

TREASURY DEPARTMENT

INTER OFFICE COMMUNICATION

DATE

January 12, 1945

TO Mr. Richard Brenner

FROM Mr. Hynning

Suggestions for Your Editing of the Legal Memorandum on the Powers of Military Government in Germany

In hurriedly reading the present draft of the legal memorandum, I ran across the following points which I should like to urge for your consideration in editing the present draft of the opinion.

1. On p. 4, last sentence of the third paragraph, query whether the United Nations have accepted this treatment.
2. On p. 6, fourth paragraph, second sentence et seq., the result of the positivist's conflict is open to doubt. Perhaps these sentences could be eliminated without affecting the argument.
3. On p. 8, the Eastern Extension Case, I believe, was submitted ex bono et equi. It is generally recognized that decisions in arbitration cases or mixed claims tribunals are not necessarily of general application.
4. Page 14, third paragraph, second sentence, states that there are no international law problems in the event of annexation. What about the Stimson document of non-recognition under the Pact of Paris? It seems to me that even before the Pact of Paris there was still a substantial problem of securing recognition from other states of the changed status brought about by annexation.
5. On p. 19 suggest elimination of the second paragraph as being unnecessary to the argument.
6. On p. 20, last sentence of third paragraph, suggest modification on writer's hesitation to describe war as legal.
7. In last paragraph suggest illustration from Art. 43 of the Hague Convention under which

"the occupant . . . shall take all steps in his power to re-establish and insure, as far as

possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country."

Other limitations on the powers of a military occupant relate to the use of the labor of prisoners of war (Art. 6), and their treatment in general (Arts. 5, 7-12, 17-20), the compulsion on the population to furnish information (Art. 44), the taking of *oaths*, reference (Art. 45), confiscation of private property (Art. 46), taxes and fiscal administration (Arts. 48, 50 and 51), requisitions (Art. 52), etc.

8. On p. 21 the quotation from the Pact of Paris omits the following important provision, which reads as follows:

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

9. On p. 22, second paragraph, second sentence, query whether its interpretation has been made perfectly clear.

10. Page 24 omits the reference to the Harvard Research Draft Convention of 1939, which represents a very fundamental step in the development of the Pact of Paris.

11. I suggest that at the end of the Pact of Paris argument there be inserted the following:

"As a result of the Pact of Paris only a lawful belligerent may be said to acquire rights by the resort to hostilities."

These rights of belligerency include, in addition to the rights and duties relating to the humane method of conducting hostilities, the rights and duties that traditionally result under the Hague Convention and the common law of war at either the successful or the unsuccessful conclusion of hostilities as well as the rights of a lawful belligerent vis-a-vis the neutrals. The government is already firmly on record against the non-recognition of territorial changes secured by a successful but unlawful belligerent. This government is already on record that it owed no duties of neutrality toward an unlawful belligerent and could legitimately extend lend-lease to the Allies. Having denied the rights of an unlawful belligerent

conflict at a time when he was temporarily successful (Japan) and having dis-
claimed the duties of a neutral toward an unlawful belligerent *in the midst of the*
(Germany), it is but logical to deny the rights of an unlawful
belligerent when he has failed in an unsuccessful war of ag-
gression. Consequently Germany may not claim the right to demand
observance by the Allied military authorities of the limitations
on military government that might otherwise arise under the Hague
Conventions or elsewhere with respect to the Allied Military
Government of German territory or the treatment of German prisoners
of war after the end of hostilities. This conclusion is reached
without prejudice to those parts of the Hague and Geneva Conventions,
which define the rights and obligations of soldiers relating to the
humane method of conducting hostilities and the treatment of the
prisoners of war during hostilities. These limitations on the humane
method of warfare have been observed and should be continued to
be observed until the end of hostilities in the general interests
of mercy and justice and specifically to avoid the danger of re-
prisal, however unlawful that might be.