SUBJECT:
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GENERATION OF PROFESSIONS
FOR THE PROSECUTION AND PUNISHMENT
OF CERTAIN WAR CRIMINALS AND OTHER OFFENDERS:

30 April 1949

Washington, D. C.

Classified

Note: By direction of the
Assistant Secretary of War
Date: May 1, 1949
Initials: H.G.
1. The Moscow Declaration did not cover the whole 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 those 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 actionable 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 Nations concurrence (or before an Allied military tribunal) of those Hitlerite nationals who have committed war offences 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 Allies; or

b. the methods of punishment of those members

of the principal Nazi organizations, such as the Gestapo and S.S., who voluntarily engaged in carrying out the ruthless
policies of the Nazi regime but who cannot readily be proved to have participated personally in the execution of specific atrocities.

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:

1. the major Nazi leaders and their principal accomplices in the broad program of war crimes and atrocities which have characterized the Nazi regime since 1933 and

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

Considerations Taken into Account in Forming the Proposals.

The proposals now advanced give recognition to the following facts:

1. 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 accepted by German military forces, in connection with which the crimes and atrocities referred to were committed;

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

3. 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

§ 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 takes adequate account not only (1) of those offenses committed within and outside Germany, during the war or against the citizens of the United Nations, but also (2) of those atrocities, both before and after 1939, committed against members of 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 15.)

2. Either in separate trials, or at the same time, the leaders of the principal Naziite organizations (i.e., the Gestapo and the S.S.) and the organizations themselves should also be tried before an Allied military tribunal. This tribunal should determine both the guilt of the individual leaders and the extent of the participation of each of these organizations and the leaders in the great Nazi criminal enterprises, of which the crimes and atrocities which have shocked the world were an integral part or at least the natural and probable consequence. (See
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 C, 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 presentation. (See discussion below, Part V.)

The proposals now advanced contemplate 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 agreements.

III. The Trial and Punishment of the Hitlerite Leaders and the Major Hitlerite Organizations Should be Conducted by an Allied Military Tribunal.

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:

b. The offenses of the Nazi leaders and their organizations which will be the subject of judicial inquiry will be largely war crimes properly punishable by a military tribunal.

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

d. 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 in the normal setting up of an international treaty court.
B. 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 contemplated by their program and perpetrated in its execution. 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 enterprise 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 serious crimes, and also with joint participation in a broad criminal enterprise which included and intended these crimes, so as reasonably calculated 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 inserted the rule of liability, common to most penal systems and included in the general doctrines 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 prosecution as such.

C. Trial of the Charges.

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

1. Stage I - There should be brought before
an international military tribunal the highest
representing German leaders to a number fairly repre-
sentative 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
desired 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
involved within the charge. The tribunal should
make findings in accordance with 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 - Without prejudice to the trial
before any niational tribunal of individuals charged
with specific atrocities, the 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 personal participation in specific atrocities,
should be brought before occupation or other appropriate
tribunals.

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The findings of the tribunal in the trial provided
for in paragraph 6 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 tri-
butaile established under this instrument. In these
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.

7. 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 reparational
labor, etc., rather than to capital punishment.

D. Procedure.

Any military or executive agreements should include
an undertaking to adopt and apply comprehensively in the
trial of war criminals, to the greatest extent practicable,
expeditions, fair, non-technical procedures which would
(in a manner consistent with the purposes of the agreement):

7. provide each accused with notice of the
charges against him and an opportunity to be heard
reasonably on such charges;
The Allied powers in their proclamation of 30th July, 1914, have declared their intention of making an immediate attack on the German Empire, and of causing its complete submission to the wishes of the Allies. In pursuance of this intention, the British Government has declared its readiness to use all means and instruments which may be required for the purpose of achieving this end.

The British Government has further declared that it is prepared to take all necessary steps for the protection of its subjects and properties in foreign countries, and for the preservation of its rights and interests in such countries.

The British Government has also declared its readiness to co-operate with the other Allied powers in all measures which may be necessary for the prosecution of the war on land and sea, and for the maintenance of the Allied forces in the field.

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punishment. The principle of justice is so fundamental in most men's minds as the rule 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 less degree by all nations, and historically its recognition is the first step in the approach to the democratic standard of liberty under law.

C. PUNISHMENT OF WAR CRIMINASL IS DESIGNED AS A DETERRENT AND TO RAISE INTERNATIONAL STANDARDS OF CONDUCT:

Punishment of war criminals should be motivated primarily by the deterrent effect, by the legitimation which it gives to improved standards of international conduct and, if the theory of punishment is broad enough, by the implicit condemnation of ruthless and unlawful force as instruments of obtaining national ends. The satisfaction of instinct 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, may be regarded eventually, and probably immediately, as adoption of the methods of the Axis itself. It will retard progress towards a new concept of international obligations simply because those who have fought 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 alien to Anglo-American and Continental traditions.

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

The preservation of the moral force behind the Allied cause is important. That force, born from the enthusiasm 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 reason could conscientiously justify such action.

3. The Verdict of History upon the Faisability of the Disposition of the 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. What future generations think of the Allied action on war criminals may have a profound effect upon the preservation of peace in years to come. That action certainly will not the
some of the Allied occupation of Germany by showing that
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 several con-
nected, however, there exists an opportunity to make 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 seriousness of the Nazi regime.

7. The Arguments Advanced Against Trials for the
Axis Arab-Germans are Not Persuasive.

The arguments which may be advanced against some
proper trial for the Axis leaders must come to this -
First, the trial might be one, lasting almost in-
definitely, 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 "Gads" trial, unsatisfactory to the
Allies 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
frenz.

Both these objections are mere arguments against
the ability of Allied legal brains to produce a fair,_searchable
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 self-respect and
give, in substance, not merely in form, a trial
decision as important 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 needlessly prolonged
delays or irrelevant matters. The advantages
of the trial method over political action are so funda-
mental that we should not allow the prejudicial power of the
enemies to hinder us from establishing the princi-
ple. 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 involve experts
based upon common law traditions and some drawn from
the Continental and Islamic systems. For example, the
United States and the United Kingdom cannot insist on
the full, rigid application of Anglo-American procedures,
"The voile of "violence," the privilege against self incrimination and similar matters, these are not inherent parts of other systems of criminal justice and there is no need for leaving over to the benefit of the accused persons, as is not affected by German law, even after the date of designation. The "Hitlerian" need only have a fair trial. Similarly, those raised in the Russian and Continental systems of law cannot properly object to 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 torture 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 has been done should be brought into the grounds of punishment. The offenses charged should include the preparation for war, the provocation 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, mass execution of peoples 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. These particular circumstances color
the enterprise and make the whole of it so clearly criminal,
that the whole enterprise should be included in the changes
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 determina-
tion of the facts, the principles of international
law applicable to the broad, vicious Nazi enterprise.
The application of this law may 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 compre-
sensive scale to meet the situation. International law
must develop to meet the needs of the times as the
common law has grown, not by creating new principles but
by adapting old ones. By including within the general area
of punishable international crimes the violation of con
crets, there will be world judicial condemnation of degradations 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 though the most valid basis for prosecution under existing
law relates to the violations of actual and recognized rules
of war, the full offense covers so obviously areas wider than
this limited field that it is natural and proper in this day
and age that we must deal with these too.
V. There is Immediate Need of an Allied Executive
Preplanning and Planning Organization to Deal with the
Principal War Crimes Trials and Related Problems:

1. In the trial of the Nazi 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 causes. 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 or the principal cause or causes 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 cause or causes
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 the member of the
executive group referred to in the preceding paragraph.

3. The full-time executive group might also be
charged with:

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9. the recommendation to the appropriate government 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 committees of or representing any of the United Nations which are or may be charged with responsibility for any matters dealt with in the agreement.

b. Expenses - Any military or executive agreement should make suitable provision for the payment of the expenses of the provisions and the executive group.