THE GENERAL BOARD

United States Forces, European Theater

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LEGAL PHASES OF CIVIL AFFAIRS AND MILITARY GOVERNMENT

MISSION: Prepare Report and Recommendations on Legal Phases of Civil Affairs and Military Government.

The General Board was established by General Orders 128, Headquarters European Theater of Operations, US Army, dated 17 June 1945, as amended by General Orders 182, dated 7 August 1945 and General Orders 312 dated 20 November 1945, Headquarters United States Forces, European Theater, to prepare a factual analysis of the strategy, tactics, and administration employed by the United States forces in the European Theater.

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APO 408

LEGAL PHASES OF CIVIL AFFAIRS AND MILITARY GOVERNMENT

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THE GENERAL BOARD
UNITED STATES FORCES, EUROPEAN THEATER
APO 408

LEGAL PHASES OF CIVIL AFFAIRS AND MILITARY GOVERNMENT

PART ONE

CIVIL AFFAIRS

CHAPTER 1

INTRODUCTORY

1. Definition.

a. The following is quoted from Section I--1, Army and Navy Manual of Military Government and Civil Affairs, 22 December 1943:[1]

"b. Occupied Territory. The term 'occupied territory" is used to mean any area in which military government is exercised by an armed force. It does not include territory in which an armed force is located but has not assumed supreme authority.

"c. Civil Affairs. The term 'civil affairs' is used to describe the activities of the government of the occupied area and of the inhabitants of such an area except those of an organized military character. 'Civil affairs control' describes the supervision of the activities of civilians by an armed force, by military government, or otherwise. The term 'civil affairs officers' designates the military officers, who, under the military governor, are engaged in the control of civilians."

b. In the course of European operations, the definition of "civil affairs" became obsolete. As Allied forces liberated Northwest Europe, civil affairs officers were deployed for liaison with civil authorities to promote success of military operations, including assistance to the civil authorities in reviving the economy of the liberated peoples. This function became the implication of the phrase "civil affairs," which was expelled, consequently, from the lexicon of Military Government. As personnel was withdrawn from "civil affairs" operations in liberated Europe for deployment in Germany, it became personnel of "Military Government." The staff advisors upon "civil affairs" in liberated territory became "military government officers" of the units advancing into Germany. Hence, Part One of this report, with its title, "Civil Affairs," relates to operations in liberated areas of the European Theater.

2. Training and Assignment of Civil Affairs and Military Government Legal Officers.

a. Civil affairs training began in the United States. The basic training of all civil affairs officers was in the School of

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1. FM 27-5, OPNAV 50E-3.

Military Government at Charlottesville, Virginia, and in the Provost Marshal General's School at Fort Custer, Michigan. Advanced training was provided in the University of Virginia, at Charlottesville, and in several other American universities. In January and February, 1944, upwards of two thousand civil affairs officers came from the United States to the American School center in Shrivenham, England. There a training program was improvised and continued in the civil affairs units after their activation. At the American universities, and to some extent in subsequent training, lawyers recruited for civil affairs from the arms and services and from bench, bar and law school faculties, were afforded instruction in the international law of belligerent occupation and in some aspects of Continental law. Upon the Continent, military government legal specialists were given, at Paris in March, 1945, a two weeks course in German law.

b. About two hundred officers were assigned, eventually, as legal specialists in military government. Nearly all were mature lawyers of superior reputation. With exception of staff officers at high level, they had no opportunity for useful work during their months in the United Kingdom. In the liberated countries, a few served as civil affairs officers; but such duty afforded little scope for application of their professional training and experience. Civil affairs duties in liberated territory included liaison with civil authorities for control of circulation, billeting troops, civilian supply, etc. There was no territorial administration by our forces. Few if any questions of civil law arose out of military operations, except concerning rights in captured property or validity of civilian claims for damages. The majority of the lawyers assigned to civil affairs were in schools and pools until the spring of 1945, when large areas of Germany began to be occupied.

CHAPTER 2

THE LEGAL STATUS OF US FORCES IN LIBERATED COUNTRIES

SECTION 1

INTERGOVERNMENTAL AGREEMENTS

3. Recognition of the French Provisional Government. At his press conference, 13 July 1944, the President of the United States said that pending free selection of a government by the French people, he was prepared to accept the French Committee of National Liberation as the de facto authority for civil administration in France. This announcement culminated long discussion between the Allied governments and the French Committee, American representatives had been accredited to the French Committee of National Liberation in 1942. In August 1943, the Committee was recognized as "administering those French overseas territories which acknowledge its authority." But the question was then reserved whether the administration of metropolitan France when recaptured from the Germans would be turned over to the French Committee of National Liberation or administered under Allied Military Government.[1] Obviously, however, it was then contemplated that the French Committee of National Liberation would be supported by the Allies in metropolitan France; for in September 1943, the Committee submitted a draft of memoranda for agreement.

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1. Secretary of State to the Press, 27 Aug 1943.

4. The French Agreement. It is not proposed in this report to analyze the memoranda of understanding between the Allied governments and the French Committee of National Liberation.[2] A statement of certain clauses is deemed sufficient--but essential--for defining the extent to which American forces were but pilgrims in a land ruled by its own people.

a. French territory was zoned into "Forward" areas, affected by active military operations, and the "Interior." Ports, fortified naval areas, aerodromes and troop construction areas of the "Interior" would be military zones where the Supreme Commander should have the necessary authority to insure that all measures be taken essential in his judgment for the successful conduct of operations. In other areas of the "Interior," territorial administration and responsibility were entirely for the French authorities. In the "Forward" zone, the French authorities, in accordance with French law, would take the measures deemed necessary by the Supreme Commander for successful conduct of operations; and in emergencies, or where there was no available French authority, the Supreme Commander might himself take such measures as should be required by military necessity.

b. French courts had exclusive jurisdiction over members of French armed forces serving in French units with the Allied forces in French territory. Such French military personnel might be arrested by Allied military police in the absence of French authority, and detained until they could be handed over to competent French authorities. Reciprocally, the French might thus arrest and detain Allied personnel.

c. Allied service courts and authorities retained exclusive jurisdiction over all members of their respective forces, including attached British and American nationals subject to military, naval or air force law, and alien nationals not recruited in French territory. Other aliens (i.e., not American, British or French) were subject to French law except as arranged between the French and the state of nationality. The question of merchant seamen was reserved.

d. The allied military authorities would inform the French of results of proceedings against Allied personnel charged with offenses against persons subject to the ordinary jurisdiction of French courts. The French, in their exercise of jurisdiction over civilians, would make necessary arrangement for insuring, in competent and convenient French courts, the speedy trial of such civilians as should be charged with offenses against persons, property or security of the Allied forces.

e. Allied military authorities and competent French authorities would provide machinery for mutual assistance in conducting investigations, collecting evidence and assuring attendance of witnesses.

f. The allied governments and competent French authorities would consult in circumstances requiring provision for jurisdiction in civil matters over non-French Allied personnel in France.

g. Non-French Allied forces, members and attached organizations not recruited in France, were exempt from all direct French taxation. No custom or internal duties would be imposed on articles imported for the Allied services, or for personnel to the extent of their needs, or for civilian relief.

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2. Annex A, Revised Directive for Civil Affairs Operations in France--SHAEF, 25 August 1944.

h. Immunity from French jurisidction and taxation would extend to Allied civilians in France for furtherance of Allied purposes as designated by the Supreme Commander.

5. Agreements with Exile Governments of Belgium, The Netherlands and Luxembourg. Practically identical agreements were signed with the Governments of Belgium and The Netherlands, 16 May 1944, and with Luxembourg, 27 July 1944.[3] These agreements are similar to that represented by the memoranda of understanding with the French. The Governments recognized that there would be a military phase--expected to be brief--when the Supreme Commander would be charged with exclusive responsibility. As soon as practicable, however, the national Governments would take over full responsibility for exclusive administration, subject to such special arrangements as might be recognized in areas of vital importance to Allied forces (as ports, lines of communication and air fields) and without prejudice to Allied use of such other facilities as might be necessary to the prosecution of the war. Appointments in the national administrative and judicial services were to be made by competent indigenous authority according to its own law. Dutch and Belgian military personnel (Luxembourg had none) serving in Allied units within their own countries were subject to exclusive jurisdiction of their own courts. Allied military police might arrest persons subject to exclusive local jurisdiction, in the absence of local authority, and detain them until they could be handed over. The Governments would insure the speedy trial of civilians charged with offenses against Allied persons, property or security. The allied commander-in-chief, in cases of military necessity, might bring such offenders to trial before a military court. Allied commanders would deliver to the national authorities those of their nationals who should commit offenses against Allied persons, property or security subsequent to the invasion.

a. Thus, it is seen, the governments of the smaller liberated countries had not quite such complete and exclusive jurisdiction as in France and the Supreme Commander had a little greater prerogative; but the distinction was contractual only, not practical.

SECTION 2

PRACTICAL CONSTRUCTION OF ARRANGEMENTS

6. The Supreme Commander did not legislate in liberated territories. A formal notice was prepared, to be posted by civil affairs detachments in certain circumstances within liberated France, directing obedience of the civil population to orders of Allied military commanders. Preparation of this notice was intended to provide for the emergency of local and temporary breakdown of French civil authority or official refusal to cooperate in a particular area. It was not meant to introduce foreign law into France. Allied military courts were not to be set up for enforcement of military orders. Offenders were only to be arrested and detained; not tried or punished, but handed over to the

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3. The text of these agreements is set forth in the following documents, respectively; SHAEF Field Handbook, Civil Affairs, Belgium, Appendix 1, p 3; Civil Affairs Directive for The Netherlands, SHAEF, 14 Aug 1944; Civil Affairs Agreements and Civil Affairs Directive for Luxembourg, Combined Chiefs of Staff, 19 June 1944 (C C/S 493/2).

French authorities as soon as they should resume cooperation.[4] During the battle of Normandy the civil affairs detachment entering LaHaie DuPuits was unable to find a mayor or other official because of the German policy of evacuating civilians. Civil affairs officers, therefore, posted "notices and proclamations," probably including the notice mentioned above.[5] But there is no record of any orders issued directly by any military commander to the civil population of LaHaie DuPuits or any other community of liberated Europe. Civil affairs officers in France were forbidden to promulgate any civil affairs enactments without Army Group authority, which never was given.

7. No Allied military courts were constituted in liberated territory. The Supreme Commander reserved the power in case of military necessity to try civilians in military courts,[6] but the necessity never was deemed to have arisen.

8. Allied Military Deference to Indigenous Authority. The Supreme Commander and his staff, and Allied military authorities generally, were scrupulous in their respect for the dignity and authority of the territorial governments. The following instances are not meant to be exclusive, but illustrative:

a. In a draft of Civil Affairs Instructional Guide No. 14, Third United States Army had the words,"direct" and "require," with reference to action desired by local authorities in France. These words were thought inappropriate at SHAEF, and were changed to "request."[7]

b. The civil affairs detachment at Briey, 26 September 1944, reported to the Commanding General, Third Army, the case of Serjej Pankretow, a Russian who had been captured by the Germans in 1942. He had been arrested by French authorities, charged with theft of captured German property. Considering his status as a prisoner of war, was the Army interested in his case? The inquiry was forwarded to SHAEF, who advised that Pankretow's case was solely for the French authorities; but that SHAEF Mission (France) had been requested to inform the French Government, which might wish to consult the Russian embassy in Paris.

c. A civil affairs officer in Orleans sent a questionnaire to the Procureur General concerning trials and appeals in collaboration cases. The French Ministry of Justice protested to the SHAEF Mission (France) that collaboration cases were not the business of civil affairs, but purely an internal concern of the French Republic. By order of the Supreme Commander, 6 December 1944, the questionnaire was withdrawn.

d. The Supply and Economics branch, G-5, SHAEF,wished to investigate food requirements in the Department of Basses Pyrennes. Upon suggestion that this would infringe French sovereignty, permission of the French Government was sought through the SHAEF Mission.[8]

e. After the invasion of Germany, members of a Belgian resistance group were arrested in Aachen upon charges of looting. They were

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4. For the former notice and instructions, see 21st Army Group Technical Instructions No. 16, 14 Jul 1944.
5. First Army to 21st Army Group, 12 Jul 1944.
6. Section 1, par 5, this study.
7. SHAEF, G-5 Legal to G-5 Executive, 12 Jul 1944.
8. CASum, SHAEF Mission (France), 16 Dec 1944.

not tried in Military Government courts until the Belgian authorities ruled, formally, that their "forces of the interior" were not subject to military law.[9]

f. Investigation of the charges against Belgian irregulars apprehended for looting in Germany disclosed existence of a large "fence" organization in Aupen. First United States Army insisted upon arrest of the receivers, but this was not accomplished except through the Belgian Government.[10]

g. Russians at a displaced persons camp in Belgium were disobeying regulations promulgated at the instance of the military government detachment supervising the camp. The detachment was instructed that the Belgian authorities had sole jurisdiction of offenses by displaced persons in Belgium and that the camp commandant could not punish the Russians.[11]

9. Cooperation of the National Authorities. Early in the process of invasion, there was a singular assertion of national sovereignty by a French military commander. The French Commandant of the Third Military Region issued a series of instructions to the local constabulary. Allied military authorities, he advised, were not authorized to order arrest by French police. Allied request in such cases should be in writing, and decision thereof was for the French. Individuals apprehended by the French constabulary were to be held in French custody and brought before French magistrates. Arrest upon request of Allied authorities was to be reported without delay to higher police headquarters. Individuals arrested by Allied authorities were not to be accepted for custody of French police unless authorized by competent French military commanders.[12] When these instructions were brought to the attention of the French Government they were promptly repudiated; and there is no similar instance reported as occurring in France or elsewhere in northwest Europe. No just complaint can be lodged for history against any of the national authorities through whose lands Allied forces passed upon their advance into Germany. If the indigenous law or its administration was deemed inadequate in any respect for Allied purposes, new laws or regulations were adopted promptly. Military courts were constituted for the trial of offenders against the persons, property and security of Allied forces. The ministries were sharply critical of their courts when these failed to satisfy the Allied authorities by adequate punishment of offenses against Allied interest. It may be fairly recorded that the Governments of the liberated countries performed every contractual obligation to the Allies.[13]

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9. CASums, SHAEF Mission, Belgium, 27 Oct--30 Nov 1944.
10. CASum, SHAEF Mission, Belgium, 27 Oct 1944.
11. CASum, First Army, 13 Dec 1944.
12. SHAEF G-5 Legal, Memorandum, 1 Jul 1944.
13. Evidence for these conclusions is stated in Chapter 2.

CHAPTER 3

LEGISLATION AND JUDICIAL PROCEEDINGS IN LIBERATED COUNTRIES AFFECTING ALLIED INTEREST AND RELATIONSHIP OF UNITED NATIONS

SECTION 3

LEGISLATION

10. During military operations in the liberated countries, legislation was by decree and executive order. The continental governments are highly centralized, so there is no such independence of local authority as in the United States. Mayors of cities and communes, as well as departmental officials, are agents of the central government. Their orders, within their sphere of authority, had the effect of law. Curfew, circulation and security restrictions were imposed by local and departmental officers upon request of military commanders, who used civil affairs detachments as their intermediaries. There is no instance of failure upon the part of any civil authority to observe the wishes of the Allied commanders in such cases.

11. Military Orders--Departmental Instructions. The "State of Siege" permitted authoritative military orders also, which had the effect of legislation.[1] In France, the ministries published instructions for cooperation of local and regional administrators with the Allied forces.

12. Specific Legislation. In Belgium there were instances of decrees by the Government, creating new laws of national scope; one against the bearing of arms by resistance forces,[2] and another imposing the death penalty for concealing an enemy agent or soldier.[3] By royal decree in The Netherlands a new type of summary military court was created for trial of minor cases involving Allied interest, with a single judge and a clerk who might act as prosecutor.[4] The Grand Duchess of Luxembourg, 4 September 1944, interdicted possession of Allied war material. In December 1944, it was held that cigarettes purchased by a civilian from an American soldier were not war material; that such transactions were not covered by the royal decree. The Grand Duchess thereupon amended her decree to make illegal civilian possession of provisions of Allied armies.[5] Other legislation in the liberated countries facilitated the marriage of American soldiers to domestic nationals.

SECTION 4

JUDICIAL PROCEEDINGS

13. In French courts:

a. The "State of Siege" allowed appointment of military courts

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1. 24 Aug 1944, G-5 First Army reported 259 decrees or orders by the Regional Comissaire for Rouen. "State of Siege" corresponds to martial law.
2. CASum SHAEF Mission, Belgium, 15 Nov 1944.
3. CASum No 63, SHAEF Mission, Belgium.
4. SHAEF G-5 Weekly Journal, 24 Mar 1945.
5. CASum 12th Army Group Civil Affairs Detachment, 20 Dec 1944.

to try offenders against Allied interests. It was contemplated that peripatetic French military courts might be attached to Allied[6] units but this was found unnecessary.[7] Military tribunals began to be constituted in France almost immediately after the landing of Allied troops. The first was appointed at Bayeux 16 June 1944 but the first reported sitting was of the court at Cherbourg which was appointed 4 July. This court tried several cases of treason, espionage and looting 8-12 July. The French mayor of Roussy-Manche was convicted of pillaging a United States dump and sentenced to 15 years in prison. The lowest sentence then imposed in a looting case by the court at Cherbourg was five years. The trials were reported in Presse Cherbourgeousie and the sentences publicized at the mairies in the liberated areas.[8]

b. But the initial zeal of French courts to prosecute their nationals offending against property interests of the Allies did not persist. The economic extremity of the French people caused an extensive black market in Allied materials and provisions. The French national authorities cooperated with the Allies towards suppression of the black market. The French Ministry of Justice conferred upon the military courts exclusive jurisdiction of cases where the charge was theft or illegal receipt of gasoline, war materials, arms or ammunition. The Ministry directed that other cases, such as theft of clothing, should be heard in military courts when possible; but these might be heard also by civil magistrates.[9] But even the military courts were complacent towards the black market. There was continual complaint by Allied authorities against the number of acquittals and the frequency of mild sentences upon conviction. The Minister of War, at the request of the SHAEF Mission, sought often to stimulate the military courts by reproach and admonition. He obtained increased activity but no greater severity.[10] In one of his letters of instruction to the regional commissaires, the French Director of Military Justice denounced the results obtained from the military courts as "notoriously inefficient"; and stated his opinion that "numerous decisions were characterized by unjustified leniency."[11] Among French nationals charged in the military courts with theft or illegal possession of Allied property, the majority were acquitted outright or only fined. Many of the prison sentences nominally imposed were suspended. About one-fourth of those charged actually served prison sentences.[12]

c. It must be admitted that some of the offenses prosecuted were not truly black market cases. The zeal of American civil affairs officers led to the prosecution of civilians for accepting in small quantities from American soldiers provisions offered in exchange for laundry service, cognac and other individual necessities. Such prosecutions were satirized by a newspaper writer of L'Etat Republican, Nancy, in an article, typical of French journalism, 17 January 1945:

> "To close a benevolent discussion Manon slammed the door with brutality and clicking the bolt exclaimed that I deserved at once the noose, the scaffold and forced labor.

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6. Original SHAEF Civil Affairs Directive, France.
7. First Army CASum.
8. First Army CASum.
9. Instructions French Ministry of Justice, Dec 1944.
10. SHAEF Mission (France), CASums.
11. SHAEF Mission (France) CASum, 3 Apr 1945.
12. These statistical conclusions are based upon the reports of SHAEF Mission (France) to SHAEF. They correspond with the figures given in the report for the first 5 months of 1945 and with indications from the figures stated in previous CASums.

"With my feet in the snow and not knowing what to do, I got the idea of seeing how the Court of Justice was functioning. Great dispensary, I thought, of guillotines and prison sentences! I climbed the many stairs leading to the court room. A gendarme with a bored look opened the door and I penetrated into the sanctuary of high justice.

"I was surprised, the audience was chuckling while on the stand the accused implored all the Gods of her innocence. The court with bored interest studied the ceiling. The prosecutor, balancing himself on his chair, warmed his hands near the radiator. The defense counsel, his forehead in his hands, looked out at the blue sky.

"The crime: as thanks for a free washing, an American had left his hostess some chocolates and two pairs of used shoes. After denunciation by jealous neighbors, the police investigated, searched, confiscated the rest of the chocolates and the shoes, and took the accused to the military court. After deposition, interrogation, plea and due deliberation she is, of course, acquitted."[13]

But most of the cases brought to trial were for theft or illegal possession of gasoline, so precious to the armed forces. It cannot be written fairly that the French military courts assisted the Allied military authorities in the conservation of necessary motive power for their fighting men. The French military courts were more greatly concerned with the purge of Frenchmen who had collaborated in the German occupation of France than with troop movement toward Allied occupation of Germany.

14. In the courts of Belgium, Holland and Luxembourg:

a. In Belgium, also, there was an extensive black market; the same futile effort of the national government towards its supression as in France; and the same deliquency of military courts. Brussels, Antwerp and Liege were centers of black market activities. Large quantities of German coal were captured in Belgium and became a prime item of commerce in the black market.[14] There seems in fact to have been in Belgium more general traffic in Allied property even than in France. It appears that Allied stores were regarded as primarily civilian relief supplies. The prosecution of policemen in Antwerp for the pillaging of Allied stores left a "bad taste" with the civil population.[15] In February 1945, 2,336 Belgians were tried for the theft or illegal possession of Allied property and 1,121 in the first half of April, 563 of the latter in Antwerp alone. No statistics are available as to acquittals, convictions and sentences; but it is obvious from the complaints of the SHAEF Mission that results of these prosecutions could not compare favorably with those in France. Officers of the Belgian armed forces sitting on the military courts were no more insensitive to public opinion than their colleagues in France. The SHAEF Mission might protest to the Government; the Government might appoint new military courts and issue orders for greater severity against offenders in such cases; but the black market grew bigger and blacker.

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13. The translation is in a letter Lt Col Arthur Sparry, SCAO, Nancy, to the CG, Third Army. 18 Jan 1945.
14. 21st Army Group CASums, Mar 1945.
15. Ibid.

b. In The Netherlands, there were no black market rings in Allied military property. Cases of individual theft or possession were mostly trivial.[16] The Netherlands authorities were cooperative in prevention of black market and prosecution of casual offenders against Allied property interests.

c. In Luxembourg, also, there were few and trivial cases against the Allies. Luxembourg had no military courts, so these were tried in civil tribunals. In a two week period ending November 11, 1944, there was only one reported case; and in the week ending January 31, when the black market of France and Belgium was having its heyday, just two cases of theft or possession of Allied property were noted in a weekly report from Luxembourg.[17] Even in Luxembourg, however, there were complaints of American civil affairs representatives that the sentences were mild.

15. In collaboration and security cases. On 12 April 1945, the editor, SHAEF G-5 Weekly Journal of Information No. 8, said in summary: "The great failure in liberated countries has been inadequate punishment of offenses against Allied interests." The reference was only to offenses against Allied property rights. There is no suggestion of delinquency in the punishment of enemy agents and offenders against Allied security. Trial of such cases began at Cherbourg in July.[18] Before 1 October, there had been 200 executions in France, some of them summary.[19] By 15 April, 5,674 Belgians had been convicted in their military courts upon charges of treasonable activity and espionage, and more than one-fourth of these sentenced to death.[20] In The Netherlands such cases seem to have been less numerous. In Luxembourg, there were many arrests but few trials. One Luxembourg national was tried for espionage at the instance of First US Army who had taken him into custody. He was acquitted of espionage, but convicted of treasonable activity and sentenced to 3 years' imprisonment.[21]

16. In American courts-martial. Of course, no black market could have grown in any liberated country without cooperation of American military personnel. Cupidity is not an exclusive characteristic of foreigners. The study of crimes among United States forces in the European Theater is assigned to another committee; hence, offenses by members of these forces under AW 84 or against civilians will not be reported here in detail. The severe sentences by courts-martial against military purveyors to the black market, when apprehended, had wide publicity and are a matter of common knowledge. ETOUSA reports shown about a dozen homicide cases, and about 150 cases of rape and assault with intent to rape, where the victims appear to have been liberated civilians, and numerous other crimes of violence and against the property of civilians in liberated countries.[22] The sex urge, stimulated by excessive use of alcohol, was a common factor in offenses by American military personnel within liberated territory, so far as brought to trial by general courts-martial.

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16. 21st Army Group CASums.
17. CASums, 12th Army Group Civil Affairs, Luxembourg.
18. See Note 8, above.
19. Report of Capt Brannon, Legal Officer 6th Army Group G-5, 5 Oct 1944.
20. CASums, SHAEF Mission (Belgium)
21. CASums, 12th Army Group, Civil Affairs, 22 Nov 1944, 12-16 Jan 1945.
22. Dig Op ETO, Vol II.

CHAPTER 4

LAW QUESTIONS INCIDENT TO OPERATIONS IN LIBERATED TERRITORIES

SECTION 5

RIGHTS IN CAPTURED ENEMY PROPERTY

17. The Seventy-Ninth Article of War, reads as follows:

> "All public property taken from the enemy is the property of the United States and shall be secured for the service of the United States and any person subject to military law who neglects to secure such property or is guilty of wrongful appropriation thereof shall be punished as a court-martial may direct."

The Senior Civil Affairs Officer, First United States Army found AW 79 a stumbling block to effective use of captured enemy property for civil affairs purposes. He did not believe any lawful authority existed to permit release of captured property even though not immediately essential for the prosecution of the war. He believed, as expedient to the circumstances, that authority should be obtained to sell as salvage.[1] But the lawyers at SHAEF did not concur. The Theater Judge Advocate cited an opinion of The Judge Advocate General, 29 January 1919, that AW 79 was meant merely for punishment of persons "who conceive that enemy property when captured becomes the property of private individuals." He disagreed that the introductory declaration of Congress (All public property taken from the enemy is property of the United States) was a definition that forbade the use of captured material in the liberation of Europe. While he accepted the declaration as a statement of law, he did not doubt that Combined Chiefs of Staff and SHAEF directives for disposition of such property were authorized by the Lend-Lease Act.[2]

18. The French Agreement: Memorandum III of the French agreement relates to property in continental France captured by Allied forces:

a. The Supreme Commander had the right to retain all war material, defined as "arms, equipment or other property whatsoever, belonging to, used by or intended for use by any enemy military, para-military formations or any members thereof in connection with their operations." However, if it should appear, prima facie, to the French authorities that captured war material was French-owned before its acquisition by the enemy, and not produced in France by order of the enemy, it was to be requisitioned by the Supreme Commander, if private property, and treated as Lend-Lease material if public property. If not required by the Supreme Commander, such French-owned war material was to be released directly to the French authorities.

b. The memorandum contemplated procedure to be established by the Combined Chiefs of Staff for releasing to the French authorities other war material not required by the Supreme Commander, for which the French would account to the United Nations.

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1. Memo to SCAO British Second Army, 30 Jun 1944.
2. Memo of Lt Bishop, 12 Oct 1944, approved by the Theater JA.

c. All captured property not war material was to be released to the French authorities, who would account to non-French owners, or to the United Nations if the owner was an opposing belligerent or national.

d. The memorandum did not apply to captured shipping.[3]

19. The SHAEF Directive. By the comprehensive Annex C, 30 September 1944, to SHAEF Administrative Memorandum No. 5, the Supreme Commander defined and categorized war material as in the French agreement. Category "A" was material which prima facie should appear to the French authorities, prior to its acquisition by the enemy, to have been in French ownership and not to have been produced or constructed by order of the enemy; and regardless of whether the enemy had paid for such material. Category "B" covered material produced or constructed in France by order of the enemy. Category "C" was war material not in Category "A" or "B." "Critical" items of Category "A" war material not required by the Supreme Commander included food stores and military equipment. Other types of war material not required by the Supreme Commander were designated as "non-critical." "Critical" items were to be returned to the French central authority and receipt obtained therefor. "Non-critical" items were to be returned to local authorities and receipt obtained. Category "B" material not required for military use was to be delivered to representatives of the French central authority. In case of doubt whether material was "A" or "B," it was stated to be the policy of the Supreme Commander to favor French ownership. The concluding paragraph of Annex C stated that by order of certain high commanders, war material might be issued as civil affairs stores, to meet the immediate needs of the civil population or to prevent waste of perishable food.

20. Application of Agreement and Directive to Civil Affairs Operations in the Other Liberated Countries. The original agreements with the exile governments had no clause relating to use or disposition of captured enemy war material. Although the Combined Chiefs of Staff, 6 December 1944, approved a draft of supplemental agreement upon this subject with the Governments of Belgium, The Netherlands, Luxembourg and Norway, none was signed until 10 May 1945. Annex C did not apply to the liberated countries other than France. However, the principle of the French agreement and the method of disposition prescribed by Annex C were adopted in all civil affairs operations.[4] SHAEF Administrative Memorandum No. 5 was revised effective 7 February 1945. By the revision, American policy was established in the whole European Theater, including occupied Germany: that captured enemy property not required in military operations should be used to carry out the civil affairs responsibility of the Supreme Commander. The civilian authorities were to be used as media for effecting this policy, but no cash sales or transactions should be had with civilian authorities except as specifically authorized. So far as concerned the civil affairs operations in the liberated countries, the revised Administrative Memorandum simply made definite the implicit directive of Annex C, published four months earlier and applied to the liberated countries three months earlier. By Annex B, 22 July 1944, the Supreme Commander had directed release of material suitable to civil affairs purposes by transactions of sale. Under Annex C, captured supplies and stores were to be issued to meet the immediate needs of the civil population

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3. Subsequently, there were detailed C C/S directives as to disposition of captured ships. Since these relate to naval operations, discussion is omitted from this report.
4. AGC 400.93-2 GDS-AGM, 4 Nov 1944, subject: "Use and disposal of War Materials in Belgium, The Netherlands and Luxembourg."

or to prevent waste of perishable food. Under subsequent instructions, the issue was to be without money and without price. Nevertheless, some civil affairs detachments continued to sell captured property. As late as 30 May 1945, a case came to the attention of SHAEF involving a claim by a French civilian growing out of such a sale. American officers had sold him a captured Chevrolet truck for 7,000 francs. The local French authorities then requisitioned the truck but did not pay for it. The Frenchman claimed reimbursement from the United States, on the ground the sale was contrary to the French agreement. SHAEF G-5 advised that reimbursement should be made; and expressed the opinion that the sale was improper, regardless of the French agreement.

21. Construction of the Agreement and Directives.

a. The very first clause of Memorandum No. III of the French agreement ("war material falling into the hands of forces operating under the command of the Supreme Allied Commander") challenged construction and application. What of property captured by French irregulars? Headquarters, 21st Army Group had the opinion that German military equipment captured by or on behalf of the FFI or French police became the property of the French Republic.[5] SHAEF G-5 disapproved this expression of 21st Army Group.[6] By Annex C to SHAEF Administrative Memorandum No. 5, the Supreme Commander assumed control of war materials captured by French irregulars and gave instructions for its custody and disposition. Nevertheless, the French Provisional Government, 14 September 1944, published an "instruction" that war materials held by the German Army taken in charge as spoils of war by the FFI and French police belonged to the French Republic. In protest, through the SHAEF Mission, the SHAEF view was stated: that material taken from the enemy by French volunteer forces, being seized as a direct result of action by Allied forces, came within the purview of Memorandum No. III.

b. What was included in the definition of war materials?

(1) Food, for instance? Obviously, answered SHAEF, if intended for use by the enemy.[7] But if not required by the Allied commands, the food should be turned over to the French without payment.

(2) Real estate? The French authorities contended that farms requisitioned by the German occupying force or its agencies, and crops produced from the farms, were not captured war materials; but belonged to owners from whom the farms were seized. The ruling of SHAEF was that real property requisitioned for military operations was war material; but if the requisition was not for military operations, administration was for the civil authorities.[8]

c. What was included in the first clause of Memorandum No. III: "war materials falling into the hands of forces operating under the command of the Supreme Allied Commander"? That was held to mean only those materials captured from the enemy. French war material hidden during the occupation, of whose existence the Germans were ignorant and never used nor claimed, was not subject to seizure by the

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5. Draft of 21st Army Group Directive, 11 Jul 1944.
6. Memorandum G-5 Legal, 17 Jul 1944.
7. Chief of Staff, Hq SHAEF Mission (France), 1 Oct 1944.
8. SHAEF G-5 Legal to G-4, 7 Nov 1944.

Allies when found by Allied Forces.[9] The property must have been owned by the enemy. Equipment leased from civilians was to be treated as private property. If merely requisitioned and not yet seized, material was not to be captured.

d. War material produced in France by order of the enemy was excluded from the category of French-owned property. The question recurred whether material in process of manufacture upon order of the enemy, but unfinished at the time of capture, was within the exception. This was ruled to be Allied property, as "intended for use by" the enemy; and it was immaterial that such property had not been paid for; but a liberal policy was to be applied in such cases where injustice to the French would result from seizure.[10]

(1) Allied forces were not bound to pay manufacturers the cost of labor in production of such material. In one case, however, the German Army had contracted with a French civilian for repair of 25 trucks. These were seized by United States forces before the work was complete. The civilian had affixed some spare parts before seizure. The Judge Advocate, 12th Army Group held the civilian entitled to compensation for the parts, but not for labor; since the rights of the conquering power are superior to those of a lienor or any contract rights between a civilian and the enemy.[11]

e. A cargo of steel was taken off a lighter in inland waters of Belgium. Prima facie the property was Belgian; hence, not booty under rules of land warfare, but under maritime law would be condemned as prize because of enemy destination. Considering certain maritime decisions during and following World War I, that jurisdiction of prize courts extended to inland waterways, should the rules of land warfare be applied or maritime law? It was the opinion at SHAEF that stores and cargoes should be treated as prize only when captured by naval forces. Otherwise, the rules of land warfare applied.[12]

SECTION 6

CLAIMS OF LIBERATED CIVILIANS

22. Memorandum No. I of the French agreement, paragraph 16, provided the respective Allied authorities would establish claims commissions to examine and dispose of any claims for compensation for damage or injury preferred in continental France against members of Allied forces concerned (other than members of the French forces), exclusive of claims for damage or injury resulting from enemy action or operations against the enemy. The claims commissions would, to the greatest extent possible, deal with claims according to the French law and practice. Decisions of the claims commissions would not preclude prosecution of the claims through diplomatic channels. The agreements with Belgium, The Netherlands and Luxembourg provided for similar claims commissions to examine and dispose of claims for compensation and

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9. G-5 Executive to DCCAO, 21st Army Group, 15 Jun 1944.
10. JA to G-4, 12th Army Group, 10 Jan 1945.
11. JA to Finance, 12th Army Group, 15 Aug 1944.
12. Inquiry 21st Army Group to SHAEF, 30 Oct 1944; answer of SHAEF G-5, 10 Nov 1944.

damage or injury preferred by civilians against authorities of the respective Allies, exclusive of claims for damage or injury resulting from enemy action or operations against the enemy.

a. The base sections assumed responsibility for the conduct of claims investigations. A study of their decisions and awards is being made by the Committee on "Legal Questions Arising in a Theater of Operations"; hence, is excluded from this report.

PART TWO

MILITARY GOVERNMENT

CHAPTER 1

THE JURISPRUDENCE OF THE MILITARY GOVERNMENT

SECTION 1

INTERNATIONAL LAW

23. Hague Regulations. The law of belligerent occupation is codified in Section III, Articles 42-56, Annex to The Hague Convention: Regulations Respecting the Laws and Customs of War on Land. Under Article 2 of the Convention, The Hague regulations were not binding in World War II, since not all the belligerents were parties to the Convention. However, the policy of the United States was that the written rules of war should be strictly observed and enforced by United States forces in the field so far as applicable, without regard to whether they were legally binding upon all of the powers immediately concerned.[1] Early in World War II, before any operations in the European Theater, the Government of the United States directed that international treaties regulating land warfare should be observed and enforced by the Army of the United States (with an exception).[2] Though it was seriously argued by some lawyers that the Pact of Paris nullified The Hague Regulations, the official declaration would seem to be conclusive that the Rules of Land Warfare, codified at The Hague, were part of the legal system of Military Government in occupied Germany before V-E Day.

24. Observance by US Forces. Article III of The Hague Regulations was generally observed by the United States forces during the belligerent occupation of Germany.

a. In one case,[3] the German government claimed that HR 42 had been reached by punishment of a civilian in a Military Government court for an act committed before the occupation, but this was refuted by the military commander concerned.

b. When it was proposed to amend Law No. 161, Frontier Control, by a provision for exclusion of Germans from a frontier zone, question was raised whether this would not violate HR 46, requiring respect for family honor and rights, and private property. The Judge Advocate, 12th Army Group, was of the opinion that evacuation under the proposed amendment would not violate HR 46, if done as a measure of military necessity, with due consideration for family rights.[4] This view was adopted at SHAEF and an amended Frontier Control Law published.

c. The question suggests itself whether Law No. 1 of the Military Government, abrogating Nazi laws, infringed HR 43, requiring an

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1. FM 27-10, Rules of Land Warfare, Chapter 1, par 5b.
2. See 1, Cir No 136, War Department, 7 May 1942.
3. Case of Maria Jensen, noted in SHAEF, 16 Dec 1944.
4. 12th Army Group to SHAEF, 7 Jan 1945.

occupant to "respect, unless absolutely prevented, the laws in force in the country." The apparent official attitude toward this regulation is curious. In the Army and Navy Manual on Military Government and Civil Affairs, 22 December 1943, the War and Navy Departments do not appear to recognize at all the binding effect of the Regulation, suggesting only: "to avoid confusion and to promote simplicity of administration, it is advisable that local laws, customs and institutions of government be retained except where they conflict with the aims of military government or are inimical to its best interests."[5] In the Handbook for Military Government in Germany, there is implied modification of the regulation by the statement:

> "The policy of the United States and British Governments, consistent with the concepts of international law, has been to recognize existing law in the occupied territory as continuing in effect, except to the extent that military necessity, national policy or the proper conduct of military government, require annulment, suspension or modification."

There is no existing offical statement of what would seem the best reason for consistency of Law No. 1 with The Hague Regulation; that the purpose of the Convention, stated in the preamble, was "to serve the best interests of humanity and the ever progressive needs of civilization" and mitigate the severity of the laws and customs of war. "Respect" toward the Nazi laws would have offended the spirit of The Hague Convention. Moreover, the declared war aims of the Allied Governments prevented them, as a matter of absolute necessity, from respecting the obnoxious Nazi laws in force within Germany before the occupation.

25. The Geneva Convention for protection of prisoners of war was applied rigorously by the Supreme Commander in the military government of occupied Germany. In the First and Ninth Armies, military government notices were posted requiring members and former members of the Wehrmacht to report to the nearest Military Government office, under penalty of death. The notice was ordered withdrawn on the ground that members of German armed forces were entitled to be treated as prisoners of war.[6]

SECTION 2

LEGISLATION OF THE SUPREME COMMANDER

This included a proclamation of policy and action directed to the inhabitants of the occupied territory; ordinances defining offenses and establishing courts for their trial; laws of general application affecting the inhabitants of the occupied territory; and notices authorized to be published by commanders of the occupation forces.[7]

26. The Proclamation. Upon occupation of enemy territory, Allied military commanders were required to publish the following:

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5. Sec I, par 9h, p 8, FM 27-5, OPNAV, 50E-3
6. SHAEF to 12th Army Group, 11 Mar 1945.
7. The Proclamation, Ordinances and Laws (except Law No. 161, as amended) were published in Military Government Gazette, Germany, 12th Army Group Area of Control, No 1.

"Proclamation No. 1

"To the people of

GERMANY

"I, General Dwight D. Eisenhower, Supreme Commander, Allied Expeditionary Force, do hereby proclaim as follows:-

I

"The Allied Forces serving under my command have now entered Germany. We come as conquerors, but not as oppressors. In the area of Germany occupied by the forces under my command, we shall obliterate Nazism and German Militarism. We shall overthrow the Nazi rule, dissolve the Nazi Party and abolish the cruel, oppressive and discriminatory laws and institutions which the Party has created. We shall eradicate that German Militarism which has so often disrupted the peace of the world. Military and Party leaders, the Gestapo and others suspected of crimes and atrocities will be tried and, if guilty, punished as they deserve.

II

"Supreme legislative, judicial and executive authority and powers within the occupied territory are vested in me as Supreme Commander of the Allied Forces and as Military Governor, and the Military Government is established to exercise these powers under my direction. All persons in occupied territory will obey immediately and without question all the enactments and orders of the Military Government. Military Government Courts will be established for the punishment of offenders. Resistance to the Allied Forces will be ruthlessly stamped out. Other serious offenses will be dealt with severely.

III

"All German courts and educational institutions within the occupied territory are suspended. The Volksgerichtshof, the Sondergerichte, the SS Police Courts and other special courts are deprived of authority throughout the occupied territory. Re-opening of the criminal and civil courts and educational institutions will be authorized when conditions permit.

IV

"All officials are charged with the duty of remaining at their posts until further orders, and obeying and enforcing all orders or directions of Military Government or the Allied Authorities addressed to the German Government or the German people. This applies also to officials, employees and workers of all public undertakings and utilities and to all other persons engaged in essential work.

DWIGHT D. EISENHOWER,
Supreme Commander,
Allied Expeditionary Force."

27. The Ordinances.

a. Ordinance No. 1, defined nineteen specific crimes punishable by death or such other penalty as a military government court might impose. The general nature of these crimes is indicated by Section 20,

the blanket clause of Article I: "Any other violation of the laws of war, or act in aid of the enemy or endangering the security of the Allied forces." Sections 21-42, Article II, list other offenses, not punishable by death but by such other penalties as a Military Government court might impose. They are in the category described by the blanket clause of Section 43: "Acts to the prejudice of good order or of the interests of the Allied forces or any member thereof." By Article III, accomplices and accessories (even after the fact) were declared punishable as principals. Article IV provides for collective fines. Article V fixes individual responsibility for corporate acts. Article VI recognized the defense of "legitimate warfare by a person entitled to the status of a combatant," but denied like effect to any claim, "that the offense charged was committed under orders of any civil or military superior or of any person purporting to act as an official or member of the NSDAP or that the offense was committed under duress."

b. Ordinance No. 2 establishes Military Government courts "for the trial of offenses against the interests of the Allied forces"; defines their jurisdiction, powers and composition; defines certain rights of one accused; and provides for review of sentences.

c. Ordinance No. 3 made English the official language of the military government.

28. The Laws.

a. Law No. 1, Abrogation of Nazi Law, was enacted "in order to eliminate from German law and administration within the occupied territory, the policies and doctrines of the National Socialist Party, and to restore to the German people the rule of justice and equality before the law." Nine fundamental Nazi laws enacted since 30 January 1933, together with all supplementary or subsidiary carrying-out laws, decrees or regulations, were deprived of effect within the occupied territory. Judicial or administrative application of any German law within the occupied territory was forbidden in any instance where such application would cause injustice or inequality by favoring any person because of Nazi connections, or "discriminating against any person by reason of his race, nationality, religious beliefs or opposition to the National Socialist Party or its doctrines." Interpretation and application of German law in accordance with National Socialist doctrines were prohibited, decisions and writings expounding or applying National Socialist objectives or doctrines were deprived of authority. Any German law effective after 30 January 1933, remaining in force within the occupied territory, was to be interpreted and applied in accordance with the prior meaning of the text and without regard to objectives or meanings ascribed in the preamble or other proclamations. Punishment under ex post facto laws, and for offenses "determined by analogy in accordance with the alleged sound instincts of the people," was forbidden. There was a provision against cruel and excessive punishment. The death penalty was abolished except for acts punishable by death under laws enforced prior to 30 January 1933, or promulgated by authority of Military Government. Detention of persons not charged with a specific offense, or punishment without lawful trial and conviction, were forbidden; and there was a direction that all executory punishments imposed before the occupation, of the character prohibited by Law No. 1, should be modified or annulled.

b. Law No. 2 regulated German Courts.

(1) The Peoples' Court, the Special Court and all Nazi tribunals were abolished. All other courts were suspended by Law No. 2 and Law No. 77, which applied

to labor courts. Provision was made for reopening the ordinary civil and criminal courts, except the national courts, when authorized by Military Government and to the extent specified in written directions.

(2) Priority was established for the trial and disposition of cases, the first order of priorities being given to criminal cases.

(3) Judges, prosecutors, notaries and lawyers, who might not act as such without the consent of Military Government, were required to take an oath as follows:

> "I swear to Almighty God that I will at all times apply and administer the law without fear or favour and with justice and equity to all persons of whatever creed, race, colour or political opinion they may be, that I will obey the laws of Germany and all enactments of the Military Government in spirit as well as in letter, and will constantly endeavour to establish equal justice under the law for all persons. So help me God."

They were relieved thereby from the obligation of any oath of office previously subscribed.

(4) Certain cases were excluded from the jurisdiction of German courts.

(5) The Military Government was vested with the authority to dismiss or suspend any German judge, prosecutor or other court official; disbar from practice any notary or lawyer; supervise the proceedings of any court; attend the hearing of any case; and have full access to all files, records and documents. Administrative review was accorded the Military Government; and power to nullify, suspend, commute or otherwise modify any findings, sentence or judgment of any German court. This, no doubt, included authority to vacate acquittal of one accused.

(6) No sentence of death imposed by a German court could be executed without consent of Military Government.

(7) Military Government might transfer any case or class of cases from a German court to the appropriate Military Government court.

(8) No member of the Allied forces, nor any employee of the Military Government, might testify in any German court without the consent of the Military Government.

(9) Statutes of limitation and prescription were suspended during the period a German court was closed, if the statute had the effect to render claims unenforceable or extinguish substantive rights.

c. Law No. 4 provided for publication by army groups of a Military Government Gazette containing measures adopted by the Supreme Commander, and for publication of local legislation in a similar Gazette

for the political subdivision to which the legislation should pertain. The Gazette was due evidence of the published legislation, and the publication was notice to all persons in the occupied territory affected.

d. Law No. 5 dissolved the Nazi party and 52 subsidiary organizations. It was declared also that 8 para-military organizations would be dissolved in due course, and further recruiting was forbidden. The offices of the Nazi Welfare Department were closed and its activities directed to be carried on by the burgermeisters. Funds, property, equipment, accounts and records of all the organizations mentioned in the law were ordered preserved intact to be delivered or transferred as required by the Military Government.

e. Law No. 6 provided that authority or approval of the Military Government should be sufficient for legality or effectiveness of any action, omission or matter requiring authorization or approval by German authority under German law; but that application for any authorization or approval should be made in the first instance to the authority, if available, and in the manner specified under German law to the extent not suspended or abrogated by Military Government.

f. Law No. 7 abolished National Socialist emblems from official seals.

g. Law No. 51 made Allied military mark notes legal tender and forbade discrimination between Allied military marks and other legal tender mark currency.[8]

h. Law No. 52 was a property control law. The related Law No. 53 provided for foreign exchange control.

(1) Law 52 authorized seizure and control of all public property, except of municipalities protected by HR 56; the property of any enemy government, national or resident of an enemy country; of the Nazi party, its affiliated organizations, its officials, and its leading members or supporters specified by Military Government; of prisoners and absent owners; and property which had been the subject of duress, wrongful acts of confisication, dispossession or spoilation from territory outside of Germany.

(2) Except as provided in the Law, or when licensed or otherwise authorized or directed by Military Government, dealings with reference to such property were forbidden. This prohibition applied also to municipal property; property of religious, charitable and educational institutions; and works of art or cultural material of value or importance.

(3) Business enterprises subject to control were permitted temporarily to engage in transactions ordinarily incidental to the normal conduct of business activities, provided those should not diminish or imperil their assets or otherwise prejudicially affect their financial position.

(4) Law No. 53 forbade transactions, except as licensed or otherwise permitted by Military Government,

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8. The records provide no explanation for the numerical designation of this and subsequent laws.

involving foreign exchange assets (comprehensively defined in the text). Importation of foreign exchange assets and the exportation of any property from Germany were forbidden. Inhabitants of the occupied territory were required to make a written declaration of their foreign exchange assets and their obligations to persons outside Germany. They were required to deliver to the nearest branch of the Reichbank, or as otherwise directed, foreign currency, commercial paper drawn on or issued by persons outside of Germany, securities issued by persons outside Germany or expressed in a currency other than German, and all gold or silver coin, gold, silver or platinum bullion, or alloys in bullion form.

(5) German lawyers in London were critical of Laws 52 and 53. Mr. E. J. Cohn, of the British Special Research Unit, Control Commission for Germany thought them "primitive in technique," and that German exchange control laws and practices should have been studied and adapted to purposes of the Military Government.[9]

i. Law No. 76 suspended temporarily all public means of communication. Private communication facilities were to be surrendered against receipt, according to notices published by Military Government in each locality. Wireless and radio receiving sets, parts, accessories or material, telephone and telegraph wire, installation facilities, and electro-medical equipment and diathermy apparatus, were to be declared to the Military Government. Censorship was imposed upon all communications.

j. Law No. 77 suspended labor courts and various labor offices.

k. Law No. 161 provided for frontier control. Originally, it simply forbade movement of persons and property over the frontiers of Germany without authority of the Military Government, except Allied forces and equipment. The Law was amended to authorize Military Government definition of a prohibited frontier zone, to be evacuated of all persons except those authorized by the Military Government to remain.[10]

29. The Notices. The Supreme Commander authorized the publication of certain notices to the population of territory as occupied. These implemented the other legislation. One announced a receiver and place of delivery for firearms, wireless transmission sets and carrier pigeons. Another established procedure for the declaration of radio receiving sets and other communication apparatus and facilities. Commanders were authorized to complete forms of notice provided by SHAEF, fixing hours of curfew, closing buildings, restricting travel.

30. Regulations. Military Government legislation by the Supreme Commander was expected to be supplemented by regulations. Law No. 76 makes reference to censorship regulations. However, no such regulations upon this or any other subject appear to have been published in occupied territory prior to V-E Day.

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9. Mr. Cohn to Wing Commander J.O.J. Malfroy, ltrs 24 Apr and 1 May 1945.
10. Incl 1 to Ltr, SHAEF, AG 014.1-1 (Germany) 8 Mar 1945.

SECTION 3

LEGISLATION INITIATED BY LOCAL COMMANDERS

31. Such legislation might be enacted for a particular area of responsibility. Except when the military situation required emergency action, the local commander was required first to obtain approval of higher headquarters.[11] The Supreme Commander became responsible, ultimately, for all legislation of the Military Government. Even in cases of emergency, a report had to be made promptly, and the local commander might be required to withdraw any legislation enacted by him.

a. Local legislation was usually in the form of notices, and merely implemented the legislation of the Supreme Commander. The only ordinance or law of any subordinate command was 21st Army Group Law No. 501. This gave extraterritorial effect to Military Government law. Its occasion was the necessity to evacuate some German civilians from border towns into The Netherlands. Before evacuation, the Military Government promulgated Law No. 501, which provided that evacuees should continue subject to the laws of the Military Government while in Netherlands internment camps. The SHAEF Mission (Netherlands) advised The Netherlands Government of this enactment and reported no objection.[12]

b. The Supreme Commander, 12 September 1944, issued his letter of "Policy on relations between Allied Occupation Forces and inhabitants of Germany." The policy established was one of non-fraternization. Restrictions were severe. American military personnel might not even speak to Germans except in the course of official business.

(1) The military commanders found standing orders to effect this policy exceedingly difficult of enforcement. It seemed logical that they be implemented by orders to Germans not to fraternize with Americans. Division commanders published notices like this:

> "Civilians will not speak to or communicate with any American military personnel, directly or indirectly, except on official business, normally through Military Government channels. Parents will be held strictly responsible that all children be kept away from American military personnel, installations, billets and any other place where American military personnel are on duty."[13]

(2) The Military Government Detachment at Monschau posted a notice forbidding fraternization by Germans with troops, and advising that violations by civilians would be punished under Paragraph 43, Article 2, Ordinance 1, as a breach of good order. This sort of notice was disapproved by First Army, 8 January 1945, with the following dictum:

> "The punishment of Germans for fraternization is considered undesirable as a sign of weakness and evidence of inability to control military personnel."

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11. Annex III, Section XV, par 2b (2), SHAEF Directive for Military Government of Germany Prior to Defeat or Surrender, 9 Nov 1944.
12. 21st Army Group CASums, 28 Nov 1944.
13. Posted by 4th Infantry Division, 11 Nov 1944.

(3) The Supreme Commander in a letter addressed to the Army Groups, 10 March 1945, declared:

> "Non-fraternization is an internal policy of Allied Expeditionary Forces to impress upon the Germans prestige and superiority of the Allied Armies and to demonstrate to the Germans the fact of their complete defeat. To enforce that policy by punishment is contrary to the reasons underlined. Accordingly the non-fraternization policy should be enforced solely through normal military discipline methods. Action, for enforcement through the issuance of orders to the Germans or prosecutions of them for attempts to fraternize, should be discontinued".[14]

SECTION 4

THE GERMAN CODES

32. Except as abrogated or affected by acts of the Military Government, German law continued in effect in the occupied territory. As in most Continental legal systems, the basis of German law is the Codes. Primarily, these are criminal, civil and commercial. There are also procedural codes: as the Judicature Act, the Code of Civil Procedure, the Code of Criminal Procedure, the Bankruptcy Act, the law for levying of executions upon land, the Land Registration Act, and the law concerning non-contentious jurisdiction. These codes, except as later reformed, were adopted by imperial Germany. Under the Weimar Republic came the Labor Courts Act, the Juvenile Courts Act and the Youth Welfare Act. Laws passed during the Hitler regime not abrogated by the Supreme Commander included measures corresponding to the New Deal laws for protection of debtors.

33. All these were a part of the jurisprudence of the Military Government. However, the Military Government courts had jurisdiction of criminal cases only. No German court was opened in occupied territory until 1 May 1945, so there was no opportunity before V-E Day for judicial administration of the German law regulating civil relations. In Military Government courts there were about 300 prosecutions lodged under German criminal law.

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14. SHAEF Letter AG 091-1 (Germany) GE - AGM, Subject: "Non-Fraternization by Germans."

CHAPTER 2

MILITARY GOVERNMENT COURTS

SECTION 5

CONSTITUTION AND JURISDICTION

34. Ordinance No. 2 was the organic judiciary act of the Military Government. Military courts were of three grades: General, Intermediate and Summary. Membership was restricted to officers of Allied forces, including attached liaison officers.

a. General Military Courts consisted of not less than three members. One officer might sit as an Intermediate or Summary court, but Intermediate courts often were composed of two or three officers. The courts might appoint advisors, clerks, interpreters and other persons necessary for the conduct of proceedings.

b. The first United States Military Government Court was appointed at Kornelimunster in September 1944.[1] About 400 Military courts were constituted in the American Zone of occupied Germany before V-E Day, and about 300 continued in operation.

35. Jurisdiction of Persons.

a. Ordinance No. 2, Article II, Paragraph 1, provides:

> "Military Government Courts shall have jurisdiction over all persons in the occupied territory, except persons other than civilians who are subject to military, naval or air forces law and are serving under the command of the Supreme Commander, Allied Expeditionary Forces, or any other commander of any forces of the United Nations."

b. The stated exception was deemed to include prisoners of war from the forces of any United Nation, if still subject to service laws.[2]

c. Another exception was stated in the Guide to Procedure.[3] Any accused who established a claim to be treated as a prisoner of war was held not subject to the jurisdiction of Military Government courts.[4]

36. The Special Case of Liberated Soviet Citizens.

a. Agreement was reached at Yalta between the United States and the Soviet Union, effective 11 February 1945, relating to the care, maintenance and repatriation of prisoners of war and other citizens of each country liberated by Soviet Forces and United States Forces, respectively.[5]

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1. First Army CASum, 27 Sep 1944.
2. SHAEF CASum, 15 Apr 1945.
3. Document 12-C, Technical Manual for Legal and Prison Officers.
4. Par 5a, Guide to Procedure.
5. Copy attached to 12th Army Group ltr, 383.7, G-5, DP, 21 Mar 1945, Subject: "Treatment of USSR Displaced Persons Liberated by Forces Operating under United States Command."

Article 2 of the agreement provided:

"Soviet and United States repatriation representatives will have the right of immediate access into the camps and points of concentration where their citizens are located, and they will have the right to appoint the internal administration and set up the internal discipline and management in accordance with the military procedure and laws of their country. The military commander in whose zone they are located shall appoint a commandant, who shall have the final responsibility for the over-all administration and discipline of the camp or point concerned."

b. A supplementary directive of ETOUSA[6] had the following paragraph:

"9. Legal Jurisdiction.

"a. The military jurisdiction of the United States over liberated Soviet citizens within the scope of this directive normally will not be exercised where:

"(1) The offense is committed beyond the confines of the camp:

"(a) against the indigenous law of Allied liberated countries, punishment for which may be administered by indigenous courts, or

"(b) against the law enforced by military government in occupied enemy territory, punishment for which may be administered by military government courts.

For the above purposes, the custody of any such offender may be surrendered by the United States camp commandant to the appropriate authorities.

"(2) The offense is committed against Soviet citizens or against Soviet internal administration and discipline, punishment for which is administered by the Soviet authorities in accordance with the right to administer internal management and discipline, as agreed between the governments of the United States and the USSR Punishment administered, in accordance with said agreement, as internal discipline of a camp, will be subject to suspension by the United States camp commandant. Cases involving such suspension of punishment by the United States camp commandant will be reported to this headquarters for reference to the appropriate Soviet authorities. Offenses of too grave a nature, in the view of the United States camp commandant, to be properly so punished as internal discipline, will be referred to appropriate higher Soviet authorities for disposition. Reference of such cases to higher

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6. Ltr, AG 383.6, OpGA, 8 Apr 1945, Subject: "Liberated Citizens of the Soviet Union."

Soviet authorities will be made through this headquarters.

"b. The military jurisdiction of the United States over liberated Soviet citizens, within the scope of this directive, normally will be exercised only where the offense is committed against the United States or its nationals."

c. What was included in the phrase "military jurisdiction"? Was the jurisdiction of Military Government courts, "military"? Section 9a (1) of the ETOUSA letter indicated a negative answer. If an offense charged to a liberated Soviet citizen was "against the law enforced by military government, punishment for which may be administered by military government courts. . .the custody of any such offender may be surrendered by the United States camp commandant to the appropriate authorities."

d. Nevertheless, it was the practice among the United States Forces not to try Soviet civilians in Military Government courts for serious offenses, but to refer such cases to higher headquarters for directions.[7]

e. This policy involved indefinite delay, illustrated by a case arising in the military district of the Fifteenth United States Army. Early in May 1945, some Russian inmates of a displaced persons camp near Geilenkirchen, organized themselves into a gang to steal cattle from German farmers. Prosecuting their enterprise, they went to a German farmhouse, took a cow from the barnyard, and shot her owner dead. The bandits terrorized the other displaced persons, but one summoned courage to report the incident. A squad of Military Police went to the quarters of the offending Russians to put them under arrest. In exchange of gunfire, one of the Military Police was so gravely injured as to incur spinal paralysis and reduction of his life expectancy to six months. Fifteenth Army requested instructions from 12th Army Group, which referred the inquiry to SHAEF. Six weeks afterward, SHAEF directed that the offenders should be tried in a Military Government court. This was communicated to Headquarters Fifteenth Army. Meanwhile, however, British forces had occupied the zone of the crime, and 12th Army Group had been succeeded by USFET. Fifteenth Army was obliged to return the file to USFET for forwarding to the British command. The file was misplaced at USFET, and as late as 10 October 1945, the Russian murderers had not been tried.[8]

f. The policy of indulgence toward Soviet offenders[9] did not promote maintenance of order in German territory occupied by United States forces. Russian displaced persons were a primary problem of public safety. They preyed upon German civilians in bands such as that described in the preceding paragraph. Bloodshed was a frequent consequence of their predatory activity. The frustration of Military Government legal officers, by reason of their impotence in cases of crime by liberated Soviet citizens, is reflected in comments quoted in Appendix 1 to this report. If, as generally assumed, punishment of

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7. Military Government staff officers were perplexed by the ambiguity of the ETOUSA directive, quoted above.
8. Fifteenth Army Ltr, AG 013, GNMJA, 19 May 1945 and subsequent indorsements.
9. The reference is only to judicial administration, not to control over Russian displaced persons exercised under the directive. It is not to be inferred that the American military authorities "indulged" Soviet criminals beyond the failure to try them in the courts.

criminals tends to "insure public order and safety," the policy of the United States authorities in the special case of liberated Soviet citizens was in default of the international obligation levied by HR 43.

37. Jurisdiction of offenses.

a. This was prescribed by Paragraph 2, Article II, Ordinance No. 2. Included were: "All offenses against the laws and usages of war; all offenses under any proclamation, law, ordinance, notice or order issued by, or under the authority of, the military government or of the allied forces; all offenses under the laws of the occupied territory, or any part thereof.[10]

b. Jurisdiction of war crimes was not limited specifically to offenses committed within the occupied territory after occupation; but the usual concept of the jurisdiction of a military government court is that "such jurisdiction embraces the trial of offenses committed during occupation."[11] SHAEF policy did not permit the trial of offenders in such cases by Military Government courts before V-E Day.

38. Powers of Sentence. A General Military Government Court had jurisdiction to impose any lawful sentence, including death. An Intermediate Court might impose a term of imprisonment not exceeding ten years, or a fine not exceeding $10,000, or both. A Summary Military Court might not sentence to imprisonment in excess of one year, or fine in excess of $1,000, but might impose both such imprisonment and fine. Any court within its powers might impose alternative imprisonment if the fine should not be paid, and make other reasonable orders suitable to the circumstances of the particular case.[12]

39. Personnel of the courts. At least one member of all Intermediate and General Military Courts was required to be a lawyer serving with the Military Government. It was directed that when practicable, a Summary Military Court should have a lawyer officer;[13] but legal specialists were assigned or attached only to the larger Military Government detachments. Hence, in most of the Summary Military Courts, the officer was not a lawyer. The inexperience of the Summary Court officers may have been a factor in the erratic administration of justice disclosed by Chapter 3.

SECTION 6

RULES OF PROCEDURE

40. Trial and Pre-Trial Procedure.

a. Article V, Paragraph 8, Ordinance No. 2, is a bill of rights of accused in Military Government courts. Every accused was entitled to have in advance of trial a copy of the charges; to be present, give evidence and examine or cross examine witnesses; to consult a lawyer before trial and to be represented at the trial by a lawyer

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10. Military Government Gazette, Germany, 12th Army Group Area of Control, No. 1, p 7.
11. Brig Gen E. C. Betts, Theater Judge Advocate, ETOUSA, Talk on Military Government to Specialist Law Course (Paris), 21 Mar 1945.
12. Rule 14 (4).
13. Rule 2 (2).

of his own choice, or conduct his own defense if desired; to be represented by an officer of the Allied Forces, if not otherwise represented, in any case in which a sentence of death might be imposed; to bring with him to the trial such material defense witnesses as he might wish, or to have them summoned by the court if practicable; to apply to the court for any adjournment necessary in preparation of his defense; to have the proceedings translated if in a strange language; to file a petition for review if convicted.

b. Proceedings were begun by summons, warrant or arrest. The warrant might be issued by any officer of the Allied Forces and executed, or a summons signed and served, by any member of the Allied Forces, or any person acting under Allied authority. Upon arrest, accused was required, generally, to be taken as soon as practicable before a summary military court for arraignment.[14]

(1) Upon arraignment the court might interrogate the accused in accordance with continental practice, but no compulsion was allowed to require answer. The accused might enter a plea of guilty or not guilty, or might plead guilty to an offense other than charged and not guilty to the offense charged. If the answer of the accused upon interrogation made it appear that he might not be guilty, then, whatever the plea, the court was required to enter a plea of not guilty. If the Summary Court concluded, from statements of the prosecution and defense heard, that it lacked power to impose adequate punishment, the procedure was to report the case to the legal officer of the next higher Military Government echelon for reference to the appropriate Intermedidate or General Military Court.[15]

(2) The rules of evidence prevailing in American courts and in courts-martial did not bind Military Government courts. Indeed, there were no absolute rules except: (a) the accused might not be sworn and could not be required to testify; (b) evidence of his bad character was not admissible until he had put his character in issue, or the bad character of any witness for the prosecution; (c) no witness could be required to incriminate himself; (d) privilege was accorded husbands, wives, parents, and children, legal advisor and priests. The best evidence rule was directory, but the general test was probative materiality. General and Intermediate Military courts might receive the evidence recorded in a Summary court upon preliminary hearing before reference. Witnesses, except the accused and children under fourteen years of age not appearing to understand the nature of an oath, were required to be sworn or make an affirmation.[16]

(3) Trials were to be public, but might be in camera if necessary to prevent any prejudice to the security of the Allied Forces, or for other exceptional reason. Trials might be <u>in absentia</u> upon request

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14. Rules 5, 6, 7.
15. Rules 7, 8, 9.
16. Rules 10-12, 17.

of the accused, or if he was believed a fugitive from justice. If service of a summons was proved, an absentia trial might proceed to conviction and sentence. Otherwise, the court could go no further than make a record of the evidence and impound property of the accused. In any trial absent the accused, the court was required to appoint an officer of the Allied forces or other suitable person to represent the defense.[17]

c. Upon finding of insanity, accused might be committed to temporary custody, pending order of the reviewing authority for permanent custody or other disposition.[18]

d. In juvenile cases, involving offenders under eighteen years of age, the procedure in Military Government courts was based upon the accepted practice of local juvenile courts and those of Great Britain and United States; including, so far as practicable, reports by welfare officers in advance of trial; detention, if necessary, apart from adult offenders; informal hearings in closed sessions; interrogation of parents and release to their custody if appropriate. However, offenders more than sixteen years of age might be tried as adults if they appeared to be physically and mentally mature.[19]

e. One sentence was required in respect of all the charges upon which the accused should be found guilty. The sentence was required to state the date of commitment, which ordinarily made allowance for any period accused had been in custody. Lawful sentences, besides fines, imprisonment or death, included restitution or forfeiture of property or its proceeds in cases involving illegal possession, use, purchase or sale of property and orders affecting business operations where the accused was found guilty of illegally operating a business. A convict might also be ordered to establish his residence within or without a designated area, or not to leave or enter a designated area without permission. Sentences might be suspended for definite reasons. All sentences, except death, were to be put into execution without awaiting action of the reviewing authorities.[20]

f. The military court trying offenses against German law was not limited by the maximum sentences permitted under such law, but might impose any sentence within its power; except that in cases of homicide, attempted homicide, or assault with intent to do grievous bodily injury, no death sentence could be imposed not allowable under German law; and for minor offenses (known to the German law as Übertretung), not more than two years' imprisonment could be adjudged.[21]

41. Provision for Review.

a. Petitions for review had to be filed within ten days of sentences.[22] Without petition, review was mandatory in all cases in which sentence exceeded one year of imprisonment or a fine of one thousand dollars. Final review of such cases was required of Army commanders in the 12th Army Group and by the 6th Army Group Comman-

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17. Rule 10 (7). Actually there were no absentia trials.
18. Rule 21.
19. Rule 22.
20. Rule 14.
21. Rule 14 (7).
22. Rule 24 (2).

der.[23] Army commanders reviewed all death sentences and the army group commanders were confirming authorities.

b. The reviewing authority might set aside any finding of guilty with or without ordering a new trial; amend the charge to support a finding of guilty if the court might have amended the charge without prejudice to the accused; suspend, reduce, commute or modify any sentence, or order, and make appropriate order for discharge of the accused, the return of a fine or the restitution of property; increase penalties where a petition for review had been filed frivolously and the evidence warranted the increase; and was vested with continuing power to remit or suspend sentences.[24]

c. Proceedings were not to be invalidated nor sentences disapproved for any error or omission unless injustice to the accused appeared.[25]

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23. SHAEF Directive for Military Government of Germany, 9 Nov 1944, permitted delegation of review in such cases by army group to army commanders. 12th Army Group by Directive for Military Government of Germany, 23 Nov 1944, delegated the reviewing authority.
24. Rule 25.
25. Rule 26.

CHAPTER 3

CRIME AND PUNISHMENT IN OCCUPIED GERMANY

SECTION 7

TRIALS IN MILITARY GOVERNMENT COURTS

42. The Principal Offenses.

a. More than 16,000 cases, involving about 20,000 persons, were tried in Military Government courts of United States Forces between 18 September 1944 and V-E Day.[1] More than 99% of these trials were in Summary courts. About 70% were upon curfew and circulation charges. About one-eighth of all cases arose under Sections 1 to 20 of Ordinance No. 1, where the death penalty might have been imposed. Actually there were eight death sentences by Military Government courts, and only four executed.

b. Approximately one-half the cases under Sections 1 to 20 were filed under Section 16 forbidding plunder, pillage or looting. About 20% more were under Section 19, relating to theft of property of Allied forces. Most such cases were trivial.

c. Thirteen cases involved espionage and communication with or direct aid to the enemy, and six unauthorized possession or communication of information dangerous to security of Allied forces. There were thirteen cases of sabotage and thirty-nine of harboring enemy soldiers. Some of these "War Treason" cases had mitigating circumstances.

d. The most common offense which could be considered grave was unlawful possession or use of fire arms. There were nearly 500 such cases. In few cases did it appear probable that the fire arms were intended to be used against Allied forces. Some were retained for protection against marauding displaced persons, some for hunting.

e. Next in frequency of commission among the serious offenses was the making of false statements to the Military Government. One hundred and fifty-six such cases were reported to 12th Army Group. German civil servants, especially, were prone to deny membership or association with the Nazi party or affiliated organizations.

f. About 90% of about 300 prosecutions under German law were for ordinary crimes, such as theft and assault, the remainder for violation of economic controls.

g. Less than 10% of the prosecutions resulted in acquittal or dismissal.

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1. This estimate has been derived from an analysis of army reports to army groups. First, Ninth and Fifteenth Armies reported to 12th Army Group for periods ending 31 May 1945, a total of 14,943 cases (See Appendix 2). Seventh Army reported to 6th Army Group, before incorporation into the 12th Army Group, 1,116 cases. It is probable that none of these cases were tried after V-E Day, since reports would hardly have reached armies so soon. Numerous offenses committed before V-E Day were not tried until afterwards, as appears from the records on review. Some records of trials before V-E Day reached the armies after 31 May 1945.

43. Punishment.

a. In his report of 4 March 1920, Colonel I. L. Hunt, Officer in Charge of Civil Affairs, American Forces in Germany, wrote of the Rhineland occupation after World War I:

> "No means seemed to exist to bring about uniformity of action by the various courts. The judgments of the courts showed a wide divergence of viewpoint. In one jurisdiction for a particular offense, a one hundred mark fine would be imposed; while in another jurisdiction for the same offense, imprisonment of three months would be imposed."[2]

b. The experience of the American Forces in Germany after World War I is paralleled by the record of Military Government courts in the belligerent occupation prior to V-E Day. In some cases small fines (as low as 150 marks) were imposed for unauthorized possession of weapons or ammunition; in others long prison terms were adjudged, up to twenty years. Penalty for curfew violations ranged from a fine of twenty marks to imprisonment for ninety days; for unauthorized circulation, from a fine of ten marks to imprisonment for nine months; for unlawful possession of Allied property, from a fine of twenty-five marks to one year's imprisonment; for false statements, from a fine of 150 marks to imprisonment for three years.

c. The practice of most Summary courts, in minor cases, was to impose fines rather than sentence to prison terms. In the majority of curfew and circulation cases, the penalty was only a fine.

d. Sentences were often suspended without reference to the direction of the Guide to Procedure: "a sentence should be suspended only for a definite reason, not as a means of cutting down a sentence considered appropriate."[3]

e. It may be said that in some political sub-divisions of the American Zone of Occupation, the administration of justice was lax in that penalties were too mild; in others, penalties were beyond legitimate requirements of the Military Government.[4]

SECTION 8

ACTION OF REVIEWING AUTHORITIES

44. Practice upon Review.

a. Article VI, Paragraph 9, Ordinance No. 2, required review of every case in which a petition for review should be filed and such others as should be determined by the rules. The reviewing authority was an officer or officers designated by or under authority of the Military Government.

b. In the 12th Army Group, the reviewing authority was the

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2. Hunt Report, p 94.
3. Technical Manual for Legal and Prison Officers, Document 12-C, par 18.
4. The "basic principle" of punishment in Military Government courts is stated in par 1 of the Guide to Procedure.

appointing authority, except that the army commander, or an officer or board of officers designated by him was responsible for final review of all cases in which the sentence should exceed imprisonment for one year or a one thousand dollar fine.[5] In the event of territorial changes in command and removal of the appointing authority from the area of the offense, the succeeding commander became the reviewing authority. Death sentences could not be executed until confirmed by the army group commander. Death sentences of German courts might be executed after confirmation by the army commander.

c. The 6th Army Group Commander was the reviewing authority in his territorial jurisdiction, except that death sentences were reviewable by army commanders and reported to Army Group for confirmation.

d. The Commanding General of the First United States Army designated a board of review for Military Government cases, composed of his G-5 and the executive and senior legal officers of the G-5 Section. This board would review all cases where the sentence was less than imprisonment for ten years or a ten thousand dollar fine. Other cases were reserved for review by the Army Commander, who also reviewed board recommendations to revise sentences. The Third and Ninth armies had similar boards of review. No board of review was constituted in the Fifteenth Army. The Judge Advocate reviewed records and submitted his recommendations to the Deputy Chief of Staff, as in general court-martial cases. This was also the practice in subordinate commands of the Fifteenth Army. In all American commands, case records were reviewed by a lawyer serving with the Military Government.

45. Doctrines Established by Review. Review involved, usually, the sufficiency of the evidence to establish an offense and propriety of the punishment imposed. These are questions of fact whose just determination required only fairness of disposition and familiarity with the scale of penalties in civilized jurisprudence. Few cases required declaration of principle or established a precedent for guidance of legal officers. So far as shown by opinions upon review, these few are digested below:

a. Military Government Court Rule 8 provided for reference of cases to higher courts after preliminary hearing in a Summary Court. Before reference, in the absence of a standing order affecting the case, the Summary Court officer must have heard sufficient statements and evidence to form an opinion he could not impose adequate punishment. In some instances, the Summary Court officer, being also authorized to sit as an Intermediate Court, would simply convert himself into the higher court and proceed to trial and sentence. Reviewing authorities held this deprived the accused of his right to a fair and impartial trial; since the court had prejudged the sentence, if not the guilt.[6]

b. Paragraph 21, Guide to Procedure, directs equivalence of $1.00 to one day's imprisonment in fixing alternative prison sentences for default of fine. Summary courts, having power to assess fines of $1,000, would, quite commonly, assess alternative prison sentences exceeding one year. This was held to be beyond their powers and

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5. 12th Army Group Directive for Military Government of Germany, 23 Nov 1944, par 6b.
6. There were several such cases, and the action of reviewing authorities uniform. One is cited in Fifteenth US Army Final After-Action Report, Judge Advocate Section, p.17.

sentences in all such cases modified.

c. Reviewing authorities were required to vacate numerous sentences of German civilians to imprisonment for acts of fraternization with American military personnel. These were generally prosecuted under Section 43, Ordinance No. 1, as "prejudicial to good order." [7]

d. Military Government Court Rule 22 was held mandatory; that juveniles must be sentenced to confinement, if at all, apart from adult offenders.[8]

e. The Commanding General, Seventh Army, vacated a sentence imposed upon a citizen of Augsburg for failure to surrender firearms. The Military Government entered Augsburg 28 April. Notices of place and time to surrender firearms were posted 30 April - 1 May. Before actual notice to the accused, his house had been taken over by American military authority, and accused denied access afterward. A machine pistol was found in his cellar. The reviewing officer wrote that in any military occupation, civilians must have reasonable notice of the circumstances for delivery of weapons; hence, that accused had committed no offense by failure to surrender his machine pistol before requisition of his house.[9]

f. An agent of shirt manufacturers in Bielefeld offered a stock for sale from a truck in front of the factory. A large crowd gathered and highways leading to the factory were jammed. The agent vendor was prosecuted under Section 37, Ordinance No. 1, forbidding public meetings. Conviction and a severe sentence were set aside by the Commanding General, Seventh Army, even though no petition for review filed. The sale of shirts was lawful, said the reviewing officer, and the gathering of customers only incidental. There was no "public meeting," forbidden by the Ordinance.[10]

g. A Saar German, after the Saar Plebiscite, had fled to France and become a French citizen. He returned to his former home, upon American occupation of Saarland, and began political agitation for separation of the Saar from Germany. He was escorted across the border into Saarland by French officers, and immediately registered with the Military Government. Because of displeasure at his subsequent political activity, he was prosecuted for violation of the Frontier Control Law, as well as upon other charges. The Commanding General, Fifteenth Army, voided the finding of guilty upon the Frontier Control charge, holding that the entry of accused into the Saar under French military auspices was not illegal.[11]

46. Summary. Such vagaries of the Military Government courts as imposition of fines where prison terms seemed appropriate, inadequate prison sentences and indiscriminate suspension of sentences could not be corrected by reviewing authorities. Moreover, sentences were sustained that seem from the record unduly severe, and to have merited revision. Prejudice of commanders and their chiefs of staff sometimes discouraged recommendations to mercy. But, altogether, the reviewing legal officers seem to have sought attainment of justice in the Military Government; and to have succeeded in such degree as to brighten the history of the belligerent occupation.

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7. See discussion and note, pages 23-24.
8. Case of Hans Tonner et al, Fifteenth Army.
9. Case of Johann Morganlander.
10. Case of Johann Hüttker.
11. Case of Joseph Nagolsky.

CHAPTER 4

THE GERMAN JUDICIAL SYSTEM

47. Courts and Lawyers.

a. Until 1933, German civil rights were in a familiar pattern. Equality before the law, freedom of speech and the press, freedom of religion, the right of petition and assembly, habeas corpus, interdiction of double jeopardy and ex post facto laws; all these were in the German tradition and their fundamental law. Minorities were secure in the use and culture of their language. There was Constitutional liability for public wrong. By German criminal law, if one accused could prove his innocence, he was entitled to indemnity for the wrongful prosecution.

b. After 1933 there was no rule of law in Germany, only martial rule. The courts became, as an English judge once said of courts-martial: "only committees to execute the power of the Government."

c. Inevitably, the bench and bar of Germany were corrupted in the process of their nazification. The criminal courts became laboratories for Nazi theory: that a judge is not a slave to law books; that the individual is not important; that cases should be decided only in the interest of the state, without regard to objective justice. To effectuate this theory, the Nazis had to free the judiciary of inhibitions arising from any sense of responsibility to law.

d. By Law No. 2, the Supreme Commander suspended the operation of ordinary German civil and criminal courts. The Military Government was charged with the responsibility for eliminating Nazi or otherwise undesirable elements from the judiciary and administration of justice. German courts were to be reopened only when a sufficient nucleus of personnel should be found who could be relied upon to administer justice, free from Nazi principles and doctrines.[1]

e. Such a "nucleus of personnel" was not readily available. It was estimated by Dr. Konrad Adenauer, former Lord Mayor of Cologne and Prussian Stadtrat President, that 95% of the German judges were Nazi.[2] While the percentage of lawyers enrolled in the Party was less (Dr. Adenauer estimated 30%), yet organization of the Nazi bar association (Deutsches Rechtswahrerbund) was a merger of professional associations of judges and lawyers.[3] Directives left it uncertain whether judges and lawyers not Nazis but members of DRB could be licensed to practice law or appointed to the judiciary.

f. The first courts to be reopened, under directives, were the Amtsgerichte, the lowest in the German judicial system. Judges of these courts were even more liable to be Party members than the judges of higher courts. The higher court judges were reluctant to assume positions as Amtsrichter, fearing prejudice to their accumulated rights of seniority and pensions. Lawyers were not eager for judicial

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1. SHAEF Directive for Military Government of Germany, Annex III, Sec XV, par 5.
2. Report of Lt Bield to Col Page, 12th Army Group, 23 Apr 1945.
3. German Basic Handbook, Part Two, Chapter V, p 82.

position, because of low salaries paid German judges and the greater remuneration of practice at the bar.

g. Physical difficulties were encountered. In many towns and cities the court houses had been destroyed or badly damaged in the course of military operations. Records had been removed with the retreating Germans.

48. Progress toward Reorganization.

a. Only one German court began to function under Military Government before V-E Day. This was the Gericht of Aachen.[4] It was reopened 1 May 1945, with one judge and three lawyers approved for practice. However, no cases were tried in the Court at Aachen until ten days after its reopening; consequently, after V-E Day.

b. Considerable progress was made by Military Government legal officers toward reopening of the German courts. They had been instructed to undertake reorganization of the judicial system as soon as possible after the establishment of Military Government.[5] They obeyed the instruction with energy.

49. Prisons and Concentration Camps.

a. The German prison system proper was administered under the Ministry of Justice. Military Government legal officers were charged with responsibility for assistance in the supervision of prison administration. Notoriously, the Nazis established many concentration camps for political prisoners, operated by the SS.[6]

b. As United States forces advanced toward the Rhine, prisons and concentration camps were generally found to be empty. The German retreat to the Rhine was orderly enough to permit movement of prisoners with retreating armies. Prisons were sometimes destroyed in bombardment. Initially, it was necessary to transport Military Government prisoners to Alsace and Lorraine for confinement. However, even west of the Rhine, some prisons and their population were found intact; and this was the case more often as American armies advanced rapidly eastward.[7]

c. No populated concentration camps were found in the Rhine province west of the Rhine. East of the Rhine, the advance of the United States Forces was so rapid, large numbers of concentration camp inmates were released haphazardly by task forces. Where communities were by-passed by the task forces, concentration camps were left intact.[8]

50. Review in Cases of Political and Other Prisoners. Military Government officers were instructed that as soon as practicable after control of prison institutions had passed to the Allied forces, they should accomplish the review of cases of political prisoners; of prisoners under sentence to death or corporal punishment; and of those

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4. Report of Fifteenth Army to 12th Army Group, "Condition of German Courts as of 30 June 1945."
5. Technical Manual for Legal and Prison Officers, Document 2, par 307, p 7.
6. For a partial list of concentration camps, see Germany, Basic Handbook, Part II, p 153.
7. 12th Army Group G-5, "Notes for Press Conference," 12 Jun 1945.
8. Ibid.

awaiting trial who had been confined for terms approximating the probable sentence if convicted. Boards of review were to be appointed by responsible commanders, who should recommend or if authorized might order the release of political prisoners and the release or provisional release of those long confined and still awaiting trial. They might also make recommendations, or if authorized, orders, with respect to the modification or commutation of sentences of death or corporal punishment imposed upon prisoners not released.

a. Political prisoners were defined as: "Those prisoners whom the prison records show to be in confinement by reason of race, creed, political activity or other injustices, or concerning whom evidence may arise indicating that the principal cause of incarceration is political persecution."[9]

b. Before V-E Day, approximately 100,000 civilians were released from prisons and concentration camps by United States forces. About one-third of these were Central Europeans (Germans, Austrians and Czechs). The alien population was almost equally divided among Eastern and Western Europeans, respectively. While a considerable number of prisoners remained in concentration camps after V-E Day, they were held for their own convenience because too ill to be moved, stateless or Eastern Europeans awaiting repatriation.[10]

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9. Document XIII g(2), Technical Manual for Legal and Prison Officers.
10. 12th Army Group to SHAEF, "Report on Political Prisoners," 5 Jul 1945.

PART THREE

DEVELOPMENT OF INTERNATIONAL LAW

CHAPTER 1

RULES OF LAND WARFARE

A primary source of international law is the practice of great Powers. "As among men so among nations the opinions and usages of the leading members in a community tend to form an authoritative example for the whole."[1] It is believed that United States Forces in the European Theater of Operations established precedents in the law of war related in this chapter.

51. Lawful Belligerents.

a. HR 1 protects militia and volunteer corps who have: a responsible commander; "a fixed distinctive emblem recognized at a distance"; carry arms openly; and conduct their operations in accordance with the laws and customs of war.

(1) The Chief of Staff, 21st Army Group, doubted whether the detachable armband worn by the members of the Volksturm was the fixed emblem required by HR 1.[2]

(2) SHAEF commented upon the question raised by the Chief of Staff, 21st Army Group: "It is doubtful whether 'fixe' (the French word used in the original draft of the Hague Rules) means irreroveable or invariable. But the requirements prescribed by us should not be more strict than those urged by us in the case of nationals of our allies seeking to bring themselves within the definition of the Hague Rules. The FFI and other irregular allied forces have worn brassards of the usual detachable type and will continue to wear them. It is considered therefore that we must accept for the present a similar usage on the part of the enemy."[3]

b. During European operations the War Department changed paragraphs 345, Liability of Offending Belligerents, and 347, Offenses by Armed Forces, in Field Manual 27-10.

(1) Paragraph 347, Offenses by Armed Forces, formerly included the following: "Individuals of the armed forces will not be punished for these offenses in case they are committed under the orders or sanction of their government or commanders. The commanders ordering the commission of such acts, or subordinate authority may be punished by the belligerent into whose hands they may fall."

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1. Sir Frederick Pollock in Columbia Law Review II, 511, quoted in a footnote, p 12, Vol 1, Hyde on International Law.
2. Memorandum 735, Opinions B, 22 Nov 1944.
3. GCT 370.63, Opns A, 8 Dec 1944.

(2) This doctrine was revised by the elimination from paragraph 347 of the words quoted above. In their place, Paragraph 345.1 was added as follows: "Individuals and organizations who violate the accustomed rules and customs of war may be punished therefor. However, the fact that the acts were pursuant to order of a superior or government sanction may be taken into consideration in determing culpability either by way of defense or in mitigation of punishment. The person giving such orders may also be punished."[4]

52. Prisoners of War.

a. Enemy civilians detained by United States forces, except for offenses against Military Government, received full protection of the Geneva Convention.[5]

b. Deserters from the German Army, regardless of desertion date, were held entitled to treatment as prisoners of war.[6]

c. Prisoners of war were compensated for work in installation of their own camps, notwithstanding Paragraph 107, FM 27-10. "Installation" was held not within the phrase "administration, management and maintenance" required gratuitously of prisoners under Article 34 of the Geneva Convention.[7] Prisoners of war were not subject to compulsory manual tasks except when incident to the operation of their camps. They were not employed as personal servants except to officers of their own nationality.[8] They were permitted to be employed in coal mines shown by actual inspection to be safe installations,[9] and used as civil service workers.[10]

53. Disposition of Booty. The practice with respect to enemy property captured in liberated countries was discussed in Part One, Chapter 3. Reference was made to SHAEF Administrative Memorandum 5 as revised 7 February 1945, directing use of captured property to discharge responsibilities of the Supreme Commander to the civilian population in occupied as well as liberated territory. As noted, cash transactions with the civilian authorities in both liberated and occupied territory were forbidden except upon specific authority of the Supreme Commander.

a. The practice of United States Forces in occupied territory accorded with the SHAEF directive.[11] The legal basis first suggested to permit release of captured property in liberated territory to civil authorities was the Lend-Lease Act. However, the conduct with reference to captured property in occupied territory suggests recognition of the limited title implied by the words of HR 53: "take possession of...

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4. FM 27-10, C-1, 15 Nov 1944.
5. This was upon initiative of the State Dept pursuant to the policy, communicated to Bern by telephone 18 Dec 1941, referring immediately to Germans and Italians interned in the United States.
6. 12th Army Group to First Army, 10 Mar 1945. First Army proposed to treat as civilians all who had deserted after 6 Jun 1944.
7. Memorandum Theater Judge Advocate, 24 Mar 1945.
8. Appendix "A" to COSSAC, 31 Jan 1944.
9. SHAEF Ltr, AG 383.6, 11 Mar 1945.
10. SHAEF to 12th Army Group, 14 Mar 1945.
11. See, for instance, Final After-Action Report, Judge Advocate Section, Fifteenth Army, p 12-13.

all movable property..which may be used for military operations."[12]

54. Power and Obligation of Belligerent Occupant. As pointed out in the discussion of Part Two, Chapter 1, the Supreme Commander did not regard the obligation to "respect, unless absolutely prevented, the laws in force in the country" as forbidding the abrogation of Nazi laws in accordance with the national policy of the United States.

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12. Lt (now Major) Bishop in his memorandum of 12 Oct 1944, approved by the Theater Judge Advocate, expressed opinion no such title to seized enemy property vests in the captor as to prevent reversion to French owners of property seized by the Germans in France and left behind upon their retreat. The conventional right to "take into possession" does not imply, necessarily, unqualified right of disposition.

CHAPTER 2

THE LEGAL EFFECT OF THE SURRENDER

55. The Romans had a word for it. Unconditional surrender was the deditio of the Roman practice,[1] when the vanquished put themselves at the mercy of the victor. "Let the Carthaginians entrust themselves to our decision," said Publius Cornelius Lentulus at the end of the Second Punic War, "as conquered peoples are accustomed to do." Grotius called this "pure surrender...which makes the one who surrenders a subject and confers the sovereign power on him to whom the surrender is made."[2] Upon such an outcome, says one writer, "there are no longer two states face to face."[3] Writes another: "The complete submission of one of the belligerents to the other puts an end to the war by the obliteration of the political existence of one of the adversaries. A state disappears - dies."[4]

a. It may be doubted reasonably whether such extreme development was expected when the Allied heads of state pronounced at Casablanca for unconditional surrender of the Axis Powers. Certainly, the Italian instrument of surrender implied no bereavement in the family of nations. But as the war continued the Allied demand for unconditional surrender of Germany became as uncompromising as Grant's message to Floyd at Fort Donaldson.

56. The German state having been extinguished at Rheims, the victorious Powers acquired sovereignty over the German people. By the Atlantic Charter, the Western Allies forswore any design to annex territory. It may be said, accordingly, that their share of the sovereignty over Germans is provisional only. Nevertheless, it is complete. The state of war between the United States and the Germans came to an end V-E Day. The relationship of conqueror and subject began to subsist instead.

57. Hence the present military occupation of Germany is not belligerent. The law of belligerent occupation codified at The Hague no longer controls.

58. This results from the basic concept of The Hague Convention, temporary and precarious occupation only. Nearly all of the rules of the Convention regulating the authority of a military occupant are obviously based on this element of precariousness. The title of Section III, Annex A, is "Military Authority over the Territory of the Hostile State"[5]--implying continued existence of the state whose territory is occupied. In the case of Germany, the existence of the hostile state did not continue. The laws of humanity still control United States forces in their government of the German people; but such limitations upon the exercise of sovereignty as are defined by The Hague Rules do not affect the current military occupation.

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1. Hershey, The Essentials of International Public Law and Organization, 1927, p 47.
2. Of the Law of War and Peace, Book III, Vol 2, p 825-6 of the translation of Carnegie Classics of International Law.
3. Varraes, The Law of War and Neutrality, 1906, Vol 1, p 286.
4. Fauchille, International Law, 1921, Vol II, Book 6, p 1030-1.
5. TM 27-251, p 31.

59. Interesting questions of domestic law suggest themselves to American lawyers. Our "Supreme Law" is the Constitution, constitutional acts of Congress and international treaties made and ratified by the authorities and in the manner specified by the Constitution.[6] None of these have any reference to the current occupation of Germany. The authority being exercised by the President through military commanders and civilian agents is as provisional as the occupation itself. Our military government is de facto. No doubt, in due course, through a treaty ratified by the Senate or by Act of Congress, the sovereign relationship of the United States to the German people will find a stable basis in positive law.

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6. Constitution, Article VI

CHAPTER 3

CONCLUSIONS AND RECOMMENDATIONS

60. The Army and Navy Manual of Civil Affairs and Military Government should be revised.

a. "Civil Affairs" deserves a new definition[1] with special reference to operations in territories administered by friendly governments. The Manual is "primarily intended as a guide to Military Government" and has only the general statement that "some of the principles set forth may be applied...as circumstances indicate" in countries where supreme authority has not been assumed by United States forces.[2] The legal relationship of United States forces to the civil population of such countries was defined sufficiently by the experience in the European Theater to justify a more definite statement of basic policies.

b. Revision of the Manual should be with due regard to international law. There is internal evidence that the Manual was, at least in part, a "laymen's document." The legal obligation to respect the laws in force in occupied territory is ignored altogether by suggestions of advisability and wisdom.[3]

c. The Manual should be harmonized with AR 25-5. Civil affairs is stated correctly to be a "command responsibility."[4] The following is an excerpt from AR 25-5:

> "The judge advocate of a command is the legal advisor of the commanding officer thereof...his functions in time of war may include duties in connection with provost courts or other military tribunals and the furnishing of advice concerning legal questions relating to claims and relations of the civil population which may arise in occupied enemy territory or be incident to hostilities."

FM 27-5 ignores AR 25-5 altogether. The only reference to a function of the judge advocate in Civil Affairs or Military Government is under the heading "Miscellaneous".[5] "Members of the Civil Affairs section of a staff will have relations with the judge advocate...for review of the records of military commissions."[6]

d. Paragraph 44 of the Manual relating to procedure in Military Government courts does not accord with the Rules of Military Government Courts and the Guide to Procedure[7] used in occupied Germany. The procedure directed by the Rules and the Guide is believed more appropriate to Military Government courts than the rules for courts-martial, directed by the Manual to be applied in the trial of offenses against the Military Government.

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1. See Part One, Chapter 1, this report.
2. FM 27-5, p 2.
3. Ibid, p 8.
4. Ibid, p 5.
5. Sec 12Y, p 20.
6. Par (2) (b) 9.
7. Documents XII-A, XII-C, Technical Manual for Legal and Prison Officers.

61. Chief Legal Officers in Civil Affairs and Military Government.

a. In most commands within the European Theater, FM 27-5 was accepted as authority for assignment of legal advisors in headquarters, rather than AR 25-5. The judge advocate was not required to perform services generally in connection with the commander's civil affairs responsibility nor in the administration of military government. The G-5 section in staffs of army groups and armies had legal assistants. The assistant chief of staff, G-5, who might or might not be a lawyer, was responsible to the commanding general for legal advice in such matters as rights in captured enemy property, the drafting of legislation for areas of responsibility, the establishment and supervision of Military Government courts, and reorganization of the German judicial system.[8]

b. When Fifteenth United States Army undertook its mission of occupation in the Rhineland, Lieutenant General Leonard T. Gerow distributed among the other general and special staff sections many functions reserved to G-5 in other occupying armies.[9] The Army Judge Advocate became the chief legal officer of the Military District. Similar responsibility in corps areas and division sub-areas passed to the staff judge advocates of those subordinate commands in the Fifteenth Army District.

c. It is believed that assignment of civil affairs and Military Government legal duties to the judge advocate section is more logical staff organization and makes for more effective use of manpower than the segregration of these duties to G-5. No good reason is perceived why a civil affairs staff section should have different legal advisors than the commander and other staff sections. Practically, the legal specialists in civil affairs staff sections and units were withdrawn from usefulness during much of the period of European operations. They had many months of idleness in England, and most of them more months of idleness in the liberated countries.[10] At the same time the functioning of the judge advocate in administration of military justice was hindered by deficiency of personnel.[11] The civil affairs legal specialists were a reserve needed but not then available to the judge advocate sections.

d. In point of fact, the Military Government legal specialist assigned to the Judge Advocate Section, Fifteenth United States Army, was made generally useful in the operation of that section, just as the other judge advocate officers; to review records of general courts-martial and military commissions, and provide legal assistance upon occasion to personnel of the command, in addition to his duties in the administration of Military Government. Correspondingly, other officers of the section were of assistance to the Commanding General in the discharge of his responsibility as Military Governor. It may be observed also that in each of the other occupying armies, two or three legal specialists were assigned to the G-5 staff section as legal advisors to G-5 only; whereas in the Fifteenth Army Judge Advocate Section there was only one, who was available for general judge advocate duty as well.

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8. Effective liaison was maintained in some commands between G-5 and the judge advocate. For instance, see First United States Army Report of Operations, Annex No 20, Book VII, p 239.
9. SOP 23 May 1945 which became effective actually 27 Apr 1945, Final After-Action Report, Judge Advocate Section, p 11.
10. Part One, Chapter 1, this report.
11. Report of the Committee on the Judge Advocate Section in the European Theater of Operations.

e. It follows, of course, that judge advocate officers should have intensive instruction in the policy and laws of Military Government, including the legal system of any country whose occupation may appear probably necessary.

62. The Military Government Courts.

a. The Rules contained a direction:

> "In General and Intermediate Military Courts, and, when practicable, in a Summary Military Court, at least, one member shall be a lawyer serving with the Military Government."[12]

Obedience to the direction of the Rule was not generally practicable. Summary courts sat at the location of every Military Government detachment. In the smaller Kreise and even in some large ones, Military Government personnel did not include a lawyer. The summary courts had considerable powers of punishment and large discretion in the exercise of their power. They might fine one accused a few marks, or assess the equivalent of two years' imprisonment. Efficient administration of justice in the Military Government requires personnel trained in the relative evaluation of crime and punishment. Military Government detachments ought to be organized with respect to the importance of Military Government courts in the effective and just control of the civil population.

b. Some officers of summary courts do not appear to have appreciated the gravity of the offense involved in unauthorized possession of firearms. This class of cases, and all cases of war treason and war crimes, should be withdrawn from the jurisdiction of summary courts.

c. It is stated in the Guide to Procedure:

> "It is important that when an offense against the Allied Forces has been established appropriate punishment should be imposed with a view to the prevention of further such offenses."[13]

This was a basic principle in administration of Military Government courts. The imposition of fines only, without prison sentences, did not usually conform to the basic principle. There was an oversupply of currency in Germany, as everywhere else in the world. Accused did not object seriously to the payment of a fine, but none of them wanted to serve time in jail. It is believed that a prison term of at least a few days should be mandatory in every case, and suspension allowed only in extreme cases.

d. The Supreme Commander stated his purpose in enactment of Law No. 1:

> "To eliminate from German law and administration within the occupied territory the policies and doctrines of the Nationalist Socialist Party and to restore to the German people the rule of justice and equality before law."[14]

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12. Military Government Court Rule 2 (2).
13. Document XII-C, Technical Manual for Legal and Prison Officers, p 1.
14. Military Government Gazette, 12th Army Group Area of Control, No 1, p 11.

The philosophy of the quoted statement permits no favor nor discrimination because of nationality. Soviet offenders against the Military Government should not have been protected from punishment for their crimes;[15] nor should rules of evidence obtain in cases of British subjects and American citizens differ from those applied in the trials of other nationals.[16]

e. The Guide to Procedure should be revised to include a statement of the principles established during the current occupation.[17] If the occupation of Germany is to be prolonged, the ordinances and laws should be studied with a view to revision and a table of maximum punishments.

63. Changes in FM 27-10, Rules of Land Warfare.

a. The word "installation" should be eliminated from paragraph 107, page 26; the word "management" substituted.[18]

b. Paragraph 327, "Booty," should be revised to indicate authority and responsibility of the captor to use surplus captured property for purposes of civil affairs and Military Government.[19]

c. It should be made plain that the written rules of land warfare do not control an occupant after unconditional surrender.[20]

64. Fraternization.[21] "We learn from history that we do not learn from history." Of the Rhineland Occupation by the Third United States Army, 1918-19, Colonel Hunt wrote:

> "The anti-fraternization orders became probably the most discussed regulation ever issued by the army of occupation....At the end of a few months the only effect on the average soldier was that it prevented him from appearing in public with his German acquaintance...Its failure to achieve practical results among the soldiers soon became notorious."[22]

a. Colonel Hunt defends the "theory" of non-fraternization, and attributes failure among the soldiers to their billeting in homes. Curiously, he adds that the removal of troops to barracks "required recission" of the order.[23]

b. The empiricist must deny validity even to the theory of orders against fraternization as a measure of Military Government. Of the experience with relation to the standing orders in the European Theater of World War II, a journalist wrote in Time magazine that their only effect was to make Americans look ridiculous; and suggested, sarcastically, that it might have been a successful regulation if limited

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15. See Part Two, Chapter 2, Section 1, this report.
16. Guide to Procedure, par 12; Document for Legal and Prison Officers TM 12c, p 3.
17. Chapter 3, Section 2, this report.
18. Part Three, Chapter 1, par 2, this report.
19. Chapter 4, Part One and Chapter 1, Part Three, this report.
20. Part Three, Chapter 2, this report.
21. The scope of the study assigned to the Committee included "the legal aspect of all relations between invading forces and civilian element including hostile nationals."
22. Hunt Report, p 205-6.
23. Ibid, p 206.

to German males more than 16 years old. As a security measure in combat zones during operations, non-fraternization orders seem logical. Among well disciplined troops they might be then and there enforced.

c. But the reason assigned at SHAEF for the standing orders against fraternization had nothing to do with security. The purpose, it was said, was "to impress upon the Germans the prestige and superiority of the Allied armies and to demonstrate to the Germans the fact of their complete defeat." The prestige and superiority of Allied armies and complete defeat of the Germans were demonstrated and impressed upon the Germans by ruined cities; by the headlong retreat and rapid disintegration of their own armed forces; by the fact of occupation; at last, by the Unconditional Surrender. The Germans had been conquered by forces of a nation dedicated to the proposition that all men are created equal. Prohibition of normal personal relations among human beings did not accord with the basis of our national life.

d. It is recommended that study be given toward effective measures for security of occupying forces and maintenance of their dignity, that do not involve the futile expedient of non-fraternization orders.

APPENDIX 1

EXCERPTS FROM REPLIES TO JUDGE ADVOCATE QUESTIONNAIRES

For assistance in the studies assigned to the Judge Advocate Section, the President of The General Board circulated among judge advocate officers and Military Government legal specialists in the European Theater a questionnaire relating in part to the legal problems of the Military Government. Most judge advocate officers simply stated that their experience in such matters was too limited to justify an expression of views. However, a few judge advocate officers and a number of Military Government detachment legal specialists sent replies. Excerpts from some are quoted in this appendix.

Colonel C. B. Mickelwait, JAGD, Deputy Theater Judge Advocate; "Bearing in mind that the Staff Judge Advocate is and should be the commander's legal adviser, I believe that the legal sections of Military Government should be under the supervision of the JA section or better still should be a part of the JA section. Otherwise a divergence of views may result in embarrassment for the commander."

Colonel Charles L. Decker, JAGD, formerly Staff Judge Advocate, XIII Corps: "The judge advocate section assisted the G-5 section in the establishment of the Military Government courts and the Commanding General of our corps required that the judge advocate review the records of trial in military government court cases which required his action. The relationship of the judge advocate and G-5 in my organization was a pleasant one. The G-5 consulted us on many occasions and we gave legal advice the same as we did to all other staff sections and commands."

Colonel Harold D. LeMar, JAGD, formerly Staff Judge Advocate of Atlantic Base Section, Peninsular Base Section, Continental Base Section and Continental Advance Section: "I was trained as a military government officer being a graduate of the School of Military Government and an instructor therein and having gone to North Africa originally as a Civil Government officer...It is my opinion that the Legal Department of Military Government should be under the supervision of the Staff Judge Advocate...that the Judge Advocate should establish procedures for courts conforming in general to the procedures of the country occupied."

Lieutenant Colonel Arthur E. Pierpont, JAGD, Judge Advocate, 94th Infantry Division: "Generally I believe all civil affairs and military government matters should be handled exclusively by agencies who have men trained for special lines of work including legal problems. A division Judge Advocate has enough to do without having to handle such matters other than as legal adviser to the commanding general...A division commander, acting as military governor in an area, naturally relies upon his JA for advice on legal matters; but trained specialists from Civil Affairs or Military Government should be entrusted with such problems and the JA make such comments or give such advice to the CG as he requests or as is deemed necessary.

"I believe military government legislation has proven adequate and effective. The necessity of prompt and complete control of occupied country is probably sufficient justification for the present system of military procedure and judgments, but they are often a decided departure from the established principles of American justice. In my opinion military government personnel of one allied country

should not be charged with any function under jurisdiction of another ally. It is essential that the local military commanding general charged with the duty of military governor give personal attention to the review of military court sentences."

Lieutenant Colonel Krit G. Logsdon, AC, Legal Officer, Detachment E-5, Company D, 2d Military Government Regiment: "Taken as a whole, the entire set up of Military Government courts has functioned very well. The work of these courts has been and is being constantly reduced by the organization and functioning of local German courts. These German courts are the answer to shifting most of the present work and responsibilities of smaller military government detachments to the German civil authorities. German Judges and Lawyers are almost without exception highly cooperative with Military Government Legal officers and have in the great majority of cases been found trustworthy and reliable...

"As to Military Government courts, generally, my opinion is that they should be rated high. The Prison Board of Review in the Westmark area, by its methods of operation; its investigation of the cases; its policy of questioning every prisoner and its insistence on fairness, earned a most enviable reputation. The work of that board, done in addition to the regular duties of its members, lasted for more than six weeks and received commendation from the appointing authority.

"The action of the reviewing authorities in Military Government and indigenous court cases has been better than average from the beginning but gradually improving in quality and efficiency...

"The displaced persons problem of looting and terrorizing communities has always been one of our most serious headaches. It still it, although it is believed and hoped on a more reduced scale.

"In my opinion the greatest need for the speedy, efficient discharge of duties by lower echelons, is in the preparation and distribution of clear, understandable directives by higher headquarters."

Major Mack W. Terry, AUS, Legal Officer, Military Government Detachment G-28: "In Germany, during combat phase, many complaints were made by civilians as to alleged instances of looting and pillaging by American troops; charges of rape were also common at this time. My investigation justified some of these charges. With the relaxation of the non-fraternization policy and the discontinuance of house searches, there has been little criticism of this nature for several months. Individual offenses are reported, but generally the civilians regard the troops as well-behaved and considerate of property rights.

"Much favorable comment has been received from civilian jurists and lawyers as to the fairness and procedure of our courts...Much difficulty was experienced in obtaining uniform sentences at the time when the courts were manned by non-legal officers...

"Displaced persons should be treated as local civilians where they have violated military government laws. The presence of a liaison officer, as now required, to sit as an adviser of the court, sufficiently protects the rights of the defendant."

Major Joseph W. Bishop, JAGD, Judge Advocate Division, Headquarters USFET: "In general, G-5 legal problems are so different from those of the army that, wherever possible, they should be handled by G-5 legal staffs rather than judge advocates. The judge advocate

should coordinate closely with G-5 on all legal problems where the army as such is concerned, e.g., where there is a security angle, where welfare of troops is concerned, where military relations with allies are involved, etc."

Major Edward T. Cusick, AUS, Legal Officer, Detachment G-33, Company B, 2nd Military Government Regiment: "Procedure through channels usually delayed unnecessarily, i.e., twenty-two days to get an order from Seventh Army Headquarters appointing intermediate court. Military Government courts are crippled by absured (and to my mind needless) limitations imposed by various tactical troop directives and orders. Paper work so burdensome as to interfere with legal and administrative duties.

"Military Government courts in small detachments always under handicap by shortage of personnel. Have tried over one thousand cases in Germany, since early in March, without the help or assistance of a prosecutor. Work of boards of review satisfactory and just.

"Restrictions preventing certain and rapid punishment should be abolished. Lawlessness amongst displaced persons generally accepted as a well known fact, but limitations placed upon Military Government courts make prosecutions difficult. This has been detrimental to prestige of American forces."

Major Franklin M. Ritchie, AUS, Legal Officer, Detachment E-1, Company A, 2d Military Government Regiment: "We have been directed to open the German courts and see that they operate, but we have been constantly hampered by the fact that troop commanders occupy court houses purely for convenience and not from necessity and fail to provide other quarters for the courts.

"Agreements with other governments for handling their nationals who have committed crimes are not adequate. They have failed to provide sufficient liaison officers to sit on or with Summary Courts in such cases, causing great delay in trials.

"The personnel of Military Government courts was not properly trained, and the officers serving on such courts had too many other duties to perform. They tried hard, but their work showed many defects due to lack of training and experience and lack of sufficient time for the job. In general, trials were fair but there was a disposition on the part of younger officers to be stampeded into convictions by reason of the demands of tactical officers.

"Seventh Army apparently did not have adequate personnel to provide for speedy review of intermediate court cases. Military Government does not have sufficient personnel for proper review of German court cases.

"The personnel of Military Government courts should be better trained and better selected. Adequate machinery should be provided for speedy review. The independence of Military Government judges should be protected against the influence of higher-ranking tactical commanders.

"Indigenous courts could relieve Military Government courts of much of their load, but such indigenous courts should be allowed adequate quarters in which to function and their authority over their own people strengthened by the support of the army rather than

diminished by constant needless interference with their functioning. They should be regarded as a means to enforce law and order rather than as a mere appendage which has no importance.

"Definite, speedy procedure for the trial of displaced persons should be set up. If their own nationals are to sit on the courts which try them, such personnel should be made readily available."

Captain O. E. Cannon, CWS, Legal Officer, Detachment E-4, Company C, 2d Military Government Regiment: "The system of appointing higher Military Government courts needs changing. If a court is ever appointed consisting of personnel present for duty, it will be found that many other urgent duties make it difficult to get the personnel together. Many are not experienced in Military Government court procedure. A suggested solution is a pool or unit of full time court officers. The headquarters to which officers are assigned should have authority to appoint the court, refer cases to it and act as reviewing authority.

"Permit military courts to try displaced persons unless there is a liaison officer quickly and easily obtainable; or have a court to handle only displaced persons cases, with which court liaison officers would be in constant touch."

Captain Russell B. Donovan, Inf, Legal Officer, Military Government Detachment G-40, Company C, 2d Military Government Regiment: "I have not observed any noticeable liaison or coordination between judge advocate and G-5 legal officers; their functions appeared separate and without any SOP to coordinate activities.

"There have been in the past, and continue to be, inconsistencies in the imposition of penalties for similar offenses tried in different courts. In the initial phases of occupation, this was patently due to the fact that many summary military court officers were not legally trained and could not call on previous experience to assist in deciding on the severity of sentences to be imposed.

"The trial of Military Government court cases is facilitated and more substantial justice effected when defendants are represented by counsel. An accused who is not represented has difficulty in understanding the proceedings and oftentimes through ignorance or fear fails to present evidence which would be competent. It is believed that a requirement that the accused be represented by counsel either of his own choice (subject to the court's approval) or one appointed from locally approved German lawyers by the court would be beneficial.

"There is an obvious need for the establishment of additional intermediate and general military courts. Several cases are still outstanding in which defendants have been bound over by a summary military court for trial by a higher court over two months ago and are still awaiting trial.

"A prime problem in the enforcement of Military Government laws has been in the trial and conviction of displaced persons who commit depradations. These acts are a definite threat to successful operation of Military Government but prosecution is impeded by vacillating policy with respect to the circumstances under which they may be tried.

"With respect to indigenous German courts, the principal problem

encountered in reactivation is the time and effort required to secure authorization from various supervisory echelons of Military Government before authorization can be obtained to reopen a court, increase jurisdiction etc. It is recommended that the legal officer directly concerned with the court involved be allowed greater latitude in the making of decisions relative to the operation of these courts. The delay experienced in the reopening of higher German courts (Landgerichte and Oberlandesgerichte) impairs the operation of lower courts in that no appelate tribunal is available to litigants."

Captain Joseph M. Donovan, CWS, Legal Officer, Detachment E-3, Company C, 2d Military Government Regiment: "In Military Government the courts and boards of review were fair, from the standpoint of substantial justice, and the limits of the mission to be accomplished.

"Residents of liberated territory offending against persons, property and security of allied forces should be treated strictly under a strong policy. It is a mistake to delegate this type of case to the indigenous courts.

"Displaced persons are a serious problem. They should be considered as such. A strong policy may sometimes have to replace our national sympathy. Military necessity should be considered. Liaison officers of the same nationality as the displaced persons, as a legal officer, is one possible solution."

1st Lieutenant Joseph F. Knowles, CAD, Headquarters Regional Military Government, Bavaria: "The untrained Military Government judiciary has handed won a variety of sentences for very similar crimes. Some are too lenient and some far too severe. On the whole, in the higher courts (General and Intermediate) a fair trial on the facts is to be found, but the sentences vary widely. In possession of weapons cases, not enough attention has been paid to the point of time and actual responsibility on the one hand; and on the other, the courts have not been severe enough in their penalties for retention of weapons after July 15th. It is suggested that a schedule of suggested punishments would have been of immense aid to these officers who acted as judges.

"The lack of any attempt to disarm the displaced persons makes the enforcement of laws on possession of weapons very difficult.

"On procedure, the most unjust feature is the lack of any system for maintaining files and records on cases so that it can readily be ascertained why a man is in prison. Some system should be set up for control and indexing of the large volume of case records.

"The criminal who is a displaced person should be tried as is any criminal, but a system of penal administration should be set up by the liaison authorities to recommend paroles, pardons, and possible transfers of place of imprisonment. The reason for this is that these people have been made criminals by circumstances and every effort should be made to reclaim them as orderly citizens."

1st Lieutenant Henri I. Ripstra, FA, Detachment I-343, Company A, 3d Military Government Regiment: "I believe sufficient authority has never been delegated, to the legal officers in the "E" and smaller detachments. It is extremely difficult to function effectively when almost every action necessary must have prior approval from higher

authority. Through experience, officers actually performing legal functions have a greater knowledge of the proper action necessary than those sitting in offices of higher headquarters.

"Some directives, legislation and rulings on law questions have not been drawn with ability. All of these documents should be so carefully drawn and thought out, that when finished they are clear, concise and lucid. It should never be necessary that legislation should require, soon after promulgation, pages of interpretations and constructions.

"There is no real necessity for three classes of Military Government courts. Two are sufficient. The Summary Military Government court should have the jurisdiction now vested in intermediate courts. Under the present situation, the local German court is under supervision of, usually, the summary court officer. The jurisdiction of the German court is much more extensive than the military court.

"The German courts have a number of functions and cannot operate efficiently until such time as they are staffed with sufficient numbers of trained personnel. A more liberal policy in retaining purely clerical and administrative employees would assist these courts to attain efficiency in operations. In determing what judges, lawyers and notaries are to be allowed to function, membership in Nazi organizations should not be the sole criterion. Their activities while members should also be matters for consideration.

"The existence of liaison between JAGD and CA/MG legal specialists is unknown to me.

"In Germany many tactical units have assumed Military Government functions and attempted direct contact with the population and officials. The results were usually confusion and misunderstanding on the part of all.

"Military Government courts have not been adequately staffed with experienced personnel. Every court should have a clerk and if possible a reporter capable of recording the evidence by shorthand. An able clerk could handle both functions after training if no reporter is available. The court officer should be, in all cases, a legally trained person.

"There should be a number of experienced officers available to prosecute the more important cases brought before the various courts.

"Actions of reviewing authorities have been good, but a bit slow sometimes.

"Displaced persons, when accused of offenses should receive exactly the same privileges and punishment, accorded under the laws, to the local population. Differences in nationality between persons in the same geographical areas, should not be grounds of discrimination either for or against an individual.

"Apparently the U.S. is attempting to establish a system of democratic government and an impartial system of justice in the occupied area. We, therefore, should make every effort ourselves to see that there is no unjust discrimination under our occupational government of the area.

2d Lieutenant Morris Karp, AUS, Legal Officer, Detachment G-39, Company C, 2d Military Government Regiment: "The Military Government courts in my estimation are doing a fine job, always acting judiciously regardless of the nationality of the accused. In some cases I do believe, though, that the sentences pronounced have been rather lenient and not commensurate with the gravity of the offenses committed. As for the indigenous courts and their personnel, it is difficult to make any judgement because they have only recently commenced to function. Thus far, they seem to lack the initiative and efficiency which the German judicial system is reputed to have possessed. Perhaps this may be attributable to a wariness to act as normally since they were so recently reorganized and activated. Also the denazification program has reduced considerably the number of experienced and skilled personnel formerly associated with the courts.

"I do not think there is enough direct contact between JA and CA/MG legal specialists. Recommend that more effective liaison between JA legal officers and legal officers on the high Military Government level be made, and that the suggestions and criticism of the judge advocate specialists be transmitted to legal officers operating on the lower Military Government levels.

"Review of Military Government cases is speedily handled by legal sections on a higher level. The review in most cases has been based on sound reasoning.

"I would like to suggest that residents of liberated territory committing offenses against the Allied Forces be severely dealt with, mainly as a deterrent to any further acts.

"In the matter of displaced persons I recommend that enough Allied Liaison Officers be available to assist in the investigation of offenses committed by Allied Nationals, and that they also sit in court at the trials as advisor to the legal officer in matters affecting displaced persons.

APPENDIX 2

ANALYSIS OF MILITARY GOVERNMENT CASES

(prepared by Cpl Fred Goldstein for Col W. H. Peters, G-5 Legal, 12th Army Group)

Total Recorded and Unrecorded (Forms 11a) Charges of Cases tried in 12th Army Group Area for Period ending 10 Jun 1945

Ordinance I

Sec No	Type of Offense	First U.S. Army	Third U.S. Army	Seventh U.S. Army	Ninth U.S. Army	Fifteenth U.S. Army	Total
1	Espionage	0	0	0	3	0	3
2	Communication with enemy	1	0	0	0	0	1
3	Unauthorized possession or communication of information dangerous to security of Allied Forces	1	1	0	0	4	6
6	Act in support of enemy	1	0	0	0	2	3
7	Killing or assaulting member of Allied Forces	0	0	0	1	16	17
8	Unlawful wearing of an Allied uniform	0	0	3	0	2	5
9	Unlawful possession of firearms or other weapons	8	51	48	139	155	401
10	Unauthorized use of firearms or explosives	1	11	0	6	13	31
12	Assisting member of enemy forces to avoid capture	7	16	0	9	7	39
13	Interference with communication	1	4	0	4	10	19
14	Sabotage	4	1	0	1	7	13
15	Destruction or removal of records or archives	3	2	0	0	8	13
16	Looting	92	112	179	126	429	938
17	Misleading member of Allied Forces	0	1	0	5	10	16
18	Incitement to Riot	0	2	0	8	18	28
19	Theft of Property of Allied Forces	13	77	16	62	185	353
20	Violation of laws of war in aid of the enemy	4	0	0	1	4	9
21	Disobedience to a Mil Gov order (90% circulation violations)	258	713	480	1004	2449	4904
22	Violation of Curfew	182	876	345	1955	2344	5702
23	Leaving shore in vessel without MG authorization	0	0	0	0	2	2
24	Moving vessel w/o MG Authorization	0	0	0	0	1	1
25	Failure to possess valid identity card	12	15	22	14	176	239
26	Unlawful issuance of a document of official concern	2	4	0	14	32	52

APPENDIX 2 (Cont'd)

Sec No	Type of Offense	First U.S. Army	Third U.S. Army	Seventh U.S. Army	Ninth U.S. Army	Fifteenth U.S. Army	Total
28	Inviting Member of Allied Forces into place marked "Off Limits"	1	2	1	1	3	8
29	Bribery	0	1	0	1	13	15
30	Assaulting Allied National	0	0	0	1	1	2
31	Unauthorized possession of property	26	105	9	112	198	450
32	Destruction of plans or records required by Mil Gov	0	1	0	3	4	8
33	Making false statements	22	7	2	36	89	156
34	False assumption of authority from Allied sources	1	3	0	2	7	13
35	Defacement or unauthorized movement of printed matter posted by Mil Gov	0	1	1	1	0	3
36	Destruction, alteration or concealment of any work of art created by another	0	1	0	0	0	1
37	Promoting or aiding a public gathering	3	0	0	4	1	8
38	Resisting arrest	1	8	12	10	49	80
39	Aiding persons wanted by Allied Forces	10	5	0	7	7	29
40	Dissemination of rumor harmful to Allied Forces	2	0	0	2	2	6
41	Conduct disrespectful to the Allied Forces	2	0	1	4	18	25
43	Acts to the prejudice of good order	33	121	32	152	594	932
Art III	Attempt or conspiracy to commit an offense	5	0	0	4	2	11
Law 53	Violation of Foreign exchange control	2	0	0	0	0	2
Law 76	Violation of communication control (post, telephones, telegraphs, radio)	0	0	0	0	7	7
Law 161	Violation of frontier control	8	50	2	14	40	114
Ger. Crim. Code	Theft, assault, etc.	16	33	12	69	123	253
Ger. Rat Law	Black market, hoarding, etc.	0	0	9	4	12	25
	TOTAL	722	2224	1174	3779	7044	14943
	Number Dismissed or Acquitted	91	255	100	357	388	1191

APPENDIX 2 (Cont'd)

Cases (Recorded)

	First U.S. Army	Third U.S. Army	Seventh U.S. Army	Ninth U.S. Army	Fifteenth U.S. Army	Total
General	6	0	1	7	2	16
Intermediate	19	7	1	36	33	96
Summary	639	1789	652	3292	3271	9643
TOTAL	664	1796	654	3335	3306	9755

APPENDIX 3

COMMENT BY CHIEF OF SECTION

The foregoing study on "Legal Phases of Civil Affairs and Military Government," was prepared in the Judge Advocate Section, The General Board, United States Forces, European Theater of Operations. The records of 12 Army Group and Fifteenth United States Army were available at The General Board. Other records were examined and officers interviewed at Headquarters United States Forces, European Theater, Seventh United States Army, Third United States Army, and Berlin District. A questionnaire was sent to all judge advocate officers serving in the European Theater during operations and to legal officers of Military Government detachments. Many replies were received, and the opinions of these officers are considered in the conclusions reached. The direction of the study and much of the research and drafting was the work of Captain Ernest May, AUS, who was graduated from the Provost Marshal General's School of Military Government at Fort Custer and the Civil Affairs Training School at the University of Michigan; served six months in Lorraine as a Civil Affairs Officer; and was Assistant G-5 at Headquarters XXIII Corps before assignment to the Judge Advocate Section, Fifteenth United States Army. During the Rhineland occupation by Fifteenth United States Army, he was the assistant to the Army Judge Advocate in supervision of Military Government courts, including review of case records, and other legal aspects of Military Government administration.

The experience of the Judge Advocate Section, Fifteenth United States Army (which became the Judge Advocate Section, The General Board) in the occupation of the Rheinprovinz Military District from 15 April 1945 to 10 July 1945 was valuable to this study. The several members of the Judge Advocate Section, all of them on duty in the European Theater during operations, contributed to this study and concurred in the conclusions and recommendations.

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