Dear Justice Jackson,

May I submit to you the following suggestions in connection
with the forthcoming trial of major war criminals:

1. I wonder whether it would not be advisable to strengthen the
"Jackson Doctrine" by arguments borrowed from Nazi legal literature.
I have in mind specifically your theory that the German State was
nothing but an instrumentality of the party, which was again nothing
but a gang of criminals. Strangely enough this theory, which is
on the very basis of the "Jackson Doctrine," finds the most striking
confirmation in the writings of the leading Nazi legal authority,
Professor Fritz Schulz. He makes this point in various writings,
especially in his monographs on "State, People, Document" and "The
Three Ways of Legal Thinking." In these two monographs he, like the
authoritative leader of the Nazi legal philosophers, makes the
unequivocal statement that the State has not existence per se but is
nothing but a servant of the people (Volk), which again is nothing
but an instrumentality of the movement, National Socialist Party.
Certainly their legal connotations are different from yours, but
the gradation of values is the same. It seems to me that a para-
graph in the indictment referring to this authoritative statement
may prove useful for the purpose of the trials.

2. It is obvious that while we are concerned with the final
outcome of the trials we are no less concerned with the strength
of the argument and the case as presented by the prosecution. I
believe there is probably in the offices of the prosecution a
"devils advocate" who is thinking in terms of defense.

It would appear that the defendants may hardly be able to
contradict the facts. The evidence will probably be overwhelming.
It can, therefore, reasonably be expected that it will concentrate
its efforts on legal points. Here are these points:

(a) The irresponsibility of State agents for State acts.
This is the traditional doctrine in both international and consti-
tutional law. Some scholars have recently based their theory on cer-
tain crimes on these "immunities." How can this theory be refuted?
I believe that the "Jackson Doctrine" gives an answer to this question while, on the other hand, a more elaborate study on this subject would seem to be most useful.

(b) The problem of illegality and criminality of aggression etc.

There seems to be a gap in the "Jackson Doctrine" concerning the criminality of an aggressive war. In your article in the New York Times magazine, you speak about "illegal war". The problem arises whether illegal war is also a criminal war or there must be some specific elements in the illegal war to make it criminal. What are the implications of an illegal war and what are the implications of a criminal war? Here again it is very interesting to note that the above-mentioned legal basis authority, Karl Schief, in his study on "The Necessity Towards the Discriminating Definition of War", takes a very definite stand against different types of war, as for instance, the just war, or the unjust war, war of aggression and war of self-defence, etc. etc. A more detailed and thorough discussion of all these problems may prove necessary in order to assert future attacks on the part of the defence who could quote some leading authorities in the allied countries as favoring this view.

3. While emphasis on the principle of self-defence is justified, a closer analysis, not only of the fact itself, but specifically of the Arabian note and the numerous reservations made by the signatories would seem to be imperative.

4. A special difficulty may arise out of the fact that neither the diplomatic correspondence preceding this conflict nor the individual charges and counter-charges made by the belligerent parties had specific reference to all the elements of the "Jackson Doctrine". Will it not be interpreted by the defense as proof that not only the belligerents, specifically the United Nations have ever thought to use the Arabian-Kellogg Pact as a factor in the struggle against the Axis? Will it not be stated by the defense that this would mean a commitment on the part of the United Nations not to assert these points?

5. I do not know whether in the numerous articles dealing with
the problem of war crimes, the basic problem of the implications of illegal war was at all discussed. It would seem to me that an illegal war is no war at all, in the sense that it does not imply
perpetration of individual crimes from the punishment interest in such a crime. What I had in mind was the following:
if a private citizen shoots another private citizen he commits
murder and will be accordingly punished. But if these two citizens
are in uniforms and are taking part in opposite armies as soldiers
and they commit the same act of murder, it is no murder any more
but hostilities - a perfectly legal action. If a citizen penetrates
into the house of his neighbour and takes away his belongings, he
commits theft and will be punished accordingly. But if the thief
is in uniform in his enemy country and penetrates into his house
and takes away whatever he deems useful, he is just neutralizing.
If a private citizen meets on the street his friend or enemy and
puts him into a box, locks him up and leaves him there, he is kid-
napping, but if the same person is in uniform and he takes people
back from their homes and puts them in concentration camps or in
preservation, he is just taking prisoners, a perfectly legal act.

Now it would seem that the moment we recognize that there are
illegal wars, everyone of these individual situations reverses to
the original and elementary criminal act and the whole war,
dissolved of its glory, becomes nothing but a series of common law
offences for which the instigators, the perpetrators and their
accomplices have to be responsible in accordance with the criminal
law of every civilized country.

I believe that this argument will probably play an important
part in the controversy, and here again a more thorough study of
all these problems may prove quite useful.

There are a few suggestions which I consider useful to submit
to you and I need not say that I am prepared to discuss it with
yourself or with your assistants at a later date and at a time at your
convenience.

Yours very truly,