IV.

The rules of international law and in particular the rules relating to neutrality and military government have been substantially modified by the Pact of Paris* of August 27, 1928, which outlawed war, and the developments in international law distinguishing between aggressors and other nations at war.

In the immediate period prior to the signing of the Pact of Paris, that is, the entire 19th and the early 20th centuries, war was recognized either as extra legal or as "legal."** The position of war under international law was clearly not illegal. When a war broke out, regardless of its nature or cause, regardless of whether it was just or unjust, both belligerents were clothed, automatically, with a complete set of belligerent rights. These belligerent rights included the rights which each belligerent had with respect to each other and with respect to all nonbelligerents. In addition, there sprung up a set of corresponding duties which each belligerent owed to the other and which each nonbelligerent owed to the belligerents. As a result a cordon sanitaire was drawn about the belligerents and the remainder of

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*"See Hall's International Law, where it is stated that it would be idle for international law "to affect to impart the character of a penalty to war, when it is powerless to enforce its decision. * * * International law has consequently no alternative but to accept war, independently of the justice of its origin, as a relation which the parties to it may set up if they choose, and to busy itself only in regulating the effects of the relation. Hence both parties to every war are regarded as being in an identical legal position, and consequently as being possessed of equal rights. P. 61.

**Also known as the Kellogg-Briand Pact or the Treaty for the Renunciation of War as an Instrument of National Policy.

the world was sharply restricted in its ability to favor one belligerent as against the other regardless of the merit of its cause. These bundles of rights and duties of nations at war or affected by war have been codified in the various provisions of the Hague and Geneva Conventions and other multi-partite declarations (e.g., relating to naval warfare.)

This artificial and unjust relationship* which grew out of the extra-legality theory of war was abandoned in the Pact of Paris, and any belligerent which thereafter engated in a war would be guilty of an illegal act and would forfeit its status as a lawful belligerent.

Popularly acclaimed as "dealing with nothing short of a world revolution,"** the pact of Paris provides in part as follows:

> "Deeply sensible of their solemn duty to promote the welfare of mankind;
>
> "Persuaded that the time has come when a frank renunciation of war as an instrument of national policy should be made to the end that the peaceful and friendly relations now existing between their peoples may be perpetuated;

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*Speaking before the Inter-American Bar Association in Havana, Cuba, Attorney-General Jackson stated, "I think it was Henry Adams who complained that he was educated in one century and was living in another. All of us, even some of our international lawyers, suffer the same dislocation of ideas. The difference is that Henry Adams recognized it. Some of our scholarship has not caught up with this century which, by its League of Nations Covenant with sanctions against aggressors, the Kellogg-Briand Treaty for renunciation of war as an instrument of policy, and the Argentine Anti-War Treaty, swept away the nineteenth century basis for contending that all wars are alike and all warriors entitled to like treatment. And this adoption in our time of a discriminating attitude towards warring states is really a return to earlier and more healthy precepts." 35 A.J.I.L. 348-59 (1941), at p. 350.

**Morrison, Outlawing of War (1927), pp. 101f, quoted in Stoner, S. O. Levinson and the Pact of Paris (1943), p. 187.

"Convinced that all changes in their relations with one another should be sought only by pacific means and be the result of a peaceful and orderly process, and that any signatory Power which shall hereafter seek to promote its national interests by resort to war should be denied the benefits furnished by this Treaty;

"Hopeful that, encouraged by their example, all the other nations of the world will join in this humane endeavor and by adhering to the present Treaty as soon as it comes into force bring their peoples within the scope of its beneficent provisions, thus uniting the civilized nations of the world in a common renunciation of war as an instrument of their national policy;

* * *

"Article I. The High 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.

"Article II. The High Contracting Parties agree that the settlement or solution of all disputes or conflicts of whatever nature or of whatever origin they may be, which may arise among them, shall never be sought except by pacific means."

Sixty-three nations, including Germany, were signatories to the Pact of Paris. All of them solemnly agreed that war was outlawed as an instrument of national policy and that war, as such, had lost its extra-legal status in the field of international law and was thenceforth to be deemed illegal except for the purpose of self defense.

The Pact of Paris was, at once, a recognition of the teachings of the historic past and a revolutionary step forward in international law. Its historical parallel was the doctrine of the unjustwar in which the aggressor by virtue of his fighting in an unlawful cause loses all his rights may be traced back to the principles of natural law. In 1758 Vattel in his "Laws of Nations" stated:

> "Whoever takes up arms without a lawful cause, has therefore, no rights whatever; all the acts of hostility which he commits are unjust."

The forward step of the Pact of Paris was the destruction of the historical and juridical foundation of war as an institution for the creation of rights and duties.

If the logic of the Pact of Paris is carried through, it is at once evident that what the 63 nations agreed to was not merely the expression of a pious hope but was rather the formation of a new legal doctrine with far reaching legal effects. The legal consequences of the Pact of Paris may be generally summarized in the following rule:

> "A State does not acquire rights or relieve itself of duties by becoming an aggressor."

Being an aggressor, a State cannot be a lawful belligerent but only an unlawful belligerent.

The rights of a belligerent may ordinarily be grouped under four classes:

(a) The rights incidental to the manner of waging hostilities;

(b) The rights assertable against "neutral" states during the course of hostilities;

(c) The rights arising out of the successful termination of hostilities; and, finally,

(d) The rights arising out of the unsuccessful termination of hostilities.

Nothing is said in this memorandum to the effect that defending or supporting states engaged in war of defense against an unlawful belligerent should disregard their obligations with respect to the humane conduct of hostilities. These rules should be observed because of thier intrinsic merit and the lack of advantages that would accrue from their flagrant violation.*

The United States Government, with substantially the

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* This was explicitly recognized in Article XIV of the Harvard Research Draft Convention of the Rights and Duties of States in Case of Aggression, quoted below. The applicability of the provisions relating to prisioners of war may be another matter.

approval of the rest of the civilized world with the exception of Japan, to which Germany and Italy were later added, has firmly taken the position that an aggressor can not derive rights out of the successful conclusion of an unlawful war or expect them to be respected by the other nations of the world. This is the Stimson doctrine of nonrecognition of territorial changes brought about by force. The Government of the United States has also taken the position that in the present war, the United States, along with other members of the United Nations prior to their active participation in hostilities, was not required to follow the role of a historic neutral in the case of unlawful aggressors like Germany and Japan. This interpretation of the effect of the Pact of Paris was specificallyrecognized in both the Budapest Articles of Interpretation quoted below and the Hague Research Convention. It is now the time to consider whether an unlawful belligerent has not also lost his rights arising under international law within his own territory upon his military defeat after waging an unlawful war of aggression.

a. Under the Pact of Paris an unlawful belligerent acquires no rights that he would not have had prior to the resort of war, but remains subject to all the duties of a belligerent.

Judge Manley Hudson, formerly of the International Court of Arbitration and now a Justice of the Permanent Court of

International Justice, stated that under the Pact of Paris two fundamental principles were being established:

> 1) "that a war anywhere is a matter of concern to people everywhere * * *. If that conception of the world's peace could be established in our time, perhaps we should have done for international law a service similar to that which was performed in the twelfth century in England when they succeeded, I believe, in establishing a conception of the King's peace to replace the local peace which had theretofore prevailed."
>
> 2) War has been brought "within the ambit of law. We propose to say that no longer is it to remain wholly extra-legal, and that now, under some circumstances, it may be illegal." (Underscoring supplied)

Having renounced war and having condemned it as an instrument of national policy, the Pact of Paris made resort to war an illegal act. Since the Pact does not itself express what legal incidence flow from its violation, it is necessary to apply recognized principles of law to determine specifically in any givencase the rights of the parties concerned. It is elementary, for example, that a person who violates a contract or fails to perform any of its material conditions may not enforce his rights under the same contract. To the extent rules of international law are not considered contractual but arise out of fundamental principles of justice the equitable maxim may be applied -- that he who seeks equity must do equity.

Indeed it would be a strange interpretation which would permit one who had breached his obligations under international law to invoke international law to restrict and hamper those who

would terminate and punish his illegal acts. An excellent statement of the legal consequences of resorting to war in violation of the Pact of Paris was made by Judge Hudson at the Budapest Conference.

> "Eighteenth century ideas called for the building of a great superstructure of the rights of belligerents and the duties of non-belligerents. I suggest that in this twentieth century we must emphasize the rights of the non-belligerents, and if it be true that under some circumstances war is illegal, then the belligerent, as such, does not gain any rights by going to war. In short, the responsibility of the legal profession of our time, I believe, can be summed up in these words: Since the politicians have succeeded, in a measure, in renouncing war, lawyers just renounce the conceptions of International Law which have been based upon the extra-legality of war.
>
> "War between nations was renounced by the signatories of the Briand-Kellog Treaty. This means that it has become illegal throughout practically the entire world. It is no longer to be the source and subject of rights. It is no longer to be the principle around 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 wrong-doers-violators of this general treaty-law. We no longer draw a circle about them and treat them with the punctiliousness of the duelist's code. Instead, we denounce them as lawbreakers. By that very act we have made obsolete many legal precedents and have given the legal profession the task of re-examining many of its codes and treaties."

The results of Judge Hudson's importunities were the short "Budapest Articles of Interpretation." They reas as follows:

> "Whereas the Pact is a multilateral law-making treaty whereby each of the High Contracting Parties makes binding agreements with each other and all of the other High Contracting Parties, and
>
> "Whereas by their participation in the Pact sixty-three States have abolished the conception of war as a legitimate means of exercising pressure on another State in the pursuit of national policy and

have also renounced any recourse to armed force for the solution of international disputes or conflicts:

"(1) A signatory State cannot, be denunciation of non-observance of the Pact, release itself from its obligation thereunder.

"(2) A signatory State which threatens to report to armed force for the solution of an international dispute or conflict is guilty of a violation of the Pact.

"(3) A signatory State which aids a violating State thereby itself violates the Pact.

"(4) In the event of a violation of the Pact by a resort to armed force or war by one signatory State against another, the other States may, without thereby committing a breach of the Pact or of any rule of International law, do all or any of the following things:

"(a) Refuse to admit the exercise by the State violating the Pact of belligerent rights, such as visit and search, or blockade, etc.;

"(b) Decline to observe towards the State violating the Pact the duties prescribed by International Law, apart from the Pact, for a neutral in relation to a belligerent;

"(c) Supply the State attacked with financial or material assistance, including munitions of war;

"(d) Assist with armed forces the State attacked.

"(5) The signatory States are not intitled to recognize as acquired de jure any territorial or other advantages acquired de facto by means of a violation of the Pact.

"(6) A violating State is liable to pay compensation for all damage caused by a violation of the Pact to any signatory State or to its nationals."

The brief articles on interpretations of the Budapest Conference have been further restated by a Harvard Research Convention that was issued over the signatures of 18 distinguished American scholars in the field of international law in October 1939.*

The Harvard Research Draft was in its own words designed

"to define legal relationships between States in cases where a resort to armed force has been in violation of a legal obligation not to resort to such means and where such violation has been duly determined by a procedure to which the law-breaking State has previously agreed."

The Draft Convention contained the following on aggressors:

"Art. 2. By becoming an aggressor, a State does not acquire rights or relieve itself of duties.

"Art. 3. (1) Subject to Article 14, an aggressor does not have any of the rights which it would have if it were a belligerent. Titles to property are not affected by an aggressor's purported exercise of such rights.

"(2) An aggressor has the duties which it would have if it were a belligerent.

"Art. 4. (1) An aggressor does not have any of the rights which would accrue to a State not an aggressor as the result of its use of armed force.

"(2) Situations created by an aggressor's use of armed force do not change sovereignty or other legal rights over territory.

"(3) A treaty brought about by an aggressor's use of armed force is voidable.

"Art. 5. By becoming an aggressor, a State loses the right to require other States to perform the obligations of executory treaties, but is not relieved of the duty to perform the obligations of such treaties; executed treaties are not affected.

"Art. 14. Nothing in this Convention shall be deemed to excuse any State for a violation of the humanitarian rules concerning the conduct of hostilities, prescribed by international law or by a treaty to which it is a party.

*For the full text and annotations of the Harvard Research Draft Convention on the "Rights and Duties of States in Case of Aggression," see 33 A.J.I.L. (1939 Supplement) 819-909.

b. Effect of the Pact of Paris upon the Rights of an Aggressor in the Occupation of a Defeated State. The Stimson Doctrine of Nonrecognition of Territorial Changes by Force.

The first crucial testing of the outlawry of war* came in September of 1931 when hostilities broke out between the armed forces of Japan and China in Manchuria. The United States Government cooperated with the efforts of the Council of the League of Nations in efforts at conciliation. Notwithstanding these efforts of conciliation Japan occupied all of Manchuria.

On January 7, 1932, the United States sent identical notes to China and Japan declaring that:

> "it cannot admit the legality of any situation de facto * * * and that it does not intend to recognize any situation, treaty, or agreement which may be brought about by means contrary to the covenants and obligations of the Pact of Paris of August 27, 1928." (Underscoring supplied)

On March 11, 1932, the Assembly of the League of Nations declared:

> "that it is incumbent upon the members of the League of Nations not to recognize any situation, treaty or agreement which may be brought about by means contrary to the Covenant of the League of Nations or to the Pact of Paris." (Underscoring supplied).

The vital change that had been wrought by the Pact of Paris was underscored by Mr. Stimson, in an address as Secretary of State before the Council on Foreign Relations in England on August 8, 1932.

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*Note that the border hostilities between the Soviet Union and China in 1929 were amicably settled upon the citation of the Pact of Paris and the League Statute. See Stimson, "The Pact of Paris: Three Years of Development", Foreign Affairs, Special Supplement to Vol. II No. 1 (1932).

"Under the former concepts of international law when a conflict occurred, it was usually deemed the concern only of the parties to the conflict. The others could only exercise and express a strict neutrality alike towards the injured and the aggressor. If they took any action or even expressed an opinion, it was likely to be deemed a hostile act towards the nation against which it was directed. The direct individual interest which every nation has in preventing a war had not yet been fully realized, nor had that interest been given legal recognition. But now under the covenants of the Briand-Kellogg Pact such a conflict becomes a legal concern to every body connect with the Treaty. All of the steps taken to enforce the treaty must be judged by this new situation. As was said by M. Briand, quoting the words of President Coolidge: 'An act of war in any part of the world is an act that injures the interests of my country.' The world has learned that great lesson and the execution of the Briand-Kellogg Treaty codified it." (Underscoring supplied).

Thus, the Pact of Paris bore its first fruit and an illegal belligerent was deprived of one of its most important belligerent rights -- the right of conquest. Prior to the Pact it had been universally accepted that a belligerent may subjugate and annex conquered territory. Under the new doctrine the right of conquest was made subject to the limitation that the conquering nation has not lost its belligerent rights by engaging in an illegal war. This doctrine was applied not only to Manchuria, but also to Ethiopia,* Austria,** Czechoslovakia,*** Memel, and Albania.

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* In 1935 when Italy invaded Ethiopia, the League of Nations declared that Italy had resorted to war in violation of the Covenant, and the United States, in conformity with the doctrine of the Pact of Paris, refused to recognize the conquest in Ethiopia.

**Also the United States has never recognized the absorption of Austria by Germany, and under the Moscow declaration has expressly refused such recognition.

***Similarly, the German absorption of Czechoslovakia and Memel and the Italian invasion of Albania were declared subject to the doctrine of nonrecognition.

c. Effect of the Pact of Paris upon the Duties of Neutrals Toward an Aggressor State; The Destroyer Deal and Lend-Lease.

Another of the extremely important belligerent rights was denied to Germany in the present World War and that is the right to have countries not engaged in the war remain completely neutral. Before the Pact of Paris when one nation declared war upon and invaded another nation the remaining nations of the World were faced with the choice of actually taking sides and becoming belligerents of acquiring a "neutral" status.

After the Pact of Paris when one of the nations involved is waging an illegal war, it does not acquire any of the rights of a belligerent. Since the status of "neutrality" only applies with respect to belligerents, the nations not involved in the war may feel free to deny to the illegal aggressor any belligerent rights such as search and seizure, etc., and also to grant assistance to the nation against whom the aggression is committed. In an illegal war the doctrine of neutrality has no application since it presupposes that the nations at war have belligerent rights.

Attorney-General Jackson, in speaking before the Inter-American Bar Association in Havana, Cuba, stated:

> "No longer can it be argued that the civilized world must behave with rigid impartiality toward both an aggressor in violation of the treaty and the victims of unprovoked attack. We need not now be indifferent as between the worse and the better cause, nor deal with the just and the unjust alike.

"To me, such an interpretation of international law is not only proper but necessary if it is not to be a boon to the lawless and the aggressive. A system of international law which can impose no penalty on a law-breaker and also forbids other states to aid the victim would be self-defeating and would not help even a little to realize mankind's hope for enduring peace.

"The principle that war as an instrument of national policy is outlawed must be the starting point in any plan of international reconstruction. And one of the promising directions for legal development is to supply whatever we may of sanction to make renunciation of war a living principle of our society."

/Here should follow selected quotations from the earlier memorandum on Outline of Effect of Pact of Paris, etc./

d. Effect of the Pact of Paris upon the Rights of Germany under Allied Occupation. A Defeated Aggressor State may not Assert Belligerent Rights against the Military Occupation by Defending States.