

January 23, 1945

CM

In re: War Criminals and Punishment.

My dear Sam:

I have read the proposed recommendation of War and Justice with reference to the above. In general, if the suggested course is one of which the President approves, I think, with some reservations, it covers the situation. My principal suggestion would be that any Joint International Military Court be composed in large part of civilian judges.

My feeling, however, is that the problem which the President immediately confronts is more political than legal.

There is a wide divergence of opinion and even some latent bitterness, perhaps, between the views of the U.S.S.R. and Great Britain, as to this problem with which the President will be confronted.

The only contribution which I feel I could offer, (in view of his request that I make a survey of this question for him and the Secretary of State), is to comment on these differences, which he confronts, and how possibly they could be composed.

THE SOVIET POSITION.

The Soviets demand mass punishment for thousands of criminals, great and small, not only for those who committed the criminal acts, but those arch-criminals who were "responsible therefore". They demand that it be so speedy, so sure, and so drastic, that it will forever deter repetition of the crimes. Their feelings are so strong, that some of their present thinking appears to be more concerned with "formalized vengeance" than with the administration of justice, under Law, which ultimately, I feel sure, they wish to sustain. Their publicists more than their law writers, exact that "Crimes Against Humanity" shall be vigorously proscribed and punished, even though they are not specifically known or defined as Crimes, under International Law. Some of the London Commission advocate this by creating an International Court by Treaty, and enacting through it retroactive criminal legislation, declaring Total War, Aggression, etc., to be International Crimes.



THE BRITISH POSITION.

On the other hand, the British "gag" at this. They fear this attitude and retroactive criminal legislation, mass trials, and the possible denial of some of those elementary protections of liberty in criminal cases, which are vital to a rule of law. They are concerned lest the judgment of posterity will be that the punishment was "formalized vengeance" not retributive justice, under Law.

WHAT COULD BE DONE.

If these two differences are not solidified through conflict of personalities over the discussion of details, there is no reason why both cannot be satisfied under a plan which can be developed. There is plenty of common ground upon which unity in plan can be based, and under which the objectives of each can be secured.

In view of the limitations upon the time of the Chiefs of State in this pending conference, the matter might be disposed of by them, in principle, with directions to their Foreign Offices to work out plans and procedure whereby their common objectives can be achieved, without serious impairment of what each desires, and in such a way as to build up a record which posterity would surely acclaim.

Such a plan could accomplish, in my opinion:

1. Certainty, which the Soviets require, that none of the guilty, great or small, should escape just punishment for their heinous crimes, and that justice would be quick and sure.
2. The certainty, which the British desire, that this would be done without doing violence to the general principles against retroactive penal legislation from crime, and be such as posterity would consider the administration of justice, not vengeance under sham formalities of law.
3. The certainty, which all desire, that the moral revulsion against these atrocious crimes shu'll be registered and be made of



3. (Continued)

record; and that these horrible "Crimes Against Humanity" shall not only be punished, lawfully, but that they shall be defined by the legislation of an international community, created by Treaty, and this assure for all time to come that these "Crimes Against Humanity" are specific crimes against International Law.

Faithfully yours,

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