JOINT MEMORANDUM BY SIR WILLIAM MALKIN, LEGAL ADVISER TO THE FOREIGN OFFICE, AND COLONEL ED. C. BETTS, J.A.G.D., THEATER JUDGE ADVOCATE, E.T.O., U.S.A.

1. We have been instructed to consider the questions arising on paragraphs 5 and 11 of the memorandum on "Maintenance of Law and Order": A.T.(E)/P(42)21. We have had several discussions on the subject, and find ourselves in agreement on the following observations.

PARAGRAPH 5 OF A.T.(E)/P(42)21.

2. No consideration is here given, nor is any necessary to be given, to the legal authority for Allied military forces to govern Axis (enemy) territory captured from Axis forces and occupied. Such capture and occupation of Axis territory would ipso facto suspend the enemy's civil government there; and it would become obligatory on the occupying Allied forces to exercise the function of government in maintaining public order through military government, until a capable substitute government is provided by the Power responsible for preservation of public order. Under such circumstances, as is recited in Article 43 of Annex to Hague Convention No. IV of October 18, 1907:

> "The authority of the legitimate Power having in fact passed into the hands of the occupant, the latter shall take all measures in his power to restore, and ensure, as far as possible, public order and safety, while respecting unless absolutely prevented, the laws in force in the country." (Paragraph 282, WDFM 27-10, Rules of Land Warfare). (All occupied countries of Europe and Axis and Allied Powers are signatories).

The exercise of such powers of military government is a command responsibility, and full legislative, executive, and judicial authority is vested in the commanding general of the theatre of operations. By virtue of his position, he is the military governor of the occupied territory and his supreme authority is limited only by the laws and customs of war (Rules of Land Warfare), and by such instructions as he may receive from higher authority. (Paragraph 5, WDFM, 27-5, Military Government).

3. Respecting the territories of Europe to be recovered by Allied forces from invading and occupying Axis forces - for the purpose of determining the authority Allied force commanders may exercise over such territory and the inhabitants thereof - it is believed that such European territory may be divided into three categories, i.e.:

> Category One: territory of a European Power from which territory, by act of government (as distinguished from terms of surrender given by a military commander without sanction of his government), such Power has withdrawn its governing authority and sanctioned the substitution of Axis Power military authority - such as in "occupied" France.
>
> Category Two: territory of a European Power over which the governing authority of such Power has been allowed to function under surveillance or by sufferance of Axis Power's military authority - such as in Denmark or "unoccupied" France.
>
> Category Three: territory of a European Power from which territory its governing authority has been ousted and Axis Power's military authority substituted without sanction by act of government of such European Power - such as in Holland, etc.

4. Category One territory, for purposes of these considerations, may properly be treated as if enemy territory captured from the enemy and occupied by force of arms - subject to the authority of the military commander, to be exercised by him through military government. Supporting the foregoing view, in Hall's International Law, Eighth Edition (1924), at page 607, it is stated that:

> "....when a place is militarily occupied by an enemy the fact that it is under his control, and that he consequently can use it for the purposes of his war, outweighs all considerations founded on the bare legal ownership of the soil."

Applying this principle, the Judicial Committee of the British Privy Council in the Gutenfels (1916) 2 B. & C. P. C. 36, held that having regard to the relations between Great Britain and Egypt, to the anomalous position of Turkey, and to the military occupation of Egypt by Great Britain, Port Said was a port enemy to Germany.

5. An historical pattern for such treatment is to be found in Japan's treatment of the Port Arthur territory captured on January 2, 1905, from Russia, occupied and administered by the Japanese Army through a military government (until the Portsmouth Peace Treaty of September 1905). At the time of such capture, by act of government, Sino-Manchukuo governing authority had been withdrawn from this Manchurian territory of Port Arthur, and Russian authority thereover had been substituted; and no state of war existed between Japan and China or Manchuria (Chapter X, International Law, applied to Russo-Japanese War, Takahashi, 1908). Similarly, at the time of capture from Axis Powers and occupation of Category One territory e.g., France), by act of government, (French) governing authority had been withdrawn therefrom and Axis Power military authority thereover substituted; and (it is assumed) no state of war exists between (France) and the Allied Powers. It does not appear that there is any legal justification for distinction between the propriety of administering the territory of Port Arthur by Japan through military government and the propriety of administering Category One territory (e.g., occupied France) by Allied Powers through military government.

6. As a consequence, it is proper that commanders of Allied forces invading, capturing from Axis Powers and occupying Category One territory assume the command responsibility of establishing and exercising military government over such territory and the inhabitants thereof. (The exercise of such responsibility may be through the aid of native officials and institutions of government, to the extent found to be trustworthy agencies). In respect of this responsibility to restore and ensure, as far as possible, public order and safety, Allied force commanders have no option.

7. Nevertheless, the extent to which Allied force commanders may find it desirable in practice to establish and exercise military government is partly a a question of policy and may depend upon the circumstances of the case. We shall revert to this point hereafter.

8. Category Two territory in principle may be treated as Category One territory. Respecting this, Hall, immediately following the statement of principle quoted above, adds:

> "... In like manner, but with stronger reason, where sovereignty is double or ambiguous a belligerent must be permitted to fix his attention upon the crude fact of the exercise of power."

9. In respect of Category Two territory, however, Allied force commanders may find it possible to meet their responsibilities for restoring and ensuring public order and safety through agencies of the local government freed from the dominance of Axis Powers control. In such event, it may be unnecessary for Allied force commanders to do anything more than to preserve unimpaired the legal fact of their authority to be exercised in such degree as circumstances may require. Similarly, in varying degrees, it may be expected that the local governments of the areas freed from Axis Powers domination will respect the authority of Allied force commanders and assist their administration of the territory through military governments - exercising such functions of government as the proximity of the fighting front and the attitude of the public require.

10. In practice, it seems probable that Category Two territory may approximate either to Category One or Category Three according to the circumstances and conditions prevailing at the time any such territory comes under control of Allied force commanders. Both in the case of "unoccupied" France and Denmark those circumstances and conditions might be such as to approximate the case either to that of "occupied" France on the one hand, or of Holland on the other.

11. Category Three territory presents somewhat different problems. It is not believed that, initially, Allied force commanders will be obligated to assume responsibilities for administering civil government in such territory. It may properly be expected that, upon the Axis military being ousted from Category Three territory, the local native government in such territory will assume its civil functions, in keeping with its responsibility to exercise its civil powers of government to restore and ensure public order and safety. To the extent that such civil administration is capable of and does restore and ensure public order and safety there will be no need for Allied force commanders to undertake such responsibility - initially, not properly theirs. However, to the extent that such native governments fail so to assume and exercise such civil powers will it become obligatory on Allied force commanders to exercise their command responsibilities through military government - in substitution for impotent native civil government.

12. Let it here be specially noted that under the law of military necessity Allied force commanders, under all circumstances, without regard to time or place, may take all measures, recognised as proper by international law, requisite to the security of their forces and ensuring the performance of their mission - by way of self-defence. These powers are in addition to those which may be exercised through military government when administering civil government over territory in which they are responsible for restoring and ensuring public order and safety.

13. Category One territory conditions provide the Allied force commanders responsible for establishing and exercising military government with full legislative, executive and judicial authority as heretofore pointed out. Conformable thereto, such commanders and the forces under them may exercise all the authorities and have all the immunities recognised in international law as inhering in military government - among which are the power of requisition, freedom from taxation, and extraterritoriality from the jurisdiction of courts civil and criminal of the territory (which, if allowed to function, do so with the authority of the military government and, of necessity, are subject to orders of the military commander administering the government). Wherefore, it is not necessary to enumerate or specify all the powers and authority of such a government in any draft of understanding between Allied force commanders and any representatives or nationals of the country concerned (e.g. France) who may be available. However, it would be desirable, if political conditions permit, to have such understandings, enumerating certain powers and authorities to be exercised by Allied force commanders, as may be agreed upon with such representatives or nationals without surrendering powers and authority of such commanders not therein enumerated.

14. The observations in paragraph 11 above about Category Three territory may well also be applicable to Category Two. In both cases, therefore, it may be desirable to provide (by agreement between Allied force commanders and the appropriate governmental authorities) for recognition of the right of requisition, freedom from taxation, and enjoyment of extraterritorial privileges and exemption from the jurisdiction of, and immunity to, processes of the courts, civil and criminal, of the territory.

15. However, in case such expectations may not be acted upon, or, even though initially acted upon, they do not materialise, and such native government fails to assume and exercise such civil powers ensuring public order and safety - Allied force commanders may exercise their command responsibility through military governments, as if in Category One territory. Under these circumstances there will be no necessity for an agreement enumerating the powers and authority of Allied force commanders. They will enjoy, ipso facto, all such as will inhere in them in Category One territory, above mentioned.

16. It results from the above that, certainly in Category Three, and possibly in Category Two or even Category One cases, we have to reckon with the likelihood that an Allied or friendly government, or part of it, will return to the occupied territory, or be established in it, as soon as the military situation permits. It will naturally desire to re-establish and exercise its authority over the territory, and to direct the operations of the local officials, so far as this may be compatible with military requirements. It appears moreover that, subject always to these requirements, the Allied force commander would wish this to be done; for he would presumably be glad to be relieved to the greatest practicable extent of the responsibility for the administration of the occupied territory; and not only that adminstration, in so far as he remains responsible for it, but the actual conduct of his military operations, will be greatly facilitated if he enjoys the willing cooperation of the Allied government concerned and the local authorities and population, and if the administrative measures which he finds it necessary to take are operated, so far as possible, through the machinery with which the local inhabitants are familiar. The more the necessary powers of the commander are exercised through the medium of the local law, government and officials, the better.

17. The question then is as to the technical method by which this result can be attained. We can see two possible procedures.

18. (A) It might be possible for the Allied or friendly government to declare a state of siege (or whatever corresponds thereto under their municipal law) in the occupied territory and to subordinate the local officials and inhabitants to the authority of the Allied force commander. Whether such action would cover all the requirements of the commander it is impossible to say except after an expert examination of the law of each Allied or friendly country concerned. If it did, this procedure would possess the following advantages:

(i) The actions taken by the Allied force commander and those acting under his direction would be sanctioned from the outset by the municipal law of the country; their validity would not be subject to question in the local courts, and there would be no need for their subsequent validation by some such process as an act of indemnity. This point, though not important as regards the commander himself and the members of his forces acting under his direction, on account of their immunity from the jurisdiction of the local courts, might possess considerable importance as regards local officials or other inhabitants who acted under the direction of the commander.

(ii) The fact of the commander's directions being carried out through the medium of the local law and its agencies, with which both the local officials and the inhabitants would be familiar, should considerably facilitate their operation without difficulty or friction.

This course may, however, encounter the following objections:

(i) The municipal law of the country concerned might not permit of the powers in question being conferred upon a foreign commander.

(ii) Even if it did, the Allied or friendly government might be unwilling for political reasons to take this step.

(iii) From the legal point of view (of the Allied force commander) objection might be felt to his powers apparently being conferred upon him by the government of the country instead of being derived from his position as the commander of a force in occupation. In case such objection obtains, the alternative course (B) (paragraph 20) would be preferable.

20. (B) The alternative course would be for the commander to act under his own authority and to issue any necessary proclamations, ordinances, etc., in virtue of that authority, but for his action to be publicly supported, and obedience to it enjoined on the local population, by the Allied or friendly government concerned. For instance, the sovereign or government of the country might issue something in the nature of a manifesto announcing that while the actions of the commander were taken under his own authority they were taken with the full knowledge and approval of the government, that all officials were to cooperate in carrying them out so far as they might be required to do so, and that all the inhabitants were to comply strictly therewith and would be liable to penalties for failure to do so. In cases where the commander or an officer under his direction found it necessary to take action in a particular locality, this could be supported by the issue of a corresponding announcement by the appropriate local authority, such as the prefect or mayor.

21. Whether such action by the Allied or friendly government concerned should be reinforced by their immediately enacting legislation validating the action of the commander and persons acting under his authority would be a matter for consideration in each case. But at some stage, such legislation would probably be necessary to protect local officials or inhabitants who had carried out the directions of the commander, and it should be definitely agreed with the Allied or friendly government that any necessary steps to this end should be taken by it.

22. Whether course (A) or course (B) is adopted, the question will arise whether offences against the enactments of the commander should be tried by military tribunals of the occupying forces or by the local courts. It would probably be desirable to make use of the latter to the greatest extent compatible with the security of the occupying forces. This, however, is eminently a matter to be considered in consultation with the Allied or friendly governments concerned.

23. It is obvious that both the principle and details of the arrangements to be made will require to be studied, so far as circumstances permit, in consultation with the Allied or friendly governments concerned, if the advantage of the hearty collaboration of the local inhabitants is to be secured. It would be very desirable, provided that military considerations permit, if the proclamations and/or enactments to be issued by the commander could be worked out in this way in advance.

24. In order to assist in this task, there is attached herewith the draft of a proclamation (Annex I) which might suitably be issued by an American commander upon invading territory of any category. The publication of such proclamations would be more likely to serve their purpose of securing the friendly cooperations of the local inhabitants, if promulgated to them through some medium in which they have confidence and are traditionally accustomed to respect as a source of authority. If no such medium is available, then promulgation should be through such agency as will tend to make cooperation by the local population respectable as a patriotic effort for the restoration of the authority of their government and the freedom of their country from the invaders - giving a sort of guarantee of the good faith of the Allied force commander's proclamation. Herewith as Annex III, to be modified as indicated in Note 3 thereof, is a suggested form for such promulgation. This is only given as an indication of what such a document should contain, since the Allied or friendly government would presumably wish to prepare their own draft.

25. If, upon invading territory of any category, it becomes necessary for Allied force commanders to assume and exercise, through military government, the powers of civil government incident to their command responsibility, because of an impotent native civil government, Allied force commanders should issue proclamations which, if issued by an American commander, may be substantially in the form of Proclamation No. 2 hereto attached (Annex II). The publication of such proclamations would be much more palatable to the native population, and the military government established, as therein provided for, would be less resented and more favoured by the local population, if such proclamations were promulgated through the same reassuring, friendly medium as Proclamation No. 1 may have been promulgated. In case such medium is the lawful government of either Category Two or Category Three territory, then it would be well to embrace in such proclamations some such recitals as are set out in Note 2 of Annex III herewith - provided merely as a suggestion.

(Among the objects to be served by such recitals (sub-paragraph a) through the governing authority, it is hoped, would be the validation and legal sanction of acts of the native population cooperating with the Allied force commanders and their military governments - immunising them against liability therefor; which may be exacted through court actions after Allied forces are withdrawn.)

26. Either contemporaneous with, or immediately following, the publication of Proclamation No. 2, ordinances for the government of such territory should be published, upon authority of the Allied force commanders governing in that territory. A comprehensive form for such ordinance is to be found in Appendix V, U.S. War Department, FM 27-5, Basic Field Manual, Military Government.

27. One particular point which will require consideration in consultation with each Allied or friendly government concerned, will be that of the legislation enacted in the occupied territory by the Germans. In our view, such legislation would cease to have effect on the termination of the German occupation; but (i) it is possible that it may be desirable to maintain certain particular enactments in force, (ii) it would in any case be desirable that the position of the German legislation should be made plain to the local population. The question whether the necessary steps to this end should be taken by the Allied or friendly government concerned (if available), or by the commander of the occupying forces, should be considered, in advance if possible, in consultation with the Allied or friendly governments concerned.

PARAGRAPH 11 OF A.T.(E)/P(42)21.

28. The principle that a force in occupation of territory possesses exclusive jurisdiction in internal matters over its members, and that these are exempt from at any rate the criminal jurisidction of the local courts, is well established in international law. It appears however, that agreements with the Allied or friendly governments concerned, laying down the precise scope of these privileges and immunities, would be very desirable, and those governments are likely to expect this to be done, particularly as most of them have had the experience of negotiating agreements of this nature in regard to their forces in the United Kingdom. The Norwegian Government have in fact already approached the British Government in the matter.

29. Such agreements should recognise the exclusive jurisdiction of the occupying military authorities over their forces in matters of internal discipline and administration. As regards the jurisdiction of the local courts, it would be desirable, as regards Phase 1 and Phase 2,* to secure that these courts should exercise no jurisdiction over the occupying forces or their members, either in criminal or civil matters. In the case of territory occupied by Allied forces after the eviction of the enemy, such exemption would be fully in accordance with international law. It is thought unlikely that in these two phases civil claims would arise, except where the responsibility really lay with the government of the occupying force, and we assume that such cases would be dealt with by claims commissions which those governments would set up in the occupied territories.

* See paragraph 2 of A.T.(E)/P(42)21.

30. In Phase 3,* the position would probably be the same as regards criminal jurisdiction, but it would be necessary to make provision for civil claims against individual members of the forces, by which we mean claims where the government could not be held responsible and which could not therefore be dealt with by claims commissions. Such claims could not be dealt with by the military tribunals of the occupying forces, and, in the interest of good relations between those forces and the local authorities and inhabitants, some means of dealing with them will have to be found. If military considerations permit, it would be a satisfactory solution if the jurisdiction of the local courts over individual members of the occupying forces were admitted in such cases, subject to arrangements which would ensure that members of the forces were not arrested or imprisoned on account of failure to meet a civil debt. Arrangements on these lines are now being worked out in regard to the American forces in the United Kingdom. If, in any case, the occupying military authorities felt unable to accept such an arrangement, it would be necessary to consider what other solution could be found, since it seems clear that provision for dealing with such civil claims must be made in some way or other.

31. If agreements on the above line are made with the Allied or friendly governments concerned, it might be that they should contain provisions as regards the fiscal, etc., immunities and privileges of the forces in occupation - see paragraphs 13 and 14 above and sub-paragraphs a, b, c and d of Note 2 to Annex III.

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