1. The nature and sources of international law. The rules of international law are not a fully developed, integrated legal system such as that which governs the conduct of individuals within our own borders.

Domestic law, stemming as it does from one paramount authority, is a relatively homogeneous, tightly-knit, comprehensive system of rules which have universal application within a given jurisdiction. International law, on the other hand, is not derived from any supreme recognized authority but has a number of different sources of varying weights. These sources are formal agreements between nations, courses of conduct recognized as good usage by nations, general principles of law and justice, treatises on international law, and domestic and international judicial decisions. They have been recognized by the Supreme Court of the United States as the sources of international law and have been prescribed as the bases for decisions by the Permanent Court of International Justice.

The principles of international law have been reduced to specific rules only to a limited extent. The incompleteness and inadequacy of international law are particularly apparent in the rules of warfare, which are one branch of international law.

The backwardness in the growth of rules of warfare is due in part at least to the fact that, unlike trade and commerce, the incidence of war is not gradual and continuous but sudden and sporadic. Thus, although some specific rules have been the subject of agreements to cover special problems which arose out of particular wars, by and large, the existing specific rules governing warfare fail to cover many important areas, and in addition there are numerous loopholes with respect to those areas which are covered. The inadequacy of the rules of warfare with reference to the problems of the first World War is described rather strikingly by Garner in his book "International Law and the World War":

> "In the first place, the war demonstrated in a striking manner that many of the rules which had been agreed upon by the body of States for the conduct of war were inadequate, illogical or inapplicable to the somewhat peculiar and novel conditions under which they had to be applied during the late war. In the second place, the war brought out the fact that the existing rules did not by any means cover the whole field; that they were wholly silent in regard to the employment of various agencies and instrumentalities for waging war, and that they did not deal at all with certain conditions and circumstances which were unforeseen at the time the rules were formulated."

Because of the substantial difference in the nature and sources of international law as compared with the nature and sources of domestic law, it should be stressed that customary techniques used in interpreting and applying domestic law may be inappropriate and even dangerous when adapted to such limited rules as have been formulated in the field of warfare. To the extent that a specific rule is available, a proper approach in applying such rule would entail a careful examination of its origin to see whether it was intended to cover the immediate situation, whether the result makes sense in the light of present day realities, and whether the end accomplished is consistent with justice and morality. Moreover, it cannot be assumed that there will always be a rule of warfare in existence which is applicable to new situations that will undoubtedly arise.

2. The applicability of existing rules of international law.
The first step that must be taken in examining the type of question which will arise when Germany collapses is to determine whether there are any existing rules of warfare which can properly be applied to the particular situation. As has been pointed out, to the extent that there are specific rules, they may be found in treaties, conventions and accepted courses of conduct.

However, in view of the fact that each treaty on the subject was framed in response to a particular need arising out of known practices, the content of the treaty must be construed in the light of its origin. Similarly, rules derived from accepted courses of conduct must be considered with reference to the fundamental reasons underlying their adoption and the types of warfare existing when nations observed them.

Extreme caution must be exercised in the application of an existing rule of warfare to new and unusual situations in order to avoid applying it in a manner inconsistent with or contrary to its underlying purpose. Rules originate and continue in effect because they meet with the approval of a large body of opinion in the society of nations. If the application of a rule to a new type of problem would not meet with the same approval, then the application of the rule would be improper.

The specific rules which have existed for some time with respect to the treatment of non-combatants are an illustration in point. These rules, which were sound in connection with previous wars and which may still be helpful in some respects in the present war, would become absurd if strictly applied to such actions as the bombing of industrial objectives, even though such action would necessarily result in death and injury to non-combatants. In modern warfare, the destruction of industrial installations serves to shorten hostilities and probably accomplishes a net saving of lives. Accordingly, the United Nations accepted this treatment of non-combatants as a proper course of conduct, and it has, in effect, become a rule of warfare.

Not only may existing rules become inappropriate to certain situations because of general changes in methods of warfare, but existing rules may be completely silent with respect to whole series of new problems, such as those arising out of developments in the techniques of warfare. For example, World War I witnessed for the first time air warfare, with respect to which there were obviously no previous rules in existence. Similarly, technical developments during this war have revealed other inadequacies in the body of the rules of warfare. When inadequacies become apparent, they should be recognized as such and the difficulties that flow from them should not be resolved by attempting to bring new cases within established principles in a manner which perverts the purpose of the existing rules of warfare.

Finally, in seeking to solve any particular problem by recourse to rules of international law, it is essential to bear in mind that even when there are existing rules of warfare in a particular field, they are not and should not be considered as a comprehensive body of rules governing all situations that may arise in that particular field. It must be recognised that only a small area is covered by the specific rules and that in most cases it will be necessary to refer to the general principles of international law rather than the specific rules which evolved from those principles to cover special situations.

3. The principles to be applied in the absence of a governing rule of international law.

It is apparent from the preceding discussion that cases are very likely to occur where the well-recognized principles of international law can not be applied logically and justly. In such situations the United States and the United Nations will be confronted with the difficult problem of adopting courses of conduct which are considered by society as a whole to be legal and proper.

To determine a legal and proper course of conduct under such circumstances requires an understanding of the basic philosophy of international law which prevails today. This philosophy can be brought into sharp relief by a brief summary of the historical development of theoretical concepts in international law.

International law was not thought of as a separate system of jurisprudence until the 17th Century. At that time the theory of "natural law" became the subject of extensive discussion and was accepted by most writers. Natural laws were considered to have always existed on a basis of morality, humanity and justice. Treaties and customs were merely the expression of these existing rules and new cases could always be fitted into a higher law which presumably had existed from the beginning of time.

The theory of "natural law" was succeeded by another known as positivism. According to the exponents of positivism international law consisted of those rules which nations were willing to observe and the higher law recognized by the natural law theorists was said to be only a code of morality and ethics. Positivism was incapable of applying legal principles to entirely new fact situations since, in the absence of an applicable specific rule found in some covenant or accepted usage, there were no general principles to which resort could be had.

For many years there was a heated debate between proponents of the two views. Recently, however, this conflict has been resolved. The events of the first World War led most writers on the subject of international law to agree that ordinary rules of justice and general principles of law can properly supplement existing rules of warfare. In other words, the absence of a crystallized rule of warfare does not mean that there are no criteria upon which a belligerent's actions should be based. On the contrary, it must act with respect to other nations in accordance with those principles of justice that guide its internal actions. Lauterpacht states in Oppenheim's International Law, at page 100:

> "In the period after the World War the science of International Law, in keeping both with the general trend of legal philosophy and with the developments in conventional International Law and arbitral practice, abandoned to a large extent the rigid adherence to the positivist view. The great majority of writers now recognise that the triumph of positivism was not accomplished without the loss of certain

important factors making for the development of International Law. It is now generally admitted that, in the absence of rules of law based on the practice of States, International Law may be fittingly supplemented and fertilised by recourse to rules of justice and to general principles of law, it being immaterial whether these rules are defined as a Law of Nature in the sense used by Grotius, or a modern Law of Nature with a variable content, or as flowing from the 'initial hypothesis' of International Law, or from the fundamental assumption of the social nature of States as members of the international community, or, in short, from reason."

Lauterpacht continues by pointing out that far from being pure theory this is:

"a frequent feature of the practice of states, especially as evidenced in arbitration conventions, and of judicial and arbitral decisions. In adopting Article 38 of the Statutes of the Permanent Court of International Justice the signatory States have sanctioned that practice. Whatever may have been its merits in the past history of international law, rigid positivism can no longer be regarded as being in accordance with international law."

The similarity of this approach to the philosophy which characterized the development of the common law is striking. Making this analogy Brierly, in his book "The Law of Nations," states:

"Thus where we might say that we attempt to embody social justice in law, giving to that term whatever interpretation is current in the thought of our time, a medieval thinker might have said that positive law ought to conform to the higher law of nature * * * even a slight acquaintance with the working of the English common law shows it perpetually appealing to reason as the justification of its decisions, asking what is a reasonable time, or what is a reasonable price, or what a reasonable man would do in given circumstances. * * *"

One of the chief contributions of natural law is the principle which is recognized and acted upon as fully today as it ever was. That principle is

"the existence of purpose in law, reminding us that law is not a meaningless set of arbitrary principles to be mechanically applied by courts, but that it exists for certain ends, though those ends have to be differently formulated in different times and places."

International arbitral tribunals have recognized that this is the proper practice and have acted accordingly. For example, the tribunal established by the United States and Great Britain under an agreement of August 18, 1910 discussed the question whether it was authorized to invoke principles of equity in deciding the Cayuga Indians Case. The decision contained this language:

> "American Courts have agreed from the beginning in pronouncing the position of the Indians an anomalous one. Miller J., in United States v. Kagama, 118 U.S. 375, 381. When a situation legally so anomalous is presented, recourse must be had to generally recognized principles of justice and fair dealing in order to determine the rights of the individuals involved."

The same tribunal applied identical reasoning to the rules of warfare in the case of Eastern Extension, Australasia and China Telegraph Company, Ltd. The decision in that case states:

> " . . . In our opinion, however, even assuming that there was in 1898 no treaty and no specific rule of international law formulated as the expression of a universally recognised rule governing the case of the cutting of cables by belligerents, it can not be said that there is no principle of international law applicable. International law, as well as domestic law, may not contain, and generally does not contain, express rules decisive of particular cases; but the function of jurisprudence is to resolve the conflict of opposing rights and interests by applying, in default of any specific provision of law, the corollaries of general principles, and so to find - exactly as in the mathematical sciences - the solution of the problem. This is the method of jurisprudence; it is the method by which the law has been gradually evolved in every country resulting in the definition and settlement of legal relations as well between States as between private individuals."

Recognition of the fact that the body of international law consists not only of specific rules but also of the ordinary rules of justice and general principles of law, has led inevitably to the conclusion that there is in international, just as in domestic law, a principle of growth. Thus, the rules of warfare are not static but are dynamic and the new and unusual problems that the United Nations will face when the hostilities with Germany cease must be solved by building upon the existing framework.

The existence of the principle of growth is apparent from even the most cursory examination of the history of the rules of warfare. When courts look back at old decisions which are argued as the basis of a litigant's case,

they sometimes take note of the principle. For example, an English court had occasion in 1934 to examine the law of piracy and one case considered had been decided in 1696. In discussing it the court said:

> "But over and above that we are not now in the year 1696, we are now in the year 1934. International law was not crystallized in the 17th century, but is a living and expanding code. * * * Again another example may be given. A body of international law is growing up with regard to aerial warfare and aerial transport, of which Sir Charles Hedges in 1696 could have had no possible idea." In re Piracy jure Gentium (1934) A.C. 586, 592-593)

The text writers have also found evidence of this principle of growth and have discussed it at some length. Hyde's "International law" contains one of the clearest expositions of this feature of international law. He points out that the rules of conduct, no matter how definitely established, when applied under conditions differing sharply from those that prevailed when they were first enunciated, often fail to reflect and sometimes even oppose the underlying principles from which they have originated. He then states:

> " . . . Nevertheless, it must be constantly borne in mind that what the consensus of opinion of enlightened States deems to be essential to the welfare of the international society is ever subject to change, and that the evolution of thought in this regard remains as constant as at any time since the United States came into being. Above all, it must be apparent that whenever the interests of that society are acknowledged to be at variance with the conduct of the individual State, there is established the ground for a fresh rule of restraint against which old and familiar precedents may cease to be availing."

Any nation can, therefore, propose changes in international law and such changes will be accepted and become law if society as a whole is convinced that benefits will be derived from them. As a matter of fact, the United States has, from time to time, proposed changes and they have become international law. Hyde gives as an illustration the attitude of the United States as a neutral during the 18th century and then states:

> " . . . Thus without specific conventional arrangement, and by practices manifesting a common and sharp deviation from formerly accepted rules, the society of States may in fact modify the regulations governing its members."

At the risk of laboring the obvious, it should be made clear that the fact that the rules of warfare can and must be expanded as circumstances require does not mean that the executive or judicial branch of a government which expands them, in a manner consistent with the ordinary rules of justice and general principles of law, will be guilty of interpolating the law of nations. As Sir William Scott said, when the British High Court of Admiralty was accused of such conduct:

> "'If the court took upon itself to assume principles in themselves novel, it might justly incur such an imputation; but to apply established principles to new cases, cannot surely be so considered. All law is resolvable into general principles: the cases which may arise under new combinations of circumstances, leading to an extended application of principles, ancient and recognised, by just corollaries, may be infinite; but so long as the continuity of the original and established principles is preserved pure and unbroken, the practice is not new, nor is it justly chargeable with being an innovation on the ancient law; when, in fact, the court does nothing more than apply old principles to new circumstances.'" (Wilson on International Law, page 12)

It would be impossible in an opinion of this kind to lay down precisely all the principles contained in our own jurisprudence that should be observed in examining special cases that may arise when Germany has been defeated. I can only indicate a few which seem to me to be the most important, and no better way could be found to state them than by quoting the words of the late Justice Cardozo.

First, the danger of dogmatic crystallization resulting in rigid and inflexible rules should be carefully avoided. As Cardozo puts it:

> ". . . But hereafter, as before, the changing combinations of events will beat upon the walls of ancient categories. 'Life has relations not capable of division into inflexible compartments. The moulds expand and shrink.' Existing rules and principles can give us our present location, our bearings, our latitude and longitude. The inn that shelters for the night is not the journey's end. The law, like the traveler, must be ready for the morrow. 't must have a principle of growth." ("The Growth of the Law", ge 19)

> ond, precedents should be examined in the light of fundamental s upon which they are based. On this principle Cardozo states:

> "We nedd a selective process if history is to be read as , and not merely as a barren chronicle. The several of approach, rightly understood and applied, correct

and prove each other. An appeal to origins will be futile, their significance perverted, unless tested and illumined by an appeal to ends. We must learn to handle our tools, to use our methods and our processes, not singly, but together. They are instruments of advance to be employed in combination. The failure to combine them, the use of this method or that as if one were exclusive of the other, has been the parent of many wrongs. Only precariously and doubtfully shall we arrive at the needed combination without the understanding that comes of accurate analysis - the analysis that is the essential preliminary to any sound and truthful synthesis." ("The Growth of the Law", page 106)

And third, the rules of warfare must not be followed blindly but only after searching analysis of their utility and the needs of society. With respect to this principle, Cardozo has said:

"Sooner or later, if the demands of social utility are sufficiently urgent, if the operation of an existing rule is sufficiently productive of hardship or inconvenience, utility will tend to triumph. 'The view of the legal system as a closed book was never anything but a purely theoretical dogma of the schools. Jurisprudence has never been able in the long run to resist successfully a social or economic need that was strong and just.'" ("The Growth of the Law", page 117)

Above all, when confronted by problems which are not covered by the existing rules of warfare, we must approach them with boldness, courage and the determination to advance the science of international law by making the necessary decisions in a manner consistent with the ethical, moral and humane principles recognized by civilized men. The responsibility of the United Nations in this respect is a heavy one. It must not be discharged with the primary emphasis on technical constructions of obsolete rules of conduct, but, on the contrary, it must be discharged with due regard to achieving the goals for which this war is being fought.