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MUSSOLINI, POSSIB
SEPT. 1943

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MUSSOLINI, POSSIBLE CHARGES AGAINST
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File Closed 13 September 1943.

4007/4045/L
AIRPORT HQ SICILY
13 September 1943

SUBJECT: Possible charges against Mussolini.

TO : C.L.O.

1. There is considerable speculation whether Mussolini is now on Ponza Island or in the hands of the Germans. It does not seem too early to discuss the question of what action, if any, should be taken against him should he be captured by the Allied Forces.

2. The Geneva Convention of 1929 does not mention the treatment of enemy officials. Oppenheim II p. 299. However, in the British Manual of Military Law, Section 57 it is stated:

"The sovereign and male members of the Royal Family, the head of a Republican State, and the Ministers who direct the policy of state, although as individuals they may not belong to the army," are liable to be made prisoners. The U.S. Manual F.M. 27-10, Section 76, is to the same effect. The British Military Notes, Part II, p. 46, suggests enemy civilians be classified as "civilian internees" so that they could be imprisoned separately from those of the enemy's armed forces that are captured. This has been the policy adopted by ABGCT.

3. It is clear that Mussolini could be confined as an enemy prisoner of war, but unless there was a special exception in the armistice agreement or peace treaty, he would be released at the time the war is ended.

4. In order to mete out some punishment of Mussolini he must be charged with some offence contrary to the laws and customs of warfare. Furthermore, it must be remembered that in any case he is entitled to a trial before punishment. Hague Regulations, Article .

5. In listing the various offences of war crime, Section 443 of the British Manual of Military Law, it is said:

"It is important, however, to note that members of the armed forces who commit such violations of the recognized rules of warfare as are ordered by their Government, or by their Commander are not war criminals and cannot therefore be punished by the enemy. He may punish the officials or commanders responsible for orders if they fall into his hands, but otherwise he may only resort to other means of obtaining redress which are dealt with in this chapter." To the same effect is Section 347 of U.S. Manual F.M. 27-10

6. Scanning the war crimes listed in the Manual it would be difficult to prove that Mussolini directly ordered any to be committed. Of this provision Oppenheim (Vol. II, p. 455) points out the impracticability of the prosecution of the superior officer:

"To limit liability to the person responsible for the order may frequently amount in practice, to concentrate responsibility on the head of the State whose accountability, from the point of view of both. International is controversial."

7. The Hague Rules have only been revised since 1918 by the adoption of the Geneva Convention pertaining to prisoners of war. There have been numerous multi-lateral pacts and treaties adopted since World War I which might have bearing on the question. Before an examination of these treaties let us inquire

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6. At the conclusion of World War I there was an insistent demand that Kaiser Wilhelm II be prosecuted and punished.

In Hall's International Law (8th edition) page 498 it is said:

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"The numerous violations of the laws and usages of war during 1914-18 led to lengthy discussion at the Peace Conference at Paris in 1919, and the subject has since been discussed by various writers. The problem is one of threefold character, namely, what are war crimes and what penalties do they involve; what persons or classes of persons are liable to punishment, and what tribunal should exercise jurisdiction. The solution of these questions by the Treaty of Versailles, 1919 went further than the United States was prepared to go, especially as regards the provision of Article 227 whereby 'William II of Hohenzollern, formerly German Emperor', was publicly arraigned 'for a supreme offence against international morality and the sanctity of treaties.' This Article proved incapable of enforcement by reason of the refusal of the Dutch Government to surrender the ex-Emperor."

9. By Article 228 of the Treaty of Peace it was provided "the German Government recognizes the right of the Allied and Associated Powers to bring before military tribunals persons accused of having committed acts in violation of the laws and customs of war. Such persons shall, if found guilty, be sentenced to punishments laid down by law." While Wilhelm II was never brought to trial there were some trials, such as those at Leipzig adjudicated. However, it is a recognition certainly by Italy that war offences can be tried after a treaty of peace.

10. It seems to the writer that in 1919 the subject was no doubt thoroughly investigated. At that time it was felt that Wilhelm II could be tried for a supreme offence against International Morality and the sanctity of treaties. No additional treaties have been passed that generally change the situation.

11. Napoleon was banished without trial by the Allied Powers but this was before the adoption of provisions similar to those of the Hague Convention requiring trials. To prosecute a head of a state, even though he be a dictator unless the prosecution will accomplish some permanent results, might tend to make of the accused a martyr or end in some farce like the Him trials. Napoleon was declared to be an usurper and an outlaw. His position was entirely different to that of Musso, appointed F.M. by the head of State.

12. However, there is one point that deserves consideration. This war was fought against the usurpation of power by dictators, which caused World warfare to follow against the wishes of peace loving peoples and nations.

13. The Treaty for the Renunciation of War (Kellogg Pact of Paris) signed August 27, 1928 was agreed to by many countries, including Germany and Italy. It provided for the settlement of disputes by pacific means, and renounced war as an instrument of international policy. In interpreting this treaty the International Law Association in Budapest in 1934 submitted that as to the Kellogg Pact "a signatory state cannot by denunciation or non-observance of the pact, release itself from its obligations thereunder." (Briggs Law of Nations pp. 716-7). If this be true then subsequent acts of Mussolini for the Italian state were ineffective to annul the treaty.

14. It will be noted that the war offences listed in the British and American manuals are not exclusive, but cited only as examples. T.M. 27-10 Sections 347, 350, British Manual of Military Law Sections 443 and 445. It would seem that by the precedent in the Versailles treaty the violation of the sanctity of treaties is a war crime.

15. In the interest of future peace Mussolini could be prosecuted for violation of the sanctity of treaties, such as the Kellogg Pact, when he declared war on France, Great Britain and the United States, but particularly on France without provocation.

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16. A successful prosecution of such a violation before a general military tribunal might serve warning on future dictators that violations of treaties resulting in war would be punished. The decision as to whether such procedure should be taken is one of policy rather than law.

Robert M. Gorman
ROBERT GORMAN,
Major,
Legal Division.

DMGOT/4045/L

No.	DATE	REFERENCE	To/From
142	13.9.43	4045/L.	From: Maj. Gorman.

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