Memorandum for the President.

Subject: Trial and Punishment of German War Criminals.

We have been giving consideration to ways and means for carrying out the United States policy regarding the trial and punishment of war criminals, as established in your statement on that subject dated October 7, 1943, the United States Declaration on Persecution of Jews of December 17, 1943, the Concurrent Resolution of the Congress of the United States of March 19, 1945 (87 Stat. 721), the Moscow Statement on Atrocities of November 1945, and your statement on the subject of persecutions dated March 24, 1944.

Difficulties inherent in separate trials for individual offenses.

Any attempt to reach these crimes on the basis of the separate prosecutions of large numbers of individuals will only make good the Nazi assumption that their crimes would go unpunished if they committed them on a sufficiently grandiose scale. The practical difficulties of proceeding on this basis are almost prohibitive.

The crimes to be punished have been committed the world over, and have been participated in by thousands upon thousands of offenders, literally millions of victims and witnesses to these offenses have perished.

As we read the pronouncements mentioned above, they establish the United States policy that we will bring to trial and punishment
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not only technical violations of the laws and customs of war, but also (1) atrocities committed by the Nazis before there was a state of war, and (2) atrocities committed by them against their own nationals on racial, religious, and political grounds. This raises the further complication that these last two classes of offences in and of themselves are not cognizable as war crimes in the most limited and technical sense. Moreover, the prosecution of Axis leaders for offences against their own nationals might be opposed as setting an unacceptable precedent of outside interference in the domestic relationships between a sovereignty and its nationals.

**Nazi atrocities, both pre-war and since, represent a criminal conspiracy.**

The criminality with which the Nazi leaders and groups are charged does not consist of scattered individual outrages such as may occur in any war, but represents the results of a purposeful and systematic conspiracy to achieve domination of other nations and peoples by deliberate violation of the rules of war as they have been accepted and adhered to by the nations of the world, the violation of treaties and international conventions and customs, and mass extermination of peoples. The objective in the prosecution of Nazi war crimes should be not only to punish the individual criminals, but also to establish and condemn the basic criminal purpose underlying the individual outrages.
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The writings and statements of the Nazi leaders themselves indicate that, beginning even prior to their assumption of power in Germany, they have been engaged in this conspiracy. The carrying out of the conspiracy demonstrably involved the commission of the atrocities and war crimes which the United Nations have pledged themselves to punish. We believe that further research, which should be undertaken promptly and carried through expeditiously and thoroughly, will develop the full scope of this conspiracy so that it may be proved according to accepted judicial standards before a fair tribunal.

**LAW OF CRIMINAL CONSPIRACY APPLICABLE**

The well recognized law of criminal conspiracy makes punishable not only the use of unlawful means to attain lawful ends, but also the use of lawful means to attain unlawful ends. An indictment upon a charge of conspiracy should be returned against the leaders of State, governmental and party agencies such as the SS, SD and Gestapo, and other individuals and groups who during the time in question have been in control of formulating and executing Nazi policy. Under such charge there would be admissible in evidence the acts of any of the conspirators done in preparation for, in furtherance of, and in consummation of the conspiracy, regardless of the fact that, separately considered, certain of these acts.
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could not be prosecuted as war crimes in the accepted and most limited definition of that term. The pertinent proof would include, among other things, atrocities committed before there was a state of war, and those committed by the Nazis against their own nationals or racial, religious, and political groups.

The indictment could properly include, in addition, conspiracy counts covering the particular unlawful purposes of such organizations as the SS and Gestapo, and counts charging other particular acts of criminality committed by the respective defendants or groups of defendants. The inclusion of these additional counts would, for the most part, require no additional proof, and at the same time would make it possible to adapt the trial procedures to the facts developed by research as indicated above.
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CONSPIRACY CHARGE COULD BE DISPOSED OF IN SINGLE TRIAL.

The basic charge of conspiracy and the additional counts in all probability could be disposed of in a single trial of the individuals, agencies, and organizations involved. Certainly no more than a very few trials would be required to dispose of this matter. The United Nations would physically bring to the bar only those individual defendants, considered to be fairly representative of the defendant groups and organizations, as they deem necessary. An adjudication would be sought of the existence, nature, and purposes of the conspiracy, its results, and the identity of the participants in it. The court would prescribe the punishment for those defendants physically before it. The adjudication would, however, determine the facts of the conspiracy and establish them for the purposes of further proceedings against the individuals, groups and organizations dealt with in the judgment, and against the members of any such organizations not then physically before the court. After such adjudication, the civil or military courts of the several United Nations (or mixed tribunals of two or more of them) would proceed to identify the additional members of the groups thus adjudicated to have been participants in the conspiracy. These courts would also appraise the degree of participation of each person in the conspiracy, and fix the punishment of each of
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then in the measure appropriate in the particular case. The procedure proposed could be handled expeditiously enough to ensure that justice would not be defeated by delays and complications.

The proceedings will be judicial and not political. They will constitute an application of legal concepts firmly rooted in our law. Not only will this proposal afford a fair trial to those charged with atrocities, but it can submit to the judgment of an appropriate tribunal the conduct of the Nazis in bringing about and carrying on the war. A condemnation after such a proceeding will meet the judgment of history, so that the Germans will not be able to claim, as they have been claiming with regard to the Versailles Treaty, that an admission of war guilt was extorted from them under duress. It may be noted, in addition, that after the charge is preferred and pending prosecution and punishment those of the criminals who have been or may hereafter be taken prisoners of war will not have any protected status under the Geneva Prisoners of War Convention. They can then be dealt with freed from the restrictions of that Convention.

RECOMMENDATION

We recommend that you approve this general method of dealing with the basic war crimes problem.
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APPROPRIATE COURTS FOR TRIALS OF CONSPIRACY CHARGES.

Two principal types of court could be employed for the trial of conspiracy charges of the character outlined above:

1. Tribunal Created by Treaty. The charges could be tried by an international court created by treaty, which would (a) define the crimes to be tried, (b) establish the composition and jurisdiction of the court to be established, and (c) make suitable provisions for court procedures, thus insuring the elimination of dilatory and irrelevant tactics without impairing the essentials of due process.

   Such a treaty should be simple and should limit the jurisdiction of the court to the trial of the charges specified in this memorandum and nothing else, thus avoiding long-term and unpredictable commitments. This treaty would also determine whether the court shall be created with both military and civilian members or on a purely military basis, appointed in a manner to be stated in the treaty.

   Three possible objections to this procedure should be mentioned:

   a. There might be concern lest the trial of these offenses should be long drawn out and serve as a sounding board for propaganda on the part of the defendants. This can be avoided by careful research into the facts and clear, fair, well prepared and skillful presentation of these facts before the court.
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   b. The tribunal might lack the flexibility to adapt to changes in the nature of the evidence as it is obtained.
a. The negotiation and approval of the suggested treaty might take a substantial period of time and consideration of the treaty by one ratifying body might bring suggestions of undesirable reservations. This objection would be largely obviated by restricting the treaty court to a limited jurisdiction, as above suggested.

b. If publicity were given to the proposed prosecution, retaliations by the Axis on United Nations prisoners of war and other persons in their custody might occur. This can be avoided by deferring public announcement of the negotiation of the treaty and its presentation for ratification until all United Nations personnel in German custody are safe. However, negotiations could now be undertaken on a confidential basis, as, for example, through the European Advisory Commission.

II. **Military Courts created by Executive Agreement or Military Arrangement.** So far as the offenses to be tried are violations of the laws and customs of war, it is probable that international mixed military tribunals to try them could be created either by executive agreement on a governmental level or by action of military commanders.
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We recommend, however, since the conspiracy charges to be tried will be of such historical importance and will involve some novel applications of existing principles of law, that the charges should be tried before a court established by a method resting upon the highest sanction provided by the laws of the several interested nations. Trial by such a tribunal would command greater public support among the several United Nations and would receive greater long-term approval. In addition a treaty could make apt provision for trial procedures, which, once ratified, would give them the unquestioned force of law in this and other interested countries.

BRITISH VIEW

The British Government has indicated, in commenting on a Draft Convention for a United Nations War Crimes Court submitted to it by the United Nations War Crimes Commission, that it favors neither the treaty process nor the erection of any international tribunal for the trial of war offenses, other than perhaps mixed military courts.

The War Crimes Commission's proposal, however, is very different from the one presented in this memorandum. For one thing, the convention drafted by the War Crimes Commission would have involved an indefinite, long-term commitment on the part of the contracting powers. It would have established a court of indeterminate duration.
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Consequently, we do not regard the British objections to the War Crimes Commission's Draft Convention as necessarily precluding assent to the proposal now advanced.

RECOMMENDATION

We recommend that you approve the preparation and negotiation of a treaty to create a court of the type and having the limited jurisdiction described above.

OTHER ESTABLISHED PROCEDURES NOT FORECLOSED

The program which we have described is not intended to foreclose other available procedures for dealing with particular offenses. Thus, for example, atrocities against our nationals by identifiable Axis individuals will remain subject to trial by United States military and naval commissions. The military and civilian tribunals of the other United Nations will probably be employed to try other individual crimes, under either international or local law. These
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procedures present no new problems of policy, and are mentioned only for the sake of completeness. They do not require further action on your part at this time.

POSITION OF THE NAVY DEPARTMENT

The Navy Department has indicated that it has a direct interest only in war crimes in the strict sense, such as are mentioned in the preceding paragraph, and that it disclaims interest in any war atrocities outside that field.

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