Program of Discussion with Judge Nesson

I. Examination of points covered in U.S. note.
   a. Do these involve matters which can or should be discussed on a
      bipartite basis or should the Russian 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. Bresneth thinks none of the two documents and the A.U.
      ought to be treated as classified.)
   c. In view of the fact that Judge Nesson, who is really a repre- 
      sentative 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. Ginz 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 followed.
      2. Common enterprise theory
         a. Trial of the major war criminals for their participation
            in the great Nazi enterprise which included those many
            atrocities as a part of the ruthless destruction of all
            that stood in their way to total 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 passive 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 men who are committed resolutely to a course of action dictated from above.

3. Military interna...tual

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

1. 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 hear of and refute the charges made or to deny participation in the enterprise.

5. Procedure should be adapted on a governmental level —

1. permitting any evidence deemed to have probative value

2. denying political necessity or state policy as a defense and hence excluding propagandist defense spokesmen

III. making "superior orders" no defense but merely to be given appropriate weight

IV. excluding from protection any state leader or official — i.e., no "sovereign immunity"

V. permitting summary 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 or persecution of minorities, the continuing policy of national territorial expansion through force or threat of force.

P. 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 checks.

5. Stage 3 proceedings —

Organizations 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 services 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 prove cause and verification of identity.

6. 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. Offenses

a. War crimes in the technical sense of offenses against the laws and customs of war
b. Offences against national laws of occupied nations

c. Offences against laws of Axis nations — possibly disregarding entirely Axis decree or administrative regulations permitting racial or religious persecution, or the ground that these are invalid as fundamentally inhumane and outrageous.

d. Organisation.

1. Use of War Crimes Commission.

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

2. There is need of a compact, coordinated organization on a quadri-partite basis:

a. To formulate court procedures on the prosecution of all types of cases and to recommend policies for adoption, where further international treaties or military agreements are considered necessary.

b. To prepare major cases for trial and to conduct the trials.

c. To organize prosecution of specific cases.

d. To ensure German nationals and SS, to list all male and

3. (fill in the blank)

All people and to see that they are retained in custody.

e. To encourage German people to identify and surrender those guilty of vandalism in either organization. This will involve development of system of propaganda, rewards etc.

3. Possible levels of organization:

a. Central Council — military level

b. Separate organization (probably useless)

c. Governmental level (like EOKA)

   Probably would induce conflict with military and Central Council.

4. Local Organization

   Probably necessary to supplement Central Council group, but should not be the directing agency. Whatever level is selected, upon or shortly after its activation,
It should be given the support of an executive or military international agreement.


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 assured at once, be given an opportunity to participate in planning, and be started on the work of establishing an organization.