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11 May 1945

MEMORANDUM For: General BETTS

Subject: Jurisdiction to try violators of the laws of war

1. The question presented is: May the United States try by military commission Germans responsible for the mistreatment, in Germany, of

(a) Nationals of the United States?

(b) Nationals of allied or co-belligerent nations?

2. The answer to the first question is clearly in the affirmative, subject only to the qualification that the mistreatment must have been a violation of the laws of war -- i.e., that it must, directly or indirectly, have arisen out of operations of war including belligerent occupation. This would be true whether the victim had a military or a civilian status, so long as his confinement was incident to operations of war. The basic proposition that a belligerent may, if they fall into its hands, try and punish those who to its prejudice offend against the laws of war is the long established usage of nations, unquestioned by any substantial authority, although not expressly included in the Hague or Geneva Conventions/Pars 346c, 347, FM 27-10, Rules of Land Warfare; British Manual of Military Law, Ch XIV, sec 441; Ex Parte Quirin, 317 U.S. 1, 25-28 (1942); Dig. Op. JAG, 1912, p 1067; SPJGW 1943/3029, 26 Feb 1943, Bull. JAG, Vol II, No 2, pp 51, 54; SPJGW 1944/8771, 15 July 1944 (not published but copy available in files of this section); SPJGW 1943/17671, 13 Dec 1943 (same); Winthrop, Military Law and Precedent (2d ed 1920) pp 793, 838; Oppenheim, International Law (6th ed, 1940) p 451; Spaight, War Rights on Land (1911) pp 280, 462; Garner, International Law and the World War (1920) Vol II, pp 469, 476; Hall, International Law (8th ed 1924) sec 135.

3. The question whether a nation may punish violations of the laws of war which are not directed against its own operations or its own nationals or property and which are not committed on its territory is considerably less clear, and discussion has sometimes been confused by a failure to distinguish between limitations on jurisdiction imposed by international law and those which result simply from the legislation of the nation concerned (See, e.g., Garner, op cit supra, pp 478-480; Fauchille, Traite de Droit International Public (1921) secs 1236(8)(9)(10).) If it is decided that the United States may punish the acts in question, a military tribunal would be the appropriate tribunal.

4. A recent opinion of the Judge Advocate General (SPJGW 1943/17671, 13 Dec 1943) speaks directly to the question. On the facts as there understood, German soldiers had executed without trial (in violation of the laws of war) certain Italian civilians, resident in Italian territory occupied by

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Germany, accused of transmitting information to United States forces in combat with the Germans. The Italian Government was a cobelligerent of the United States. Certain Germans thought to be guilty of the act were captured and held by the US forces. The Judge Advocate General held that either a tribunal of the Italian Government or a military tribunal of the United States would have jurisdiction to try and punish. (As to the Italian courts, no serious problem appeared, since the crime was committed on Italian territory against Italian nationals and since the Italian penal code expressly provided for such jurisdiction.) As to the jurisdiction of the United States, the reasoning of the opinion went principally upon the ground that "the right to punish for such an offense against an ally proceeds upon the well-established principle that allies or cobelligerents constitute but a single side of an armed struggle". However, the breadth of this view is somewhat limited by the emphasis placed upon the direct interest of the United States in punishing the offense, since it was its military operations rather than those of its Italian cobelligerent which were directly affected.

5. The opinion of the JAG, moreover, states unqualifiedly a considerably broader proposition which must, however, be regarded as dictum. After quoting an earlier opinion of the JAG (SPJW 1943/14218, 30 Oct 1943), advisory and anticipatory in nature, to the effect that "jurisdiction in cases of offenses against the law of war is personal rather than territorial and is largely determined by physical custody of the accused, or lack of it", the JAG employs the following very broad language:

"The fundamental and all-important fact is that the persons involved are suspected of having committed crimes of an international character in violation of the international laws of war. An offense against the laws of war is a violation of the law of nations, and a matter of general interest and concern. Whether committed by their own forces or those of the enemy, all civilized belligerents have an interest in the punishment of offenses against the laws of war In the present situation the United States has jurisdiction because it has the physical custody of the accused and as its military courts have jurisdiction over such offenses."

6. In the opinion of the undersigned, the case of the captured commandants of German internment camps is not fundamentally different from that before the Judge Advocate General. It is supposed that among the persons confined in such camps were a substantial number of civilian nationals of allies or cobelligerents of the United States, incarcerated without trial, subsequent to the entry of the United States into the war, for activities favorable to the war effort of the United States. While such persons may have committed acts injurious to the German occupant for which they would properly be punishable as "war traitors", yet even so, such punishment could not lawfully be inflicted without trial (par 356, FM 27-10, Rules of Land Warfare, C XIV, par 449, British Manual of Military Law), nor be cruel or inhuman in character (par 46, FM 27-10). If any of the internees were entitled to treatment as prisoners of war the offense as to them is even more clear. If the above precedent established by the Judge Advocate General is controlling, it would appear that a United States military commission would have jurisdiction to

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try the commandant of such a camp in which allied or cobelligerent nationals, incarcerated during the period of our hostilities, had been the victims of violations of the laws of war.

7. However, the views of the Judge Advocate General appear to mark something of a departure from an earlier official attitude of the United States Government. The same question was, of course, considered during the course of the Peace Conference in Paris after the last war, and particularly by the Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties. The American representatives, headed by Secretary of State Lansing, made certain formal reservations to the recommendation of the Commission that mixed tribunals be employed for the trial of war criminals. The memorandum supporting the American reservations stated that "the jurisdiction of a military tribunal over a person accused of the violation of a law or custom of war is acquired when the offense was committed on the territory of the nation creating the military tribunal or when the person or property injured by the offense is of the same nationality as the military tribunal", and again that "It seemed elementary to the American representatives that a country could not take part in the trial and punishment of a violation of the laws and customs of war committed by Germany and her Allies before the particular country in question had become a party to the war against Germany and her Allies; that consequently the United States could not institute a military tribunal within its own jurisdiction to pass upon violations of the laws and customs of war, unless such violations were committed upon American persons or American property, and that the United States could not properly take part in the trial and punishment of persons accused of violations of the laws and customs of war committed by the Military or civil authorities of Bulgaria or Turkey." (Quoted in Hyde, International Law Chiefly as Interpreted and Applied by the United States (1922), Vol II, pp 850, fn 3, 851, fn 4) The dictum of the opinion of the Judge Advocate General goes beyond this view, in that it would sustain the trial by a United States military commission of one who had mistreated an allied or cobelligerent national, though that opinion would seem to recognize that our jurisdiction would go back in time only to those whose mistreatment was suffered by reason of their acts favorable to our war effort and therefore subsequent to our entry into the war. It should be noted that the opinion of the JAG makes no reference to the views of the American representatives at the Peace Conference and may have overlooked them. It may further be noted that a subsequent memorandum of the War Plans Division for the JAG (SPJGW 1944/8771, 15 July 1944) deliberately avoids the expression of any opinion on the question as to whether a nation having custody of an alleged violator of the laws of war may try him if his offense did not directly affect that nation's army, citizens or territory.

8. Both opinions, however, state positively that a nation having physical custody of a violator of the laws of war may properly turn him over to the custody of an ally or cobelligerent having jurisdiction to try him. "... Regardless of what belligerent has jurisdiction to try the war criminal, any belligerent captor may detain him, and if necessary turn him over to the competent ally or cobelligerent for trial . . ." (SPJGW 1944/8771, 15 July 1944). The United States might, therefore, with perfect propriety turn over to the government of France or Russia, for example, the commandant of a German internment camp in which French or Soviet nationals had been victims of violations of the laws of war. In view of the primary interest of such nations and their expressed desire to try persons guilty of violations of the laws of

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war against their nationals, it is believed that such disposition of camp commandants now in US custody would be sound policy. It would also be consistent with the spirit of the Moscow Declarations of 19-30 Oct 1943, according to which German war criminals whose deeds can be localized "will be sent back to the countries in which their abominable deeds were done in order that they may be judged and punished according to the laws of these liberated countries. . .". While in the case of offenses against nationals of the allied country on German territory the basis of the jurisdiction would be personal rather than territorial, the general policy may be extended to that case.

9. It is possible that the appropriate legal authorities of the Military Government of Germany will be of the opinion that such offenders may also be tried by Military Government courts, in their capacity as successors to the German Criminal courts. Clearly such courts have jurisdiction of the person and over the place of the offense. To the extent that the offenses were denounced by German law when committed they are clearly punishable. It should be noted that the Weimar Constitution which, to the best of the knowledge of the undersigned, was never annulled by the Nazis, made international law a part of German law. More serious problems would be presented in cases in which the acts in question represented only an abuse of power conferred by German law or were expressly sanctioned thereby. It is assumed that the entire problem is under consideration by the appropriate authorities of Military Government.

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Concur:

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