January 25, 1946

My dear Sam:

In re: War Criminals and Punishment.

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., U.K. 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 JUDICIAL QUESTION.

The Soviets demand mass punishment for thousands of criminals, great and small, not only for those who committed the criminal acts, but these mass-criminals who were "responsible therefore". They demand that it be as speedy, as sure, and as 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 publicity more than their law writers, state that "Crimes Against Humanity" shall be vigorously prosecuted and punished, even though they are not specifically known or defined as Crimes, under International Law. None of the London Commission advocate this by creating an International Court by Treaty, and enacting through it retrospective criminal legislation, declaring Total War, Aggression, etc., to be International Crimes.
THE BRITISH POSITION.

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

WHAT COULD BE DONE.

If these two differences are not satisfied through conflicts 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 pressing conference, the matter might be discussed by them, in principle, with directions to their Foreign Officers to work out plans and procedures whereby their common objectives can be achieved, without serious involvement of what each desires, and in such a way as to build up a record which posteriority will surely acclaim.

Such a plan could accomplish, in my opinion:

1. Certainly, which the Soviet requires, that none of the guilty, great or small, should escape just punishment for their crimes, and that justice would be quick and sure.

2. The certainty, which the British desire, that this could be done without doing violence to the general principle against retributive punishment against certain crimes, and be such as not merely would counter the administration of justice, but vengeance under such formalities of law.

3. The certainty, which all desire, that the moral revulsion against these atrocities crimes shall be registered and be made of
3. (Continued)

record; and that these horrible "Crimes
Against Humanity" shall not only be
punished, but that they shall
be defined by the legislation of an
International community, asserted by
Treaty, and this accords for all time
that these "Crimes Against
Humanity" are specific crimes against
International law.

Faithfully yours,

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Joseph W. Davies

The Honorable Franklin D. Roosevelt,
Legal Counsel to the President,
The White House,
Washington, D.C.