In approaching the problems in international law that will arise in connection with the defeat of Germany, it is necessary to bear constantly in mind the nature of the rules of conduct governing warring nations and the manner in which this branch of law has developed. In this way there will be reasonable assurance that the steps taken by the Allied Armies in the administrationof Germany will fit properly into the body of rules that exist today. When considering problems of domestic law, reference can always be had to an authority which makes rules of law and is capable of enforcing them. In the international field, however, there is no supreme authority and the rules of law are founded upon common consent. Evidence of such consent appears expressly in treaties and implicitly implacably in the courses of conduct adopted by nations and recognized by them as rules of law.

The primary sources of the rules of war are therefore treaties and customs. Subsidiary sources which must be examined are the general principles of law and justice, treatises on the rules of war, and both national and international judicial decisions. These are the sources which have been recognized and relied upon by the Supreme Court of the United States and which have been prescribed as the bases for decisions by the Permanent Court of International Justice.

It is readily apparent from the character of these sources from which we must ascertain the rules of war that many situations will require

the application of old rules to new sets of facts, and even the establishment of new rules where none have been said to exist in the past. Not only have the rules of war developed during comparatively recent times, but they have developed in a sporadic fashion, this is particularly true of those rules which are founded upon customary courses of conduct.

In the application of rules derived from customs, extreme caution must be used to see that they are not applied to new situations in such a manner that the result will be inconsistent with or contrary to the purpose of the original rule. Moreover, the desire to find a rule of law governing a particular problem should not lead to an attempt to fill the gap in the rules of war by interpretation of those rules that do exist, except in those cases where such an interpretation is both logical and just. As Garner points out in "International Law and the World War", the war which ended in 1918 revealed the inadequacy of the existing rules of law to cover situations that occur in modern warfare. On page 452, he states:

> "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."

The customs which prevail from time to time in the conduct of war must always be examined in the light of the periods within which they were created and in which they developed. Each successive war brings new methods of warfare and with these new methods come new rules of conduct which gradually attain the status of rules of law. This gradual development was noted by a British court in the case of In re Piracy Jure Gentium where, after considering a number of early views with respect to the law of piracy, and particularly a case arising in 1696, 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 * * *. 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."

When new problems arise in the course of a war which are not specifically covered by existing rules of warfare and which can not adequately be brought within the scope of such rules, a difficult situation ~~concerns~~ confronts belligerent nations. Under the early theory of ~~law of~~ natural law, rules always existed which were based on morality, humanity and justice. Governments and courts merely serve to give expression to these existing rules. Under the natural law theory new cases were merely fitted into a higher law which was presumed to have always existed. This theory was ~~later dominated~~ succeeded by another known as positivism. According to the newer theory there could be no law without an effective sanction so that only those rules of morality and ethics which nations were willing to enforce constituted the body of international law.

The positivists would have found it impossible to apply legal principles to new fact situations since no accepted course of action could be relief upon as law governing the case.

The conflict which existed among theorists in the field of international law has been more or less resolved in recent years. Since the first World War events have led most publicists to agree that rules of justice and general principles of law can properly supplement existing international law. 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. Thegreat 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. In fact recourse to such rules 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 Statute 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 existing International Law. Probably what has been described above as the Grotian school comes nearest to expressing correctly the present legal position."

Lauterpacht's approach is not a novel one. It has been recognized and acted upon by international arbitral tribunals. 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:

> "In the second place, we must bear in mind the dependent legal position of the individual Cayugas. Legally they could do nothing except under the guardianship of some sovereign. They could not determine what should be the nation, nor even whether there should be a nation legally . . . 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 considerations of equity that have repeatedly been invoked by the courts where strict regard to the legal personality of a corporation would lead to inequitable results or to results contrary to legal policy, may be invoked here. In such cases courts have not hesitated to look behind the legal person and consider the human individuals who were the real beneficiaries. Those considerations are even more cogent where we are dealing with Indians in a state of pupilage toward the sovereign with whom they were treating."

The same tribunal in the case of Eastern Extension Australasia and China Telegraph Company, Ltd., used this language:

> ". . . 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 jurisprudenceis to resolve the conflict of opposing rights and interests by ~~making~~ 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."

Hyde in his book "International Law" goes even farther. After discussing the fact that the rules of conduct, no matter how definitely established, often fail to reflect and sometimes often oppose the underlying principles from which they have originated when an effort is made to apply them under conditions differing sharply from those that prevailed when they were established. He 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."

From this principle he deduces that any nation can propose changes in international law which will be accepted if society is convinced that benefits will be derived from them. He points out that the United States has at times proposed such changes and that they have become international law. He gives us an illustration of the attitude of the United States as a neutral during the 18th Century. He 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."

When general principles of law are to be applied in order to evolve an appropriate rule of international conduct in time of war, the fundamental principles of jurisprudence which underlie our own domestic legal system will also be of assistance. Several of these principles are particularly

First, the danger of dogmatic crystallization resulting in rigid and inflexible rules should be avoided. Second, precedents should be examined in the light of the fundamental principles upon which they are based. And third, we should not look upon the system of rules of warfare as a complete and finished body of law. These guides are stated clearly and forcibly in the following quotations from the late Justice Cardozo's book, "The Growth of the Law":

> ". . . 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. It must have a principle of growth."

• • • •

> "We need a selective process if history is to be read as history, and not merely as a barren chronicle. The several methods 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."

• • • •

> "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.'"