough to permit the German republic to become established on a firm foundation.

11. The briefest quantitative examination of the membership problem discloses the gigantic nature of the proposal. To try even 100,000 individuals before a 3-judge tribunal, allowing one hour per individual and dispatching eight cases per day, would consume the time of 375 judges for a period of four months. This includes no allowance for review or for the incidents of administration or for delay or other impediment. It is believed that the judges of the International Military Tribunal will be very slow to make the enormous declaration sought in the indictment unless it appears that suitable preparations have been made to carry out the legal consequences of the condemnation of the Nazi groups. Clearly the problem needs prompt study in order to bring it into manageable proportions. And it would patently be idle to proceed with the trial of membership cases unless some significant treatment had been settled upon for those convicted of membership.

12. It is evident that the prosecutor charged with responsibility as outlined in the paragraphs above will have to receive the constant and effective support of the Theater Commander, and

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in particular of the Office of Military Government. He would look to the army - G-2 - for the actual apprehension of those whom he designated as suspects and witnesses. The detention of apprehended persons would be a responsibility of the Theater Provost Marshal. The Chief of Counsel would proceed in close coordination with the Legal Branch of the Office of Military Government (U.S. Zone), which bears staff responsibility for the system of military governments courts and for reestablishing the German criminal courts. The Office of Chief of Counsel would arrange with the Information Control Division for a proper presentation of its program to the German nation, with the object of developing a favorable state of public opinion. Public relations should be conducted through the existing agency. Because of the political importance of the trial and punishment of Nazi criminals, the Chief of Counsel should consult the U.S. Political Advisor in the Theater. Coordination between the functions of the Chief of Counsel and those of the War Crimes Branch under the Theater Judge Advocate could best be effected by having one or more representatives of each on duty with the other. Liaison would have to be established with the authorities of the other zones of occupation, and with the Governments of the United Nations, for the apprehension and delivery of persons wanted as accused or as witnesses, and for the production of evidence.

13. In order that all those services which the military authorities must render to the Chief of Counsel may be planned for and made fully available at the time and place needed, it is desirable that the post of Coordinating Officer for war crimes be created within the office of Deputy Military Governor. This should be filled by a general officer with exceptional qualifications appropriate to the task. It would be a full-time job for the Coordinator and a small but able staff. His function would be to coordinate the work of all staff and operating agencies of the Theater insofar as they were called upon to render any service in respect of the war crimes within the scope of activity of the Chief of Counsel. The Coordinating Officer would not supplant any existing agency or undertake himself to perform their functions; he would be the one to whom the Chief of Counsel would look for making arrangements to meet his needs, and who would coordinate the action of the agencies of the Army and of the Military Government in responding to them. He would develop with the Chief of Counsel the conception of the operation in view, and then would plan for and cause to be worked out in detail the consequences of that operation so far as the Army and the Military Government were concerned. He would bring into conference the several agencies which must contribute their part to the execution of the entire scheme. And conversely, he would be the means of communicating to the Chief of Counsel the over-all objectives of the Military Government in their relation to the problem of Nazi criminality.

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14. The pressure in point of time for adopting and getting into operation a plan for discharging the responsibilities placed on the Theater Commander by JCS 1023/10 should be frankly admitted. The date set for the termination of military government in Germany practically fixes the time when trial of war crimes in military government courts should cease. It would seem anomalous to go on prosecuting by our own efforts and before our own tribunals after the date when in other respects the administration of government will have been handed over to the Germans. Consider still further the general psychological effect, at home and in Germany, of protracting our trial of war crimes beyond the summer of 1946. (It may be of interest that the Lord Chancellor expressed himself as strongly of the opinion that in the British Zone trials in such cases should not be carried on later than June 1946.) Consider too the date when it may be expected that the big case in the International Military Tribunal will be terminated. For planning purposes we should expect to wind up our prosecutions within say four months after that date. So short will this remaining period be that it is believed a very serious effort should be made to bring to trial, in military government courts, without awaiting the conclusion of the big case, as many cases as possible of the more serious Nazi crimes. It is believed that these cases could be presented to the public in such a way as to support, rather than to detract from, the universal interest in the major trial. It must be frankly recognized that if we wait until the big case is complete before we initiate other prosecutions, very little can be expected from our direct efforts beyond the trial of twenty-four Nazis and six Nazi organizations.

15. A concerted study should be undertaken at once--into which all interested staff agencies should be drawn--of the treatment and employment of persons held in custody because of being within the arrest categories. I am informed that we have made a commitment to the French to supply them with between 1,300,000 and 1,700,000 Germans, for labor. Ordinary German soldiers--not the members of the evil Nazi organizations--are being chosen for this hard lot. The result is that, as a dread winter approaches, comparatively blameless German soldiers are performing hard labor on short rations away from home--the less culpable portion of the civil population lives in cold and hunger and uncertainty--and the members of the SS etc. are held in comparative safety and comfort awaiting individual trials to follow the big trial and leading to some form of punishment to which so far little serious thought has been given. We may not bring individuals to trial for membership in criminal organizations until the criminal liability of the organizations has been adjudged. That puts the matter off till next spring. Then, assuming that the Tribunal gives judgment as sought in the indictment, countless individual trials would be required. It is evident that it would be disastrous, from a psychological point of view, to press for the condemnation of Nazi groups and then fail to do a thorough job of bringing home the consequence to the countless numbers involved. And when at long last their guilty membership had been established, what penalty would be imposed? The situation thus prescribed argues strongly for using the members of the Nazi groups and organizations for labor now, subject to their being recalled for trial by us, or to their being tried by the government to whom they had been delivered, whenever it may become desirable to try them.

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16. An acceptable performance of the task imposed upon this Theater will require an intelligent and inclusive conception of the entire problem and concerted action to carry the plan into execution with a minimum of cross-purpose or inconsistent movement. Resort should be had to regular conference among interested parties, under the leadership of the Coordinating Officer. Persons competent to advise upon German judicial institutions and upon the psychological aspect of the prosecution of Nazi criminals should be drawn into the work of planning and administration. The Information Control Division should be consulted and fully utilized in order that our efforts may be known and understood by the German people, and that their own responsibility may be effectively developed.

17. So large an enterprise calls for a very considerable increment of personnel, of outstanding ability, in every unit which must bear the load. Recruitment will be one of the major problems, both for the prosecutor and for the staff sections involved. All commitments are necessarily subject to the understanding that suitable personnel will be made available.

18. It is recommended that the following steps be taken in furtherance of the plan outlined above:

(a) Seek, in concert with the Legal Adviser of the Office of Military Government for Germany (US), the agreement of the Chief of Counsel to the arrangement outlined above or to such modification as may be worked out in conference.

(b) Next, present the resulting proposal for adoption by the Theater Commander. Action thereupon would include, inter alia,

(1) dispatch of appropriate messages to Washington outlining the proposal and requesting necessary authorization and action; and, anticipating approval,

(2) the development at once of an appropriate staff and organization for the prosecution of Nazi crimes, and the creation of the office of Coordinating Officer, and

(3) the initiation of such parallel staff action as would be essential to the support of the plan - e.g., expediting action within the Office of Military Government (U.S. Zone) for the creation of appropriate judicial machinery and for preparing the German courts and prosecutors for the discharge of the responsibility assigned to them.

(c) In any case, the disposition to be made of the members of the Nazi organizations now in custody, pending any judicial proceedings against them, should be studied at once.

Concur:

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