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22 November 1944

MEMORANDUM for the Assistant Secretary of War.

Subject: Trial of European War Criminals.

1. The G-1 plan, first presented at the conference held in your office on 27 September, has been the subject of continuous study and discussion since that time.

2. I agree, first, that there must be a trial of the arch-criminals before an international tribunal, full and complete, with a verbatim record of oral evidence and of documents. I feel quite strongly that the world cannot afford to dispose of the war guilt question by compelling the vanquished nations to make an admission under duress, as it did in article 231 of the Versailles Treaty in 1919. There must be convincing proof of guilt, which should be preserved in such form that the record of trial can be widely distributed.

3. The foregoing, the full-dress international trial of the ringleaders, I may call Stage A of the proceedings. All concerned, I think it is fair to say, agree that there must be such a trial. There is likewise agreement as to what I may call the Stage C trials, the individual proceedings against identifiable criminals before the military or civilian courts of the injured nations. As you are aware, there have been a good many conferences recently touching the proposed trial by U. S. military commission of the Bulgarians who mistreated captured American aviators.

4. My only substantial qualification refers to Stage B, the trial of the individual Nazis not identified as perpetrators of particular crimes, but simply as members of Nazi organizations which have already been in court at stage A.

5. Par. 9d of the G-1 paper states, referring to Stage A,

"d. The judgment should adjudicate:

* * * *

"(2) That every member of the Government and organizations on trial is guilty of the same offense. Such adjudication of guilt would require no proof that the individuals affected participated in any overt act other than membership in the conspiracy.

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"f. Thereafter, every member of the mentioned government organizations would be subject to arrest, trial and punishment

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In the national courts of the several United Nations. Proof of membership, without more, would establish guilt of participation in the mentioned conspiracy, and the individual would be punished in the discretion of the court. Proof of the commission of other criminal acts would subject the individual to additional punishment conformably to local law."

6. The only possible difficulty arises from so much of par. 9f, just quoted, as proposes to hold the Stage B proceedings "in the national courts of the several United Nations". To the extent, of course, that members of the SS, Gestapo, and the like, are tried by French, Dutch, Polish, or Russian courts, for their connection with offenses committed in or against the nationals of France, the Netherlands, Poland, or Russia, the holding of such trials accords with the general principles laid down in the Moscow Statement on Atrocities. Thereafter the legal sufficiency of the proof adduced is a matter of municipal rather than international law, and, in the event of conviction, the accused no longer fall within the protection of the Geneva Convention, but may be executed or held to forced labor, as the case may be, as convicted war criminals.

7. We are concerned primarily with the problem as it affects the United States. It is clear, of course, that the military commissions of the United States, like its courts-martial and its civilian criminal courts, can proceed to judgment of conviction only upon complete proof of the personal guilt of the individuals before them. Each record must be complete in itself. The procedure of the military commission is expeditious, and its rules of evidence are now relaxed; but the basic principle that the accused must be proved guilty on the evidence presented to the tribunal in the particular case still applies.

8. Obviously, if Hans Schultze, an SS man, were a defendant in the Stage A proceeding, the mere fact that he voluntarily joined the SS and swore an oath blindly to obey his leaders, would, even in the absence of further evidence, be sufficient to make him a co-conspirator with the others and subject to the same penalty. The same result would be reached in the federal courts of the United States by a combination of the conspiracy and accessory provisions of the Federal Criminal Code (18 U.S.C., secs. 88, 550).

9. Advance the matter by one step, and suppose that Schultze were tried in a Stage B proceeding in a U.S. district court. The

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judgement in Stage A would not be binding against Schultze, because on this hypothesis he would not have been a party to Stage A. The record in Stage A would be inadmissible hearsay. And Schultze could only be convicted by recalling all the Stage A witnesses. I agree with the G-1 paper that any such procedure would be so cumbrous and time-consuming as to be self-defeating.

10. Before a U.S. military commission, with the rules of evidence relaxed to the point of elimination, the Stage B proceeding would be simpler, because there the record of trial of Stage A would have probative value, and so would be admissible. But every Stage B trial would require the introduction of that record, which, more likely than not, will be of considerable bulk. Therefore, the G-1 paper under consideration proposes a practical short-cut, namely, the adoption of a rule of law which would in effect provide that the Stage A record should be considered as being in evidence, or the Stage A judgment as being proved, in all the Stage B proceedings. With this final step taken, there may well be a question whether the Stage B proceedings could be held in either the civil or military courts of the United States unless the judgment at the first trial were either made conclusive as a matter of binding law, or the findings of fact at the first trial were given prima facia weight.

11. I agree that, if justice is to be done at all, we must take this final step. It is true that a great many persons will have to be tried, more probably than have ever been tried before; but mass murders have never before been perpetrated on such a large scale either. Certainly we can not afford, by any act or omission of ours, to lend support to the view that crime can be made to pay if it is undertaken with a wide enough scope. Therefore, in order to proceed to the Stage B trials on the footing that Stage A has been established as the law and facts of the case in Every Stage B trial, it will be necessary to conduct the Stage B proceedings either (a) in international courts or military commissions, or (b) in the courts of other nations, or (c) to give such force to the Stage A trial as would bind United States courts. This could be done by a treaty provision, which would then become the supreme law of the land; or for military courts, by an executive order under the 38th Article of War, making the findings of fact by the Stage A court prima facia evidence of such facts in the Stage B proceedings.

12. Although the suggested concept of res judicata goes beyond anything now known to our criminal law, I see nothing in it repugnant to natural justice. In civil litigation, parties to causes are bound by judgments obtained against those in privity with them. The class suit is a familiar remedy in Anglo-American

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equity. The statutes of several states permit unincorporated associations to be sued in actions nominally against an officer thereof, the judgment, however, to be binding against all the members of the association. The modern civil law, I am advised, permits the introduction of certain evidence against some conspirators in trials of other conspirators. And, as I have already pointed out, under the conspiracy and accessory provisions of the U.S. Code, individuals no less remote from the commission of criminal acts than are the Stage B.defendants from the Nazi war atrocities can be brought to book for their misdeeds.

13. There, of course, all the co-conspirators must be in court, and we have mass sedition or poultry racket trials, as the case may be. Obviously we cannot try in one proceeding the million odd SS men and Gestapo agents. It would not be practicable to try them individually and to put the Stage A record into the record of each Stage B trial. But I see nothing inherently unfair or unjust in trying the organization in a proceedings where it is defended and represented by its leaders, and in then making that judgment binding on all who voluntarily became members of the organization. Therefore, subject to the qualifications already noted as to proceeding in United States courts at Stage B, I agree in principle with this part of the proposal also.

14. I suggest, therefore, that the G-1 plan be expanded and revised along the following lines:

a. The res judicata principle should be written into the treaty or other agreement which established the court for the Stage A trial.

b. The language of the plan should be revised to indicate that the courts in the Stage B proceedings will, in addition to identifying the individuals of the groups and organizations whose criminality will have been adjudicated in Stage A, determine these individuals' respective degrees of guilt, and award appropriate punishments accordingly.

15. I would further suggest that, as soon as the G-1 proposal, duly modified and expanded in the light of this and similar comments, shall have been approved in Washington, it be transmitted to the American delegates to the United Nations War Crimes Commission with

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