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By AC/DA on 11/13/2012

4 January 1945

MEMORANDUM

I.

1. The question is presented whether the launching of the present war by the Axis powers is a crime for which the Axis leaders are liable to trial and punishment.

2. a. It is generally agreed that acts committed before the outbreak of war which commanded, or procured, or reasonably and probably involved the commission of so-called war crimes after the outbreak of war, and which were followed by and did result in war crimes after the outbreak of war, are war crimes.

b. It is further commonly agreed that the launching of the war itself by the Axis leaders does not constitute a "war crime" in the strict legal sense in which this phrase is used in the literature on the subject, or in official United States policy.

c. For the purpose of this discussion, it may likewise be considered as agreed that at the time of the Versailles Conference, international law held that the launching of an aggressive war was not a crime.

3. The above leaves open the question, however, whether the conduct under consideration nonetheless constitutes a crime, and the problem may therefore be stated as follows:

Does international law today condemn as a crime the launching of the present war, for which its instigators may be tried and punished by an international tribunal?

II.

4. International law is based on customary usage and treaties among the several States. These, however, are not the law but only its expression. Together, they disclose the principles of conduct which are from time to time accepted by States as controlling their relations with one another, but the ultimate foundation of those principles consists of the public concepts of morality and justice in the

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States concerned. More than any other law, therefore, international law grows and develops with the growth and development of the public conscience upon which it is founded. Whatever was the public view toward aggressive war at the time of the Versailles Conference, it will not be disputed that the launching of a war of aggression today is condemned by the vast majority of mankind as a crime. A formal declaration in treaty form to this effect by the United Nations today would therefore unquestionably rest on solid grounds, and of itself would constitute valid international law.

5. This would be true, even if such a declaration were made today as a new and original matter. It is not necessary to labor that point, however, for there have been, since the Versailles Conference, four formal Governmental declarations on the broadest international basis condemning aggressive war as a crime. These public acts constitute the clearest sanction for the proposition that in the international law of today aggressive war is a crime. The acts referred to were, in chronological order:

a. The Geneva Protocol. At the Fifth Assembly of the League of Nations, on 2 October 1924, the Delegates of 48 Governments unanimously accepted the Protocol for the Pacific Settlement of International Disputes (known as the Geneva Protocol), which declared that "a war of aggression constitutes * * * an international crime". While the technical scope of the agency exercised by the several representatives of the 48 Governments concerned is one which may be debated by the legalistically minded, it must be admitted that the Protocol, in the words of an English authority, "is the creation of the governmental will of the vast majority of the civilized states under whose rule mankind today exists" (P. J. Noel-Baker, The Geneva Protocol, London, 1925). It may be noted that at this date, Germany was not yet a member of the League of Nations nor, of course, did the United States take any official part in the proceedings.

b. Resolution by the Eighth Assembly of the League of Nations. On 24 September 1927, at the 18th plenary session of the Eighth Assembly of the League of Nations, the Delegates of 48 States (including Germany and all the world powers save the United States and the Union of Soviet Socialist Republics) unanimously adopted a Resolution stating that a war of aggression constitutes an international crime.

c. Resolution of the Sixth Pan American Conference. At Havana, Cuba, in February 1928, the Delegates at the Sixth Pan American Conference, at which all the 21 American Republics were

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represented, unanimously adopted a resolution prepared by the Commission on Public International Law, stating that "war of aggression constitutes an international crime against the human species." This resolution was introduced by the Mexican Delegation and was immediately accepted by Mr. Hughes on behalf of the Delegation of the United States.

d. The Kellogg-Briand Pact. At Paris in 1928, the representatives of over 60 Nations, including all the great powers, signed a pact under which the contracting parties "solemnly declare in the names of their respective peoples that they condemn recourse to war for the solution of international controversies, and renounce it as an instrument of national policy in their relations with one another."

6. The effect of these formal public acts by the Governments concerned in changing international law as it existed prior to that time is summed up in the words of Professor Lauterpacht, a leading British authority on international law, who refers to "the crime of war, as distinguished from war crimes, for which the German Government made itself responsible by resorting to war in violation of its voluntarily undertaken and repeatedly reaffirmed international obligations." Continuing, Professor Lauterpacht states in part as follows:

"* * * In this matter the position is different from that which obtained in 1914 and which prompted the Commission on Responsibilities set up in 1919 by the Paris Conference to declare that 'by reason of the purely optional character of the Institutions at The Hague for the maintenance of peace (International Commissions of Enquiry, Mediation and Arbitration) a war of aggression may not be considered as an act directly contrary to positive law'. The law of any international society worthy of that name must reject with reprobation the view that between nations there can be no aggression calling for punishment, and it must consider the responsibility for the premeditated violation of the General Treaty for the Renunciation of War as lying within the sphere of criminal law. That responsibility embraces such clearly warlike acts as that perpetrated in the form of the invasion and proclaimed annexation of Czechoslovakia in March, 1939." (Memorandum by Professor Lauterpacht to the International Commission for Penal Reconstruction and Development in July 1942).

To the same general effect is a statement by the present Secretary of War, when Secretary of State in 1932, that:

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"War between nations was renounced by the signatories of the Briand-Kellogg Treaty. This means that it has become illegal throughout practically the entire world. It is no longer to be the subject and source of rights. It is no longer to be the principle about which the duties, the conduct, and the rights of nations revolve. It is an illegal thing. Hereafter when two nations engage in armed conflict either one or both of them must be wrongdoers--violators of this general treaty law. We no longer draw a circle about them and treat them with the punctilios of the duelist's code. Instead we denounce them as lawbreakers. By that very act we have made obsolete many precedents and have given the legal profession the task of reexamining many of its codes and treaties."

7. It may further be pointed out that the Soviet view is likewise to the effect that the launching of an aggressive war is today a crime in international law. This is made clear in a book entitled "The Criminal Responsibility of the Hitlerites" by A. N. Trainin, a Soviet professor of law who is a leading member of the Extraordinary State Commission for the Investigation of German Crimes, and who expresses not only his own opinion but also the official attitude of the Soviet Government. At page 40 of this book appears the following statement:

" * * * The following classification of international crimes can be worked out:

"First group: Interference with peaceful relations between nations:

- "1. Acts of aggression,
- "2. propaganda of aggression,
- "3. conclusion of agreements with aggressive aims,
- "4. violation of treaties which serve the cause of peace,
- "5. provocation designed to disrupt peaceful relations,
- "6. between countries,
- "7. terrorism,
- "8. support of armed bands ('fifth column').

"Second group: Offenses connected with war:

- "1. offenses against war prisoners, wounded and sick soldiers,
- "2. offenses against the life, health, honor and property of the civil population,
- "3. destruction and looting of material and cultural values."

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III.

8. The argument which is generally made in opposition to the view that under present international law aggressive war is a crime, is that the Kellogg-Briand Pact, while condemning recourse to war, does not declare that a violation of the treaty constitutes a crime. This argument, however, obviously does not apply to the League of Nations proceedings and to the action taken at the Sixth Pan American Conference, in all of which aggressive war was precisely denounced as a crime.

9. Furthermore, there are many crimes in international law, recognized and established as such and punishable even by death, which are nowhere in any treaty or statute of international application specifically declared to be crimes, and for which criminal sanctions and punishments are nowhere provided. A notable illustration of this fact is found in the treaties which form the entire foundation for the rules of land warfare. These are the Hague Convention No. IV of 1907 with the Regulations annexed as a part thereof, and the Geneva Prisoners of War Convention of 1929. These two Conventions both lay down rules of conduct to be followed by belligerents in the carrying on of military operations, but in neither Convention is a violation of the rules set forth therein declared to be a crime, nor are original sanctions or punishment for individual offenders prescribed. Yet it is universally accepted that violations of these Conventions constitute war crimes and that individual offenders may be punished even by death. This being the case with respect to these two Conventions, no valid reason is seen why it is not equally true of the Kellogg-Briand Pact which, it is generally agreed, rendered recourse to an aggressive war by the signatories an illegal act. Individuals who violate this Pact by launching an aggressive war commit no less a criminal act than do individuals who violate the above Conventions by murdering prisoners of war; they simply do it on a greater and more destructive scale. No logical distinction can be established between these Conventions and the Kellogg-Briand Pact and the same results should therefore flow from all of them.

IV.

10. Furthermore, the launching of the present war was criminal by reason of the fact that as against certain of the United Nations, it was launched in violation of treaties of friendship and non-aggression, and without any declaration of hostilities as required by Hague Convention No. III of 1907. This Hague Convention, like the others, contains no language declaring a violation of its terms to be a crime, or providing criminal sanctions for such violation. Nonetheless, for the reasons already stated it is not considered that the absence of such language prevents violations of this Convention from being dealt with as crimes under international law.

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V.

11. It is therefore concluded:

a. That whatever may have been the law at the time of the Versailles Conference, the law of today condemns aggressive war as an international crime, triable and punishable as such.

b. That as against certain of the United Nations, the launching of the present war was a crime because of the manner and circumstances in which it was done.

M. C. BEEVAIS,
Lt. Col., G.S.C.

D. W. BROWN,
Maj., G.S.C.

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