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MEMORANDUM

September 8, 1939

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Mr. Messersmith

I suggest the following as a reply to the third paragraph of Mr. Milton's letter of September 4:

"You are quite right in believing that submarine warfare has been condemned in various treaties and conventions signed since the Great War.

It will be recalled that at the Washington Naval Conference, 1922, the British proposed the abolition of the submarine, which they claimed was essentially an offensive weapon, a weapon of "murder and piracy involving the drowning of non-combatants". The French opposed the total abolition of this type of ship, stating that it was essentially the defensive weapon of the smaller Naval Powers. The French believed, however, that it was possible to reconcile the use of submarines with the laws of humanity. The French were supported by the Italians and the Japanese while the United States took the position that, although it was not practicable at that point to abolish the submarine, unlimited submarine warfare should be outlawed and

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laws should be drawn up prescribing the methods of procedure of submarines against merchant vessels, both neutral and belligerent. In other words, the five leading Naval Powers should agree to a denouncement of illegal methods of submarine warfare in terms clearly understandable and to bind themselves to assure the application of the principles of international law in connection with submarine warfare and to consider and debate what should be done to strengthen the laws governing the use of this weapon.

As a result of the discussions, a Treaty was agreed upon between the United States of America, the British Empire, France, Italy and Japan relating to the use of submarines and noxious gases in warfare. Articles 1, 2, 3 and 4 dealt with the submarine. Article 1 provided that, one (a), a merchant vessel must be ordered to submit to visit and search to determine its character before it can be seized; (b) a merchant vessel must not be attacked unless it refused to submit to visit and search after warning, or to proceed as directed, after seizure; and two (a), a merchant vessel must not be destroyed unless the crew and passengers have first been placed in safety; (b) belligerent submarines should not under any circumstances be exempt from  
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the universal rules above stated; and if a submarine cannot capture a merchant vessel in conformity with these rules the existing law of nations requires it to desist from attack and from seizure and to permit the merchant vessel to proceed unmolested. Article 2 called upon the signatory Powers to invite all other civilized Powers to express their assent to the foregoing statement of established law so that there might be a clear public understanding throughout the world of the standards of conduct by which the public opinion of the world should pass judgment upon future belligerents. Article 3 was a declaration to the effect that any person in the service of any Power who should violate any of those rules, whether or not such person was under orders of a governmental superior, should be deemed to have violated the laws of war and should be liable to trial and punishment as if for an act of piracy and might be brought to trial before the civil or military authorities of any Power within the jurisdiction of which he might be found. Article 4 provided that the signatory Powers, recognizing the practical impossibility of using submarines as commerce destroyers without violating, as they were violated in the war of 1914-1918, a requirement universally accepted by civilized nations for the protection of neutrals and non-combatants

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and to the end that the prohibition of the use of submarines as commerce destroyers should be universally accepted as a part of the law of nations, that they should accept the prohibition as henceforth binding as between themselves, and should invite all other nations to adhere thereto.

At the London Naval Conference, 1930, the British again proposed that the use of submarines for purposes of war should be totally abolished. They were supported by the American Delegation but opposed by the Italians, the Japanese and the French. After discussion it was agreed that a Protocol should come into force as between the Five Powers, open to the adherence of all other Naval Powers.

This Protocol was incorporated in the London Naval Treaty, 1930, as Part IV, Article 22, as follows:

"(1) In their action with regard to merchant ships, submarines must conform to the rules of international law to which surface vessels are subject;

"(2) In particular, except in the case of persistent refusal to stop on being duly summoned, or of active resistance to visit or research, a war ship, whether surface vessel or submarine, may not sink or render incapable of navigation a merchant vessel without first having placed passengers, crew and ship's papers in a place of safety. For this purpose the ship's boats are not regarded as a place of safety unless the safety of the passengers and crew is assured, in the existing sea and weather conditions, by the proximity of land, or the presence of another vessel which is in a position to take them on board".

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In addition, the High Contracting Parties invited all other Powers to express their assent to the above rules.

Prior to the London Naval Conference, 1935, the British Government approached the United States and Japan, which had ratified the London Naval Treaty, 1930, also the French and Italian Governments, which had failed to ratify, and invited them to join in perpetuating in a separate Protocol Part IV of the London Naval Treaty, 1930. All Four Powers expressed approval of this plan in advance of the Conference, and, subsequent to the conclusion of the London Naval Treaty, 1936, the French and Italian Governments ratified this Protocol.

The next step was the signing of a proces verbal by the Five Powers which opened the Protocol for the signature of all other Powers. This took place on November 6, 1936, and on November 23 Germany, in a note signed by Von Ribbentrop, adhered to the Protocol among the first. It is to be remembered that the Protocol was to stand in perpetuity. There was no provision for denunciation and in actual fact the Germans have not attempted to denounce the Protocol and are clearly bound by it.

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