SECRET

War Department
Office of the Chief of Staff
Civil Affairs Division
Washington 25

8 January 1945

MEMORANDUM FOR THE DEPUTY DIRECTOR, CIVIL AFFAIRS DIVISION:

SUBJECT: Consequences of Unconditional Surrender

1. You have informally requested comments on your memorandum of 12 February 1944 on the consequences of Unconditional Surrender under International Law. I have read the memorandum without the benefit of extensive familiarity with International Law and with the sole purpose of determining whether the legal position which you advocate is likely to have consequences which will be convenient and advantageous to the United States and the United Nations.

2. In my opinion it would be unwise for us to comit ourselves to a theory of surrender which would mean the immediate termination of the state of war with Germany upon the cessation of hostilities. Not only might such a termination have unfortunate consequences upon later attempts to effect long-range settlement of European issues by peace treaties, but it might seriously limit the powers which belligerent forces of occupation would possess if the state of war continued to exist. Furthermore, the conditions upon which the war should be brought to a final termination can better be agreed upon among the United Nations after the cessation of hostilities than while actual combat continues.

3. In paragraph 13 of your memorandum you suggest that the consequence of unconditional surrender may be that "the German State ceases to exist as a legal entity." Mr. Jessup, in his letter of 20 April 1944, has pointed out the serious consequences which this might involve and has indicated what formalities and ritual might have to be observed by the Allies to prevent that unfortunate consequence. I believe that an interpretation of Unconditional Surrender which would breed such complications would be highly impolitic and that it might have even more serious consequences than those which resulted in Sicily from the suspension of the powers of the Crown.

4. The great advantage which your theory of Unconditional Surrender offers is the unlimited authority over Germany which it gives the Allies. Our rights would extend to annexation, partition, and complete subjugation of the people. Possessing those rights it would, however, be essential as an administrative matter that the Allies at the outset make some declaration of the scope of the authority which they would in fact exercise. I assume that total annexation is out of the question and that complete partition is unlikely. A pronouncement would be essential as to whether the German State still existed and as to whether the Allies or any one of them claimed on its own behalf or on that of other nations sovereignty over all or a portion of

the occupied area. Such questions cannot for long be left undecided, particularly when the confusion of tripartite control is superimposed upon the ambiguities of International Law. It is difficult for me to see how the necessary pronouncements and declarations could be made in such a way as to escape the tone of contractual undertakings not to assert unlimited authority. Such undertakings would be inadvisable during the continuation of a state of war; they might prove fatally complicating if entered into after the termination of the war. Although I am in general agreement with your analysis of the question of the applicability of the Hague Convention to the post-surrender occupation, it seems to me that if we publicly announce, as I believe we must, that we are not annexing German territory, that we do not claim sovereignty, and that we still recognize the existence of the German State a strong argument can be made that the general standards of the Convention are as binding upon as as they would be if the war continued into the post-surrender period. This means that your interpretation of Unconditional Surrender will not have scotched the familiar arguments against the repeal of German law and against the enactment of new law to replace it.

5. My hesitance to accept your interpretation of Unconditional Surrender centers, perhaps, around the feeling that it lifts an essentially military problem to a governmental level and in doing so serves to create difficulties for the military government which another theory would avoid. By terminating the war, by giving us authority to destroy the German State, and annex all of her territories your theory creates problems which are, in my mind, so serious that they outweigh the advantages which the theory unquestionably possesses.

6. I should prefer to look upon Unconditional Surrender as the acknowledgment by the German high command to the highest military authorities of the United Nations that the armed forces of Germany have been conclusively defeated. I realize that the word "capitulation" contains a bilateral overtone which may be unfortunate. It does not, however, carry the unfortunate historical connotations that the word "armistice" does, and it possesses the very considerable advantage of suggesting a military rather than a governmental transaction. If we destroy the resistance of German armed forces by the capitulation of those forces we are in a position to assert as much authority over the German government, the German State, and the German people as we may choose to exercise. As you have pointed out, we may decide to accept the standards set forth in the Hague Convention. If we do, we will not unduly have hampered our power. No matter what interpretation of the Unconditional Surrender is adopted, British resistance to a drastic program must be anticipated. I am very doubtful if our hand will be appreciably strengthened vis-a-vis any of our Allies by the adoption of any particular theory of Unconditional Surrender.

7. By suggesting that the word "capitulation" may be useful for the formulation of a workable theory I do not mean to suggest that we should abandon the concept of Unconditional Surrender and substitute something different in its place. I do feel, however, that we will create more problems

than we will seve by looking upon Unconditional Surrender as you have suggested that we should. An effective victory over the armed forces of Germany, acknowledged by them to be complete and final, will in fact give the commanders of our forces all the powers which they need to conduct a forceful military government of Germany. Through that government they will be able to achieve the essential political objectives of the United Nations, if we do not permit a narrow interpretation of International Law to hamper them.

MARK DeW. HOWE
Lt. Col. GSC
Chief, Government Branch

COLUMBIA UNIVERSITY
in the City of New York
[New York 27, N.Y.]

Naval School of Military Government and Administration
Office of the Director
431 West 117th Street

April 20, 1944

SECRET AND PERSONAL

Colonel William C. Chanler
Civil Affairs Division
War Department
Pentagon Building
Washington, D. C.

Dear Willie:

With further reference to our telephone conversation, I wish to repeat that I am in agreement with your general conclusion concerning the nature of a document which might be described as "an instrument of surrender."

I think that the fundamental distinction which you wish to draw is between a document which might by its label or by its terms seem to indicate that it was the result of negotiation and therefore had a contractual nature. I think it is clear that either an Armistice or a capitulation is a contractual arrangement.

The kind of instrument to which you refer it seems to me is one which might record a fact having legal consequences but would not itself, like a contract, be the source of legal rights. The fact would be the defeat followed by unconditional surrender.

If this be true, then the form of document should very carefully guard the exact manner in which signatures of representatives of the Allied nations might be affixed to the paper. Their signatures should indicate no more than the receipt of the paper and their cognizance of the enemy's acknowledgment of the fact.

I am troubled by the difficulties of the next step. It is inherent in the theory on which the argument proceeds that the war has come to a close. This, as I see it, is an essential distinction between the usual method of ending hostilities by agreement and ending them by the fact of a defeat so complete as to amount to an annihilation in the political sense. If this be true, there is no place subsequently for a "peace" treaty.

As I think you properly point out, unconditional surrender, as here discussed, is the equivalent of subjugation in its legal effects, in the sense that the instrument of surrender is an acknowledgement that subjugation has taken place. The books all seem to assume that subjugation will result

in an annexation of territory and in the extinction through absorption or partition of the defeated state. Surely, however, you are right in indicating that the conqueror may forebear to exercise his extreme right and may confer upon the defeated state such privileges as seem to him good.

It would not seem to me to be clear, whether, as a conclusion of law, it is necessary to say that upon the receipt of the instrument of surrender the surrendering state ceases to exist as an international legal entity. If that is the consequence, then it seems to me the victorious state or states would have to recreate whatever type of entity they desire to have succeed to the former state. To go through this process would involve one in all that maze of legal complexities which are attendant upon any case of state succession. It involves a problem concerning debts, treaties, nationality and a dozen other things, all of which would have to be most carefully foreseen and provided for if grave difficulties are to be avoided.

Aside from those legal technicalities, the political implications of bringing one state to an ending and creating a new state in its place are so vast as to make me feel that a policy leading to this result should not be embarked upon lightly but only after the political implications have been studied with great care and, presumably, in consultation with the State Department.

It might be possible to guard against the suggested consequence of the termination of the life of a state by some appropriate indication at the time of accepting the instrument of surrender. It might also be possible, speaking realistically, merely to take the position that the surrendering state did not go out of existence. I doubt if anyone would assert the contrary if the principal powers took that position.

If, however, the surrendering state remains in existence, I still see no escape from the conclusion that the war has been terminated. Whether it would be considered desirable to have the war legally come to an end at that moment is something to which a good deal of thought ought to be devoted. From the domestic point of view I assume that there would be certain consequences with respect to the rights of enemy nationals and enemy property but since presumably a state of war would continue in another part of the world, the general war powers would not be affected. Nevertheless, I would have supposed that most thinking and planning proceeded on the assumption that there would be an interval between the cessation of hostilities and the termination of the war. If this is true, a check would of course have to be made to see whether the fact that they happened simultaneously upset any calculations.

From the external point of view, it would still remain true that the Allies would remain belligerents or at least some of them would. They would therefore retain belligerent rights vis-a-vis neutral powers for example. (on the other hand, it is possible to assume that this result would be welcomed at a very high level.)

Assuming then that the war has come to an end through "subjugation" and that the victorious states have, through some appropriate device, signified their renunciation of the full privileges which would flow normally from subjugation, it would seem necessary to proceed to negotiate or to impose a treaty which would deal with some of the vast multitude of topics which would be involved in the settlement of a great war. One can see definite advantages and disadvantages to the novel process of negotiating such a treaty without having to consider the point that the war continues until the treaty is ratified.

There remains the problem which you discuss concerning the rights which the victorious powers would have after the surrender and before the treaty. If it be a real subjugation, then I assume that their rights would be the same as those which they would have in their own territories. There is, however, a difficulty which seems to me so great as to be insurmountable. It would be the Allies jointly who presumably would succeed to the enemy s tate and who would have a situation comparable to that which followed Germany's relinquishment of her overseas possessions to the principal allied and associated powers. Presumably the sovereignty over those colonies vested in the allied and associated powers jointly, at least until the Mandates were approved. A condominium, however, of the metropolitan territory of the enemy is rather a ghastly thing to contemplate.

If, however, I am correct in assuming that the war has come to an end through the surrender, then the Allies would not have the right of an occupant and, if they renounced their joint rights of sovereignty over the enemy state, it would seem that there would have to be some express reservation of the rights or powers which they wished to retain and exercise for a period of time on the ex-enemy territory. Cf. e.g. status of prisoners for war.

I think it is clear, as I think you indicate, that precariousness is the key quality of a belligerent occupation and that element would be clearly eliminated by unconditional surrender. For that reason, I do not follow you in your subsequent analysis of the powers of an occupant and their applicability to the situation under discussion. In this respect, I think we are probably agreed on the point stated in your paragraph 19.

Your conclusion in paragraph 20 that one need not be troubled about some of these points at this juncture is, I think, too sanguine. It seems to me rather dangerous to proceed along the indicated line without first thinking through the consequences.

SECRET AND PERSONAL

This is barely an introduction to the problem and I should hope that we could discuss it when I am in Washington on May 3rd. Meanwhile, if you have anything further in mind that I might consider in regard to it, please communicate with me either by mail or by telephone, UNiversity 4-3200, Ext. 881.

Sincerely yours,

(signed) Phil Jessup

Philip C. Jessup.

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CLASSIFIED MESSAGE CENTER
INCOMING CLASSIFIED MESSAGE

SECRET IVI
PRIORITY

From: Supreme Headquarters, Allied Expeditionary Forces,
Main, Versailles, France

To: War Department

No.: S-74067 7 January 1945

S-74067 from SHAEF Main to AGWAR for Marshall for Hilldring personal for Bernstein signed Eisenhower cite SHGE.

If at all possible request you obtain some official views on subject of supply accounting for spare parts, split or broken medical units.

Considerable quantities of spare parts for trucks, etc., have been issued principally from military stocks. Medical units have been broken up in order to issue only such medical supplies as are urgently needed. We feel that if each spare part or each medical supply taken from units is treated as a commodity there will result a cumbersome accounting task disproportionate to value to be recovered for the supplies thus delivered.

New subject: We are considering the possibility of paying troops in Germany with Allied military marks only until such time as Reichsmarks and Rentenmarks can be used entirely. It would be most helpful if you could obtain some preliminary official views as to whether there would be an objection to such a program.

New subject: Growing indications are that Financial Branch this Headquarters will have responsibility during SHAEF period for reparations, restitutions and return duties in connection with its property control responsibility.

There is also possibility of Financial Branch responsibility for these subjects at US Zonal Headquarters. These duties may include handling parts of problem of exports of goods from Germany, restitution of property and similar subjects which will arise during this period. Suggest you contact Treasury, FEA and other interested government agencies with a view toward learning names of military or other personnel who may have had specialized experience in these subjects and who are or who may in the future be available for assignment to this headquarters.

New subject: For your information we have originated request to COMNAVEU for Lt. Carlock, Ensign Murphy and Surrey for duty in connection with freezing and blocking and foreign exchange work.

End

ACTION: General Hilldring (Col. Bernstein)

CM-IN-6543 (8 Jan 45) DTG 071930A m/m

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WAR DEPARTMENT
CLASSIFIED MESSAGE CENTER
INCOMING CLASSIFIED MESSAGE

SECRET TOT
PRIORITY

From: Supreme Headquarters, Allied Expeditionary Forces
Main, Versailles, France

To: War Department

No: S 73844 5 January 1945

S 73844 to AGWAR for Marshall for Hilldring for Chanler signed Eisenhower cite SHGE.

It is requested you hand to General McSherry or Colonel Bernstein for delivery to Legal Branch any available material you have on hand relating to the legal consequences of unconditional surrender or to legal basis of governmental powers exercisable by control body post defeat.

Only study on subject now available here is your memorandum of 12 February 1944. Also consider desirable if feasible your explanation to one of such officers of current United States views on such matters.

End

ACTION: CAD

CM-IN-4790 (6 Jan 45) DTG 05/1900A

SECRET

PERSONAL & CONFIDENTIAL. December 19, 1944.

Professor Sheldon Glueck,
Harvard Law School,
Cambridge, Massachusetts.

Dear Professor Glueck:

As a graduate of Harvard Law School and, since 1917, a sporadic though earnest student of the problem of world peace, may I take the liberty of commenting on your very interesting and timely book on War Criminals?

I confess I haven't yet had time to read through the whole of your work and will confine myself to your Chapter 1 and the first part of Chapter 3.

I could not agree more with your introductory remarks in Chapter 1, regarding International Law, and would like to take as my text the last sentence of your paragraph on page 15:

> "The law of nations is capable of growth; and there has never been a better opportunity to shape it to the desirable end of enforcing respect for its tenets."

Applying that principle to your Chapter 3, I believe you are overlooking an important opportunity to shape that law even more desirably, when you dismiss, rather cursorily, the possibility of punishing Hitler and his associates "for the crime of having initiated an unjust war", and take the position that it is sufficient to punish them for their atrocities.

The great trouble with International Law as an instrument of peace has been that it is based on the philosophy that war is a natural and lawful enterprise, provided the rules are observed, and consequently places its emphasis on making war pleasanter, rather than on trying to prevent it. To punish the Hitlerites and the Japs solely for traditional war crimes is merely to further strengthen this wicked doctrine. For we will be saying in effect: "Next time you go to war, behave yourselves like gentlemen and obey the principles of chivalry (which all writers recognize as the basis of the Rules of War) and no one will have any objection". I cannot feel that this is to "shape International Law" to its most desirable end, even though it may help to enforce respect for the Hague Convention, and thus perhaps make the next war less barbarous. To my mind, we will never put an end to war till we put an end to the German and Jap "war-worshipping" philosophy. This can only be done by declaring

war to be a common crime, as we did with duelling and by enforcing that declaration. It will never be done by limiting our punishment to violations of the "principles of chivalry".

At pages 37 and 38, you take the position that it would be very desirable for the future to establish that war is a crime, but that it cannot be done now. Specifically, you point out that because the Kellogg Pact "failed to make violations of its terms an international crime * * * * the legal basis for prosecutions for violations of the Pact of Paris may be open to question, though the moral grounds are crystal clear".

I inclose a memorandum which I recently prepared in the hope of avoiding that legal obstacle upon which all discussions of this question seem to founder. My proposition is a very simple one: Most writers seem to agree that the Kellogg Pact at least declared a war of aggression to be unlawful, even though it may not have made it a "crime". If this be so, must it not follow that, when Hitler and his cohorts entered Czechoslovakia, etc., "vi et armis", they were not "lawful belligerents" under International Law and therefore have no defense to a criminal charge of murder and banditry. For I take it "Lawful belligerency" is a soldier's only defense to a charge of murder.

I note your comment on page 230 to the effect that Mr. Kellogg's interpretation of his own Pact leaves a "hole bigger than a barn door". You quote his remarks to the effect that "even under the Pact every nation is free at all times, regardless of treaty provisions, to defend its territory from attack and invasion and <u>it alone is competent to decide</u> whether circumstances require recourse to war in self defense". This is the objection frequently made to all proposals to outlaw a war of aggression. How do you define aggression: It seems to me that Mr. Kellogg himself indicates the answer to this in the next sentence which you quote: "If it (a nation) has a good case, the world will applaud and not condemn its action." Isn't there a necessary and obvious corollary: "If a nation has a bad case, not only the world, but (under my theory) a properly constituted tribunal would condemn its action."

Duelling has been outlawed. Yet "self defense" is still a valid defense to a charge of murder, even though no one but the defendant himself is competent to decide when he must shoot. But this has not put a "hole bigger than a barn door" through the law against murder. It merely puts the burden on the defendant to establish the fact of justifiable self defense.

In the instant case, as Mr. Kellogg points out, a nation or its leaders would have to prove that it was defending its territory "from attack or invasion", thus ruling out Hitler's arguments regarding "economic encirclement", the "Crime of Versailles", or similar questions

of National Policy. For these are expressly ruled out by the Pact, just as the laws against duelling rule out the defense of "personal honor" or other personal problems except self defense, to a charge of murder. But this does not require a formal definition of "aggression". Nor does it raise the old bogey of defining a "just" or "unjust" war, or of studying the "origins". War, like homicide, is unlawful, unless a plea of self defense is made and proved.

No one could have a worse case than Hitler or Tojo on which to base an argument that "defense of their territory from attack or invasion" justified their aggressions. So let's make the best use of it we can, by using their "bad case" to make "good law". "The law of nations is capable of growth; and there has never been a better opportunity to shape it to the desirable end of enforcing respect for its tenets."

By way of background, to give you perhaps the "state of mind" from which my thesis arises, I inclose a somewhat verbose and disorganized extempore speech which I made to a group (which I suspected of containing many isolationists), the day before I entered the service.

Yours very truly,

WM. C. CHANLER,
Colonel, GSC.

Incls.

WCC/cre

P. S. The inclosed memorandum was prepared by me unofficially, as a lawyer. However, I have submitted it to authorities here who are officially looking into the question, so I must ask you to consider the memorandum itself as personal and confidential. It would not do to have it come out that this proposal was under official consideration. However, discussion of a theory of law per se can hardly be considered a "military secret".

LAW SCHOOL OF HARVARD UNIVERSITY

CAMBRIDGE 38, MASS.

December 22, 1944.

Col. William C. Chanler, GSC
War Department
Civil Affairs Division
Room 3B-920
Pentagon Building
Washington 25, D. C.

Dear Col. Chanler:

It was very kind of you to send me a letter enclosing your analysis of a memorandum on lawless aggression as a basis for punishing the Nazi leadership.

This comes to me at a time when I am especially busy, and I have, therefore, been able only to glance through your letter and memorandum. At this stage, let me say two things: (1) I had seriously considered including in my book some such line of argument as you present, but decided finally that there would on the whole be more harm than good in stressing this approach at the present juncture. (2) Even a quick reading of your memorandum impresses me with the clarity, cogency and persuasiveness of your arguments and analogies. In fact, had I had the benefit of your memorandum before I finally sent in my manuscript to the printer, I would have seriously reconsidered the omission of the Kellogg Pact approach to liability.

When I have had a chance to study your memorandum more carefully, I shall write you again, and in the meantime, with great appreciation and best wishes for the holiday season, I am

Sincerely yours,

/s/ Sheldon Glueck
/t/ Sheldon Glueck
Professor of Criminal Law
and Criminology

SG:mw

COPY

MEMORANDUM 12 February 1944

Subject: The Consequences of Unconditional Surrender under International Law.

1. It is apparent from the recent discussions regarding the terms to be included in an instrument of unconditional surrender that considerable confusion exists as to the consequences of such a surrender under international law. It is the purpose of this memorandum to seek to clarify this subject.

2. Leading writers on international law are generally agreed that there are three ways of terminating a war: (1) By a mere informal cessation of hostilities; (2) By a peace treaty usually preceded by an armistice, and (3) By total and final defeat of one of the belligerents by the other. Oppenheim, 6th Edition, Vol. II, Para. 261, et seq; Hall, 7th Edition, Para. 197, et seq; Hyde, Para. 904-906, incl.; Feilchenfeld International Economic Law of Belligerent Occupation, 389-394, incl.

3. With the first we are not concerned. It has only rarely occurred in modern times and is not likely to occur as a result of the present war. The second is the usual and most familiar method. It generally takes the form of a temporary cessation of hostilities by an armistice entered into either at the request of one of the parties or at the suggestion of a neutral power offering its "good offices." A peace conference is then called, and, if a peace treaty results from the conference, the war is formally terminated. If negotiations break down hostilities are presumably resumed. This is the method adopted at the end of the last war. The trouble was that the armistice was granted before the German military forces were actually totally defeated in the field. This permitted the German Government later to convince the German people that their armies

had never actually been defeated but had merely ceased fighting upon being offered acceptable terms, which, after they had voluntarily disarmed, they claimed they never received.

4. Presumably, in order to prevent a recurrence of such a situation, President Roosevelt and Prime Minister Churchill have stated that it would be the policy of the Allies in the present war to continue the struggle until the "unconditional surrender" of Germany. While no definition of these words will be found in text books on international law -- in fact, they are generally not even mentioned -- it would seem that they could have but one meaning: that Germany acknowledges her total and final defeat and throws herself upon the mercy of the Allies. When then are the consequences of such a surrender?

5. As stated above, the third recognized method of terminating a war is by the total and final defeat of one combatant by the other. It is classically referred to as "Debellatio". Other writers refer to it as "conquest" and "subjugation". The commonly accepted concept of these words is that the armed forces of one combatant are either destroyed or captured by the other, so that the defeated country is no longer able to offer any resistance whatever and is therefore completely at the mercy of its adversary. But it is obvious that this state of affairs would also be brought about if all of the military commanders surrender their forces unconditionally and permit them to be disarmed and made prisoners of war, even before they are physically destroyed. And the same result would seem necessarily to follow also if the recognized government of the country executed an instrument acknowledging its defeat and ordered all military

commanders to surrender, provided of course that these orders are in fact promptly carried out.

6. Under any of the above situations the war is permanently and finally terminated. The conquered nation is without power further to resist and is completely at the mercy of the conqueror.

7. Under these circumstances it is universally conceded under international law that the conqueror has the right to dismember or annex the conquered state, and thus destroy its very existence. All that is necessary is a unilateral declaration of annexation or partition. No treaty or other agreement of any kind is necessary. After annexation or partition no question of international law survives as to the relations between the conqueror and the conquered. So far as international law is concerned, the annexing state, or in the event of a partitioning, the newly created state becomes the legitimate sovereign and has the same absolute and complete dominion over the persons, property and territory of the conquered country as it has within its own boundaries.

8. It follows that there is no need for an elaborate armistice or other agreement, setting forth the rights and powers of the Germans and the Allied powers pending final action. All that is needed is a simple and broad instrument signed by the Germans conceding their total and complete defeat and unconditional surrender, accompanied and followed from time to time by such proclamations or orders as may seem necessary or desirable. Such an instrument is not in the true sense an "armistice" at all, nor is the period following it an "armistice period." There is an instrument of surrender by Germany, and instructions to Germany by the Allies. It is a misnomer to speak of this as an "armistice", or of the period following a surrender and before final action is taken as a "post-armistice period."

It is simply a "post-surrender period."

9. But what are the rights of the conquering state during this "post-surrender" period? With one or two exceptions, this question is largely theoretical. The rights of an occupying Power under international law are sufficiently broad to make unnecessary a decision whether they are binding. But it is worth consideration as we will no doubt wish to change the laws of the country, and to use all German resources for the war against Japan. It may be argued that these two courses were forbidden by the Hague Convention.

10. Writers on international law appear somewhat uncertain as to this question, and frequently confuse the relationship with that existing during a temporary armistice before the final defeat of either adversary. The rights of an occupant of enemy territory during such an armistice are clearly defined under international law. In fact, the only phase of this entire field adequately covered by writers on international law deals with the rights of an occupant of enemy territory before the final cessation of hostilities.

11. The situation before an armistice is well defined and universally understood. After a temporary armistice it is generally conceded that, unless otherwise provided in the armistice terms, the rights and duties of the occupant over territory which he had occupied by force of arms before the armistice remain subject to the Hague Convention and general rules of international law. While there is considerable discussion in the text books as to the rights of an occupant of enemy territory occupied pursuant to the terms of a temporary armistice, such discussions are generally more or less theoretical. Presumably, if as a part of the terms of an armistice, one party is permitted to occupy certain additional territory of the other

pending the consummation of a peace treaty, the rights of the occupant will be defined by the terms of the armistice -- and usually this document will provide that the occupant shall have all the powers of an occupant of enemy territory under international law. Similarly, such an instrument should define the rights of the parties over unoccupied territory.

12. The basic concept of international law and of the Hague Convention covering the situations just described in that the occupation is purely temporary and precarious. Obviously before any armistice is entered into, and while actual hostilities continue, the outcome of the war is uncertain and the occupied territory may be liberated by its own forces. Similarly, during a temporary armistice before the total defeat of either party, entered into for the purpose of negotiating a peace treaty or for other reasons, either party is at liberty, if no peace treaty is agreed upon, to re-open hostilities. Accordingly, the tenure of the occupant over the territory of his enemy is again precarious and temporary. Nearly all of the rules of the Hague Convention are based upon this element of precariousness. The occupant is forbidden to change the fundamental law of the country except so far as may be made necessary by military exigencies for the sound reason that his occupancy may be temporary. There is no purpose in changing the fundamental law of a country which may soon be returned to its original and legitimate sovereign.

13. But in the present instance we have an entirely different situation. The enemy is totally and finally defeated. The rights of the conqueror are no longer precarious or temporary. There is no prospect or possibility of a resumption of hostilities. The conqueror may, simultaneously with the unconditional surrender, issue a unilateral declaration

of annexation or partition, and that ends the matter. The German State ceases to exist as a legal entity.

14. It is submitted that under such circumstances the Allied powers may take such less drastic steps pending their determination as to the final steps to be taken as they see fit. All that is necessary after the execution by Germany of an instrument of unconditional surrender, is to issue such instructions to the German people and to the German government as the Allied forces may from time to time deem necessary. These may be issued in the form of proclamations, orders, or instruction issued in the name of the Allied commander.

15. But as a matter of fact, the question of whether the rights of the Allies are limited is largely theoretical. The requirements of the Hague Convention are not burdensome; it seems that the provision regarding respecting the laws of the occupied country and limiting requisitions to the purposes of the occupying forces are the only provisions of the Hague Convention which might be troublesome. Presumably, property rights would be respected as required by the convention. Anything coined for war purposes would be charged to Germany as a part of the reparations at the final settlement. But certainly, we do not want to wait for final action before seeking to put an end to the Nazi Corporate State and seeking to re-introduce Democratic principles; nor do we want to wait before making such use of German resources as we desire for the war against Japan. We may take both steps by also taking final action. Why should we have to wait till final action is taken?

16. It might be pointed out in this connection that even if objection were raised that some steps such as this were prematurely taken, this does not affect their ultimate validity under international law. The

original announcement of annexation of the South African Republic by Great Britain during the Boer War was premature, as the Boers had not yet been finally defeated in battle; nevertheless, when all resistance was overcome, all writers on international law agreed that the annexation became legal under international law.

17. So here, if any objection should be made that it was a violation of the Hague Convention to change the fundamental law of Germany or use her resources for other purposes than those of the Army of Occupation before a final and formal instrument in the nature of a peace treaty was agreed upon by the Allied powers and imposed upon Germany, the answer is that such acts would become valid the moment the final step had been taken. The argument therefore that there is an interim period before the final consummation of a peace treaty during which the rights of a conquering power are limited is purely theoretical. Whatever rights it may take would become legal and valid at the time of the final consummation of the peace treaty or Declaration of Partition.

18. Similarly, if the argument be advanced that after the unconditional surrender of Germany the war with Japan may not be terminated: it being from a realistic standpoint inconceivable that Japan should be able to cross the whole of Europe and Asia to rescue Germany, the continuance of the war with Japan would hardly seem to have any bearing on the proposition that the war with Germany is totally and finally terminated by her unconditional surrender. But even if a theoretical argument to this effect were made, it would have no force unless in fact Japan ultimately did succeed in liberating Germany from control of the Allies. The case in this respect would be exactly similar to that of South Africa during the Boer War. The acts taken by the conqueror become valid and are recognized

as such under international law when the war is finally and formally ended.

19. In the opinion of the writer, however, it seems that the suggestion that the Hague Convention is binding on a conquering power after the total and final defeat of its adversary is unsound. The element of uncertainty upon which the Convention is based is lacking, and it seems illogical to limit the conqueror who may destroy the very existence of the conquered state from taking less drastic steps while determining what final action he desires to take. Such a rule would result in forming the hand of the conqueror to exercise his rights to the fullest extent at once -- a result which would clearly be contrary to the underlying philosophy and trend of international law.

20. But in any event, any doubts which may arise on this issue need not trouble us at this juncture. Any theoretical violation of the prohibition against changing the laws of Germany would be cured when the ultimate fate of Germany is determined and set forth, either in a unilateral declaration of partition or treaty with a new German State. As to any use that might be made of requisitioned resources for the war against Japan, they would merely entitle Germany to a claim for credit against reparations, and in any event, can be disposed of at the time of final settlement. If any doubt exists, it can be resolved by including in the instrument of surrender, not as an "agreement" but as a declaration by Germany that "all her military, naval and air equipment and all her resources are surrendered unconditionally to the Allies".

21. Certainly it is not necessary to limit ourselves by an elaborate agreement to accomplish these two proposals. It is submitted that the proper course is a simple instrument of surrender, accompanied by an elaborate a set of preliminary unilateral instructions as may be

desired, but with a clear reservation of the right to issue such further instructions from time to time as may seem desirable.

W. C. CHANLER
Lt Col F.A.

INFORMAL MEMORANDUM PREPARED IN MAY, 1944, AT REQUEST OF COLONEL CHANLER, BY PROFESSOR PHILIP JESSUP, PROFESSOR OF INTERNATIONAL LAW, COLUMBIA LAW SCHOOL.

SUBJECT: The Nature and Consequences of Unconditional Surrender under International Law.

1. Official acceptance of the concept that war is to be waged against Germany and Japan until there is an "unconditional surrender" of each of these two Powers in turn, has not as yet been clarified by a full analysis of the nature and consequences of unconditional surrender. Since there is no recent historic case in which there has been a literal use of such a total submission by a defeated power, the consequences are not obvious.

2. It will be indicated in this memorandum that the legal consequence of unconditional surrender may or may not be the termination of the war ipso facto, depending in part upon the factual situation at the time and in part upon the subsequent conduct of the Allies. The question whether or not a state of war continues after the cessation of hostilities through an unconditional surrender, necessarily affects the nature of the occupation of enemy territory and the powers of the occupant. Any precedent set now by the handling of the situation in Europe will inevitably affect future action in the Pacific Area. Accordingly this subject is of direct concern to the Occupied Areas section of the Navy which has responsibility for planning now for the eventual occupation of certain enemy territories in the Pacific.

3. In view of the unprecedented nature of unconditional surrender in the literal sense of those words, this memorandum is arranged under three main headings:

I. What is an unconditional surrender?

II. How is an unconditional surrender made and accepted?

III. What are the legal consequences of unconditional surrender?

I. What is an unconditional surrender?

4. It has become so usual in modern wars to bring hostilities to an end through an armistice followed by a treaty of peace, that it is difficult to find precedents for unconditional surrender. The Hague Conventions never employ the term. The Fourth Hague Convention does deal with "capitulations" and with "armistices". A capitulation, as defined in the U. S. Army Manual FM27-10 (1940) Section 244, "is an agreement entered into between commanders of belligerent forces for the surrender of a body of troops, a fortress, or other defended locality, or of a district of the theater of operations." It is clear from this definition, as from Article XXXV of the regulations annexed to the Fourth Hague Convention, that a capitulation is a contractual arrangement, and that it is an arrangement for a surrender of a portion only of the enemy forces; it is not used to refer to the total submission of the enemy state. Article XXXV of the Hague Regulations evidently contemplates that a capitulation will contain reciprocal obligations since it says they must be "scrupulously observed by both parties." The capitulations of Santiago and of Manila in 1898 are typical. [1]

1 TM 27-251 (1944) Appendix D and E.

5. An armistice also is a contractual arrangement; Article XXXIX of the Hague Convention refers to "the contracting parties," to an armistice. FM 27-10, Section 251, says that an armistice should if possible "be agreed upon in writing and duly ratified...." Section 253 of the same Manual states that "An armistice is not a partial or a temporary peace; it is only the suspension of military operations to the extent agreed upon by the parties." [2] An Armistice may, like a capitulation, provide for the surrender of specified arms, ships, bodies of troops or the like, as was done in the Armistice of November 11, 1918 between the Allies and Germany, and in the armistice of June 22, 1940 between France and Germany. [3] No case has been found in which an armistice arranged for the complete and unconditional surrender or submission of a defeated power. There is no reason in principle why an armistice should not arrange for the surrender of all the arms and all the ships and all the fortresses and all the troops of the defeated Power. It would remain true that by its very nature an armistice is an agreement providing for a temporary, interim condition involving certain specified suspensions of hostilities and looking forward to the conclusion of a treaty of peace. By virtue of the fact that it is itself a contractual arrangement it recognizes the continued existence of the defeated Power as a State with capacity to contract and

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2 The appropriate sections of the Manual and of the Hague Regulations are printed in Hackworth's Digest of International Law, Vol. VI pp. 416-417.

3. Summarized in Hackworth's Digest, Vol. VI pp. 422-426.

to carry out the terms of a contract, and by anticipation of a later treaty of peace, it implies the continuance of that status.

6. Unconditional surrender, in the literal sense of the term, is identical with what Grotius calls "pure surrender", which he says "makes the one who surrenders a subject, and confers the sovereign power on him to whom the surrender is made." He exemplifies his meaning by quoting Publius Cornelius Lentulus in regard to the Carthaginian State at the end of the Second Punic War:

> "Let the Carthaginians entrust themselves to our decision, as conquered peoples are accustomed to do, and as many have done heretofore. We shall then look into the matter, and if we shall have granted anything to them they will be grateful to us; (586) for they will not be able to call it a treaty.
>
> "That, furthermore, makes a very great difference. So long as we make treaties with them they will always be finding pretexts, as if wronged in respect to some point of the treaty, in order that they may break it. For openings for controversy always remained, since many points are of doubtful interpretation. But when we have taken away their arms from them, as having surrendered, and have brought their very persons under our power, then at length they will understand that they have nothing that is their own; then they will lose heart, and whatever they may have received from us they will gladly accept as if bestowed from another's bounty." 4

Grotius concludes that the victor has absolute power and full legal rights to do as he pleases with respect to the vanquished but that an unlimited use of this right and power may not be wise. Textor, on the other hand, discusses the practice in Roman times of surrender "into the good faith"

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4 De Jure Belli Ac Pacis Libri Tres (1625) Vol. II, pp 825-826 of Translation in Carnegie Classics of International Law.

of the victor.[5] He deduces from a number of historical instances that there was a sufficiently established meaning to such a formula to impose, in certain cases at least, a legal obligation on the victor not to exercise the fullness of his power upon the defeated enemy. He would read intent of agreement into the surrender when the situation of the defeated party was not utterly hopeless. In other words he seems to contemplate an implied agreement whereby the surrender was made not in fact unconditional, but conditional. His discussion clearly implies, however, his agreement with Grotius as to the nature of an unconditional surrender.

7. Most of the older writers and many of the modern ones, recognize unconditional surrender as a special situation which they usually discuss in connection with the termination of war. It is what Hershey refers to as the "deditio or unconditional surrender" of the Roman practice.[6] What is in mind is a situation in which a defeat is so complete that there is no occasion for negotiating an armistice or other contractual arrangement; the defeated party is either extinguished or so exhausted as to give up completely and put himself at the mercy of the victor. This is the type of situation to which Gentili refers in saying that wars are settled when "either the arms of

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5 Synopsis of the Law of Nations, (1680), Vol. II, p. 305 of Translation in Carnegie Classics of International Law. Textor relies also on Grotius, op. cit. p. 827.

6 The Essentials of International Public Law and Organization (1927) p. 49.

the conquered are taken from them, or they are laid down by agreement, or they may even be thrown down through discouragement."[7] To state the extreme case by way of illustration, one may imagine the employment of a gas or other new method of destruction totally obliterating by death every person in uniform or capable of bearing arms, together with the destruction of all planes, tanks, ships and guns and the razing of all war plants. Representatives of the government of the state so destroyed might remain alive to communicate to the victor the fact that they unconditionally surrender, that resistance is at an end and that the victor is completely free to do with them and their territory as he pleases.

8. In less extreme form perhaps, this is in fact what is meant by the term debellatio as that term is used in the literature of international law. According to Nys, one of the most competent legal historians in the field of international law, the term debellatio comes from the Latin debellare "where are juxtaposed the words 'de' designating the end and 'bellum' signifying war."[8] It is a debellatio when the enemy State is brought to its destruction and subjugation. "There are no longer two states face to face."[9]

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7 De Jure Belli Libri Tres (1598) Vol. II, p. 360 of translation in Carnegie Classics of International Law.

8 Le Droit International, (1906) Tome III, Ch. II, pp. 720-721.

9 Varraes, Les Lois de la Guerre et La Neutralite, (1906) Vol. I, p. 286.

So Fauchille says:[10] "The complete submission of one of the belligerents to the other (debellatio) puts an end to the war by the obliteration of the Political existence of one of the adversaries. It is a State, insofar as it constitutes a juridicial entity, which disappears, which dies."

Ruiz Moreno[11] identifies debellatio with "the absolute submission of the conquered." Accioly[12] calls it the "complete submission or subjection of a belligerent." Several writers are at pains to point out that debellatio and conquest are not identical. Thus Strupp[13] remarks that "Debellatio must not be confused with conquest of which it is simply the condition. Conquest alone does not suffice to create this juridical situation called debellatio....The will (animus) plus the possession creates this juridical situation. There is necessary also a moral element, the will (animus) utterly to destroy the adversary. It is this will, coupled with the actual detention (Possessio) of the territory, which creates the juridical situation where, by virtue of the norms of public international law, the conqueror can appropriate to himself the enemy country and terminate the war. It is essential that the sovereignty of the enemy state can no longer be exercised, that the international legal personality capable of acting has disappeared. A partial conquest of territory does not suffice."

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10 Traite de Droit International Public, (1921) Vol. II, Book VI, pp. 1030-1031.

11 Derecho Internacional Publico, (1941) Vol. III, Par. 411.

12 Tratado de Direito Internacional Publico (1935) Vol. III, p. 428.

13 Elements du Droit International Public, Universal, European et Americain, Book III, Chapt. X, p. 346, (1927).

Usage seems to indicate that the term debellatio is applied to a concept which is sharply to be distinguished from conquest, and also from that which is called by many writers "subjugation".[14] Subjugation, according to Oppenheim, may "correctly be defined as extermination in war of one belligerent by another through annexation of the former's territory after conquest, the enemy forces having been annihilated."[15] "It may in fact be possible," says Hyde,[16] the authoritative exponent of the United States' interpretation of international law, "for a belligerent to occupy the entire domain of its enemy, and after having overcome all resistance, to destroy its life as a state and to appropriate its territory as the fruits of victory. Peace may ensue as the direct consequence of the act of subjugation, and perhaps be fairly attributable to it. In such case the termination of the war is marked both by the acquisition by the conqueror of the right of sovereignty, and by the actual submission to his will of every hostile interest." Accioly supports Oppenheim's view that "the complete submission or subjection of a belligerent (debellatio)....presupposes the conquest of territory but....ought not to be confused with it." He points out that in World War I, the greater part of the territory of Belgium and of Serbia were conquered by the Central Powers without ending the war since there was no annihilation of the political

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14 Phillipson, however, (Termination of War and Treaties of Peace (1916) p. 9) treats debellatio and subjugation as identical.

15 International Law, 6th ed. p. 325.

16 International Law (1922) Vol. II, p. 823.

existence or extermination of the armed forces of these two countries.[17] Comparable examples in the current war are numerous. In these situations, there is a conquest of the territory without a surrender of the sovereign of the territory. There might of course be an abject and unconditional surrender of a dispirited enemy without the conquest of any territory. In such a case however, the evidence of submission and unconditional subjection to the will of the victor would have to be extraordinarily clear in order to have it appear that there was a debellatio. It is, however, merely a question of proof. The fact of conquest of territory (and perhaps its subsequent annexation) is irrefutable proof of subjugation but not an inherent essential thereof. Total and irremediable defeat is the significant fact. Thus if German forces were simultaneously defeated on half a dozen fronts outside of Germany following a last desperate massing of all available manpower outside of that country; if each one of the armies on the several fronts surrendered unconditionally to the commander of the United Nations forces opposite them; if at the same time the continuance of the blows of overwhelming air power had completed the destruction of the industrial power of Germany and finally convinced the Nazi government of the futility of continuing the struggle; and if this were followed by the unconditional surrender of that government, then there would exist the fact of total defeat even though no allied soldier had set foot on German soil. It would be irremediable because it is not realistically conceivable that

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17 Tratado de Direito Internacional Publico (1935) Tomo III, Sec. 1964.

Japan, the only remaining strong ally of Germany, could proceed across Asia and Europe and rescue her Axis partner. Occupation of the enemy territory is therefore not an essential element of total defeat; particularly in the days of air power. It is perhaps true that before the development of air power, it would have been difficult to establish the actuality of the defeat without occupation but this is not necessarily so; it would have enhanced the difficulty rather than demonstrated the impossibility of proof.

9. In summary it may be said that an unconditional surrender is a total yielding of a defeated Power having as its purpose and as its result the placing of the defeated Power in the hands of the victor without terms or conditions, not as a matter of contract or agreement, but as the result of such overwhelming defeat as to leave in the mind of the defeated Power no choice except to throw himself upon the mercy of the victor.

II How is an unconditional surrender made and accepted?

10. The absence of modern precedents for unconditional surrender makes it possible to say that there is no traditional formula or form for such an act. The surrendering party must communicate his conclusion to the victor and he may do so through any device, that is by a parlementaire or under a flag of truce, through a neutral State, by radio broadcast, or otherwise. The conqueror would undoubtedly wish for assurance that the surrender was genuine and complete and unconditional. He would wish to assure himself from the military point of view that there was no trickery involved and that an acceptance of the surrender would not imperil his

forces or the success which they had already in fact attained. He might wish to make certain that the surrender would be given effect by certain definite actions to be taken by the defeated party and its forces. With these points in mind, it would be appropriate for the conqueror to require the surrendering party to formulate the surrender in a written document which would be subscribed in such a way as to bind the State. In appropriate cases it might well be necessary to have the signatures of both the highest civil or constitutional authority and the highest military authority. There is no reason why the conqueror should not specify what signatures he wishes to have on the instrument in order to be certain that the act of surrender is concurred in by all influential groups within the defeated country. The conqueror might further indicate what specific actions on the part of the defeated state must be taken if the surrender is to be accepted in the sense that fighting will cease. The conqueror might stipulate that the instrument of unconditional surrender should be a brief document testifying to the fact of total defeat and the State's recognition of the fact together with an acknowledgment that full power now rested in the conqueror to make such disposition of the defeated party as might seem to the former desirable. There might be a specific undertaking by the surrendering party to do such things or to comply with such orders as the conqueror might subsequently make known. Thereafter, the conqueror might from time to time, as convenient, issue in the form of orders, notices, or proclamations, instructions con-

cerning the conduct to be required of the defeated State and its inhabitants. It would be equally possible for the conqueror to make known at the outset at least some of the specific acts which is considered to be essential parts of the surrender and to require the surrendering party to incorporate mention of these acts and pledges to perform them forthwith. In the absence of such intimation by the conqueror, the surrendering party might frame a proposal of its contemplated action to make its surrender effective and lay such proposal before the conqueror. The conqueror might then accept or reject; he might indicate what changes or additions he desired to have made before he was willing to accept the surrender.

11. When the document was in shape satisfactory to the conqueror and was duly executed and submitted to him, he might for the sake of the record make an appropriate notation thereon to the effect that he had accepted the surrender. But such a subscription by the conqueror is quite unnecessary. Even if the acceptance is noted upon the instrument of surrender, this would not make the instrument a contract, or, in the terminology of international law, a treaty. As the evidence compiled in Hackworth's Digest shows, a treaty is an instrument which records an agreement between two or more states.[18] An instrument of unconditional surrender such as has been described is not an agreement, in the juridical sense of the term. The conqueror promises nothing. The surrendering party may or may not make a promise. In its simplest form, an instrument of surrender is a

18. Vol. V, pp. 1-2

bare recital of a fact — the fact of complete defeat and the fact of the acknowledgment of this defeat which places the defeated party wholly in the hands of the victor. The additional statements which may be made in the instrument may take the form of promises by the surrendering state but as such they are supplementary to and not an inherent part of the surrender itself.

12. Undoubtedly, if the conqueror wishes so to do, he could have the unconditional surrender embodied in a treaty which might take either a unilateral or a bilateral form. Thus Ayala, writing in 1581 as Judge Advocate General of the Spanish Army in the Low Countries, refers to a category of treaties "in which terms were dictated to the vanquished in war. For since all their property had been surrendered to the stronger in arms, it was within his right and discretion to say what part thereof he purposed as victor to keep and in what to mulct them."[19] Whether or not such a treaty is imposed upon a defeated enemy, it may be executory or fully executed in form. In other words, it may express an agreement of the parties whereby one or both undertake to do or to refrain from doing certain acts after the treaty enters into force; or it may like some treaties of cession or boundary treaties, record a completed factual situation. If the treaty is merely the recording of a completed fact, the legal nature or consequences of the fact are not determined by the inclusion in such an instrument since they would have the same effect if never embodied in a document but merely expressed

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19 On the Law of War (1582) Vol. II, p. 76 of the translation in Carnegie Classics of International Law.

orally. Indeed it is possible in principle and in theory to contemplate such an extirpation of a defeated nation as might leave no authoritative voice to give expression to the fact of subjection and surrender. A situation of this kind is not to be anticipated.

Although an unconditional surrender may thus be embodied in a treaty without altering the fact of total submission or the legal consequences of such submission, such a treaty would have to be drawn with great care to avoid an unexpected and undesired legal result. If the treaty were carelessly drawn, it might well take effect like the usual treaty of peace and absorb into itself all of the sources of legal right upon which the victor might thereafter depend. In other words the victor would lose that unrestricted power over the defeated enemy which results from a debellatio, and would in place thereof have only such powers as might be derived from the written instrument. The political complexities of disputed interpretations is one of the obvious circumstances attendant upon such a situation. Moreover the recognition of the defeated enemy as a contracting party might be misinterpreted to constitute a denial of that complete destruction which the term debellatio envisages. These observations lead to the conclusion that the situation would be more clear-cut if the treaty form were wholly avoided and the procedure suggested in paragraphs 10 and 11 were followed.

III. What are the legal consequences of unconditional surrender?

13. The principal issue to be discussed under this heading is whether an unconditional surrender results in the termination of the war, and if so whether this is an automatic and necessary result of the surrender or whether it is contingent upon various factors. This is a legal question. If the war may be thus terminated, it is equally important to consider what the consequences are and whether they are desired. This is in part a legal and in part a political question.

14. It is well established that war may end in one of three ways:

I "By the de facto cessation of hostilities on the part of both Belligerents, and a renewal, de facto, of the relations of peace.

II "By the unconditional submission of one Belligerent to another.

III "By the conclusion of a formal Treaty of Peace between the Belligerents."

The statement quoted is that of Phillimore in effect translating the words of Heffter, but the same thought is expressed, inter alia, by Merignhac, Nys, Longuet, W. E. Hall, Arnold Bennett Hall, Oppenheim, Phillipson, and G. G. Wilson.[20] Bustamente

20. Phillimore, Commentaries Upon International Law, (3rd Ed. 1885) Vol. III, P. 774; Merignhac, Les Lois et Coutumes de la Guerre sur Terre (1903) p. 323; Nys, Le Droit International,

adds as a "very exceptional" fourth case "the declaration made unilaterally by some one of the belligerent parties or by all of them." This seems to envisage something different from Strupp's "declaration of unilateral will" which that author seems to include as part of Phillimore's second category of unconditional submission.[22] Hyde suggests an example of unilateral termination which probably illustrates Bustamente's category; the Joint Resolution of the Congress of the United States of May 15, 1920 bringing to a close the state of war between the United States and Germany.[23] The resolution of the Chinese Parliament on September 3, 1919 was similar.[24]

15. It is unnecessary to deal here with Phillimore's first category of de facto cessation of hostilities, which as several writers have pointed out, is rate and unsatisfactory.[25]

(1906) Vol. III, p. 720; Longuet, Le Droit Actuel de la Guerre Terrestre (1901) p. 261; W. E. Hall, International Law, (4th ed.) p. 579; A.B. Hall, Outline of International Law, (1915) p. 92; Oppenheim, International Law (2nd ed.) Vol. II, p. 322; Phillipson, Termination of War and Treaties of Peace, (1916) p. 3; Wilson, Cyclopaedia of Law and Procedure, Vol. 40, p. 393.

21. "Manual de Derecho Internacional Publico" 2nd Ed., p. 603, 1942.

22. "Elements du Droit International Public, Universel, Europeen et Americain," Book 3 - Chap. X, p. 347, 1927.

23. International Law, Vol. II, (1922) p. 822

24. Lauterpacht, without dissent, calls attention to Hyde's fourth category in a note to the Sixth edition of Oppenheim; Vol. II, p. 464 note.

25. See especially Phillipson, Termination of War and Treaties of Peace, pp. 3 ff., and W. E. Hall op. cit. p. 586.

It is also outside the scope of this paper to deal with treaties of peace. Most writers who deal with the subject make the undebatable statement that this is the most usual mthod in modern times for the conclusion of war. The point to be borne in mind, however, is the unanimity or at least broad prevalence of the view that a peace treaty is not the only means of ending war.[26] It has already been noted that it is possible to think of unconditional submission or surrender being incorporated in a treaty and that it may then be the treaty which brings the war to a conclusion.

16. The point requiring attention here is that raised in Phillimore's second category, according to which a war may be terminated by "unconditional submission." The purpose here is to supplement what has been stated in the preceding paragraphs concerning debellatio, by further examination of the nature of the act which according to the authorities brings about the termination of the war.

17. It is believed to be sound as stated by Hyde, Strupp, and Halleck that to effect the termination of the war, by what they describe as subjugation, there must be a coincidence of a factual situation and an intent. The requisite factual situation is that which has already been described as constituting a debellatio. The requisite intention may be examined.

26. Cf. in addition to other writers cited, Manuel Gonzalez-Hontoria y Fernandez Ladreda, "Tratado de Derecho Internacional Publico," Part II, p. 252, 1930.

It was natural for the writers thinking in terms of such cases as the Prussians annexations of 1866, and the British absorption of the Boer Republics, to stress the annexation of the enemy territory as an essential characteristic of subjugation.[27] It is true also of those earlier writers who stress the total extinction of defeated enemies in earlier times.[28] It appears on analysis, however, that this element of annexation of the territory of the defeated enemy is referred to more as proof of the intent to extinguish the defeated enemy state than as a separate factual condition which must be established for its own sake.[29] Certainly there can be no clearer proof of an intent to extinguish a state which has been defeated in war than to annex it and absorb it into the body of the victor. The international jurists who have analyzed the situation nevertheless seem to have in mind as the ultimate requisite, a clear intention on the part of the victor so to act as to make impossible the recrudescence of hostilities. There is a constant undercurrent of effort to keep the case of subjugation clear from that of occupation since

27. See, e.g., Nys, "Le Droit Internation", Tome III, p. 721, for reference to the absorption of Hanover, Hesse, Nassau and Francfort. Longuet, op. cit. p. 261 cites also the French acquisition of Madagascar. See other case in Ruiz Moreno, op. cit., sec. 411; Accioly op. cit. sec. 1964; Fauchille op. cit. sec. 1694-B.

28. E.G. Rachel, "Dissertations on the Law of Nature and of Nations," (1676) Vol. II, Sect. II, Carnegie Classics of International Law and Gentili, "De Jure Belli Libri Tres", Vol. II, p. 308, 1933.

29. N. Heffter, (op. cit. p. sec. 178) says "ordinarily" the conquered territory is added to that of the victor.

the basic characteristic of belligerent occupation from which flows much of the abundant law on the subject, is precariousness. As Strupp says in the passage already quoted, the essential thing is that "the sovereignty of the enemy state can no longer be exercised, that the international legal personality capable of acting, has disappeared." For this reason he requires evidence of the will (animus) utterly to destroy the adversary. 30

In Hershey's summary of Roman practice, deditio or unconditional surrender, is a separate category from conquest and appropriation of territory. It could not be denied by the logic of the position of Strupp or those who take a comparable view, that the victor, having utterly destroyed his adversary, might thereafter, acting from motives of liberality or merely from a keen sense of ultimate political realities 31 freely grant to the defeated enemy a new life in the same or other frontiers or under whatever conditions seemed wise. These are political, not juridical considerations. The emphasis which is placed upon them by the writers is due to the fact that they are frequently confronted with the necessity of treating the subject of conquest or subjugation as a means of acquisition of territory or

30. Feilchenfeld, International Economic Law of Belligerent Occupation, (1942) p. II.

31. Cf. Ruiz Moreno's invocation of the strength of the feelings of irredentism and nationalism and the history of Poland, op. cit. sec. 411. Vattel, op. cit. p. 311 remarking that "in this case, as in every other, good policy is in complete accord with humane treatment," quotes with admiration the reply which was made to the Romans by the ambassador from Privernum. In the Senate the ambassador was asked by the Consul, "If we show mercy, what reliance can we place upon the peace you ask of us?" The ambassador replied: "If you grant us peace upon fair terms, it will be certain and perpetual; if upon unfair terms it will not last long.

thereafter as involving the problem of state succession which inheres in a situation where one state is extinguished and another succeeds to it.[32] That problem of state succession is however separable. The problem here under discussion is the termination of war, not the soundness of title (sovereignty) acquired by conquest plus annexation or subjugation. There does not appear to be any inherent reason why the elements of subjugation which are invoked as bringing a war to an end need to be coupled with problems of succession to territory in order to deal adequately with the question of termination of war. Faced by a sorry plethora of historical precedents in which victors have been only too eager to absorb or partition defeated states, writers on international law have not felt impelled generally to deal with the situation where the victor has had the intelligence to deal justly with a helpless enemy which had unconditionally surrendered. "Now in every victory, if the conqueror waives any of his rights over the conquered,.....this is a matter of grace and not of obligation under the law of nations, as Alexander the Great said in his own case to the ambassadors of Darius . . ."[33] It may be repeated however, that the classical precedents which have had a distinct influence in developing the thought of the writers on international law and hence on that law itself, clearly recognize the possibility from a juridical point of view that the victor may not exercise his new rights to the full.[34]

32. Interalia Stockton, Outlines of International Law (1914) sec. 57.

33. (Textor, op. cit. p. 307.)

34. Gentili, op. cit. p. 353.

18. Accordingly the element of will (animus) which must be present with the fact of unconditional surrender in order to terminate the war, is the clear intent of the victor to proceed from that moment, not as a belligerent prepared to negotiate or even to impose a treaty of peace, but as one possessing by virtue of the surrender, the right to dispose of the vanquished as he pleases without reference to those rights and powers which flow from and inhere in the status of belligerent.

19. The refusal of the victor to exercise his right to annex the territories of the defeated state may make it more difficult to conclude that the war was terminated, but it interposes no absolute legal obstacle. It might occur, as so frequently it does in legal situations, that the eventual determination concerning the date of the end of the war would not be made until some time subsequent to the tender and receipt of the unconditional surrender. At that subsequent time it might well be relevant to consider the conduct of the victor after the surrender. If he proceeded forthwith to invoke in occupied territory the powers of a belligerent occupant under the Fourth Hague Convention, if he treated the surrendered armies of the enemy as prisoners of war,[35] if he proceeded to negotiate a peace treaty, there would be evidence that there was an absence of intent to bring the war to an end.

Much might be deduced also from the form or terms in which a surrender document is received or "accepted." If it is couched in the language of contract, particularly of an executory contract, this is evidence of the recognition of the

35. Lawrence, op. cit. p. 569.

continuance of the enemy as a power with capacity to contract and suggests strongly the analogy of an armistice which is a prelude to a peace treaty. One might therefore say that the surrender did not end the war. If, however, the victor proceeds after the surrender to deal with a defeated enemy as one having the right of total succession (whether or not that right is exercised); if it no longer assets against states which were neutral in the war the rights of a belligerent (although it may be privileged under international law to exercise other rights of a special character); if it announces the arrangements under which the defeated state will resume its life, as a unilateral rather than as a bilateral proposition; then one may be led to conclude that there has been a genuine debellatio and the termination of the state of war will be dated from the date of the surrender.

20. It is clear from the considerations set forth in the preceding paragraphs that there may be a surrender which does not result in a debellatio or termination of the war. Many historical examples of armistices could be cited in this connection. The Armistice of November 11, 1918, for example, constituted a yielding or surrender of Germany, but it was definitely conditional upon the terms set forth in it. It did not terminate the war but constituted merely the first step in which was essentially a negotiated peace despite the short shrift given the views of the German representatives.

21. It is apparent that no difficulty is involved in securing the result that even an unconditional surrender would

not bring the war to an end. The difficulty is rather in the reverse case where it is desired to demonstrate the required intent (animus) without going to the extreme of extinguishing Germany as a State. The simplest and clearest course of conduct would involve a statement at the time of the receipt of the unconditional surrender of the enemy that the state of war would continue. If such were the intention, it might then be added that the Allies would proceed to a complete belligerent occupation of the territory of Germany pending their unilateral decision concerning the future of Germany, and with a view to ensuring the compliance of the German people with the terms set forth in the surrender.

22. The fact that the victor is a group of powers rather than a single State, does not affect the situation juridically from the standpoint of the termination of the war. Naturally as Textor says: "And what about allies? Must the spoils of victory be shared with them? I think so, if the alliance be on equal terms and the victory have been obtained by the joint forces." The only real difficulty involved in the case of Allies as common recipients of an unconditional surrender is one resulting when the defeated state is extinguished and the allies become joint successors to it. The ensuing legal complexities would be great but are not within the scope of this memorandum.

23. As indicated already in this memorandum, having determined that it lies within the power of the victorious State

or States to have an unconditional surrender result or not result in the termination of the war, it remains a question of policy to determine whether or not it is desired to bring about one or the other result. These questions of policy are outside the scope of this memorandum but attention may be drawn briefly to examples of the potential consequences which should be analyzed:

A. From the international point of view; --

i. What would be the effect on our relations with the neutral States?

ii. Under Article 75 of the Geneva Convention of 1929, would it not be necessary to arrange at once for the repatriation of prisoners of war?

iii. Having in mind the fact that the war is being waged jointly against Germany and Japan jointly by some powers but against Germany only by other powers, what effect would this situation have in a different theater of war?

iv. If the war is terminated, do the regulations annexed to the Fourth Hague Convention relative to occupied territories cease to apply and if they do, what general guide of conduct is to be in force for the armies of all the allies who may participate in the occupation?

B. From the domestic American point of view; --

i. Under American constitutional law, is the power to terminate war lodged in the Congress which has power to declare war, or may the President as Commander in Chief bring the war to a close by accepting an unconditional surrender?

ii. What is the effect upon various war powers in general or under statutes of a termination of war?

iii. In particular what would be the consequences with respect to enemy alien property and trading with the enemy if the war were terminated by a debellatio instead of by the more usual treaty of peace?

C O N F I D E N T I A L

27 December 1944.

MEMORANDUM FOR MR. McCLOY:

Subject: Comments on Mr. Dorr's Memorandum on War Criminals.

1. I have read with interest Mr. Dorr's memorandum of 9 December commenting on my suggestinn regarding the effect of the Kellogg Pact on International Law in relation to the punishment of Hitler for his acts of aggression.

2. His first point is that there is a distinction between the Budapest Resolutions of the International Law Association, to the effect that the Kellogg Pact relieves a neutral of its obligations towards an aggressor, and my contention that therefore it also relieves a victim of aggression of its obligations. His argument is that the Budapest Resolutions are based on the theory that a violator of the Pact, by violating his obligation not to go to war "relieves the other signatories of certain correlative obligations -- even to the extent of permitting it to send its armed forces into battle with those of the violator though it has no other grievance". I am not aware that the obligations of a neutral towards a lawful belligerent stand on any different footing than the obligations of one belligerent towards another. The neutral must accord the belligerent certain rights, and a belligerent must accord another belligerent certain other rights, such as, to treat its soldiers and leaders as lawful belligerents and not as common bandits. These obligations all stem from International Law, and hence would seem to be of identical force and authority in relation to a neutral as to a belligerent. If a violation of the Kellogg Pact relieves a signatory of its obligations towards the violator as a neutral, I can see no reason why it does not likewise relieve it of its obligations as a belligerent.

3. Mr. Dorr's remaining points raise the real issue in this discussion: He queries whether it was contemplated by the signatories of the Kellogg Pact that the consequences which I suggest should flow from it, and whether therefore, particularly in the absence of specified sanctions, the Pact can now be held to have had such consequences. But the same argument is equally applicable and, indeed, has been applied by International

lawyers of the Jessup-Hyde-Borchard School, to the Budapest Resolutions, with which they disagree on the very grounds raised by Mr. Dorr.

4. These arguments may well support the proposition that it would be improper to punish Hitler for a violation of the Pact. But that is not what is here proposed. The present proposal is based simply on the proposition that the Pact must have had some meaning and effect, that that effect must have been to make a war of aggression unlawful, and that certain legal consequences must follow from that change in the basic concept of International Law.

5. Thus the real question posed by Mr. Dorr, and in fact the real question involved in this entire subject, is whether, because the Kellogg Pact did not prescribe specific "sanctions", or because there is no evidence that the legal consequences now sought to be drawn from it were foreseen, considered and accepted by all the signatories prior to its execution, we must write off the Pact as having accomplished nothing at all.

6. The views advanced by Mr. Dorr are similar to those contained in the informal JAC memorandum. They are also similar to the views expressed to me on this subject by Dr. Philip Jessup of Columbia Law School, who writes me that a number of other eminent writers on International Law, such as Borchard, Hyde, etc., agree with him, that the Budapest Resolutions are wrong, although he lists a number of other professors of International Law, such as Quincy Wright and Clyde Egleton who, he says, would take the view herein advocated. I think it is fair to state that Mr. Dorr's view is in accordance with what we might call the more accepted theories of writers on International Law, and I think it is pertinent therefore to consider how much weight should be given to their views.

7. In considering the problem from this angle, we must bear in mind that what they call "International Law" is not "law" in the ordinary sense at all. There is as yet no Court which can pass upon the validity of their views as to what is a lawful war or what are the rights of one belligerent towards another in such a manner as to make its decision

binding upon the belligerents. The only way in which their views ever come to a Court Test is in an action for damages alleged to have been sustained by a private owner of property in the course of the war, at the hands of a belligerent. It is probably because of the very narrowness of this field that the only consequences which these professors ascribe to the many attempts to outlaw war is in relation to claims for damage to person or property. They concede for instance that injury to property by a violator of the Kellogg Pact might give rise to a claim for damages which would not exist prior to that Pact. But they deny that the Pact can have had any effect as between the nations who actually signed it.

8. To effect a change in International Law binding upon nations, they maintain that all of the consequences of the change must be spelled out and agreed to in the treaty creating the change. I have not had an opportunity for exhaustive research, but so far as I am aware this view is not supported by any Court decisions — certainly not by any decisions dealing with the rights of belligerents inter se se. It is interesting to note in passing, however, that although no sanctions are provided for violations of Hague Convention III, its provisions are generally accepted as binding.

9. Their view is based upon what they call the International Legal System: that is to say, upon a system built up largely by their own and their predecessors' writings, which they would now probably say had become the "accepted custom and usage of nations". I suggest that we have a perfect right to re-examine the basis of their rules and to consider whether "the custom and usage of nations" has not perhaps been changed very fundamentally by the treaties and resolutions adopted during the past 20 years, even though those documents may be lacking in certain elements deemed necessary for the creation of a punishable "war crime". As already pointed out, we would not be alone in taking such a view.

10. For, as stated above, there is another school of thought, at least among certain professors of International Law, and the members of

the International Law Association, which holds that the Resolutions of the Eighth Assembly of the League of Nations, declaring a war of aggression to be an International crime, the resolutions of the Pan-American Conference to the same effect, and the Kellogg Pact did make a fundamental change in International Law.

11. Concededly, prior to these resolutions and treaties, it was universally accepted under International Law that all wars, whether of aggression or defense, were lawful. All a nation had to do was to go to war, even without a formal declaration, and it was accorded the rights of a lawful belligerent. It was only bands not recognized by a State, or not dressed in the uniform of a State, who were "guerrillas". As a result of the last war, world opinion revolted against the rule that wars of aggression were lawful, and the history of the past 20 years shows repeated and continual efforts to change it. The outstanding attempts to implement this change in public opinion are the two resolutions and the treaty above referred to. The question is whether we shall agree that these attempts were meaningless and ineffective, because certain procedural steps may not have been followed, or whether we should take the more liberal view that, because they constituted the integration and expression of the unanimous opinion of mankind that wars of aggression should no longer be considered lawful, they in effect set forth the present day "usage and custom of civilized nations" -- or putting it baldly, whether we shall take the position that these declarations mean exactly what they say ; that a war of aggression is no longer lawful.

12. If we accept that position, there can be little doubt that so fundamental a change in International Law as to make certain wars previously lawful, unlawful, must have serious consequences. The only one hitherto considered was in relation to the rights of neutrals. This has been passed on by a very eminent body, the "International Law Association". Their interpretation has been publicly referred to as correct by high officials of this government. Now we are confronted with another consequence which likewise appears logically to flow from such a change. The question is whether we are to face it or duck it for fear some lawyers will say they do not agree with us.

13. I do not see how we can be accused of "legal legermemain" if we say that the Kellogg Pact meant what it said. It will not be the first time that a signatory of a formal legal document has found himself confronted with consequences which he had not foreseen, and I think it is most improper to insist, as many lawyers do, that to point out these consequences after the act smacks of "ex post facto" or of changing the law to suit our purposes. Many taxpayers who had thought, on the advice of eminent council, that certain transactions were exempt under certain taxing statutes, have been compelled to pay the tax, and many a criminal has attempted to establish that he had a legal defense for his crime, which the Court, after the event, held not to have been a valid defense.

14. I question whether it is realistic to attempt to pretend that International Law can be dealt with with the same legalistic approach as ordinary law. However, as our legal International lawyer friends insist upon taking that approach, I see no reason why they should not play that game in accordance with the generally accepted rules: if a contracting party is found, even though innocently, to have violated his contract because he did not understand its full implications and is faced with the consequences of his acts, he should not be permitted to cry that some one is changing the law on him.

15. In considering what position the U. S. should take on this very fundamental and important issue, we must bear in mind that this country has been a leader in the struggle to outlaw wars of aggression for a long time, and that we were the principal instigators of the Kellogg Pact itself. For this country to now take the position that because of what the public will consider legalistic abra-ca-dabra, our own Pact is a meaningless scrap of paper, would, as pointed out by the informal JAC memorandum, discredit us with the public, and would at the same time strike a devastating blow against the attempts of this country to outlaw wars of aggression. For what confidence would the public have in any future attempt to stop up the "rat-holes" in the present treaties which worry some lawyers, if the plain language of those treaties were held to be meaningless.

16. The worst that could be said of the proposal is that it is not crystal clear and that professors of International Law are divided in their opinion on it. Certainly a respectable legal argument can be made to sustain the proposal. It would seem therefore to come down largely to a question of policy.

17. Considering the relative advantages and disadvantages of the proposed course, the answer at least from an American standpoint seems fairly clear. One of the great difficulties in the struggle for peace has been the traditional theory of International Law that all wars were lawful -- a theory which necessarily leads to the conclusion that all treaties "guaranteeing" peace, etc., are mere scraps of paper. This philosophy is to a large part responsible for the German and Japanese philosophy that a war of aggression is a noble and patriotic enterprise. Attempts to change this basic concept by international agreement defining a "just" and an "unjust war", or of defining an "aggressor" have gotten us nowhere, and probably never will -- it is too difficult to get agreement on a definition.

18. All this will be changed at a stroke if the position can be taken and established that all wars are unlawful, unless justified by actual self defense. Homicide is presumably a crime unless justified by self defense or some other legal justifications. So also, if the above proposal is accepted, all wars will be unlawful unless justified. As stated by Mr. Kellogg, the only justification under the Kellogg Pact would be that a war was waged in defense of territory against invasion. Unless justifiable on that ground, people would have no more right to kill other people when dressed in uniform and representing a "state" than they would have as ordinary private individuals.

19. What harm could come from such a rule of International Law to any peace-loving nation?

20. Concededly it is a drastic and revolutionary change in International Law, but we have been trying to bring about that change for over 20 years. Here is our chance. Don't let it slip by. Certainly we should not let ourselves be talked out of it because of any legalistic dogma of doubtful validity and no enforceability.

21. If we take the opposite view and punish the Nazis only for recognized "war crimes", we are saying to the world once more that war is a fine and noble enterprise, provided only you obey "the rules of chivalry" (which are laid down by all textwriters and even by our own Army Manual 27-10 as forming the basis of rules of land warfare.)

22. The suggestion that we should wait to accomplish this purpose by International Agreement at a later date is merely to continue the existing legality of war until another world conflict. Why wait until the next war to try and outlaw war? Let's do it now, while we have the opprotunity.

WM. C. CHANLER,
Colonel, GSC.

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CONFIDENTIAL

DRAFT

WCC/crc

30 Nov 1944

MEMORANDUM:

Subject: Can Hitler and the Nazi Leadership be Punished for Their Acts of Lawless Aggression, thus Implementing the Kellogg Pact and Outlawing Wars of Aggression?

1. At the time of Hitler's various acts of aggression against his peaceful neighbors, they were universally denounced as lawless by the non-axis world and it was frequently said that if captured Hitler and his associates would be brought to trial and punished for these acts as common bandits. To thoughtful students of the problem, such a course seemed to present possibilities of real progress along the difficult road toward world peace; for it would establish once and for all the principle for which American statesmen have long striven, that armed aggression is a crime.

2. But now that the time for punishment draws near, this thought seems to have been largely abandoned. In part, this is the natural result of Hitler's barbaric acts of wholesale murder, his destruction of towns, etc. First emphasis is placed on punishing these acts, which, more than anything else have shocked the conscience of mankind. This is as it should be, and the pending proposal to prepare charges in the nature of conspiracy indictments for this purpose appears to present a thoroughly sound method for its accomplishment. But could we not add either as a part of the general conspiracy charge, or as a separate and additional count, a charge that the defendants conspired to and did direct armed forces unlawfully to enter the borders of peaceful neighboring states and kill all people therein who opposed them?

3. It has been said that there would be no legal basis for such a charge: that it is unprecedented to attempt to hold either the heads of state or the generals of armies criminally guilty for lawful acts of war; that the only basis for their punishment would be to prove that they had violated or were responsible for violation of the laws of war. But such

objections are based upon the traditional theory of International Law that war is a legitimate instrument of national policy, a theory which, thanks largely to the efforts of the U.S.A., has now been universally repudiated.

4. As Mr. Stimson, Secretary of War, said in the course of his testimony before the House Committee on Foreign Affairs, on January 16, 1941, in support of the Proposed Lend-Lease Bill:

> "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.'" *

By that Pact, all civilized nations, including Germany, Japan and their satellites, solemnly agreed to "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"; and in Article II they further "agree that the settlement or solution of all disputes or conflicts of whatever nature or origin they may be which may arise among them, shall never be sought except by pacific means".

5. The great change in International Law to which Mr. Stimson referred is that one of the legal consequences of that Pact is to deprive a nation which violates it of its traditional rights as a lawful belligerent towards neutrals. In support of this proposition Mr. Stimson cited the resolutions adopted by the International Law Association at its meeting in Budapest on September 10, 1934, reading in part as follows:

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

* * * * *

* Statement of Hon Henry L. Stimson, Secretary of War, Hearings before the House Committee on Foreign Affairs, 77th Congress, 1st Session on H. Res. 1776, pages 103-5.

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

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

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

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

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

6. If the Kellogg Pact, by outlawing war as an instrument of national policy, deprives a violator of that Pact of his rights as a lawful belligerent towards neutrals, surely it must follow that it likewise deprives him of the same protection towards the victims of his aggression. If this is so, then armed forces of a signatory state which enter the territory of a neighboring signatory State and commit depredations therein stand on no better footing than a band of guerillas who under established International Law are not entitled to be treated as lawful belligerents.

7. To give an illustration: when Pancho Villa entered the U. S. unlawfully in 1915-16, he was concededly a bandit. True he did not come as a representative of Mexico; on the contrary, Mexico had repudiated him. Now if Mexico had recognized Villa as one of her generals, and had not repudiated him, under International Law as it then stood his acts would have been lawful acts of war and Villa and his band would have been entitled to all the protection of the laws of war and of course, another consequence would have been that a state of war between the U. S. and Mexico would have existed. But today, under the Kellogg Pact, neither recognition by Mexico, nor even a formal declaration of war would legalize such armed aggression, unless the United States itself had first attacked Mexico. For such a declaration of war would itself be unlawful, and so could not legalize any acts done under it.

* International Law Ass'n., 38 Reports (1935) 66, 67.

8. It thus follows that armed aggression is unlawful and that acts of aggression cannot be defended as lawful acts of war. If this be sound, then all hostile actions of the Axis armies are war crimes and could be punished as such by any Allied military tribunal, whether or not the acts would constitute violations of the laws of war if committed by a lawful belligerent. Thus, a count in the proposed conspiracy indictment charging all acts of the Axis Armies as constituting war crimes would seem logically to be tenable.

9. However, it may be that this is too drastic a step to be taken at the present time. Objection would be raised, for example, that England and France declared war on Germany over the invasion of Poland and that thereafter Germany was lawfully at war with England and France. While these declarations of war are entirely consistent with the theory of the Kellogg Pact, (See Paragraph 4 (d) of the Budapest Resolutions Supra) nevertheless, confusing and unnecessary collateral issues might be raised.

10. It would seem that perhaps the most effective way to raise this issue would be to follow the course laid down in the Moscow Declaration. Let us assume that, relying upon that declaration, Czechoslovakia or Poland, let us say, or both together, should demand that Hitler and his associates be delivered to them for trial on the charge that they had directed forces under their command to unlawfully enter their territory by force of arms, killing all citizens who stood in their way, etc., in violation of the domestic criminal law of Poland and Czechoslovakia.

11. It must be observed that under this procedure it would not be proposed to punish Hitler and his associates for violation of the Kellogg Pact as such, nor for violation of any principle of International Law. They would be charged with violation of the domestic criminal law of the countries invaded.

12. The War Crimes Commission, or a special tribunal established for such purposes by the United Nations, would then be squarely faced with the question whether or not the Kellogg Pact in fact outlawed a war of aggression.

Presumably, the tribunal would hold hearings in the nature of an extradition procedure. The complaining nations would recite the Kellogg Pact, the Munich Pact, the 1934 Ten-Year Guaranty of Peace between Germany and Poland, and would allege a conspiracy to unlawfully enter upon and destroy the existence of Poland and Czechoslovakia and kill any persons therein who might resist, and the actual carrying out of such conspiracy for the purpose of conquering the world, etc.

13. After hearing Hitler's defense which would no doubt be based primarily on the proposition that the acts charged were lawful acts of war, the tribunal could quite properly hold that the defense is not valid because the defendants having violated the Kellogg Pact are now lawful belligerents. To hold otherwise would be to hold the Pact meaningless.

14. What other defense could Hitler Present? He would no doubt point out that most of the signatories to the Kellogg Pact, including the United States, either by specific reservation or by collateral formal statements, have taken the position that the Kellogg Pact does not prohibit a defensive war, and would then seek to prove that his aggressions were in fact necessary to the defense of Germany.

15. This would raise a question of fact for the Court to determine and it would seem that if ever a case was presented to a Court in which sufficient facts existed to sustain a charge of aggression, this is it. If properly presented, the Court should have no difficulty in dismissing such a defense as sham.

So far as Hitler's argument that war was necessary to correct the "Crime of Versailles" and gain the "Lebensraum", necessary to Germany's existence, the answer is that these are the very issues of "National Policy" which under the Kellogg Pact must be settled by peaceful means. The exception permitting defensive war should be limited to a defense against actual or undeniably imminent armed aggression. Otherwise, the pact is meaningless.

16. Thus, we would have a judicial interpretation of the Kellogg Pact to the effect that any person or group of persons who engage in

such a course of conduct as that followed by the Nazis in connection with the present war are violators of the Pact and as such are common criminals, not subject to the protection accorded to a lawful belligerent by International Law. Surely this would be a most beneficial and useful step in the difficult path towards the elimination of war. While it may not of itself deter a future Hitler, it would certainly make it more difficult for him to persuade his people that he was leading them in a lawful and noble enterprise and it would make it much easier to unite the peace-loving nations in opposition to him.

17. But the greatest advantage of the proposal would be that it would get around the great stumbling block which has stymied all previous attempts to outlaw wars of aggression: the difficulty of defining an "aggressor" in a formal treaty. If the definition is broad enough it is always feared that it might prevent a war entered into in good faith purely for the purposes of defense against imminent aggression. As soon as reservations are proposed to meet this difficulty it becomes apparent that any aggressor can easily get around the treaty. But by the procedure here proposed all this would be avoided. There would be no need of entering into any new treaty. We would simply have a judicial determination analogous to a common law precedent to the effect that the facts presented by Hitler's course of conduct constitute a violation of the Kellogg Pact and deprive him and his followers of the protection of International Law.

This would not constitute such a precedent, for example, as to outlaw a war undertaken in good faith for purposes of defense against an enemy threatening armed attack. It would, however, put upon a nation contemplating such a war the burden of being certain that it could establish its good faith before an international tribunal. This should not deter the U.S.A. -- it has always been our view that we should not go to war unless actually attacked. Nor should it be unacceptable to France, who originally proposed the Kellogg-Briand Pact, nor to China, nor to any of the smaller nations. The U.S.S.R. led all nations of the world in its efforts to outlaw war during the past 20 years and there is no reason

to suppose that its policy has changed. The British Foreign Office might be disturbed by the procedure. By the nature of her far-flung Empire, Great Britain is made acutely conscious of the advantage of the "mailed fist" in its preservation and control. On the other hand, it is very probable that in a public debate the British public would strongly support this proposal, and would not support a government which refused to support a principle outlawing war, on the ground that war might be advantageous to the Empire.

18. An incidental advantage of the proposal is that an indictment of Hitler and his associates on such charges as those here suggested should make their extradition possible from even the most squeamish nation in which they might take refuge.

19. As to procedure: the particular proposal of a demand by Poland or Czechoslovakia is suggested because it seems to present the simplest test case. Unnecessary complicating collateral issues are avoided and the issue is simply and squarely presented. On the other hand, there would probably be serious objection to actually turning over Hitler and the Nazi leaders to Poland or Czechoslovakia for trial and punishment under their domestic criminal law. This could be avoided by providing in the decision that they would not be turned over until after the War Crimes Commission was through with them. They could then be first tried under the general conspiracy indictment.

20. Except for the danger of beclouding the issue with collateral questions, the most satisfactory procedure would be to add a count for unlawfully entering the peaceful neighboring countries, etc., to the pending conspiracy indictment. The danger of beclouding the issue might be avoided by combining the two procedures: First, a decision in a hearing on a demand from Poland or Czechoslovakia. The issue would then become "stare decisis" when the question arose at the general conspiracy trial and collateral complications might thus be avoided.

21. It has also been suggested that such an issue as this should be determined by political action of the United States instead of by

a judicial proceeding. But this would require formal action, perhaps even on the treaty-making level, and might raise more complications than it avoided. Furthermore, it might not have quite the same effect as a judicial interpretation of the Kellogg Pact. But the question of procedure can no doubt be better solved in the course of the actual drafting. The important thing is to get the principle presented and decided, so that it becomes a recognized precedent in International Law.

22. In conclusion, it must be borne in mind that strong objections will undoubtedly arise from a fear of the possible consequences of the precedent. As suggested above, the British are likely to be the ones most strongly urging this objection. But the short answer is that the more it is urged that such a precedent might be embarrassing in the event that one of the United Nations wanted to go to war in the future, the more obvious it becomes that the precedent will effectively contribute to world peace.

23. So far as legal objections are concerned, the answer is that once it is done, it will <u>be</u> International Law, regardless of possible present doubts. If it presents a possibility of contributing to the future peace of the world, legalistic objections should not be permitted to stand in the way.