

3 February 1953

MEMORANDUM

TO: C/EE

FROM: EE/RA

SUBJECT: Situation Resulting from BDJ Telecon, 31 January 1953

1. As a result of subject teleconference, the Hessian judicial authorities presumably proceeded on Monday, 2 February 1953, with a pretrial investigation against Lueth, Peters, Schiplack, Hammacher, and Bischoff, on suspicion of having committed the following offenses in 1951 and 1952:

- a. As leaders and sponsors, having promoted the efforts of an association the object or activities of which are directed against the constitutional order of the Federal Republic (German Criminal Code, Sec. 90a);
- b. Being founders or members of an association the object or activity of which is directed to the commission of punishable acts (German Criminal Code, Sec. 129);
- c. Participating in a combination which has for its purpose the commission of major crimes against life, or which has such crimes in view as a means to other purposes (German Criminal Code, Sec. 49b).

Coupled with these charges are German Criminal Code, Sec. 47, which punishes each joint offender as a principal; Sec. 73, which requires the application of the severest penalty where one act violates several provisions of criminal law; and Sec. 74, which prescribes a cumulative punishment for several acts constituting the same crime.

2. On the assumption that the prosecution's entire case rests upon activities of the Apparat, considered as an integral part of the BDJ, Peters, who is the only defendant who was a member of the Apparat, will testify that all his instructions in paramilitary matters, that is, in the organization, equipping, training, etc., of an anti-Communist resistance group, came from [redacted], whom he believed to be a liaison officer of the United States Army. Peters will further testify that the collection of informational data about political personalities was done by the organization itself as a matter of routine organizational security, and that the sources of that information were overt, private intelligence peddlers. Lueth will testify that the BDJ never received any instructions directly or indirectly from [redacted] and that he, in fact, did not know and had never met [redacted]. On questions regarding organizational financing, Lueth will testify that BDJ support came from many

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quarters, including both official and private German quarters, and that one source of funds was privately and anonymously American. It is believed that the other three defendants have never seen [] nor received instructions from him, so that it is unlikely that their testimony might be damaging.

3. In the meanwhile, Dr. Kanter of the Criminal Law Division of the Federal Ministry of Justice, will present to CIA on or about Wednesday, 4 February 1953, a pro forma for a statement to be signed by some responsible U. S. official (preferably Gen. Truscott) to the effect that [] directed both the paramilitary and political activities of the Apparat and that with regard to the political activities, he was unauthorized by the U. S. authorities to do so. (Kanter indicated that the content of the statement might have to be modified to satisfy the federal prosecutor or to adjust it to documentary evidence in the hands of the Hessian authorities, but expressed his doubt that such modification would be necessary.) If the U. S. authorities are agreeable to submitting such a statement, Kanter will speak with Zinn upon the latter's return from vacation (presumably about 9 February) advising him generally that the Americans have submitted a statement of their interest, and will furnish the statement itself to the federal prosecutor, who will withdraw the case from Hessian jurisdiction. Kanter assured our representative that the statement would get no more publicity than this, except for its description in general terms, to be seen by U. S. authorities in advance, in a report which the Federal Government would have to make to the Bundestag on the entire BDJ affair. This statement, Kanter assures us, will enable the federal prosecutor to decline to prosecute the matter on the ground that there is no evidence of illegal activity. This, he feels, would be the optimum result from the point of view of the Federal Government, as well as that of the United States, because it would constitute a definitive end to formal proceedings and would minimize offensive publicity.

4. The Federal authorities are unwilling to remove the case from Hessian hands before or during the very early stages of the investigation for the following reasons:

- a. They regard the pretrial examination as a very preliminary step presenting no real case to be withdrawn;
- b. They consider early removal politically unwise;
- c. They have agreed with Zinn to discuss the matter with him after his return from vacation; and
- d. They do not wish to remove it at all unless and until they can be certain, on the basis of a U. S. statement, that they will be able to dispense with further proceedings.

The Federal authorities, however, have Zinn's assurance that the pretrial investigation will not give rise to publicity beyond, perhaps, the formal

announcement that an investigation has been begun.

5. Reber proposes to examine the German pro forma and then write a careful statement implicating [redacted], if necessary, but not the U. S. The view of the Washington Office that it is neither necessary nor advisable to admit unauthorized activity by [redacted] was one which the Field agreed to use as a guide for the testimony of Peters. We should expect that they will also be guided by this position in the preparation of the statement requested by the Federal authorities. We should expect, also, that they will check with counsel for the defendants to confirm our notion that the information gathering activities were not unlawful.

6. The preference of the Washington Office that the High Commission exercise its powers to remove the case from the jurisdiction of German courts and other authorities under Article 7 of the Allied High Commission Law #13, a preference which we assume to be shared by our field representatives, proved futile in view of HICOG's determination that the exercise of such powers at this time would be politically unwise. The Federal authorities are also disinclined to have HICOG take the case out of (Hessian) jurisdiction. For the same reasons, Washington's second preference that the matter be ruled out of the jurisdiction of German courts under Article 1(b)(iii) of Law 13 was abortive.

7. It cannot be determined whether or not the preliminary investigation will have run its course before the Federal authorities intervene. If it has, there is very little doubt that the examining judge will request HICOG to make a statement as to the extent of the relations maintained by the defendants with the U. S. authorities, as a preliminary step in determining whether or not the guilt of the defendants is wholly or partially removed by operation of Allied High Commission Law #62. If the statement which is then issued removes guilt completely, the defendants will be discharged, but the unfavorable publicity will be increased in volume and intensity. If the statement affords only partial coverage of guilt, trial by Hessian authorities would be the next step for the balance of guilt not accounted for. The intervention of Federal authorities prior to the conclusion of the pretrial investigation is, therefore, devoutly to be wished and enthusiastically to be sought.

8. The Field reports that the Germans view the BDJ ban in only four Laender as an impossible situation and that Kanter's suggested procedure would eliminate the ban. It would appear from this that the Federal Government would revoke the ban after it had taken jurisdiction of the entire matter. This aspect, however, is decidedly unclear.

9. A cable just received from the Field advises us that:

- a. Lueth was briefed in accordance with the sense of our tele-conference;

- b. Lueth's lawyer advised Examining Judge Schneider on 30 January that the defense would object to the jurisdiction of the Hessian courts on the ground that the same case was under active investigation on the federal level at Karlsruhe;
- c. Lawyers for Lueth and Peters submitted written brief on this position and during a formal hearing on Monday, the judge announced that the jurisdictional plea would be referred to the three-judge trial court for criminal matters;
- d. Lueth expects the trial court's decision on Friday, 6 February, and is confident of referral of the case to Karlsruhe; and
- e. The field is continuing efforts to induce federal authorities to bring the case to federal level.

Of course, it is to be hoped that Lueth's optimism proves justified. On the limited information we have, however, I am inclined to doubt that the Hessian courts will find themselves without jurisdiction, for the following reasons:

- a. The charges seem to concern the BDJ, while the Federal authorities are investigating the Apparat;
- b. Four of the accused are not under investigation by Federal authorities;
- c. If there is a conflict of jurisdiction, Kanter would surely have mentioned it; and
- d. Zinn, an experienced lawyer and Minister of Justice for a long time, would not be likely to instigate prosecution in his own courts unless he were reasonably certain of their jurisdiction.

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