

GENERAL OBSERVATIONS ON MILITARY COMMISSIONS

1. A basic reason underlying the employment of military commissions for the trial of spies and war criminals whose offenses threaten the security of our forces is the policy of the Theater Commander that in such cases the execution of justice shall be as swift as is consistent with fairness. Such commissions, appointed by virtue of the power inherent in the Commander of an Army in the field under the "common law" of war, are not governed by statute. The laws of war require only that such individuals be given a fair trial, without specification of the nature of such trial. They are governed by the restrictions imposed by the source of the authority. These restrictions are few. Of course, the accused is entitled to the services of an interpreter and defense counsel. The Commission may make its own rules of procedure - ad hoc - without the necessity of set forms being established or appearing of record. Those employed by general courts-martial are a guide, to be employed only insofar as they facilitate speedy and orderly justice. As a matter of convenience, commissions appointed in Twelfth Army Group have largely analogized the forms (charge sheet, etc) employed by general courts-martial, and the record of trial is in a form similar to that produced by a general court-martial. But, for instance, peremptory challenges have not been allowed. Similarly, the rules of evidence employed by general courts-martial are in no wise binding upon the commission; they are used as a guide and only to the extent that they tend to facilitate speedy justice by the elimination of irrelevant and time-consuming matter, lacking in probative value.

2. In the interest of speed, offenders will be tried in common wherever their offenses have in common sufficient elements so that a saving of time will be effected, and the policy of the commissions will be to deny any requests for a severance. Experience has demonstrated that German soldiers engaged in spying or missions of sabotage normally attempt to pass our lines in parties of two or more; in such cases a common trial is obviously appropriate.

3. The various restrictions imposed - as a matter of policy - by SHAEF upon the commissions' exercise of jurisdiction (see par 5 of ltr of authorization) boils down to this: in liberated territory of allied nations (i.e., in France, Belgium, Holland and Luxembourg) the commissions will try only members of the German armed forces charged with spying or with such violations of the laws of war as affect the security of our forces - for example, attempts to pass behind our lines, in civilian clothes or allied uniform, for the purpose of committing hostile acts. Civilians (including German civilians) who are charged with such acts committed in the territory of any ally will be tried by the tribunals of that ally; members of the German armed forces guilty of war crimes which do not affect the security of our forces (e.g., the massacre of civilians in territory occupied by Germany) will not, under present policies be tried until after the cessation of hostilities. In occupied Germany - i.e., in those portions of Germany where Military Government has been established and its courts are functioning - offenders will,

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as a matter of policy, be tried by such courts. However, military commissions may try any person (not subject to the exclusive jurisdiction of a United States or allied court-martial) for offenses of the character specified committed in those parts of Germany which are not yet occupied and in which Military Government courts are not yet functioning.

4. The sentence authorized by the custom of war upon conviction of the offenses over which the commissions have jurisdiction is death, and this is the sentence usually pronounced, although the court has, of course, jurisdiction to pronounce a lesser sentence. The sentence will normally be to be shot to death by musketry, both because such a death is more appropriate upon conviction of an essentially military offense, not necessarily involving moral turpitude and because such a sentence is considerably easier to execute - on the continent - than a hanging. Clemency, of course, is for the appointing authority (and the confirming authority, if any) rather than for the court. In this connection it is appropriate to point out that spies and war criminals of the type under consideration are executed not because their acts are necessarily turpitudinous - spies may be motivated by high patriotism - but simply and solely as an essential security measure, to eliminate the particular spy and discourage other spies. Hence, most of the factors ordinarily affecting clemency are inappropriate.

5. Publicity. No publicity of any sort will attend the trial and execution. Unless the circumstances are very exceptional such trials should be in camera, for reasons of security. The accused is not entitled to the privileges of a prisoner of war, and no notice of any sort will be furnished the protecting power or the International Red Cross. The letters and effects of the accused will be transmitted to the PMG, through TPM, with a statement of the circumstances surrounding his death, for transmission to the IRC or German authorities after the cessation of hostilities.