

2 April 1946

*SRL*  
Program of Discussion with Judge Rosenman

I. Examination of points covered in U.K. note.

- a. Do these involve matters which can be or should be discussed on a bipartite basis or should the Russians and French be included?
- b. Do they really involve the fundamental principles which must be decided at the governmental level before planning can proceed?  
(Mr. Hackworth thinks memo of the two Secretaries and the A.G. ought to be treated as classified.)
- c. In view of the fact that Judge Rosenman, who is really a representative of the President, has been designated to act, should even these points be discussed without including the Russians and the French?
- d. Shall we put forward an affirmative program?
- e. What consultation with Mr. Winant is appropriate or possible?

II. Affirmative program we desire to put forward.

A. Trial of major war criminals.

1. A policy of trial rather than agreed political disposition should be favored.
2. Common enterprise theory
  - a. Trial of the major war criminals for their participation in the great Nazi enterprise which included these many atrocities as a part of the ruthless destruction of all that stood in their way to race supremacy. Establishment of the facts (both pre-war and later) of the enterprise, and adequate proof that it was a systematic and planned reign of terror.
  - b. Simultaneous declaratory judgment or "class suit" prosecution of the major organizational participants in the common enterprise -- SS - Gestapo -- organizations charged with genocide program. This rests in part upon

the fact that the SS, the Gestapo, etc. are made up of carefully selected volunteers pledged to absolute obedience, and hence can be said to be made up of members who are committed recklessly to a course of atrocity dictated from above.

c. Military international tribunal

4 to 7 members -- 1 US, 1 UK, 1 USSR, 1 French - Possibly 1 to 3 other representatives of United Nations.

d. Necessity of judicial procedure on an expeditious, non-technical basis -- which affords the minimum requirements of due process but without countenancing irrelevancies or delay. Such a procedure should seek to prove

i. the common enterprise and its illegality in the sense that it was reasonably likely to result in the commission of war crimes and other atrocities; that these did result and were in essence a part of the definite policy of the program.

ii. The identity of the participating individuals or groups and the fact of their participation. The procedure need only afford an opportunity to know of and refute the charges made or to deny participation in the enterprise.

e. Procedure should be adapted on a governmental level -

i. permitting any evidence deemed to have probative value

ii. denying political necessity or state policy as a defence and hence excluding propaganda defence speeches

iii. making "superior orders" no defence but merely to be given appropriate weight

iv. excluding from protection any state leader or official-- i.e. no "sovereign immunity"

v. permitting summaries of testimony to be introduced--i.e. special masters might be appointed to investigate and report on the actions permitted by the Nazi leadership in Germany (with respect to minorities) and in the

various occupied areas, the policies pursued by them,  
the deliberate programs of persecution of minorities,  
the continuing policy of national territorial expansion  
through force or threat of force.

f. To meet the evidence adduced, the defence should be permitted to show merely absence or lack of truth of the facts alleged. Arguments as to legal insufficiency of the allegations or as to theories of national or political right (inconsistent with ordinary decency) should not be permitted in the guise of evidence, or as purported justification. The applicable law should be determined by the executive agreement so far as in doubt.

3. Stage 2 proceedings --

Organisations found to have participated in the common enterprise would be determined in the first stage. Members would be subject to penalty

a. upon identification as members

b. upon their failing to prove (i) that their membership was involuntary; or (ii) that their participation was nominal only.

Involuntary servitude or rehabilitation work would be normal punishment for membership more than nominal. Proof of explicit consent to, direction of, or participation in any atrocity would be required for capital punishment. Trials at this stage would be in the nature of orders to show cause and verification of identity.

B. War criminals charged with specific crimes.

1. Trial by

a. military court, court martial, military commissions of U.S. or Allies

b. national courts of United Nations

c. occupation courts or tribunals.

2. Offences

a. war crimes in the technical sense of offences against the laws and customs of war

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- b. offences against national laws of occupied nations
- c. offences against laws of Axis nations -- possibly disregarding entirely Axis decrees or administrative regulations permitting racial or religious persecution, on the ground that these are invalid as fundamentally inhumane and outrageous.

C. Organization.

1. Use of War Crimes Commission.

Its cases, as far as they go, are helpful but the Commission is not a prosecuting or planning body -- but merely a research and advisory body. In this capacity it may have usefulness.

2. There is need of a compact, coordinated organization on a quadripartite basis

- a. to formulate court procedures on the prosecution of all types of cases and to recommend policies for adoption, where further international executive or military agreements are considered necessary
- b. to prepare major cases for trial and to conduct the trials
- c. to organize prosecutions of specific cases
- d. to screen German nationals and PWs, to list all Gestapo and SS people and to see that they are retained in custody
- e. to encourage German people to identify and surrender those guilty of membership in either organization. This will involve development of system of propoganda, rewards etc.

3. Possible levels of organization

- a. Control Council -- military level
- b. Separate organization (probably unwise)
- c. Governmental level (like EAC)

Probably would induce conflict with military and Control Council

d. Zonal Organization

Probably necessary to supplement Control Council group, but should not be the directing agency.

Whatever level is selected, upon or shortly after its activation,

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it should be given the support of an executive or military international agreement

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- a. defining its jurisdiction
  - b. settling the principal policy problems -
    - (i) crimes to be tried
    - (ii) theory of prosecutions
    - (iii) elimination of defences
    - (iv) provision for "streamlined" modified judicial proceedings rather than political disposition
  - c. giving it power to formulate detailed policy and procedures, establish an organization, initiate proceedings etc.
4. Competence of personnel.

Although the Control Council seems the appropriate body to which to attach the coordinating organization, the organization need not be exclusively military. Counsel and administrators of the highest competence and of some real distinction should be called upon to organize the work and control its operations. These should be selected from best available civilian and military legal and investigatory personnel. Their ability should be so unquestioned that, not only will they do a first-rate piece of work of prosecution but the public must have confidence in their capacity to do so.

It is important that the leading military and civilian members of the coordinating group be secured at once, be given an opportunity to participate in planning, and be started on the work of collecting an organization.