MEMORANDUM OF PROPOSALS FOR THE PROSECUTION AND PUNISHMENT OF CERTAIN WAR CRIMINALS AND OTHER OFFENDERS

25 April 1945

1. The Moscow Declaration Did Not Solve the Main Problem of the Trial and Punishment of War Criminals.

In the statement jointly issued by President Roosevelt, Premier Stalin and Prime Minister Churchill on 1 November 1943, usually referred to as the Moscow Declaration, it was announced that all members of the Hitlerite forces who have been responsible for, or have taken a consenting part in, atrocities and war crimes in territory occupied by the Axis forces, would be sent back to the countries in which their abominable deeds were done in order that they may be judged according to the laws of those countries. It is assumed for the purposes of this memorandum that the four principal Allies will cooperate in carrying out this policy set out in the Moscow Declaration and also that the several Allies will cooperate fully in arranging for the trial and punishment by the United Nation concerned (or before an Allied military tribunal) of those Hitlerite nationals who have committed war offenses anywhere against the civilians or soldiers of any United Nation.

No policy, however, was fixed in the Moscow Declaration covering

a. the punishment of the major war criminals, whose offenses have no particular geographical localization, beyond the announcement that they would be punished by joint decision of the Governments of the Allied; or

b. the methods of punishment of those members of the principal Nazi organizations, the Gestapo and S.S., who engaged in carrying out the ruthless...
policies of the Nazi regime but who cannot readily be identified with particular war crimes.

II. Summary of Proposals.

This memorandum proposes that the following policy be adopted by the Governments of the United States, the Soviet Union, and the United Kingdom, and the Provisional Government of France for the trial of

a. the major Nazi leaders for their instigation of the broad program of war crimes and atrocities which have characterized the Nazi regime since 1933 and

b. the principal Nazi organizations and their members, through whom the most heinous of the Nazi cruelties have been put into effect.

Considerations Taken into Account in Framing the Proposals.

The proposals now advanced give recognition to the following facts:

a. that the criminality of the German leaders and their associates does not consist solely of individual outrages, but represents the result of a systematic and planned reign of terror within Germany and within the areas occupied by German military forces, in connection with which the crimes and atrocities referred to were committed;

b. that these crimes and atrocities were perpetrated pursuant to a premeditated criminal plan;

c. that for the carrying out of the acts of oppression and terrorism which their program involved,
the Nazi leaders and their associates created and utilized a numerous organization, chief among which are the S.S., and the Gestapo, and

5. that there is necessity for establishing practical measures for bringing these criminals, their principal organizations, and their active leaders and members to justice on a basis which establishes the guilt of the Hitlerites not only (1) for those offenses committed outside Germany, during the war or against the citizens of the United Nations, but also (2) for those atrocities, both before and after 1939, committed against Axis minorities.

Proposed Policy

1. The Axis leaders should be tried before Allied military tribunals composed of officers of the four principal Allies. Their guilt and punishment should be determined by judicial action of a military tribunal and not by political action of the Allied Governments. (See discussion below Part IV, page 10.)

2. Either in separate trials, or at the same time, the leaders of the principal Hitlerite organizations (e.g., the Gestapo and the S.S.) and the organizations themselves should also be tried before an Allied military tribunal. This tribunal should determine the extent of the participation of each of these organizations and its members in the great Nazi criminal enterprise, of which the crimes and atrocities which have shocked the world were the natural and probable consequence. (See
discussion below Part III, Section B, page 6.

3. The extent of the guilt of the individual members of the Hitlerite organizations, which may be found to have participated in the Nazi enterprise, should be determined and the individual members should be punished in a manner based upon the extent of their guilt. (See discussion below, Part III, Section 6, page 7.)

4. An Allied executive group, composed of representatives of the four principal Allies, should be established to prepare the charges against the Hitlerite leaders and the organizations, to collect and present the evidence in support of those charges and to conduct their prosecution. (See discussion below, Part V.)

The proposal now advanced contemplates that the four principal allies will enter into an executive or military agreement embodying the foregoing policies, to which the other United Nations will be invited to adhere after the agreement has been negotiated and signed. Prior participation by the other United Nations in the negotiation of the agreement is probably not appropriate because the agreement will be largely a matter affecting the four nations engaged in the occupation of Germany and because of the necessity for speed in reaching agreement.

III. The Trial and Punishment of the Hitlerite Leaders and the Major Hitlerite Organizations Should be Based upon Their Voluntary Participation in a Common Enterprise of which the Axis Aggressions and War Crimes were the Probable Consequences.

A. Method of Determining Guilt.

After Germany's defeat or unconditional surrender, the Allies by joint action, pursuant to treaty or
otherwise, could probably agree to put to death the most notorious Nazi criminals without trial. Such action, however, would be violative of concepts of justice, which the freedom-loving United Nations accept and, on that account, would be distasteful and inappropriate. For reasons more fully stated in Part IV of this memorandum, it is felt that all reasonable efforts should be made to avoid such a purely political disposition of the Nazi leaders. Instead, it should be possible to determine upon a suitable judicial process more in accord with the common traditions of the principal United Nations.

It is believed that a military tribunal is the appropriate type of court for this judicial action for the following reasons:

a. The principal offenses of the Axis leaders and their organizations which will be the subject of judicial inquiry will be war crimes properly combinable by a military tribunal. The other offenses to be tried are closely related to the strictly military offenses.

b. The trials will take place as a part of or in connection with a military occupation of Germany and Austria.

c. The crimes to be punished are atrocities which should be dealt with by the swift justice of a military tribunal created by simple military or executive agreement. The prosecutions should not be subject to the delays inherent either in the formal setting up of an international treaty court or in remitting the cases to any national civil court.
3. Nature of Charges to be Made.

For the systematic and planned policy of oppression and aggression both within Germany and against Germany's neighbors, the Nazi leaders and the whole membership of the principal Nazi organizations share responsibility. The leaders and their organizations must be made to pay the penalties which international law and the laws and customs of war exact for war crimes and atrocities of the type which were the natural and probable consequences of such a program. It should be remembered that in this program members of the S.S. and the Gestapo, as volunteers pledged to absolute obedience, joined, with their leaders.

Accordingly, the Government of the United States advances for consideration a plan which in no way would interfere with the punishment of individual Nazis at the scene of their crimes for specific atrocities which they have committed. Neither would it interfere with separate trials of the principal Nazi leaders before Allied military tribunals if that is considered desirable. Indeed such separate trials might have substantial advantage in that they can be conducted quickly and without awaiting final disposition of the trial of the charges of the common criminal enterprises of the whole Hitler hierarchy of criminals. The plan proposed, however, would ensure the punishment of the Nazi leaders and the active members of the principal Nazi organizations for the program in which they have played the major part.
The German leaders and their associates and the organizations employed by them should be charged with the commission of their atrocious crimes, and also with joint participation in a broad criminal enterprise which included and intended these crimes, or was reasonably calculated or likely to bring them about. The allegation of the criminal enterprise should be so couched as to permit full proof of the entire Nazi plan from its inception and the means used in its furtherance and execution, including the pre-war atrocities and those committed against their own nationals, neutrals, and stateless persons, as well as the waging of an illegal war of aggression with ruthless disregard for international law and the rules of war. There should be invoked the rule of liability, common to most penal systems and included in the general doctrine of the laws of war, 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.

In support of this charge there should be admitted 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 prosecutions as such.

5. Trial of the Charges.

The trial of the charges described in the preceding paragraph should be carried out in two stages:

a. Stage 1 - There should be brought before
as international military tribunal the highest ranking German leaders to a number fairly representative of the groups and organizations charged with complicity in the basic criminal plan. (As stated above, this need not preclude separate prior trial of particular German leaders if that is deemed desirable.) Adjudication should be sought not only of the guilt of those individuals physically before the tribunal, but also of the complicity of the members of the organizations included within the charge. The tribunal should make findings adjudicating the facts established, including the nature and purposes 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 should sentence those individual defendants physically before it who are convicted.

The above, which might take place in one or more trials, should complete the mission of this international tribunal.

b. Stage 2 - Thereafter, other individuals charged with specific atrocities and members of the organizations who are charged with complicity through such membership in the basic criminal plan but against whom there is not sufficient proof of specific atrocities should, unless held for trial by one of the United Nations or sent back for trial under the provisions of the Moscow Declaration.
be brought before occupation or other appropriate tribunals. The findings of the tribunal in the trial provided for in paragraph 2 above should be taken to constitute a general adjudication of the criminal character of the groups and organizations referred to, binding upon all the members thereof in their subsequent trials in occupation tribunals or in other tribunals established under this instrument. In those subsequent trials the only necessary proof of guilt of any particular defendant, as regards the charge of complicity, should be his membership in one of those organizations. Proof should also be taken of the nature and extent of the individual's participation.

2. The defendant in each case should, upon conviction, suffer death or such other punishment as the tribunal may direct, depending upon the gravity of the offense and the degree of culpability of the defendant. In general, except upon proof of very substantial individual participation in specific atrocities, the less prominent defendants might well be sentenced to perform useful reparations labor, etc., rather than to capital punishment.

3. Procedures.

Any military or executive agreement should include an undertaking to adopt and apply comprehensively in the trial of war criminals, to the greatest extent practicable, expeditious, fair, non-technical procedures which would (in a manner consistent with the purposes of the agreement):
B. provide each accused with notice of the charges against him and an opportunity to be heard reasonably on such charges;

C. permit the court to admit any evidence which it considers would have probative value;

D. except as the court in its discretion shall deem appropriate in particular cases, exclude any defense based upon the fact that the accused acted under orders of a superior officer or pursuant to state or national policy;

E. exclude any defense based upon the fact that the accused is or was the head or purported head or other principal official of a state;

F. confine trials strictly to an expedited hearing of the issues raised by the charges.

IV. The Guilt and Punishment of the Hiterite Leaders Should be Determined Judicially before an Allied Military Tribunal, and not by Purely Political Action:

It may be argued that the Axis leaders should be dealt with politically rather than judicially and that, without trial, by joint action of the Allies they should be put to death upon capture. The United States is vigorously opposed to any such political disposition. Because great importance is attached to judicial action, the arguments in favor of a swift but fair trial of the Hiterite criminals, are set out below in considerable detail:

A. The Punishment of those guilty of War Crimes and Atrocities is for Criminal Violation of International Law:

The Allied promises to bring the major Axis leaders to justice rests squarely on the ground that these leaders
have been responsible for crimes, acts which violate generally accepted standards of the conduct of nations — not only during the war but in preparing for it and starting it. These standards are defined partly by custom; partly by treaties; but, in any event, they constitute law, the violation of which is regarded by the world as criminal.

3. Punishment for Crimes Should Only Follow a Judicial Trial

No principle of justice is so fundamental in most men's minds as the role that punishment will be inflicted by judicial action. Judicial punishment is imposed only after notice to the accused of the charges against him, establishment of the facts upon which the charges rest, and an opportunity to defend against the charges with the advice of counsel. The form in which proof is presented varies from nation to nation. So does the precise extent of the opportunity to defend, the nature of the hearing, and the incidence of the burden of proof. This principle is applied in greater or lesser degree by all nations, and historically its recognition is the first step in the approach to the democratic standard of liberty under law.

4. Political Repression Involves Return to Primitive Practices

Accordingly, there normally would be no doubt that even the worst of the Axis leaders, falling into Allied custody, would be entitled to be put upon his trial, if charged with offenses under the laws and customs of war. Any other method of punishment involves resort to primitive practices and a reversion to the bare concept of might based on
force. There is no real middle ground. In Caesar's day the enemy were treated as enemies; i.e., slaughtered out of hand if they were not enslaved. In Napoleonic times there was banishment and imprisonment by what was called political action; — now, if political action is taken, we would impose death — surely this is retrogression rather than progress. Even in Napoleon's day such political action was little applauded. Napoleon's case, however, provides no real precedent except as a method of getting a man who was a threat to the peace of the world to a place where he could cause no trouble. It was not, and was not regarded as, the punishment of a man for crimes he had committed.

II. Punishment of War Criminals is Designed as a Deterrent and to Raise International Standards of Conduct

Punishment of war criminals should be activated primarily by its deterrent effect, by the impetus which it gives to improved standards of international conduct and, if the theory of punishment is broad enough, by the implicit condemnation of ruthlessness and unlawful force as instruments of attaining national ends. The satisfaction of instincts of revenge and retribution for the sake of retribution are obviously the least sound basis of punishment. If punishment is to lead to progress, it must be carried out in a manner which world opinion will regard as progressive and as consistent with the fundamental morality of the Allied cause. A purely political disposition of the Axis leaders without trial, however disguised, will be regarded eventually, and probably immediately, as a descent to the methods of the Axis itself. It will retard progress towards a new concept of
international obligations simply because those who have sought in this war to preserve democracy will have made their most spectacular dealing with the vanquished a negation of democratic principles of justice. They will have adopted methods repugnant alike to Anglo-American and Continental traditions.

2. The Method of Punishment Adopted must not Detract from the Moral Force Behind the Allied Cause:

The preservation of the moral force behind the Allied cause is important. That force, born from the necessities of self-defense, has brought freedom-loving peoples together and can keep them together. If we lose it in the matter of punishing war criminals, we sacrifice a part of something very precious. Only the most imperative reasons could conceivably justify such actions.

3. The Verdict of History Upon the Fairness of the Disposition of War Criminals Has Practical Significance:

A further highly important reason for adopting a fair judicial method of bringing war criminals to justice is that such methods are more likely than any others to commend themselves to the judgment of history. That future generations think of Allied action on war criminals may have a profound effect upon the preservation of peace in years to come. That action certainly will set the tone of the Allied occupation of Germany by showing that a government of laws and not of men has begun. A political disposition of the Axis leaders, on the other hand, would look like, and would be, a continuation of totalitarian practices. One has only to remember the confusing propaganda interpretations of the Versailles Treaty to realize what might be the disastrous results of action dictated by politics and not by fundamental principles.
of law and justice. If Allied actions are soundly conceived, however, there exists an opportunity to mark up an important step in the obtaining of future world security. Punishment following a judicial determination, in which a number of nations participate, to the effect that the alleged violations of international law have occurred, will certainly induce future government leaders to think before they act in similar fashion. It will serve also to bring home the truth to those Germans who remain incredulous about the infamies of the Nazi regime.

0. The Arguments Advanced Against Trials for the Axis War Criminals are Not Persuasive:

The arguments which may be advanced against some proper trial for the Axis leaders must come to this - First, that the trial might be one, lasting almost indefinitely, in which all sorts of irrelevant matters might be discussed, producing a fertile field for controversy and possibly leading to adverse world reactions; second, that attempts to restrict the trial to a reasonable length and to matters which are relevant might lead to a trial which is a mere travesty upon Allied ideals of judicial inquiry. The fear really is that the trial will be either (1) a prolonged "State" trial, unsatisfactory to the Allied and providing Hitler and his associates with an effective sounding board for propaganda and an easy road to martyrdom, or (2) an inadequate substitute for our traditional procedures which the world will brand as an attempted fraud.

Both these objections are mere arguments against the ability of Allied legal brains to produce a fair, expeditious, reasonable procedure to meet the novel situation which is presented. As a problem of pure procedure it obviously can be solved. If a proper
procedure is devised, an Allied military tribunal can administer it with fairness, dignity and sobriety and give, in substance and not merely in form, a trial and decision as impartial as it lies within the ability of humans to provide. There are few issues of fact which cannot be tried in a reasonable time, and, if the military judges properly control the trial, the accused should receive a fair hearing without unduly prolonged discussion of wholly irrelevant matters. The advantages of the trial method over political action are so fundamental that we should not allow the bag-a-boom of possible embarrassments to hinder us from establishing the principle. More is involved than convenience and avoiding the chance of Nazi propaganda and countercharges.

It should not shock anyone that a trial before an Allied military tribunal should have some aspects based upon common law traditions and some drawn from the Continental and Slavic systems. For example, the United States and the United Kingdom cannot insist on the full, rigid application of Anglo-American procedures, the rules of evidence, the privilege against self-incrimination and similar matters. These are not inherent parts of other systems of criminal practice and there is no need for leaning over backward to give the Axis leaders the benefit of protective principles, not afforded by German law, even prior to Axis distortion of German justice. The Hitlerites need only have a fair trial. Similarly, those raised in the Russian and Continental systems of law
cannot properly object to having the methods of trial influenced by common law principles to some extent.

The trial should be an Allied venture, reflecting the influence of the systems of justice in force in all four of the principal Allied nations. Of course, the accused while in custody should not be subjected to duress or to any essentially unfair or unreasonable interrogation and the trial in all respects should be conducted justly and impartially.

A final objection may be raised that there can be no real trial when the real offense, for which Hitler and the other Axis leaders are being tried, is the totality of what they have done to the world since 1933. It is true that all that the Axis has done should be brought into the grounds of punishment. The offenses charged should include the preparation for war, the prewar atrocities and the launching of aggressive war in violation of Germany's treaty obligations as well as the ruthless conduct of war in violation of international law and custom.

Principal emphasis, doubtless, will be placed in the trial upon those patent violations of the customs of war which most shock the Allies (e.g., murder of prisoners of war, abuse of populations in occupied territories, deportation of Allied peoples for use as slave labor, etc.) Nevertheless, these offenses were only a part of the whole ghastly Hitlerite enterprise of which these offenses were the invariable consequence. The particular atrocities color the Hitlerite enterprise and make the whole enterprise no clearly a criminal violation of international law, that the whole enterprise
should be included in the charges and revealed in the trial.

The very breadth of the offense, however, is not in itself an argument against judicial action. It is a most important reason for a trial, for it is highly desirable that there be established and declared by actual decision, after adequate hearing and determination of the facts, the principles of international law applicable to the broad, vicious Nazi enterprise. In texture and application, this law will be novel because the scope of the Nazi activity has been broad and ruthless without precedent. The basic principles to be applied, however, are not novel and all that is needed is a wise application of these principles on a sufficiently comprehensive scale to meet the situation. International law must develop to meet the needs of the times just as the common law has grown, not by enunciating new principles but by adapting old ones. By including within the general area of punishable international crimes the violation of compacts, there will be world judicial condemnation of deprivations so great and so violent that international security cannot exist if they should be permitted to continue unchecked. The law should be ample enough to cope with the totality of the offense and through the most solid basis for prosecution under existing law relates to the violations of actual and recognized rules of war, the full offense covers an obviously area wider than this limited field that it is natural and proper in this day and age that we must deal with those too.
V. There is Immediate Need of an Allied Executive
   Prosecuting and Planning Organization to Deal with the
   Principal War Crimes Trials and Related Problems:

1. In the trial of the Hitlerite leaders no charges
   which cannot be proved should be presented and the theory
   of prosecution should rest upon ascertainable facts. The
   actual trial of cases must be planned and conducted
   by persons familiar with the techniques of the expeditious
   presentation of intricate cases. Accordingly, there
   should be created to take charge of preparations for the major
   trials, an Allied executive or planning group consisting
   of one representative each of the United States, the
   Soviet Union, the British Commonwealth and France. This
   group should be assisted by an adequate staff of attorneys
   and research personnel to compile and analyze data,
   prepare the charges in the principal cases or cases to
   conform to the proof and arrange the evidence for pre-
   sentation to the international military tribunal.

   So far as the operations of this executive group
   are carried out within Germany or Austria, such operations
   might appropriately be subject to the administrative
   direction of the Control Council for Germany or for Austria,
   as the case may be.

2. The presentation of the principal case or cases
   before the international tribunal should be made by
   persons designated by the United States, the Soviet Union,
   the British Commonwealth and France, each of these countries
   being entitled to designate one person, who might be its
   member of the executive group referred to in the preceding
   paragraph.

3. The full-time executive group might also be
   charged with:
a. the recommendation to the appropriate governmental authorities of agreements and measures supplemental to or in addition to the agreement, necessary or appropriate to accomplish its objectives, and

b. the maintenance of liaison among and with the appropriate military and civil agencies, authorities and commissions of or representing any of the United Nations which are or may be charged with responsibility for any matters dealt with in the agreement.

4. Expenses — Any military or executive agreement should make suitable provision for the payment of the expenses of the prosecutions and the executive group.