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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 17, 1942, the United Nations Declaration on Prosecution of Nazi of November 17, 1942, the Concurrent Resolution of the Congress of the United States of March 16, 1945 (79 Stat. 721), the Moscow Statement on Atrocities of November 1943, and your statement on the subject of persecutions dated March 20, 1943.

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

I. CRIMINALITY OF THE NUREMBERG CRIMES

The crimes to be prosecuted. The criminality of the German leaders and their associates does not consist of scattered 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 customs, 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 invasion 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 prosecution of this enterprise with complete disregard
for law and morals. Specific atrocities against belligerents in the course of
hostilities are merely one aspect of the larger plan.

This is the scope of the criminality to be dealt with and the diminution of
the crimes to be reckoned.

The atrocities to be punished: The outstanding offenders are, of course,
these 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 program 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
oppression and terrorism which their programs required. Chief among the instrumen-
talities used by them are the SS, from the personnel of which the Gestapo is constituted, and the SA. These organizations consist of unswerving volunteers, pledged to absolute obedience and having as their mission the carrying out of such acts as the following: Liquidating internal dissidents; operating concentration camps; carrying out mass arrests, torture, and ex-
terminations; and committing mass crimes in the execution of large scale re-
pressive operations against enemy civilian populations in the rear of the battlefield. The members of these organizations are also the personnel pri-
marily relied upon to carry on partisan guerilla and underground operations.

II. DIFFICULTIES OF AN EFFECTIVE WAR CRIMES PROGRAM

Difficulties of identification and proof: The number and variety of the offenses, the inordinate number of offenders, and the problems of apprehension, trial, and punishment necessarily resulting therefrom, present a situation which is without precedent in the field of criminal justice.

In thousands of cases, it would be impossible to establish the offender's identity or to connect him with the particular act charged. Witnesses will be dead and scattered. The gathering of proof will be laborious and costly, and the mechanical problem involved in uncovering and preparing proof of particular offenses one of appalling dimensions. To the limited extent that individual offenders could be prosecuted under these difficulties, the paper work would be monstrous, and lateness and coordination singularly difficult.

It is not unlikely, in fact, that the Nazis have been counting on just such
considerations, together with today's war weariness, to protect them against punishment for their crimes if they lose the war.

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

Legal Difficulties: In addition to the foregoing practical difficulties, there are difficulties arising from the implementation of 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 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 the Nazi leaders for 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.

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It is nevertheless the declared policy of the United Nations to ensure that these 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 combat, 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 problem involved, must necessarily contemplate that a substantial number of the criminals will go unpunished. In the interests of peace and 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 — i.e., 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 devastated 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 (e.g., R.A., 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 brief of this charge and the determination of the guilty parties would be carried out in two stages:

First stage: The General 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 these 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 three 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 such individual members 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 criminal character of
the groups and organizations blamed 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 rest upon the defendant the burden of exculpation, e.g., 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. Here, for example, the
proof showed no more than minor personal participation, no capital sentence would be imposed and any other penalty would be so adjusted as to reflect fairly the individual's degree of participation in the total criminal plan.

In this changing the German leaders and the principal groups and organizations which were the instruments 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 in 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 these 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 exonerate himself or to mitigate his offense provides all the individual safeguards that substantial justice requires.
The Moscow Declaration provides that those German officials 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 criminal deeds were done
in order that they may be charged and punished according to the laws of those
liberated countries and of the Free governments which will be created therein.

It further provides that the above is without prejudice to the case of those
best criminals whose offenses have no particular geographical localization,
and who will be punished by the joint decision of the Governments of the
Allies.

The procedure discussed in this memorandum will further the objectives
of the Moscow Declaration by simplifying the problem of proof involved in
prosecuting the criminals to which the Declaration is concerned.

The proposed procedure will not provide trial of individual members of the
groups or organizations involved in the conspiracy for particular war crimes
whether in the country where the crimes were committed or other offenses committed by those involved as such specific charges can
practically be sustained, but to the contrary.

There are two alternative methods for determining the applicable law
and establishing a competent tribunal under the procedure hereinafter set forth.

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These alternatives are: (a) an international action by treaty or convention defining the offenses, sanctioning the procedure and establishing the tribunal at the principal seat of the war, or (b) transferring military courts created either by executive agreement or by military arrangement to apply, as far as possible, the law of war and those principles of international law that might be involved, without benefit of treaty declaring.

In view of the general character of the plans 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 learned 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 plans to pertinently within and without the realm 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 prosecution of these war criminals be placed upon the firmest possible basis.
To achieve this end, a treaty or convention of the United 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 afford the criminality of aggressive war. It would state the applicable principles of the law of war, affirm 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 mechanisms outlined above, including all subsidiary tribunals, the binding effect of the findings of the court in the principal trial, it would establish an international tribunal to adjudicate the basic charge, and offer the competence of military tribunals and national courts to entertain and entertain the subsequent proceedings against individual defendants.

A treaty or convention met in these terms would not only have international status but would also become 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 be the most effective means of compelling the action of civilized mankind for the proposed proceedings and ensure that they will meet the judgment of history.

Procedures without treaty: In the event that a treaty shall be practically unattainable it would be necessary to proceed in military courts created by
executive agreement or by the action of military commanders, 
individual

So 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, 
that we have described as the basic charge to be directed against the German 
leaders and their accomplices and organizations were to be presented be-
fore a military tribunal thus created, we gravely doubt that it would be 
legally possible to include as a constituent element of the charge the knowl-
edge of an aggressive character of the elimination 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 hitherto. It should be said, moreover, that it 
is very doubtful whether the adjudication in the first trial could be made 
without legislative amendments, as proposed in this memorandum, without admi-
mitting to subsequent trials, as proposed in this memorandum, without amending 
the treaty legislation in the United States, and possibly in other countries as well.

We are mindful that the treaty method involves disadvantages. Proceeding 
with 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 unpalatable charges and limitations in the 
terms of the treaty in those countries in which legislative approval is re-
quired. 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 problems 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.