1/29/45

Secretary Morgenthau

Mr. O'Connell

In connection with recent discussions regarding certain post-hostilities German problems of concern to the Treasury Department, as, for example, currency matters, exchange control, ownership of foreign exchange assets, control of banks, and control of financial transactions in general, I have, at your suggestion, made an examination of the broad question of the legal authority which the United Nations will have to act with respect to Germany after her military defeat. This memorandum is addressed to that broad legal question rather than to specific questions which may arise. I am confident, however, that the approach suggested to this broad issue will furnish a basis for answering specific problems with which the Treasury will undoubtedly be concerned.

It is, of course, impossible at this time to analyze in detail all of the situations that may exist or to solve the host of legal problems that will arise with respect to the nature of Allied occupation of Germany, the rights and duties of the occupants, the punishment of war criminals, etc. The resolution of these questions will be greatly assisted, however, by the formulation of a sound and practical general approach to international legal problems and by ascertaining the authority of the United Nations to carry out their legitimate war aims.

## I. General Approach to Problems of International Law

In evaluating any problem of international law for the purpose of determining whether a particular course of conduct is consistent with the recognized principles of international law, it is necessary to consider

(1) The nature and sources of international law;
(2) The applicability of existing rules to new or unusual conditions; and
(3) The principles to be applied in the absence of a specific rule of international law.

An orderly analysis is essential when new and unusual situations arise as is likely to be the case when Germany has been defeated.

### (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 each having a limited scope.

The sources of international law 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.1/ These sources have been recognized by the Supreme Court of the United States2/ and have been prescribed as the bases for decisions by the Permanent Court of International Justice.3/

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 constitute one branch of international law.4/

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. In addition, there are numerous loopholes with respect to those areas which are covered in a general way. The inadequacy of the rules of warfare with reference to the problems of the First World War is vividly described by Garner in his book "International Law and the World War:"5/

> "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

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1/ Moore, International Law Digest, Vol. I, section 1; Hackworth, Digest of International Law, Vol. I, sections 3-7; Taylor, International Public Law (1901), section 30; Lauterpacht, Oppenheim's International Law, Vol. I, sections 15-19; Wheaton's International Law, 6th English Ed., pp. 10-23.

2/ Hilton v. Guyot, 159 U.S. 113, 163; The Paquete Havana, 175 U.S. 677, 700; Thirty Hogsheads of Sugar v. Boyle (1815) 9 Cranch U.S. 191, 198; The Scotia (1871) 14 Wall. U.S. 170, 187.

3/ Wilson, International Law, (3d ed.) p. 11; S. S. Lotus, Per. Ct. Int. Jus., Judgment 9, Sept. 7, 1927, Sec. A, No. 10 (II Hudson, World Court Reports (1935, 20, 33, 35); Chorzow Factory, Per. Ct. Int. Jus., Judgment 13, Sept. 13, 1928, Sec. A, No. 17 (I Hudson, World Court Reports, 1934, 646, 663).

4/ Spaight, War Rights on Land (1911) p. 11.

5/ Garner, International Law and the World War, Vol. II, p. 452; see also Lauterpacht, Oppenheim's International Law, preface to the 5th edition, IX.

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, 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. A proper approach in applying an existing rule entails 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, new situations will undoubtedly arise and it cannot be assumed that there will always be an applicable rule of warfare in existence.

(2) The applicability of existing rules of international law.

In view of the fact that treaties are framed in response to particular needs arising out of known practices, their contents must be construed in the light of their 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.[5] 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 necessarily results in death and

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[5] The Hague Conventions of 1899 (II) and 1907 (IV) Respecting the Laws and Customs of War on Land, Annex, Arts. 3, 22, 23, 24, 25, 26, 27, 28, 36 Stat. 2277.

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 have accepted this treatment of non-combatants as a proper course of conduct, and it has, in effect, become a rule of warfare.7/

Not only may existing rules become inappropriate to certain situations because of general changes in methods of warfare, but they 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.8/ 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 recognized 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.9/

(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 other United Nations will be confronted with the difficult problem of adopting courses of conduct which will be considered legal and proper by society as a whole.

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. For many years there was a heated debate between proponents of the "natural law" theory and those who favored the concept of positivism. Recently, however, this conflict has been resolved. The events of the first World War led most writers

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7/ See Spaight, Airpower and War Rights (1924), Chapters VIII-XI.
8/ Id., pp. 196-198.
9/ This principle was recognized in the Preamble to the Hague Regulations 36 Stat. 2277. See also Spaight, War Rights on Land, (1911), p. 11.

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 accordanced with these principles of justice that guide its internal actions. Lauterpacht states in Oppenheim's International Law, at page 100 (5th ed., vol. I):

> "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." (Underscoring supplied)

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." (Underscoring supplied)

The similarity of this approach to the philosophy which characterized the development of the common law is striking. Making this analogy briefly, 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 mediaval 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. * * *."[10]

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10/ Quoted in Hackworth, Digest of International Law, Vol. I, p. 6.

One of the chief contributions of natural law is a principle which is recognized and acted upon as fully today as it ever was. That principle is[11]

> "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." (Underscoring supplied)

International arbitral tribunals have recognized that this is the proper practice and have acted accordingly.[12] 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."[13]

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 recognized rule governing the case of the cutting of cables

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11/ Ibid.

12/ See Administrative Decision No. II, by Judge Parker, Mixed Claims Commission between the United States and Germany, November 1, 1923; Annual Digest, 1923-1924, case No. 205; Goldenberg & Sons v. Germany, Special Arbitral Tribunal between Roumania and Germany, September 27, 1928; Annual Digest, 1927-1928, case No. 369; Lena Goldfields Arbitration September 2, 1930; Annual Digest, 1929-1930, case No. 1 (Cited in Lauterpacht, Oppenheim's International Law, Sixth Ed., p. 28).

13/ Nielsen's Report of American and British Claims Arbitration (1926) 203 at 314. Quoted in Hackworth, Digest of International Law, Vol. 1, p. 8.

> 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."14/ (Underscoring supplied)

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 this 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

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14/ Id., pp. 73, 75-76.

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."15/ (Underscoring supplied)

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."16/

It would be impossible 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. Several general guides can, however, be stated briefly. In the first place, the danger of dogmatic crystallization — which inevitably results in rigid and inflexible rules — should be carefully avoided. Secondly, precedents must always be examined in the light of the fundamental principles upon which they are based. And thirdly, rules must not be observed blindly but only after searching analysis of their utility in furthering the needs of society.

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15/ Hyde, International Law Chiefly as Interpreted and Applied by the United States, Vol. I, p. 3

16/ Id., p. 5.

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 primary emphasis on the technical construction 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.

## II. Authority of the United Nations to Carry Out Their Legitimate War Aims.

Germany's defeat will not be the final realization of all our war aims, but will only serve as an opportunity for the United Nations to take the steps necessary to achieve the objectives for which they have fought so hard and so long. The period immediately following the cessation of major hostilities in Europe must be utilized for this purpose. There are no rules of international law which present legal obstacles to the attainment of the goal.

This conclusion is based on the following principles which will be fully discussed below:

(1) International law permits nations which have won a war such as that being waged against Germany by the United Nations, to accomplish the ends for which they have struggled by imposing upon their defeated enemy, in an armistice or a treaty of peace, or through military occupation, such terms and punishments as they consider necessary.

(2) Germany has forfeited all belligerent rights under international law except the right to humane treatment, and since the United Nations include nearly all of the civilized peoples of the world, the best test as to the humaneness of the treatment to be accorded Germany is public opinion and the views of government authorities in the United Nations.

### (1) Achievement of war aims through an armistice, a treaty, or military occupation.

Victorious nations do not always accomplish their war aims by merely defeating their enemies in battle. They generally fight for specific objectives which can be attained only after they have been

militarily successful and are in a position to impose upon their enemies appropriate terms and punishments. This is particularly true when wars are fought against ruthless aggressors such as Germany and Japan.

It is not necessary, for the purposes of this memorandum, to examine the war aims of the United Nations in minute detail. It should suffice to point out that there has been an enormous expenditure of life and property to thwart the Axis dream of world domination and to make certain that peace-loving nations will never again be similarly threatened. The legitimacy of these objectives could not possibly be questioned.

The task confronting the United Nations when hostilities against Germany are at an end, and again when those against Japan terminate, is enormous in proportion and extremely complex. Effective performance of the task may well require unprecedented action, but there are no principles of international law which stand in the way of its successful completion.

The measures required to prevent future aggressions by Germany and Japan can be the subject of an armistice or a treaty of peace. They may also be carried out through military occupation.

A general armistice is essentially a cessation of hostilities pending the settlement of the terms of a treaty of peace. The losing belligerent generally requests an armistice and is faced with the choice of accepting the terms proposed by its stronger adversary or continuing hostilities against hopeless odds. An armistice represents, therefore, the will of the victor and it is recognized that he may impose upon his defeated adversary any terms that he desires.

The history of the last 100 years reveals many examples of armistice which imposed severe terms upon the losing belligerent. The Armistice Convention of January 28, 1871, in the Franco-Prussian War provided for the delivery of the fortresses and the surrender of the armed garrisons of Paris, the payment by Paris of a "war contribution" of 200,000,000 francs, and the occupation by the German army of large parts of France.

The protocol of peace in the Spanish-American War stipulated that Spain would relinquish her sovereignty of Cuba, cede Puerto Rico to the United States and that the United States should occupy Manila until the fate of the Philippines was determined.17/

17/ Phillipson, Termination of War and Treaties of Peace (1916), p. 70.

The terms imposed upon Germany by the Armistice of November 11, 1918, included, among other things, the evacuation of invaded territories, the surrender of specified war material, the surrender of all submarines, as well as a certain number of surface vessels of war, the evacuation of particular ports, and the occupation of certain strategic positions along the Rhine. As stated by Hyde, "these provisions reveal an arrangement designed to accomplish far more than merely cessation of hostilities, and serving in case of the observance of its terms, to render it practically impossible for Germany to resume formidable operations against its enemies."18/

Almost all treaties of peace contain provisions designed to achieve the war aims of the victor. They provide for such things as cession of territory, payment of reparations and indemnities, occupation by foreign troops, etc. If a war aim is a legitimate one, there are no rules of international law that prevent the inclusion in a treaty of peace of terms necessary to accomplish it.

International law also permits a victorious nation to annex the entire territory of its defeated adversary, thus eliminating it entirely from the society of nations, if such action is in furtherance of a legitimate war objective.19/ When annexation takes place, the treatment of the area subjugated becomes a matter of domestic concern for the conqueror and there are no problems of international law. No treaty or other agreement with the losing nation is required and the disposition to be made of its territory is a question decided by the victor alone or in conjunction with its allies. 20/

There are, therefore, at least two separate and distinct courses that the United Nations can follow when they have defeated Germany. They can (1) impose upon Germany in an armistice or a treaty of peace, such terms and punishments as they deem appropriate to prevent future aggressions, or (2) they can annex all German territory, obliterate Germany as a nation, and administer the former German territory in any way they see fit, subject only to such limitations as may exist in their own domestic laws. These two courses being open, can it be said that if the corrective measures deemed essential fall short of complete annexation and if there is no effective German government in existence which could sign an armistice or a peace treaty, the hands of the United Nations will be tied? Can it be said that the inability of Germany to sign a

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18/ 2 Hyde, International Law Chiefly as Interpreted by the United States, sec. 647.

19/ Oppenheim's International Law, Vol. I, pp. 449-450; Hall, A Treatise on International Law, p. 681; Lawrence, Principles of International Law, pp. 159-160; Hyde, International Law Chiefly as Interpreted by the United States, pp. 176-177.

20/ Mormon Church v. United States, 136 U.S. 42; United States, Lyon et al. v. Huckabee, 83 U.S. 414, 434; and texts cited in footnote 25.

The rule is neither shocking nor obscure when considered in its proper frame of reference, i.e., the conditions that exist when treaties of peace are drafted. They do not result from the usual give-and-take type of negotiations that prevail in normal times. On the contrary, the stronger belligerent offers terms to its adversary and the loser must accept them or face annihilation. If the loser refuses the offer, hostilities will continue and this will generally lead to a further deterioration so that the second offer may be even more severe and the need to accept the terms even more urgent. Pressure and duress are, therefore, the motivating forces in the negotiation of peace treaties. The treaty of peace would not have become the principal device for terminating wars if the loser were permitted at a later date to abrogate its obligations on the basis of duress. This would have rendered practically all such treaties nullities and international law would undoubtedly have developed along other lines, giving recognition to the accomplishment of legitimate war objectives through other means.

Phillipson states the basis of the rule quite clearly. He says:

> "* * * If peace negotiation is not an actual extension, in another plane of conflict, of the military operations of the belligerents, it is at all events a substitute therefor, and cannot possibly be considered as being immune from all threats and pressure. There is not and cannot be any legal principle forbidding a peace negotiator to threaten that he will resume hostilities if his terms are not accepted; for the other party knows full well what will happen if the negotiations fail. A certain element of pressure is therefore inevitable here, and it cannot properly be described as duress."22/

Lawrence takes the same view:

> "Most treaties of peace are made by the vanquished state under duress; but there would be an end of all stability in international affairs if it were free to repudiate its engagements on that account whenever it thought fit."23/

Thus, the validity of a peace treaty is not based upon the consent of the vanquished but rather upon the practical benefit of the stable re-establishment of peaceful relations. In view of the fact that

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22/ Phillipson, Termination of War and Treaties of Peace, p. 162.

23/ Principles of International Law (1923) p. 303. See also 2 Hyde, International Law Chiefly as Interpreted by the United States, p. 8; 5 Moore, International Law Digest, p. 183; Edmunds, The Lawless Law of Nations (1925) p. 184; Lauterpacht, Private Law Sources and Analogies of International Law (1927), p. 161.

annexation depends solely upon the will of the victors and treaties of peace upon the consent of the vanquished obtained under duress, it is clear that these two procedures are not exclusive. The terms and punishments are in fact decided upon and enforced by the victors. Thus, the method they adopt is simply a matter of form and not of substance.

It would be absurd to assert that the United Nations can annex Germany but if they are unwilling to do so they can take less drastic steps only if they are willing to rely upon a German government which must arise out of the wreckage of six years of Nazism plus more than five years of total warfare. There might be some merit to such a conclusion if consent of the vanquished were an element of peace treaty negotiations but, since consent is not involved, the historical methods of achieving war aims are obviously not legal limits but only manifestations of the general rule that legitimate war objectives can be attained through the imposition upon the defeated nation of appropriate terms and punishments.

Prolonged occupation as a means of achieving war aims has been recognized by writers since the early days of international law. In 1758 Vattel stated:

> "When, therefore, he (a conqueror) has totally subdued a hostile nation, he undoubtedly may, in the first place, do himself justice respecting the object which had given rise to the war, and indemnify himself for the expenses and damages he has sustained by it; he may, according to the exigency of the case, subject the nation to punishment by way of example: he may even, if prudence so require, render her incapable of doing mischief with the same ease in future."24/ (Italics in original)

In recent times Phillipson has made a similar observation:

> "Conquest means nothing more than effective military occupation by the enemy forces; and as such it may be merely a provisional procedure, or a means to some other end contemplated by the Government of the occupying forces."25/ (Underscoring supplied)

There is, therefore, nothing in international law that would prohibit the use of military occupation, or any other measures, to impose appropriate terms and punishments on Germany in order to prevent further aggressions against peace-loving nations.

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24/ Vattel, Law of Nations, (1758, Chitty ed., 1859) Book III, sec. 201.
25/ Phillipson, Termination of War and Treaties of Peace (1916), p. 9.

(2) Germany is not entitled to belligerent rights under International Law.

Careful study of the limitations placed by international law upon the activities of occupying powers and victorious nations reveals that the United Nations, in planning for the treatment of Germany, will not be hampered in any way by technical legal difficulties. Germany is not entitled to the rights generally accorded to belligerents under international law.

International law as embodied in treaties and usage must, like other branches of law, be interpreted by human beings. The basic ingredient of each rule of warfare is a logical moral principle which, for practical purposes, must be set forth in words. The words used may sometimes be subject to technical legal construction leading to conclusions entirely foreign to the moral principle. If by denying belligerent rights to Germany we should deprive her of the protection derived from sound moral principles, we might be open to severe criticism. If, on the other hand, the United Nations scrupulously observe accepted moral standards and merely deny to Germany the opportunity to contend that -- without reference to the underlying moral principle -- certain activities violate the words in which particular rules of warfare are stated, then their behavior cannot be questioned.

In fact, this approach is eminently suited to the type of problem with which we will be confronted when Germany collapses. It cannot reasonably be contended that the Germans have a right, through technical legalistic argument, to prevent the accomplishment by the United Nations of the objectives for which they have fought. Such arguments have not been available as a defense against past German aggressions and barbarities and it is only just that they should not be permitted to interfere with the methods deemed by the United Nations to be essential to the prevention of future aggressions and barbarities.

The Germans have violated the Pact of Paris which renounced "recourse to war for the solution of international controversies" and "as an instrument of national policy." The Germans have violated most of the provisions of the Hague Conventions. The Germans have committed innumerable outrages that defy description. They have made no effort whatever to conform to a standard of conduct which would meet with the approval of public opinion throughout the world. Accordingly, they have lost the right to be treated as belligerents, they have established grounds for retaliation and they are not in a position to contest, or even discuss, the measures which will be taken by the United Nations.

This conclusion — discussed in detail below — is clearly a proper statement of the existing rules of international law. Although it means that the Germans have no "legal" rights as belligerents it does not mean, and should not be considered as implying that Germany is not entitled to humane treatment. As indicated in the preceding pages, the absence of legal rules established by treaties or general usage throws us back upon general principles of law for guidance in the conduct of the war and the period that will follow, and there are no principles of American jurisprudence permitting inhuman treatment of individuals, groups or nations.

We must, therefore, in formulating plans for the post-war period, observe those moral principles which are the foundation of our own civilization. Ordinarily this will be a simple matter, since the average American is accustomed to make decisions with these maxims in mind. There will probably be situations, however, so novel that the demands of morality will be difficult to ascertain. In such cases, reliance upon the statements of the leaders of the United Nations governments will be the safest course to follow. Their utterances will be found, in general, to embody public opinion as crystallized by governmental planning and governmental action. Since moral principles are in essence the standards of conduct accepted by the great bulk of civilized peoples, it would be impossible to find a more accurate source. Even in these more difficult situations, however, the effort to give the Germans humane treatment should not be perverted and the issues should not be clouded by technical reasoning. The problem is one of conscience, not of law.

The Pact of Paris of August 27, 1928,[26] which was formally designated the "Treaty for the Renunciation of War as an Instrument of National Policy" introduced a new concept in the Law of War. During the entire 19th and early 20th centuries, war was recognized as having an "extra-legal" status — it was not considered illegal yet writers hesitated to describe it as legal.

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 the other and with respect to all non-belligerents. In addition, there sprang up a set of corresponding duties which each belligerent owed to the other and which each non-belligerent owed to the belligerents.

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26/ 4 Treaties, Conventions, International Acts, Protocols and Agreements between the United States and Other Powers, (1938) p. 5130.

As a result a cordon sanitaire was drawn about the belligerents and the remainder of the world was sharply restricted in its ability to favor one belligerent as against the other regardless of the merits of the cause.

This artificial and unjust relationship was abandoned in the Pact of Paris, and any belligerent which thereafter engaged in a war as an instrument of national policy would be guilty of an illegal act and would forfeit its status as a lawful belligerent.

The Pact of Paris provides, in part:

> "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.
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> "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."[27] (Underscoring supplied)

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.

Having renounced war and having condemned it as an instrument of national policy, the Pact of Paris made resort to war an illegal act. However, the Pact of Paris does not itself express what legal incidents flow from its violation. Nevertheless, its interpretation has been made perfectly clear by the authorities. An excellent statement of the legal consequences of resorting to war in violation of the Pact of Paris was made by Mr. Stimson, as Secretary of State, in a speech before the Council on Foreign Relations on August 8, 1932. He stated:

> "War between nations was renounced by the signatories of the Briand-Kellogg Treaty. (Pact of Paris) 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 the general treaty. 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

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27/ Id., at 5132

legal precedents and have given the legal profession the task of re-examining many of its codes and treatises." (Underscoring supplied) (Parenthetical phrase supplied) 28/

A more specific formulation of the legal effects of the violation of the Pact of Paris may be found in the interpretation placed upon the Pact by the Harvard Research Convention on Rights and Duties of States in Case of Aggression, which was drafted in October 1939 and was signed by eighteen distinguished American scholars in the field of international law. The Convention provides in part:

" * * * an aggressor does not have any of the rights which it would have if it were a belligerent. * * *.

"An aggressor does not have any of the rights which would accrue to a State not an aggressor as the result of the use of its armed force." (Underscoring supplied) 29/

When the logic of the Pact of Paris is carried through it is at once evident that what the 63 nations agreed to in August 1928 was not merely the expression of a pious hope but was rather the formation of a new legal doctrine with far-reaching effects. This new concept of international law has been applied to specific situations which have occurred since its formulation. It will be observed that nations resorting to war as an instrument of national policy have not been accorded the "rights of belligerents."

The first crucial test 30/ 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 Council of the League of Nations in efforts at conciliation. Notwithstanding these conciliatory efforts, 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) 31/

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28/ Foreign Affairs, Special Supplement, Vol. 11, No. 1, (1932) p. IV.
29/ 33 American Journal of International Law, Supp. 819, 886, 888.
30/ 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. 11, No. 1 (1932).
31/ Peace and War. United States Foreign Policy, 1931-1941, Department of State, (1943) pp. 159, 160.

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)32/

The vital change that had been wrought by the Pact of Paris was underscored by Mr. Stimson in his address before the Council on Foreign Relations:

> "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 everybody connected 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) 33/

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.34/ Under the new doctrine the right of conquest does not exist if the conquering nation has lost its "belligerent rights" by engaging in an illegal war. This doctrine was applied not only to Manchuria, but also to Ethiopia,35/ Austria,36/ Czechoslovakia,37/ and Albania.38/

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32/ Monthly Summary of League of Nations (1932) p. 100.
33/ Foreign Affairs, Special Supplement to Vol. 11, No. 1 (1932) p. VIII.
34/ See footnote 19.
35/ In 1935 when Italy invaded Ethiopia, the United States, in conformity with the doctrine of the Pact of Paris, refused to recognize the conquest of Ethiopia. Peace and War, United States Foreign Policy, 1931-1941, Department of State, 1943, p. 33.
36/ The United States has never recognized the absorption of Austria by Germany, and under the Moscow Declaration has expressly refused such recognition. Dept. of State Bulletin, Nov. 6, 1943, Vol. IX, p. 310.
37/ Press Release, State Dept., March 25, 1939, Vol. XX, No. 495, p. 221.
38/ Dept. of State Bulletin, June 3, 1944, Vol. X, p. 510.

Another of the important "belligerent rights" is the right to require that countries not engaged in the war remain completely neutral.

Prior to 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 or maintaining a "neutral" status. However, since the Pact of Paris there can be no "neutral status" where war has been resorted to as an instrument of national policy. Neutrality, as such, applied only to a "belligerent" and a nation waging a war in contravention of the Pact of Paris is not a "belligerent" and consequently is not entitled to require other nations to remain neutral.

This doctrine has had practical application in the present war. Germany, having resorted to war as an instrument of national policy, has not been accorded its "belligerent right" to have all non-participating nations maintain a strict neutrality. On September 3, 1940, the President of the United States announced the exchange of fifty of our over-age destroyers for naval and air bases in the British Caribbean possessions.

Commenting on the legal significance of the transfer of destroyers to Great Britain at a time when she was engaged in a war, Quincy Wright made the following enlightening observations:

> "It is believed that the various public declarations by the President and the Secretary of State that Germany and Italy are aggressors, that international law and the Pact of Paris have been violated, that acts of the violating states professing to change the status of occupied territories will not be recognized, and that forms of aid incompatible with a status of neutrality will be extended to the victims of aggression, are adequate to indicate that the United States is no longer a neutral from the point of view of international law.
>
> * * *
>
> "* * * the United States has a complete answer to any challenge to the propriety of the destroyer transaction under international law. The states of the world have generally recognized that Germany has initiated hostilities in violation of its international obligations under the Pact of Paris and other instruments. Consequently Germany is not a lawful belligerent, and parties to these instruments are not obliged under international law to observe towards Germany and her allies the duties of a neutral."39/

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39/ The Transfer of Destroyers to Great Britain, 34 A.J.I.L. 680, 688-689.

Another marked departure from the conventional concept of neutrality may be found in the Lend-Lease legislation introduced on January 10, 1941, and approved by the President on March 11, 1941, which asserted the freedom of a non-belligerent to discriminate between the participants in foreign hostilities by favoring the lawful belligerent as against the aggressor nation in a manner which would have been clearly in violation of international law principles of neutrality as they existed prior to the Pact of Paris, but which are completely consistent with the new doctrine that an aggressor is deprived of its "belligerent rights."

The fact that the adoption of the Lend-Lease Bill constituted a radical departure from former concepts of neutrality was expressly recognized by Secretary of State Hull and Secretary of War Stimson, the House Committee on Foreign Affairs,40/ and the Senate Foreign Relations Committee.41/ Testifying before the House Committee on Foreign Affairs, Mr. Hull stated:

> "The question presented is, therefore, whether in view of a universally recognized world movement of force based on determination to invade and to conquer and to subjugate, peaceful nations shall wait until the invaders cross their boundary line, still clinging to the forms and

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40/ The House Committee on Foreign Affairs expressed the principle as follows:
"* * * Furthermore, the Kellogg-Briand Pact, which is a part of international law not only was intended to outlaw force as a means of resolving international disputes, but its violation has also been regarded by many distinguished international lawyers as giving any signatory the power:
"'to decline to observe toward the State violating the Pact the duties prescribed by International Law, apart from the Pact, for a neutral in relation to a belligerent: [and to] Supply the State attacked with financial or material assistance, including munitions of war.* * *'" H. Rept. 18, 77th Cong., 1st sess., p. 5.

41/ The report of the Senate Foreign Relations Committee indicated unmistakably that that body appreciated the change in the legal relationship brought about by the Pact of Paris. The report states, in part:
"* * * In line with that doctrine, the Kellogg-Briand Pact is recognized by eminent scholars of international law to give any signatory the power, where the pact's provisions are violated by another nation, to cease to abide by the neutrality laws which govern in normal times, and to 'Supply the State attacked with financial or material assistance, including munitions of war; * * *'" (Underscoring supplied) S. Rept. 45, 77th Cong., 1st sess., p. 4.

> shadows of neutrality laws, or whether they shall recognize that this is a world movement of conquest without limit as to extent of territory and invoke the law of self-defense before it is too late to assert it successfully, as was the case with so many of these magnificent little countries in Europe. That is the question. We can take our choice. And in these circumstances, where we have a situation of an outlaw country moving straight at another country, there is no occasion to invoke neutrality. Only the law of self-defense can be invoked, from any practical viewpoint." (Underscoring supplied) 42/

A more elaborate analysis of the problem was presented by Mr. Stimson who stated, before the same congressional committee:

> "This country was one of the authors of one of the greatest changes in international law that has ever taken place when it was in 1926 and 1927 and 1928 the initiator of what has been called the Pact of Paris, or the Kellogg-Briand Pact." 43/

Then referring to the Association of International Law, which interpreted the significance of the Pact of Paris, Mr. Stimson continued:

> "* * * I might say that the membership of that association is composed of the most distinguished international lawyers from all over the world; Americans, British, Frenchmen, Germans, Scandinavians, Italians, Japanese--all of them. And they considered what the effect would be of an attack in violation of the Kellogg Pact by one signatory upon another, and what effect it would have upon the rights and redresses of the other members of the great family of nations which had entered into that treaty under international law. And the conclusions which they reached are the most authoritative statement of international law on that subject which, so far as I know, has ever been published. And this is what they said, and I would like to have it on this record very carefully so that when our friends say that to help Great Britain at this time would be an act of war, I would like them to know that these great scholars and lawyers have said it would be under the Kellogg Pact. * * *
>
> "Now, this is what they said and they were considering just that very question.

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42/ Hearings before the House Committee on Foreign Affairs, 77th Cong., 1st sess., January 15, 1941, on H.R. 1776, p. 10.

43/ Id., p. 103.

"'Whereas the pact (the Pact of Paris) is a multilaterial law-making treaty —'

"Making international law among those members, in other words.

"'* * * 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 63 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 —

* * *

"'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 —

* * *

"'decline to observe toward the State violating the pact the duties prescribed by international law, apart from the pact, for a neutral in relation to a belligerent—'

"We are no longer bound by the rules." (Underscoring supplied) 44/

The right of annexation and the duty of neutrality are merely examples of belligerent rights forfeited by a nation engaging in a war that is contrary to the provisions of the Pact of Paris. The effect of the Pact upon the activities of the United Nations during the occupation of Germany is equally as great. We need not be blind followers of ancient precedents in our treatment of the defeated aggressor. We are not required to give cognizance to legalistic arguments that this or that "right" of Germany is being violated. On the contrary, the United Nations are free to exercise their joint ingenuity in the formulation of a plan that will insure the world against any repetition of the Nazi outrages, and there will be no legal obstacles to overcome in order to execute the plan. Germany by attempting to dominate the whole earth has forfeited all "legal"

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44/ Hearings before the House Committee on Foreign Affairs, 77th Cong., 1st sess., Jan. 15, 1941, on H.R. 1776, pp. 103-104.

rights and can only claim what will be freely accorded without request — the observance of humane principles in the application of appropriate terms and punishments.45/

45/ In view of the clear implication of the Pact of Paris and its previous application by this and other governments, it is unnecessary to develop other reasons why there can be no technical application of the Hague Conventions to the occupation of Germany. Briefly, some of the other reasons are:

(a) Should the United Nations choose to achieve their war aims by means of an armistice, a treaty or annexation—all imposed upon Germany—their powers would be unlimited. Since they can also choose to accomplish these aims through a military occupation, it would be illogical to confine such action within limits that would not exist if a different choice were made.

(b) The Hague Conventions are designed to apply to the type of warfare that was known in the nineteenth century and they cannot be applied logically and justly to "total warfare."

(c) The Hague Convention rules governing military occupation apply only to a precarious occupation while hostilities are in progress and the occupant is in imminent danger of being driven out of the occupied territory.

(d) All of the rules of the Hague Conventions are subject to exceptions in cases of military necessity. The prevention of further hostilities is as clear a military necessity as the successful completion of a military campaign.

(e) The United Nations are entitled to take reprisal measures against Germany because of Germany's violations of the Hague Conventions.

(f) Some of the belligerents are not bound by the Hague Conventions and, therefore, under the terms of the Conventions they do not apply to any of the belligerents.

Secretary Morgenthau

Mr. O'Connell

In connection with recent discussions regarding certain post-hostilities German problems of concern to the Treasury Department, as for example, currency matters, exchange control, ownership of foreign exchange assets, control of banks, and control of financial transactions in general, I have, at your suggestion, made an examination of the broad question of the legal authority which the United Nations will have to act with respect to Germany after her military defeat. This memorandum is addressed to that broad legal question rather than to specific questions which may arise. I am confident, however, that the approach suggested to this broad issue will furnish a basis for answering specific problems with which the Treasury will undoubtedly be concerned.

It is, of course, impossible at this time to analyze in detail all of the situations that may exist or to solve the host of legal problems that will arise with respect to the nature of Allied occupation of Germany, the rights and duties of the occupants, the punishment of war criminals, etc. The resolution of these questions will be greatly assisted, however, by the formulation of a sound and practical general approach to international legal problems and by ascertaining the authority of the United Nations to carry out their legitimate war aims.

I. General Approach to Problems of International Law.

In evaluating any problem of international law for the purpose of determining whether a particular course of conduct is consistent with the recognized principles of international law, it is necessary to consider

(1) The nature and sources of international law;
(2) The applicability of existing rules to new or unusual conditions; and
(3) The principles to be applied in the absence of a specific rule of international law.

An orderly analysis is essential when new and unusual situations arise as is likely to be the case when Germany has been defeated.

(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 each having a limited scope.

The sources of international law 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.1/ These sources have been recognized by the Supreme Court of the United States2/ and have been prescribed as the bases for decisions by the Permanent Court of International Justice.3/

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 constitute one branch of international law.4/

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. In addition, there are numerous loopholes with respect to those areas which are covered in a general way. The inadequacy of the rules of warfare with reference to the problems of the First World War is vividly described by Garner in his book "International Law and the World War."5/

> "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."

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1/ Moore, International Law Digest, Vol. I, section 1; Hackworth, Digest of International Law, Vol. I, sections 3-7; Taylor, International Public Law (1901), section 30; Lauterpacht, Oppenheim's International Law, Vol. I, sections 22-31; Wheaton's International Law, 6th English Ed., pp. 10-23.

2/ Hilton v. Guyot, 159 U.S. 113, 163; The Paquete Havana, 175 U.S. 677, 700; Thirty Hogsheads of Sugar v. Boyle (1815) 9 Cranch U.S. 191, 198; The Scotia (1871) 14 Wall. U.S. 170, 187.

3/ Wilson, International Law, p. 11; S. S. Lotus, Per. Ct. Int. Jus., Judgment 9, Sept. 7, 1927, Sec. A, No. 10 (11 Hudson, World Court Reports (1935, 20, 33, 35); Chorzow Factory, Per. Ct. Int. Jus., Judgment 13, Sept. 13, 1928, Sec. A, No. 17 (I Hudson, World Court Reports, 1934, 646, 663).

4/ Spaight, War Rights on Land, p. 11.

5/ Garner, International Law and the World War, Vol. II, p. 452; see also Lauterpacht, Oppenheim's International Law, preface to the 5th edition, IX.

Because of the substantial difference in the nature and sources of international law as compared with the nature and sources of domestic law, 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. A proper approach in applying an existing rule entails 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, new situations will undoubtedly arise and it cannot be assumed that there will always be an applicable rule of warfare in existence.

(2) The applicability of existing rules of international law.

In view of the fact that treaties are framed in response to particular needs arising out of known practices, their contents must be construed in the light of their 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.6/ 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 necessarily results 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 have accepted this treatment of non-combatants as a proper course of conduct, and it has, in effect, become a rule of warfare.7/

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6/ The Hague Conventions of 1899 (II) and 1907 (IV) Respecting the Laws and Customs of War on Land, Annex, Arts. 3, 22, 23, 24, 25, 26, 27, 28, 36 Stat. 2277.

7/ Spaight, Airpower and War Rights (1924), Chapters VIII-XI.

Not only may existing rules become inappropriate to certain situations because of general changes in methods of warfare, but they 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.8/ 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 recognized 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.9/

(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 other United Nations will be confronted with the difficult problem of adopting courses of conduct which will be considered legal and proper by society as a whole.

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. For many years there was a heated debate between proponents of the "natural law" theory and those who favored the concept of positivism. 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

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8/ Ibid, pp. 196-198.

9/ This principle was recognized in the Preamble to the Hague Regulations, 36 Stat. 2277. See also Spaight, War Rights on Land, p. 11.

that guide its internal actions. Lauterpacht states in Oppenheim's International Law, at page 100 (5th ed., vol. I):

> "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 fertilized 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." (Underscoring supplied)

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." (Underscoring supplied).

The similarity of this approach to the philosophy which characterized the development of the common law is striking. Making this analogy briefly, 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 mediaval 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. * * *."10/

10/ Quoted in Hackworth, Digest of International Law, Vol. I, p. 8.

One of the chief contributions of natural law is a principle which is recognized and acted upon as fully today as it ever was. That principle is[11]

> "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." (Underscoring supplied)

International arbitral tribunals have recognized that this is the proper practice and have acted accordingly.[12] 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."[13]

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 recognized rule governing the case of the cutting of cables

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11/ Ibid.

12/ See Administrative Decision No. 11, by Judge Parker, mixed claims commission between the United States and Germany, November 1, 1923; Annual Digest, 1923-1924, case No. 203; Goldenberg & Sons v. Germany, Special Arbitral Tribunal between Roumania and Germany, September 27, 1928; Annual Digest, 1927-1928, case No. 369; Lena Goldfields Arbitration September 2, 1930; Annual Digest, 1929-1930, case No. 1 (Cited in Lauterpacht, Oppenheim's International Law, Sixth Ed., p. 28).

13/ Nielsen's Report (1926) 203, 307, 313-315, 317, 321.

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."14/ (Underscoring supplied)

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 this 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

14/ Ibid, pp. 73, 75-76.

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."15/ (Underscoring supplied)

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."16/

It would be impossible 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. Several general guides can, however, be stated briefly. In the first place, the danger of dogmatic crystallization — which inevitably results in rigid and inflexible rules — should be carefully avoided. Secondly, precedents must always be examined in the light of the fundamental principles upon which they are based. And thirdly, rules must not be observed blindly but only after searching analysis of their utility in furthering the needs of society.

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15/ Hyde, International Law Chiefly as Interpreted and Applied by the United States, Vol. I, p. 3.

16/ Ibid, p. 5.

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 primary emphasis on the technical construction 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.

## II. Authority of the United Nations to Carry Out Their Legitimate War Aims.

Germany's defeat will not be the final realization of all our war aims, but will only serve as an opportunity for the United Nations to take the steps necessary to achieve the objectives for which they have fought so hard and so long. The period immediately following the cessation of major hostilities in Europe must be utilized for this purpose. There are no rules of international law which present legal obstacles to the attainment of the goal.

This conclusion is based on the following principles which will be fully discussed below:

(1) International law permits nations which have won a war such as that being waged against Germany by the United Nations, to accomplish the ends for which they have struggled by imposing upon their defeated enemy, in an armistice or a treaty of peace, or through military occupation, such terms and punishments as they consider necessary.

(2) Germany has forfeited all belligerent rights under international law except the right to humane treatment, and since the United Nations include nearly all of the civilized peoples of the world, the best test as to the humaneness of the treatment to be accorded Germany is public opinion and the views of government authorities in the United Nations.

### (1) Achievement of war aims through an armistice, a treaty, or military occupation.

Victorious nations do not always accomplish their war aims by merely defeating their enemies in battle. They generally fight for specific objectives which can be attained only after they have been

militarily successful and are in a position to impose upon their enemies appropriate terms and punishments. This is particularly true when wars are fought against ruthless aggressors such as Germany and Japan.

It is not necessary, for the purposes of this memorandum, to examine the war aims of the United Nations in minute detail. It should suffice to point out that there has been an enormous expenditure of life and property to thwart the Axis dream of world domination and to make certain that peace-loving nations will never again be similarly threatened. The legitimacy of these objectives could not possibly be questioned.

The task confronting the United Nations when hostilities against Germany are at an end, and again when those against Japan terminate, is enormous in proportion and extremely complex. Effective performance of the task may well require unprecedented action, but there are no principles of international law which stand in the way of its successful completion.

The measures required to prevent future aggressions by Germany and Japan can be the subject of an armistice or a treaty of peace. They may also be carried out through military occupation.

A general armistice is essentially a cessation of hostilities pending the settlement of the terms of a treaty of peace. The losing belligerent generally requests an armistice and is faced with the choice of accepting the terms proposed by its stronger adversary or continuing hostilities against hopeless odds. An armistice represents, therefore, the will of the victor and it is recognized that he may impose upon his defeated adversary any terms that he desires.

The history of the last 100 years reveals many examples of armistices which imposed severe terms upon the losing belligerent. The Armistice Convention of January 28, 1871 in the Franco-Prussian War provided for the delivery of the fortresses and the surrender of the armed garrisons of Paris, the payment by Paris of a "war contribution" of 200,000,000 francs, and the occupation by the German army of large parts of France.

The protocol of peace in the Spanish-American War stipulated that Spain would relinquish her sovereignty of Cuba, cede Puerto Rico to the United States and that the United States should occupy Manila until the fate of the Philippines was determined.17/

17/ Phillipson, Termination of War and Treaties of Peace, pp. 68-70.

The terms imposed upon Germany by the Armistice of November 11, 1918 included, among other things, the evacuation of invaded territories, the surrender of specified war material, the surrender of all submarines as well as a certain number of surface vessels of war, the evacuation of particular ports, and the occupation of certain strategic positions along the Rhine. As stated by Hyde, "these provisions reveal an arrangement designed to accomplish far more than merely cessation of hostilities, and serving in case of the observance of its terms, to render it practically impossible for Germany to resume formidable operations against its enemies."18/

Almost all treaties of peace contain provisions designed to achieve the war aims of the victor. They provide for such things as cession of territory, payment of reparations and indemnities, occupation by foreign troops, etc. If a war aim is a legitimate one, there are no rules of international law that prevent the inclusion in a treaty of peace of terms necessary to accomplish it.

International law also permits a victorious nation to annex the entire territory of its defeated adversary, thus eliminating it entirely from the society of nations, if such action is in furtherance of a legitimate war objective.19/ When annexation takes place, the treatment of the area subjugated becomes a matter of domestic concern for the conqueror and there are no problems of international law. No treaty or other agreement with the losing nation is required and the disposition to be made of its territory is a question decided by the victor alone or in conjunction with its allies.20/

There are, therefore, at least two separate and distinct courses that the United Nations can follow when they have defeated Germany. They can (1) impose upon Germany in an armistice or a treaty of peace, such terms and punishments as they deem appropriate to prevent future aggressions, or (2) they can annex all German territory, obliterate Germany as a nation, and administer the former German territory in any way they see fit, subject only to such limitations as may exist in their own domestic laws. These two courses being open, can it be said that if the corrective measures deemed essential fall short of complete annexation and if there is no effective German government in existence which could sign an armistice or a peace treaty, the hands of the United Nations will be tied? Can it be said that the inability of Germany to sign a

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18/ 2 Hyde, International Law Chiefly as Interpreted by the United States, sec. 647.

19/ Oppenheim's International Law (Vol. I, pp. 449-450); Hall, A Treatise on International Law, p. 681; Lawrence, Principles of International Law, pp. 159-160; Hyde, International Law Chiefly as Interpreted by the United States, pp. 176-177.

20/ Mormon Church v. United States, 136 U.S. 42; United States, Lyon et al. v. Huckabee, 83 U.S. 414; and texts cited in footnote 25.

treaty coupled with the unwillingness of the victors to annex all Germany, means that a more moderate course than annexation cannot be undertaken? Obviously, the answer to these questions is an emphatic "no".

Customarily nations have achieved legitimate war aims either by treaty or by annexation. There is nothing in this practice, however, from which an implication can be drawn that these methods are exclusive. The situations that have existed in the past were such as to fit known procedures but the fact that they did is not in any sense a reason for concluding that no others can be utilized.

Assuming that the United Nations do not wish to eradicate Germany completely by annexing all of its territories, the traddidional approach left open to them is to impose their will upon Germany by means of an armistice or a treaty of peace. The essential nature of such an "agreement" must be examined in order to determine whether it has as its basis any principle of law which would be violated should the terms and punishments be imposed without benefit of a bilateral document.

In many respects an armistice and a treaty of peace occupy under international law a position equivalent to that of a contract under domestic law. The analogy fails, however, in one important respect. Duress does not invalidate a treaty although it would invalidate a contract. In discussing the analogy, Lauterpacht states:

> "There are few questions in international law on which there is such a measure of common agreement as this, that duress, so far as States are concerned, does not invalidate a contract; nevertheless it is submitted that this exception does not affect the view presented here of the fundamental identity of contracts and treaties. It has already been pointed out that analogy fails here so far as international law is an undeveloped law; it may safely be said that with the development of international law to a system of law without qualifications and limitations the analogy will hold with undisputed force."21/

The ideal situation visualised by Lauterpacht of international law without qualifications and limitations is far from realization at present. The law remains as it was in 1927 when he published his treatise - duress does not vitiate a treaty.

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21/ Lauterpacht, Private Law Sources and Analogies of International Law (1927) p. 161.

The rule is neither shocking nor obscure when considered in its proper frame of reference, i.e., the conditions that exist when treaties of peace are drafted. They do not result from the usual give-and-take type of negotiations that prevail in normal times. On the contrary, the stronger belligerent offers terms to its adversary and the loser must accept them or face annihilation. If the loser refuses the offer, hostilities will continue and this will generally lead to a further deterioration so that the second offer may be even more severe and the need to accept the terms even more urgent. Pressure and duress are, therefore, the motivating forces in the negotiation of peace treaties. The treaty of peace would not have become the principal device for terminating wars if the loser were permitted at a later date to abrogate its obligations on the basis of duress. This would have rendered practically all such treaties nullities and international law would undoubtedly have developed along other lines, giving recognition to the accomplishment of legitimate war objectives through other means.

Phillipson states the basis of the rule quite clearly. He says:

> "If peace negotiation is not an actual extension, in another plane of conflict, of the military operations of the belligerents, it is at all events a substitute therefor, and cannot possibly be considered as being immune from all threats and pressure. There is not and cannot be any legal principle forbidding a peace negotiator to threaten that he will resume hostilities if his terms are not accepted; for the other party knows full well what will happen if the negotiations fail. A certain element of pressure is therefore inevitable here, and it cannot properly be described as duress."22/

Lawrence takes the same view:

> "Most treaties of peace are made by the vanquished state under duress; but there would be an end to all stability in international affairs if it were free to repudiate its engagements on that account whenever it thought fit."23/

Thus, the validity of a peace treaty is not based upon the consent of the vanquished but rather upon the practical benefit of the stable re-establishment of peaceful relations. In view of the fact that

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22/ Phillipson, Termination of War and Treaties of Peace, p. 162.

23/ Principles of International Law (1923) p. 303. See also Hyde, International Law Chiefly as Interpreted by the United States, p. 8. See also 5 Moore, International Law Digest, p. 183; Edmunds, The Lawless Law of Nations, p. 184; Lauterpacht, Private Law Sources and Analogies in International Law, p. 161.

annexation depends solely upon the will of the victors and treaties of peace upon the consent of the vanquished obtained under duress, it is clear that these two procedures are not exclusive. The terms and punishments are in fact decided upon and enforced by the victors. Thus, the method they adopt is simply a matter of form and not of substance.

It would be absurd to assert that the United Nations can annex Germany but if they are unwilling to do so they can take less drastic steps only if they are willing to rely upon a German government which must arise out of the wreckage of six years of Nazism plus more than five years of total warfare. There might be some merit to such a conclusion if consent of the vanquished were an element of peace treaty negotiations but, since consent is not involved, the historical methods of achieving war aims are obviously not legal limits but only manifestations of the general rule that legitimate war objectives can be attained through the imposition upon the defeated nation of appropriate terms and punishments.

Prolonged occupation as a means of achieving war aims has been recognized by writers since the early days of international law. In 1758 Vattel stated:

> "When (a conqueror) has totally subdued a hostile nation, he undoubtedly may, in the first place do himself justice respecting the object which had given rise to the war, and indemnify himself for the expenses and damages he has sustained by it; he may, according to the exigency of the case, subject the nation to punishment by way of example. He may even, if prudence so requires, render her incapable of doing mischief with the same ease in the future."24/ (Italics in original)

In recent times Phillipson has made a similar observation:

> "Conquest means nothing more than effective military occupation by the enemy forces; and as such it may be merely a procedure or a means to some other end contemplated by the Government of the occupying forces."25/ (Underscoring supplied)

There is, therefore, nothing in international law that would prohibit the use of military occupation, or any other measures, to impose appropriate terms and punishments on Germany in order to prevent further aggressions against peace-loving nations.

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24/ Vattel, Law of Nations, (1758, Chitty ed., 1859) Book III, sec. 201.
25/ Phillipson, Termination of War and Treaties of Peace, note 7, at 9.

(2) Germany is not entitled to belligerent rights under international law.

Careful study of the limitations placed by international law upon the activities of occupying powers and victorious nations reveals that the United Nations, in planning for the treatment of Germany, will not be hampered in any way by technical legal difficulties. Germany is not entitled to the rights generally accorded to belligerents under international law.

International law as embodied in treaties and usage must, like other branches of law, be interpreted by human beings. The basic ingredient of each rule of warfare is a logical moral principle which, for practical purposes, must be set forth in words. The words used may sometimes be subject to technical legal construction leading to conclusions entirely foreign to the moral principle. If by denying belligerent rights to Germany we should deprive her of the protection derived from sound moral principles, we might be open to severe criticism. If, on the other hand, the United Nations scrupulously observe accepted moral standards and merely deny to Germany the opportunity to contend that — without reference to the underlying moral principle — certain activities violate the words in which particular rules of warfare are stated, then their behavior cannot be questioned.

In fact, this approach is eminently suited to the type of problem with which we will be confronted when Germany collapses. It cannot reasonably be contended that the Germans have a right, through technical legalistic argument, to prevent the accomplishment by the United Nations of the objectives for which they have fought. Such arguments have not been available as a defense against past German aggressions and barbarities and it is only just that they should not be permitted to interfere with the methods deemed by the United Nations to be essential to the prevention of future aggressions and barbarities.

The Germans have violated the Pact of Paris which renounced "recourse to war for the solution of international controversies" and "as an instrument of national policy." The Germans have violated most of the provisions of the Hague Conventions. The Germans have committed innumerable outrages that defy description. They have made no effort whatever to conform to a standard of conduct which would meet with the approval of public opinion throughout the world. Accordingly, they have lost the right to be treated as belligerents, they have established grounds for retaliation and they are not in a position to contest, or even discuss, the measures which will be taken by the United Nations.

This conclusion — discussed in detail below — is clearly a proper statement of the existing rules of international law. Although it means that the Germans have no "legal" rights as belligerents it does not mean, and should not be considered as implying that Germany is not entitled to humane treatment. As indicated in the preceding pages, the absence of legal rules established by treaties or general usage throws us back upon general principles of law for guidance in the conduct of the war and the period that will follow, and there are no principles of American jurisprudence permitting inhuman treatment of individuals, groups or nations.

We must, therefore, in formulating plans for the post-war period, observe those moral principles which are the foundation of our own civilization. Ordinarily this will be a simple matter, since the average American is accustomed to make decisions with these maxims in mind. There will probably be situations, however, so novel that the demands of morality will be difficult to ascertain. In such cases, reliance upon the statements of the leaders of the United Nations governments will be the safest course to follow. Their utterances will be found, in general, to embody public opinion as crystallized by governmental planning and governmental action. Since moral principles are in essence the standards of conduct accepted by the great bulk of civilized peoples, it would be impossible to find a more accurate source. Even in these more difficult situations, however, the effort to give the Germans humane treatment should not be perverted and the issues should not be clouded by technical reasoning. The problem is one of conscience, not of law.

The Pact of Paris of August 27, 1928, which was formally designated the "Treaty for the Renunciation of War as an Instrument of National Policy" introduced a new concept in the Law of War. During the entire 19th and early 20th centuries, war was recognized as having an "extra-legal" status — it was not considered illegal yet writers hesitated to describe it as legal.

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 the other and with respect to all non-belligerents. In addition, there sprang up a set of corresponding duties which each belligerent owed to the other and which each non-belligerent owed to the belligerents.

As a result a cordon sanitaire was drawn about the belligerents and the remainder of the world was sharply restricted in its ability to favor one belligerent as against the other regardless of the merits of the cause.

This artificial and unjust relationship was abandoned in the Pact of Paris, and any belligerent which thereafter engaged in a war as an instrument of national policy would be guilty of an illegal act and would forfeit its status as a lawful belligerent.

The Pact of Paris provides, in part:

> "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 2. 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." (Underscoring supplied)

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.

Having renounced war and having condemned it as an instrument of national policy, the Pact of Paris made resort to war an illegal act. However, the Pact of Paris does not itself express what legal incidents flow from its violation. Nevertheless, its interpretation has been made perfectly clear by the authorities. An excellent statement of the legal consequences of resorting to war in violation of the Pact of Paris was made by Judge Manley Hudson, of the Permanent Court of International Justice, in discussing the Budapest Conference. He stated:

> "War between nations was renounced by the signatories of the Briand-Kellogg Treaty. (Pact of Paris) 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." (Underscoring supplied) (Parenthetical phrase supplied)

A more specific formulation of the legal effects of the violation of the Pact of Paris may be found in the interpretation placed upon the Pact by the Harvard Research Convention which was drafted in October 1939 and was signed by eighteen distinguished American scholars in the field of international law. The Convention provides in part:

"* * * * An aggressor does not have any of the rights which it would have if it were a belligerent * * *.

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

When the logic of the Pact of Paris is carried through it is at once evident that what the 63 nations agreed to in August 1928 was not merely the expression of a pious hope but was rather the formation of a new legal doctrine with far-reaching effects. This new concept of international law has been applied to specific situations which have occurred since its formulation. It will be observed that nations resorting to war as an instrument of national policy have not been accorded the "rights of belligerents."

The first crucial test[26] 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 Council of the League of Nations in efforts at conciliation. Notwithstanding these conciliatory efforts, 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)

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26/ 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).

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:

> "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 everybody connected 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.[27] 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,[28] Austria,[29] Czechoslovakia, Memel and Albania.[30]

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27/ See footnote 19.

28/ 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 of Ethiopia.

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

30/ Similarly, the German absorption of Czechoslovakia and Memel and the Italian invasion of Albania were declared subject to the doctrine of non-recognition.

Another of the important "belligerent rights" is the right to require that countries not engaged in the war remain completely neutral.

Prior to 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 or maintaining a "neutral" status. However, since the Pact of Paris there can be no "neutral status" where war has been resorted to as an instrument of national policy. Neutrality, as such, applied only to a "belligerent" and a nation waging a war in contravention of the Pact of Paris is not a "belligerent" and consequently is not entitled to require other nations to remain neutral.

This doctrine has had practical application in the present war. Germany, having resorted to war as an instrument of national policy, has not been accorded its "belligerent right" to have all non-participating nations maintain a strict neutrality. On September 3, 1940 the President of the United States announced the exchange of fifty of our over-age destroyers for naval and air bases in the British Caribbean possessions.

Commenting on the legal significance of the transfer of destroyers to Great Britain at a time when she was engaged in a war, Quincy Wright made the following enlightening observations:

> "The United States has a complete answer to any challenge to the propriety of the destroyer transaction under international law. The states of the world have generally recognized that Germany has initiated hostilities in violation of its international obligations under the Pact of Paris and other instruments. Consequently Germany is not a lawful belligerent, and parties to these instruments are not obliged under international law to observe towards Germany and her allies the duties of a neutral. * * *
>
> "It is believed that the various public declarations by the President and the Secretary of State that Germany and Italy are aggressors, that international law and the Pact of Paris have been violated, that acts of the violating states professing to change the status of occupied territories will not be recognized, and that forms of aid incompatible with the status of neutrality will be extended to the victims of aggression, are adequate to indicate that the United States is no longer a neutral from the point of view of international law."31/

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31/ 34 A.J.I.L. 688.

Another marked departure from the conventional concept of neutrality may be found in the Lend-Lease legislation introduced on January 10, 1941 and approved by the President on March 11, 1941, which asserted the freedom of a non-belligerent to discriminate between the participants in foreign hostilities by favoring the lawful belligerent as against the aggressor nation in a manner which would have been clearly in violation of international law principles of neutrality as they existed prior to the Pact of Paris, but which are completely consistent with the new doctrine that an aggressor is deprived of its "belligerent rights".

The fact that the adoption of the Lend-Lease Bill constituted a radical departure from former concepts of neutrality was expressly recognized by Secretary of State Hull and Secretary of War Stimson, the House Committee on Foreign Affairs[32] and the Senate Foreign Relations Committee.[33] Testifying before the House Committee on Foreign Affairs, Mr. Hull stated:

> "The question presented is, therefore, whether in view of a universally recognized world movement of force based on determination to invade and to conquer and to subjugate, peaceful nations shall wait until the invaders cross their boundary line, still clinging to the forms and

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32/ The House Foreign Relations Committee expressed the principle as follows:

> " * * * Furthermore, the Kellogg-Briand Pact, which is a part of international law, not only was intended to outlaw force as a means of resolving international disputes, but its violation has also been regarded by many distinguished international lawyers as giving any signatory the power:
>
> "To decline to observe toward the state violating the Pact the duties prescribed by international law, apart from the Pact, for a neutral in relation to a belligerent: (and to) supply the state attacked with financial or material assistance, including munitions of war. * * *"

33/ The report of the Senate Foreign Relations Committee indicated unmistakably that that body appreciated the change in the legal relationship brought about by the Pact of Paris. The report states, in part:

> " * * * In line with that doctrine, the Kellogg-Briand Pact is recognized by eminent scholars of international law to give any signatory the power, <u>where the Pact's provisions are violated by another nation, to cease to abide by the neutrality laws which govern in normal times</u>, and to 'supply the State attacked with financial or material assistance, including munitions of war.'" (Underscoring supplied)

shadows of neutrality laws, or whether they shall recognize that this is a world movement of conquest without limit as to extent of territory and invoke the law of self-defense before it is too late to assert it successfully, as was the case with so many of those magnificent little countries in Europe. That is the question. We can take our choice. And in these circumstances, where we have a situation of an outlaw country moving straight at another country, there is no occasion to invoke neutrality. Only the law of self-defense can be invoked, from any practical viewpoint. * * *"
(Underscoring supplied)

A more elaborate analysis of the problem was presented by Mr. Stimson who stated, before the same congressional committee:

"This country was one of the authors of one of the greatest changes in international law that has ever taken place when it was in 1926 and 1927 and 1928 the intiator of what has been called the Pact of Paris, or the Kellogg-Briand Pact."

Then referring to the Association of International Law, which interpreted the significance of the Pact of Paris, Mr. Stimson continued:

" * * * I might say that the membership of that association is composed of the most distinguished international lawyers from all over the world; Americans, British, Frenchmen, Germans, Scandinavians, Italians, Japanese — all of them. And they considered what the effect would be of an attack in violation of the Kellogg Pact by one signatory upon another, and what effect it would have upon the rights and redresses of the other members of the great family of nations which had entered into that treaty under international law. And the conclusions which they reached are the most authoritative statement of international law on that subject which, so far as I know, has ever been published. And this is what they said, and I would like to have it on this record very carefully so that when our friends say that to help Great Britain at this time would be an act of war, I would like them to know what these great scholars and lawyers have said it would be under the Kellogg Pact. * * *

"Now, this is what they said and they were considering just that very question.

"'Whereas the pact (the Pact of Paris) is a multilateral law-making treaty - - '

"Making international law among those members, in other words.

"' * * * 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 63 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 --

"'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 . . .

"'decline to observe toward the State violating the pact the duties prescribed by international law, apart from the pact, for a neutral in relation to a belligerent --'

"We are no longer bound by the rules."

The right of annexation and the duty of neutrality are merely examples of belligerent rights forfeited by a nation engaging in a war that is contrary to the provisions of the Pact of Paris. The effect of the Pact upon the activities of the United Nations during the occupation of Germany is equally as great. We need not be blind followers of ancient precedents in our treatment of the defeated aggressor. We are not required to give cognizance to legalistic arguments that this or that "right" of Germany is being violated. On the contrary, the United Nations are free to exercise their joint ingenuity in the formulation of a plan that will insure the world against any repetition of the Nazi outrages, and there will be no legal obstacles to overcome in order to execute the plan. Germany by attempting to dominate the whole earth has forfeited all "legal"

rights and can only claim what will be freely accorded without request -- the observance of humane principles in the application of appropriate terms and punishments.34/

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34/ In view of the clear implication of the Pact of Paris and its previous application by this and other governments, it is unnecessary to develop other reasons why there can be no technical application of the Hague Conventions to the occupation of Germany. Briefly, some of the other reasons are:

(a) Should the United Nations choose to achieve their war aims by means of an armistice, a treaty or annexation - all imposed upon Germany - their powers would be unlimited. Since they can also choose to accomplish these aims through a military occupation, it would be illogical to confine such action within limits that would not exist if a different choice were made.

(b) The Hague Conventions are designed to apply to the type of warfare that was known in the nineteenth century and they cannot be applied logically and justly to "total warfare".

(c) The Hague Convention rules governing military occupation apply only to a precarious occupation while hostilities are in progress and the occupant is in imminent danger of being driven out of the occupied territory.

(d) All of the rules of the Hague Conventions are subject to exceptions in cases of military necessity. The prevention of further hostilities is as clear a military necessity as the successful completion of a military campaign.

(e) The United Nations are entitled to take reprisal measures against Germany because of Germany's violations of the Hague Conventions.

(f) Some of the belligerents are not bound by the Hague Conventions and, therefore, under the terms of the Conventions they do not apply to any of the belligerents.