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21 May 1945

NOTE FOR JA FILE:

Subject: Conference on Division of Responsibility Among
Legal Agencies of Control Council, G-5 SHAEF
and this headquarters with particular reference to
trial of war criminals.

1. A conference was held in General Betts' office at 1600 hours 15 May, on the general subject of the allocation of responsibility for legal work among this section — i.e., the legal branch of the armed forces — the legal division of the US Group Control Council, and the legal branch of G-5, SHAEF, and more particularly on the division of responsibility for trial of war criminals. Present were General Betts, Col Hall, Col Fairman and Capt Bishop, all of this sec; Col Marsh (USGCC); and Col Hayden Smith (G-5, SHAEF).

2. Some discussion was had, apropos of an exchange of messages between General Clay and Assistant Secretary McCloy, on the relationship of Justice Jackson to the Theater Commander, the WD stating that Jackson will be subject to the control only of the President and not of the Theater Commander. General Betts pointed out that the Chief of the US Control Council will be not only (initially) Theater Commander but also a representative of the US Government, responsible only to the President and that at a later date the Chief of the US Control Council may well be a civilian. Since both he and Justice Jackson will derive their authority from the same source — i.e., the President — their relationship to each other must be settled at that level and cannot in any case be a matter of concern to the military.

3. Some discussion was had of the present role of each of the three legal organizations in the trial of war criminals, it being understood that no agreement could be made at present and that the ultimate allocation of responsibility is a matter for higher authority. These roles were roughly blocked out as follows:

a. Group Control Council: The Control Council will assume only such responsibility for trying war criminals as may be decided and directed at the governmental level. Present indications are that the Control Council's responsibility will be confined to those war criminals — principally major war criminals — who are to be tried by mixed tribunals for crimes not directed against a particular United Nation. The general idea, subject to change without notice, is that a mixed tribunal appointed by the Tripartite control group will try the half dozen or so topflight war criminals, probably on some such sweeping charge as conspiring to dominate the world by unlawful means and through the instrumentality of criminal organizations. Findings and sentences would be subject to approval by the Joint Control Commission. It is anticipated that the findings in such trials may serve as the basis of charges against less important members of the criminal organizations, such as the SS and the Gestapo — in other words, having established that the Gestapo is a criminal organization, it would be sufficient for the prosecution to charge and prove membership therein, leaving upon the defendant the burden of proving that his own participation was not criminal. The tribunals which will judge such cases appear not yet to be decided; conceivably, subordinate mixed tribunals will try those whose crimes cannot be

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localized and those whose main crimes were committed in a particular country will be returned to that country to be judged by its courts, in line with the Declaration made at Moscow in 1943.

b. The ultimate responsibility of Military Government Courts is but little more precise. At present it is the policy of Military Government to try before its tribunals only those violations of the laws of war which postdate occupation and are, therefore, in violation of the ordinances of Military Government (para 16, 17, Eclipse Memorandum No 18, 16 Jan 1945). It is probable (as outlined in previous memoranda of this Division) that Military Government courts have jurisdiction to try violations of the laws of war antedating occupation, certainly those which threatened the security or impaired the efficiency of US forces. However, Eclipse Memorandum No 18, above cited, while prescribing Military Government Courts as the normal forum for trial of such war crimes committed in territory in which Military Government has already been established, makes no mention of violations of this type antedating occupation — an omission which supports the provisional policy of G-5 SHAEP that such violations will not be tried by Military Government Courts. Col Smith stated that, if Military Government Courts were ultimately charged with the trial of violations of the laws of war (threatening the security or impairing the efficiency of our forces) which antedated occupation of the area in which they were committed, they would suggest that the War Crimes Branch of this HQ be responsible for the investigation and prosecution of such cases — to which Col Hall indicated that, assuming adequate personnel, his organization could handle the job.

c. The clearest jurisdiction and responsibility for trial is that of the Army's military commissions over persons whose violations of the laws of war threatened the security or impaired the efficiency of the forces under the command of the Army Group commander, whether committed before or after occupation. (Those committed after occupation will normally be tried by Military Government Court, as above indicated, but their jurisdiction of such offenses is expressly made concurrent with that of Military Commissions by par 17b of Eclipse No 18). This jurisdiction is in no wise novel or controversial, depending as it does upon the common law of war and having been frequently exercised during hostilities, and is expressly exempted from the various declarations of policy which postpone the trial of war criminals whose crimes did not threaten the security or impair the efficiency of our forces. It is not planned to expand the jurisdiction of these tribunals beyond that which they now exercise, although such expansion — to include trial of war criminals whose crimes were directed against allied nationals, for instance — would, in the view of this section, be proper as a matter of international law if deemed to be desirable policy.

d. It should be stressed that policy — as directed by SHAEP and Combined Chiefs of Staff — is at present to try only those war criminals whose violations threatened the security or impaired the efficiency of forces under the command of the Army Group Commander (and those whose violations of the laws of war are also in violation of existing ordinances of Military Government). Trial of other war criminals is still under consideration at the inter-governmental level and the foregoing discussion of potential responsibility is entirely speculative.

4. The broader question of overall legal responsibility was touched upon again in conclusion. It was understood that Col Marsh's organization will prepare a staff study and recommendations on the problem, which will be coordinated

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with Col Fairman, for this section, and Col Hayden Smith.

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