

SECRET

Copy/kk

12 January 1945

MEMORANDUM to General Betts:

Subject: (1) - Par 3, SHAEF, Directive for Military Government of Germany Prior to Defeat or Surrender, 9 Nov 1944, as amended 15 Dec 1944.
(2) - Par 17, SHAEF Directive to Army Groups and Communications Zone, Subject: War Criminals and Security Suspects, Dec 1944.

1. Par 3, Sec XV, Annex III of the SHAEF Directive, Subject (1) above, provides, in part:

"The jurisdiction of such Military Government Courts over persons and offences shall be as provided in such Ordinance," (Military Government Ordinance No 2) "provided that, as a matter of policy, until further instructions, violations against the laws and usages of war will not be tried except with respect to persons charged with the commission of such offences which threaten to impair the security of your forces or the effectiveness and ability of such forces or members thereof, or within the occupied territory subsequent to its occupation."

2. Par 16 of the SHAEF Directive, Subject (2) above, provides:

"Pending further instructions, you will not try war criminals, except those persons who are accused of such violations of the laws and customs of war as threaten the security, or impair the efficiency, of the forces under your command."

It is further provided, by Par 17 of the same Directive:

"In those areas of GERMANY where Military Government has been established, such persons will be tried by Military Government Courts, except where the crime was committed in unoccupied territory and the criminal is apprehended in occupied GERMANY, when trial may be by Military Government Court or Military Commission/Tribunal, at your discretion. All offences against the proclamations, ordinances and regulations of Military Government, will be tried by Military Government Courts." (underscoring added)

3. The wording of Par 3, quoted above, suggests the question of whether such a Military Government Court may exercise jurisdiction over a war crime committed in the occupied territory prior to occupation, and the further question of whether such a court may properly try a war criminal, apprehended in or brought into occupied territory, for an offense committed in unoccupied territory. The underscored portions of Par 17, quoted above, raise only the latter of these two questions.

4. The jurisdiction of military commissions which are appointed pursuant to Ltr, Hq, European Theater of Operations, US Army, Subject: "Authority

SECRET

SECRET

to Appoint Military Commissions", AG 334 OpGA, 19 Nov 1944, as amended, and Ltr, Hq, European Theater of Operations, US Army, Subject: "Authority to Appoint Military Commissions", 24 Dec 1944, and similar authorizations, "is personal rather than territorial and is largely determined by physical custody of the accused, or lack of it." (SPJGW 1943/14218 30 Oct 1943) The Theater Commander, though, has restricted the cases to be tried by such commissions to those involving espionage or violations of the laws of war which threaten or impair the security of the appointing commander's forces, or the effectiveness or ability of such forces or members thereof. Substantially the same restrictions are imposed by the Supreme Commander in the portions of the Directives quoted in pars 1, 2, above.

5. In determining the jurisdiction of Military Government Courts created under the authority of the Military Government as a result of occupation, different considerations must be taken into account. The little authority that exists on the question of the jurisdiction of military commissions indicates that those commissions set up by and operating under the authority of a military government resulting from belligerent occupation may not properly assume jurisdiction over "offenders whose crimes were committed prior to the occupation" or over "an offense committed without such territory" (Winthrop, Military Law and Precedents, 1920 reprint, pp 836, 837).

6. Par 2a, Art II of Ordinance No 2, Military Government - Germany (Directive for Military Government, op cit, p 34) provides that Military Government Courts shall have jurisdiction over "All offences against the laws and usages of war" and par 2b of the Ordinance provides for jurisdiction of violations of promulgations of the Military Government. Since Military Government Ordinance No 1 (Directive for Military Government, op cit, p 30), defining crimes and offenses, makes all violations of the laws of war offenses against the Military Government, there is some reason to believe that said par 2a may have been intended to give jurisdiction to the Courts to try offenses against the laws and usages of war committed prior to occupation or outside the occupied area, and par 2b to give jurisdiction over those cases arising in occupied territory subsequent to occupation. The Ordinances, however, are promulgated "By Order of Military Government", and provide that they shall become effective on the date of first promulgation, and it is believed that these terms limit the jurisdiction of the Military Government Courts to the trial of offenses committed in the occupied territory subsequent to occupation - this in accordance with the usual concept of military government tribunals. In this connection, par 5b, Document XII, Appendix C, (SHAEP) Technical Manual for Legal and Prison Officers (undated), in commenting on Ordinance No 2 and the jurisdiction of Military Government Courts over offenses, states:

"The jurisdiction of Military Government Courts only arises in respect of offenses committed subsequent to occupation. Offenses committed prior to occupation must be left to be dealt with by German Courts, unless they come under the category of War Crimes. The manner in which war criminals in general are to be dealt with will form the subject of separate instructions."

SECRET

SECRET

This comment would seem to indicate that at the time it was written, Allied authorities probably contemplated using Military Government Courts for the trial of only those cases normally within the jurisdiction of a tribunal established as the result of belligerent occupation.

7. Do these limitations on the jurisdiction of courts established as a result of occupation prevent such courts from sitting also as military commissions under the common law of war to try offenses against the laws and usages of war which may have occurred outside the occupied territory, or prior to occupation? "In the absence of any statute prescribing by whom military commissions shall be constituted, they have been constituted in practice by the same commanders empowered...to order general courts-martial..." (Winthrop, op cit, p 835). In this theater, however, the appointment of such commissions and their jurisdiction have been limited as stated in par 4, above. The Supreme Commander has now, by the Directives which are the subject of this memorandum, provided that Military Government Courts may try cases involving violations of the laws and usages of war even though such offenses were committed prior to occupation or outside occupied territory. So far as the armed forces of the United States are concerned, "The jurisdiction exercised by military commanders in the administration of military government is upon the authority of the President as commander-in-chief of the Army and Navy" ("The Law of Military Occupation, Supplement to Constitutional Powers and Limitations", Dept of Law, US Military Academy); and "a court established by...the commanding general...will...be presumed to have been authorized by the President" (Mechanics and Traders Bank v. Union Bank (22 Wall 276) - quoted in fn 2, p 5, A. W. Green, "Military Commissions and Provost Courts"). Since the commander-in-chief has authority to establish the two types of tribunals under discussion, in order to carry out the powers and responsibilities of a belligerent, there would seem to be nothing to prevent the military commander in charge of the forces in a war theater from constituting tribunals with authority to act in the dual capacity of a Military Government Court and common law of war military commission; and utilizing such tribunals for the trial of offenses against the laws and usages of war committed prior to occupation or outside the occupied area, as well as those violations of the laws and usages of war committed within the occupied area subsequent to occupation. And it would seem that the fact of referring to such a tribunal cases involving offenses against the laws and usages of war committed prior to occupation or outside the occupied territory would be tantamount to a grant of authority to that court to try those cases.

8. It is submitted that the grant by a military commander of authority to Military Government Courts to try a class of cases not normally triable by courts set up as a result of occupation might be analogized to the authority granted by Congress to the courts in the District of Columbia. Congress has authority to create Federal Courts in the District and the further authority to exercise exclusive legislation over the area. In the exercise of this dual authority, Congress may clothe the courts of the District not only with the jurisdiction and powers of the Federal Courts in the Several States, but also with such authority as a State may confer on her courts, i.e., the courts may be vested not only with judicial powers, but also with legislative duties. (Constitutional Powers and Limitations, Dept of Law, US Military Academy, pp 37-40). Since the courts being set up in Occupied Germany are not statutory courts, it would seem that they may be clothed with authority and functions deemed essential or helpful for carrying into execution the various different powers of the President as Commander-in-Chief.

SECRET

SECRET

9. Thus, while in the Ordinance creating Military Government Courts jurisdiction may have been limited by place and time requirements (i.e., within the occupied territory, subsequent to occupation), with the result that war crimes committed prior to occupation or outside of the occupied territory could not be tried by a Military Government Court, as such, there appears to be no valid objection to conferring upon such courts (as the Supreme Commander has done in the subject Directives) authority to sit as military commissions under the common law of war and try cases involving war crimes committed prior to occupation or outside the occupied territory. Such cases, however, should not be tried as a violation of an enactment of the Military Government, but, rather, as a violation of the laws and usages of war. Because of the custom and usage by virtue of which military commissions are composed of 3 or more members, and the fact that all war crimes are punishable by death, those offenses against the law and usages of war which are to be tried by a tribunal which also sits as a Military Government Court should be tried by a court consisting of not less than 3 members, and empowered to impose death penalty.

10. In summary - Regularly constituted Military Government Courts may be empowered to try any offenders for any offenses properly triable by a military commission appointed under the common law of war by the military commander constituting the Military Government Court; and may be empowered by such military commander by formal general grant of jurisdiction, by informal special grant of jurisdiction, or by reference of charges to trial.

DONALD S. GRAHAM,
Capt, JAGD.

Concur:

NORMAN D. LATTIN
Lt Col, JAGD
Acting Chief, International Law Div.

Approved:

ED. C. BETTS,
Brigadier General, USA,
Theater Judge Advocate.

SECRET