We have been giving consideration to ways and means for carrying out the United States policy regarding the trial and punishment of Nazi criminals, as established in your statement on that subject dated October 7, 1942, the United Nations Declaration on Prosecution of Nazis of December 17, 1942, the Concurrent Resolution of the Congress of the United States of March 16, 1943 (57 Stat. 721), the Moscow Statement on Atrocities of November 1943, and your statement on the subject of persecutions dated March 20, 1944.

An analysis of the problem and recommendations for handling it are set forth below.

I. CRIMINALITY OF THE CRIME

The crime to be punished. The criminality of the German leaders and their associates does not consist of isolated individual outrages such as may occur in any war, but represents the result of a systematic enterprise for achieving domination of other nations and other peoples with ruthless disregard for the law of nations, the rules of war and the accepted moral standards of mankind. This has involved preparation, going back as far as 1933, for waging aggressive war, the launching of the war, the violation of treaties and international conventions and custom, deliberate violations of the rules of warfare and the mass extermination of people.
From the moment of Hitler's appointment as Chancellor of the Reich, there began the policy of making war against opposition elements internally, as part of the program of ultimate conquest by "total war" externally. Separately considered, the liquidation of racial and dissident minorities inside Germany which began in 1933 was the domestic affair of the Reich. Viewed in the light of the intervening years, it is seen that these minorities were only the first "enemy.

The second stage in the execution of the plan was the liquidation of Austria, Czechoslovakia, Poland, Norway, Denmark, the Lowlands, Russia and other countries, coupled with the unprecedented extermination of civilian populations in these countries. Nazi policy and the actions of the Reich since 1933 have been "totally" secret to the execution of this enterprise with complete disregard for law and morals. Specific atrocities against belligerents in the course of the hostilities are merely one aspect of the larger plan.

This is the scope of the criminality to be dealt with and the dimension of the crimes to be readied.

For reasons to be published, the outstanding offenders are, of course, those leaders of the Nazi Party and German Reich who since January 30, 1933, have been in control of formulating and executing Nazi policies. These offenders specifically contemplated the commission of the crimes under discussion, and the progress undertaken by them was calculated to bring them about.

In addition, the Nazi leaders created and utilized in the service of their party and the Reich a numerous organization for carrying out the acts of
considerations, together with today not war weariness, to protect them against punishment for their crimes if they lost the war.

The first requirement of any program for punishing the Nazi war criminals is accordingly, that it shall overcome the above practical difficulties.

Legal Difficulties: In addition to the foregoing practical difficulties, there are difficulties of a legal character in formulating a statement of the crime which is practically adapted to the scope of the criminality involved and which covers all the various types of atrocities which have been committed.

Some of these acts (e.g., the launching of an aggressive war) are not criminal under the municipal law of any of the victim states, but have, since the Versailles Treaty, been declared to be criminal under international law.

Some of the worst outrages were committed by the Nazis against their own nationals, many of them before the war. These, while plainly violations of the accepted moral standards of mankind as expressed in the legal systems of all civilized states, are not technically offenses against international law, and the extent to which they may have been in violation of the German law as changed by the Nazis is difficult of determination. Moreover, to prosecute these acts as independent crimes would set the precedent of an international right to interfere in the internal affairs of states by sitting in judgment on their conduct toward their own nationals.

This would open the door to innumerable consequences and present grave questions of policy.
It is nevertheless the declared policy of the United Nations to ensure
that those offenses are punished.

Since "war crimes", defined in the most limited and technical sense,
might be said to include only those violations of the rules of warfare which
are committed in the course of military operations or occupation, it is
plain that many of the worst atrocities to be dealt with cannot be reached
under this limited concept, but will have to be punished on some other basis.

It is also evident that only a negligible minority of the offenders will be
reached by attempting to try them on the basis of separate prosecutions for
each of their individual offenses. Other methods of procedure must be found.

Any realistic war crimes program, however well adapted to the problems
involved, must necessarily contemplate that a substantial number of the
criminals will go unpunished. In the interests of peace, security and the
rehabilitation of the German people, as well as for the sake of justice, it
is essential that, to the largest possible extent, the criminals should be
punished in such measure as their offenses deserve — by death, if the facts
justify, or by imprisonment at hard labor in the case of the lesser offenders.
These latter could be employed, for example, in the restoration of desolated
areas.

We have, accordingly, undertaken to formulate a program intended to
overcome the practical and legal difficulties to which we have referred.
We think that a just and practical solution lies in changing the German leaders and the organizations employed by them, such as those referred to above (i.e., A.I., Gestapo), with joint participation in the formulation and execution of a broad criminal plan of aggressive warfare, the commission pursuant to that plan of a multitude of specific violations of the laws of war, and a conspiracy to achieve domination of other nations and peoples by the foregoing unlawful means.

This charge, couched in various counts, would be broad enough to permit full proof of the entire Nazi plan and its execution, including the steps taken before the outbreak of war.

The trial of this charge and the determination of the guilty parties would be carried out in two stages:

- **First stage**: The preliminary trial

  The United Nations would, in the first instance, bring to the bar jointly the highest ranking German leaders to a number fairly representative of the groups and organizations charged with complicity in the basic criminal plan.

  Adjudication would be sought not only of the guilt of those individuals physically before the bar but also of the complicity of the groups and organizations included within the charge. The tribunal would make findings adjudicating the facts established, including the nature and purpose of the criminal plan, the identity of the groups and organizations guilty of complicity in it, and the acts committed in its execution. The tribunal would also prescribe
the punishment of those individual defendants physically before it who are
convicted of the offense.

In view of the numerous membership of the organizations that would be
charged with complicity, it clearly would be impossible to repeat the proof
of the basic criminal plan in the trial of each individual member of the
culpable organizations. Accordingly, some procedural mechanism is indispensable
in order to permit the members of these organizations to be tried for their
participation in the offense, without repeated proof of the facts already
established in the first trial. In view of the nature of the charges and the
representative character of the defendants who will be physically before the
court in the first trial, we think that the findings of the court in that trial
may fairly be taken to constitute an adjudication of the representative character of
the groups and organizations blameless upon all the members thereof in their
subsequent trials.

In such subsequent proceedings, therefore, the only necessary proof of
guilt of any particular defendant would be his membership in one of the
organizations whose guilt had been adjudicated in the first trial. Such proof
would cast upon the defendant the burden of negating, as, for example, by
establishing that he joined the organization without knowledge of its criminal
purposes. In these trials proof would also be taken of the nature and extent
of the defendant's individual participation in the crimes adjudicated in the
first trial and the punishment of each defendant would be fixed in a measure
appropriate to the facts in his particular case. Thus, for example, the
proof showed no more than minor personal participation, no capital sentence would be imposed and any other penalty would be as adjusted as to reflect fairly the individual's degree of participation in the total criminal plan.

In thus changing the German leaders and the principal groups and organizations which were the instrument for the execution of their illegal purposes with joint responsibility for the crimes committed by the Nazi regime, a novel principle of law is being favored. The rule of liability involved is common to all penal systems and is included in the general doctrine of the laws of war, namely, that those who participate in the formulation and execution of a criminal plan involving multiple crimes are jointly liable for each of the offenses committed and jointly responsible for the acts of each other. Under such a change there are admissible in evidence the acts of any of the conspirators done in furtherance of the conspiracy, whether or not those acts were in themselves criminal and subject to separate prosecution as such.

It is apparent, therefore, that the only novel principle involved in the foregoing plan is the procedural one of utilizing in the subsequent proceedings the findings of the tribunal in the first case to the extent indicated above. As we have already stated, in view of the representative character of the principal trial, this procedural mechanism is under the circumstances entirely just; the opportunity afforded each individual defendant to exculpate himself or to mitigate his offenses provides all the individual safeguards that substantial justice requires.
The Moscow Declaration provides that those German officers and men and members of the Nazi Party who have been responsible for, or who have taken a consenting part in the commission of atrocities, measures, and executions, will be sent back to the countries in which their similar deeds were done in order that they may be charged and punished according to the law of those liberated countries and the free governments which will be created thereaft.

It further provides that the above is without prejudice to the cases of those Nazi criminals whose offenses have no particular geographical localisation, and who will be punished by the joint isolation of the Governments of the Allies.

The procedure discussed in this memorandum will further the objectives of the Moscow Declaration by simplifying the process of proof involved in bringing to justice the criminals with whom the Declaration is concerned.

The proposed procedure will not prejudice trial of individual members of the groups or organisations involved in the conspiracy for particular war crimes where the evidence can be obtained.

There are two alternative methods for determining the applicable law and establishing a competent tribunal under the procedure hereinafter set forth.
These alternatives are: (a) International action by treaty or convention defining the offenses, sanctioning the procedure and establishing the tribunal at the primary seat and the secondary seat by which the basic findings will be made or (b) utilizing military courts created either by executive agreement or by military arrangement to apply, so far as possible, the laws of war and those principles of international law that might be involved without benefit of treaty declaration.

In view of the general character of the plan we have proposed we believe that the treaty method is very much to be preferred.

The Treaty Method: Whatever the nature or legal basis of the proceedings instituted, it must be expected that the defendants will raise every possible objection both to the substantive law under which they are charged and to the competence of the tribunal. They will, for example, advance quotations from text writers questioning whether the acts of states may be punished for war crimes and challenging the view that the launching of aggressive war may be punished as crime. They will invoke orders of superior authority as an alleged defense. In addressing their plea to the tribunal without and without the basis it is to be assumed that they will attempt by every possible means to challenge the basis in law and justice of the proceedings instituted against them. For this reason, and also because of the legal considerations involved, it is of the highest importance that the preservation of these war criminals be placed upon the firmest possible basis.

SECRET
To achieve this end, a treaty or convention of the United States

Nations is certainly the most desirable instrument in which to formulate the
applicable substantive law and the procedure to be followed as well as to
establish the court.

Such a treaty or convention would affix the criminality of aggressive war.

It would recite the applicable principles of the law of war, affix the joint
responsibility of co-conspirators for participation in such criminal enterprise
and declare the appropriate punishment for offenses thus defined. The treaty
would further provide for the procedural mechanics outlined above, including
the binding effect of the findings of the court in the principal trial. It
would establish an international tribunal to adjudicate the basic charges and
affix the competence of military tribunals and national courts to entertain
the subsequent proceedings against individual defendants.

A treaty or convention so framed would not only have international
status but would also be the law of the land in each of the signatory states.

It would thus establish the legal basis of the proposed proceedings upon the
most unassailable foundation. The justice of its provisions would not be open
to significant challenge. Such a treaty would also be the most effective means
moral the sanction of civilized mankind for the proposed proceedings and
ensure that they will meet the judgment of history.

Procedure without treaty: In the event that a treaty should be practically
unattainable it would be necessary to proceed in military courts created by
executive agreement or by the action of military commanders.

As far as the offenses to be tried are violations of the laws and customs of war, it is probable that international mixed tribunals could be created to try them either by executive agreement or by military commanders.

If what we have described as the basic charge to be directed against the German leaders and their associates, groups, and organizations were to be presented before a military tribunal thus created, we gravely doubt that it would be legally possible to include as a constituent element of the charge the launching of an aggressive war and the prosecution of an aggressive war as elements of this offense, lying as it does at the root of the other crimes, would in our view represent a serious weakening of the general plan presented here. It should be said, moreover, that it is very doubtful whether the adjudication in the chief trial could be made binding in subsequent trials, as proposed in this memorandum, without amendment of the treaty legislation in the United States, and possibly in other countries as well.

We are mindful that the treaty method involves disadvantages. Pursuing an agreement with the terms of the treaty would probably involve considerable negotiation. In addition, the project might provide extended parliamentary procedures, resulting perhaps in undesirable changes and limitations in the terms of the treaty in those countries in which legislative approval is required. It is apparent, however, that substantial difficulties are presented in furthering the program that we believe to be desirable unless the treaty method is employed.
 Accordingly, we recommend that if it is possible to do so the treaty
method be employed.

II. Recommendations

We recommend:

1. That you approve the program for dealing with the basic war crimes
    problem as described in this memorandum.

2. That you approve the setting up of an appropriate agency to
    undertake promptly and carry out thoroughly and expeditiously the research
    necessary to establish the proof in support of the proposed indictment.

3. That you approve the preparation and negotiation of a treaty to
    create a court of the type and jurisdiction described above.