Brief on Angue III (16)
Papers on "Hague III" The Jotyo War crimes Indictment

(114)

STANDARD FORM NO. 64

Office Memorandum • UNITED STATES GOVERNMENT

TO : Mr. Gray, Legal Section, GHQ, SCAP **DATE:** 30 Nov. 1948

FROM : Capt. J. J. Robinson, International Prosecution Section, GHQ, SCAP

SUBJECT: Paper on "Hague III and the Tokyo War Crimes Indictment".

1. As requested by you, I attach the subject paper.

2. Your analysis is requested on the following points:

   a. The sufficiency of Hague III to be the basis for charging a criminal offense;
   b. Necessary or desirable amendments of Hague III;
   c. The suggested definition of "war crime";
   d. The suggested definition of "aggressive war".
   e. Any other points for comment.

3. Citation of authorities used by you would be appreciated. Your comments and citations will assist in final revisions which may be required in preparing the paper for inclusions in Proceedings of International Bar Association Conference, The Hague, 18 August 1948, and Proceedings of Section Criminal Law, American Bar Association, Seattle, 8 September 1948. Your views will be appreciated.

J.J.R.

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To: M. Gray
From: J.J. Robinson
With memo and regards -
Tokyo 30 Nov '48.

HAGUE CONVENTION III AND THE TOKYO WAR CRIMES INDICTMENT

A Paper Prepared by

Captain James J. Robinson, USNR

for

Symposium I - The Progressive Development of International Law

at

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The International Bar Association

in

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HAGUE CONVENTION III AND THE TOKYO WAR CRIMES INDICTMENT

The subject of this paper is Hague Convention III and the Tokyo War Crimes Indictment. The subject is discussed from the standpoint of the practicing lawyer. The paper deals with the practical problems of prosecution and defense in the administration of international criminal law. The consideration of such problems is a primary concern of the organization which is conducting this conference, the International Bar Association. As stated in the International Bar News for July, 1948, the Association "was organized primarily to concern itself with the problems facing practicing lawyers." Almost 200 practicing lawyers have been facing at Tokyo since April, 1946, problems of international criminal law connected with the war crimes trial there. About 120 of these lawyers are from the eleven participating Allied nations and 79 are from Japan.

The extent of the problems faced by the lawyers at Tokyo is indicated by the extent of the court room activities, of the facts concerned, and of the law involved. In regard to the court room activities, the transcript record of the proceedings in open court during the 417 court days to date totals almost 50,000 pages. The exhibits introduced by prosecution and

defense number more than 5,000, and their total pages are estimated to exceed 500,000. Almost 450 witnesses testified on the witness stand, including the sixteen defendants who took the witness stand in their own behalf. The number of witnesses whose testimony or statement was given not on the stand but by affidavit or other writing was 775. The personnel regularly engaged in the operational and administrative phases of the trial, in addition to the eleven justices and the legal counsel, totalled about 1,000. The lawyer's problems included the usual problem of meeting deadlines for the preparation of trial briefs and summations, and court rules for the processing and service of documents in both English and Japanese, and all other preparations necessary for being ready whenever a court room page would bring to the lawyer's office a message from the senior counsel reading, "Be in court in ten minutes!"

The scope of the lawyer's problems with regard to investigating and marshalling facts and evidence is indicated by the number and prominence of the defendants, originally twenty-eight, now twenty-five, former generals, admirals and other heads of the Japanese armed forces and Government; by the period of time covered by the facts, amounting to almost twenty years; and finally by the territory covered, both in the Pacific and Indian Ocean areas, extending 10,000 miles from east to west and more than 5,000 miles from north to

south, and also in other continental and oceanic areas.

When the war in the Pacific ended with the Japanese surrender, on August 15, 1945, just three years ago last Sunday, the lawyer's problems with respect to the law of war crimes moved from the stage of preparation and planning to the stage of execution. It is appropriate as an observance of this third anniversary of the end of the Pacific war that lawyers of more than 50 nations are conferring here at The Hague on the development of international criminal law. War crimes cases are properly receiving consideration as one determining factor in the future of international peace or war. In fact, the Conference may well consider here whether or not it is a fair criticism to say, as Alfred Noyes, the British writer, says, that a principal cause of World War II was the failure of the Allies to prosecute war criminals after World War I, followed by the related failure to establish international criminal law on a working basis under the League of Nations.

The legal problems which were faced by lawyers charged with duties in the investigation and prosecution of war criminals when the war ended three years ago centered in the usual working divisions of a criminal case, namely, the criminal code, the criminal courts, and the police. Fortunately, the laws and customs of war could be counted upon to furnish the last two divisions, namely, the courts and the police. The principal court

in Japan was set up in the Japanese War Ministry Building in Tokyo by the Supreme Commander for the Allied Powers, with the appropriate cooperation of other Allied authorities, under its Charter which named it the International Military Tribunal for the Far East. The police forces were provided from occupation troops. The code, or statutes, defining the substantive offenses and specifying essential details of the procedure, began to require the attention of counsel most insistently when the indictment was being written in the spring of 1946.

What code provision or statutes should counsel use as the foundation for the indictment? What defined war crimes offenses should counsel select as most clearly reflecting the evidence, as well as the views of millions of people, including many Japanese? And what war crimes charges would most accurately reflect also the solemn obligation to punish war criminals which the Allies undertook in the Potsdam Declaration, as recognized by the Japanese surrender terms and as provided for in the Charter of the International Military Tribunal for the Far East?

Counsel, as the indictment shows, selected principally treaty provisions and other legal provisions and definitions describing or defining the planning, preparing, initiating and waging of wars of aggression. "The perpetration of aggressive war," said defense counsel in final summation, "is the crux of

the charges here brought." The crux of aggressive war from an operational standpoint is the commencement of hostilities; and the crux of aggressive war from a legal standpoint, as this paper will seek to demonstrate, is the commencement of hostilities without compliance with Hague Convention III of 1907.

In the Tokyo war crimes indictment, the prosecution counsel of the eleven participating nations based numerous counts substantially or potentially upon Hague Convention III. Prominent among these counts are those which charge certain Japanese defendants with the initiation of wars of aggression. Count 18 charges that they initiated a war of aggression against China on September 18, 1931. Count 19 charges that they initiated a war of aggression against China again on July 7, 1937. Counts 20 to 26 charge them with the initiation of wars of aggression also on December 7, 1941, against the United States, the Philippines, the British Commonwealth, and Thailand; on September 22, 1940, against France; in 1938 against the Soviet Union; and in 1939 against Mongolia.

Count 37 and Counts 39 to 43 likewise are based principally or substantially on Hague Convention III. They charge that sixteen or more of the Japanese defendants, by ordering, causing and permitting Japanese armed forces in time of peace to commence hostilities at Pearl Harbor, Kota Bahru, Hong Kong, Shanghai and Davao, unlawfully killed and murdered nationals of the

United States, of Great Britain, of the Philippines, and of other countries.

The prosecution and the defense presented arguments and evidence before the Tribunal in which they respectively supported or attacked Hague Convention III as a legal basis of these counts. The Convention was represented to the Tribunal by the prosecution as a sound and controlling provision of international law, providing a legal standard and rule for use in determining whether a particular war is or is not a war of aggression and whether the initiation of a war of aggression is a war crime. Defense counsel, on the other hand, vigorously and skillfully supported their position that aggressive war is not definable and that initiating aggressive war is not a crime. In regard to the term aggressive war, a member of defense counsel said, "The dulcet term aggressive war is amorphous, elusive and indefinable; it is too vague to be defined." In regard to the crime of aggressive war being based even in part on Hague III, defense counsel said that Hague Convention III is not law, and that it establishes no legal duty on any state or on any individual. The Convention was characterized as a mere technical rule for determining the date when a war commences or as a survival of "outworn chivalry" having no place in modern war. The violations of the Convention, as shown by its history, especially during the 1930's, were declared by the defense to have been

so numerous, so flagrant, and so free from any resulting penalty that the Convention had become in fact a mere dead letter. And finally, an official Japanese document, which was introduced in evidence by the prosecution, presented among other views a view that "The Hague Treaty Number III is nothing but a bluff or simulacrum and there is no need to respect such a childish treaty at the outbreak of a war in which the fate of a nation is at stake."

These arguments on both the merits and the deficiencies of Hague III indicate the desirability of an analytical consideration here of the questions raised. This paper will therefore place before this Conference the use of Hague III by legal counsel in deciding first, whether or not a particular war may be charged to be a war of aggression, and second, whether or not the initiation of a war of aggression, or the commencement of hostilities, may be indicted as a violation of Hague Convention III which fulfills the legal requirements for a war crime.

This analysis and discussion are obviously not concerned with diplomacy or policy. The subject matters presented in this paper are restricted to established principles of criminal law and international law, and to published records, such as the official transcript of the Tokyo trial and of other public judicial proceedings. The paper is prepared for use in a round table discussion in a lawyers' conference on the progressive development of international law. For the foregoing reasons,

it is to be noted that statements are made on the personal responsibility of the writer alone and that they do not reflect official policies, legal positions, or future activities of the International Prosecution Section, or of the United States Navy, or of any other Section, Department or official of any Government.

I

The first question for consideration may be stated as follows:

Is Hague Convention III a standard by which a war may be determined in fact to be or not to be a war of aggression?

The answer is indicated by (A) the history of the treaty and by (B) the words or text of the treaty.

(A)

The Convention's history includes its origin and its observance or its violation by nations and individuals in commencing hostilities.

Japan has had a principal but involuntary responsibility for the origin and development of Hague Convention III. Japan was charged by China with beginning the Sino-Japanese war of 1894-95 by commencing hostilities without a declaration of war by the capture by a Japanese cruiser of the Chinese transport Koshung. Japan was charged by Russia ten years later with treachery in commencing hostilities in the Russo-Japanese war of 1904-05 by attacking the Russian fleets at Chemulpo and Port Arthur on February 8, 1904, two days before Japan declared war on Russia on February 10. Japan had in fact commenced hostilities by capturing the Ekaterinoslav, a Russian cruiser, on the morning of February 6, at least fourteen hours before the delivery at the Russian capital of the Japanese note breaking off diplomatic relations. Japan denied the Russian accusations of treachery. Russia,

however, proposed to the powers in their plans for the Second Peace Conference that provisions relative to the opening of hostilities be modified by that Conference, which met at The Hague on June 15, 1907. The result was Hague Convention III.

This Convention had a truly international blood lineage and birth ceremony. After it was proposed by the Russians, its text was presented by the French, based on a recommendation by the Institute of International Law adopted at Ghent in 1906. The delegations of Germany, Great Britain, Japan, and Russia on the Conference Subcommission expressly declared themselves in accord with the proposal. In the sessions of the Second Peace Conference, and in the later discussions throughout the world on ratification and adhesion, the Convention received unique support by the nations of the world. It was the only general convention among the thirteen conventions signed at The Hague Conference of 1907, which eventually received the approval of all the forty-four participating nations without any reservations whatsoever. Furthermore, it is not restricted by any "general participation" clause, nor by any limitation to land warfare or to sea warfare, a limitation in some of the other conventions which reflected special and diverse national interests and strategy. The permanency of its support by the nations and peoples of the world, moreover, is indicated by the fact that, although Article 7 provides that any nation may withdraw from the Convention upon one year's notification to the

Netherlands Government, no nation has denounced and withdrawn from the Convention.

The Convention, since it was signed here at The Hague on October 18, 1907, has had a history of unfailing approval by the peace-loving, law-abiding free people and democratic governments of the world. A significant instance should be noted of compliance with Hague Convention III even by a country not reputed to be peace-loving. Japan in 1914 in commencing hostilities against Germany evidenced recognition of Hague Convention III. On August 15, 1914, Japan delivered an ultimatum to Germany, making specified demands in connection with Tsingtao and the Shantung Peninsula, and setting August 23 as the expiration date. On that date, in the absence of compliance by Germany, Japan formally declared war on Germany. Then, in September, Japan formally commenced hostilities, and on November 7, 1914, the Japanese forces compelled the surrender of the German and Austrian force at Tsingtao. It is to be noted that obedience to Hague III in 1914 was not hazardous for Japan because Germany was deeply engaged in European war and because the Japanese naval and military operations at Tsingtao, unlike the later Japanese operations at Pearl Harbor and elsewhere on December 7, 1941, did not depend for their success upon complete secrecy and total operational surprise.

The treaty has also had a history of unfailing condemnation, ridicule and violation by militarist dictators. Each time a

militarist dictator, after advancing upon his local national stage by the procedures of the coup d'etat and the fait accompli, has sought to use those same procedures, plus the blitzkrieg, to expand upon the international stage, he has been challenged by the plain and simple command of Hague Convention III.

In October, 1935, Mussolini launched the Italian armies upon the invasion of Abyssinia, in violation of Hague Convention III and other treaties. "Mussolini's bluff succeeded," observed Mr. Churchill, "and an important spectator [Hitler] drew far-reaching conclusions from the fact. . . . In Japan, also, there were pensive spectators." In Japan, the militarists continued on the march; they rejected the London naval limitation treaty; Japanese officials not acceptable to military groups were assassinated or purged; and on July 7, 1937, Japanese armed forces commenced the new hostilities in China without compliance with Hague Convention III.

Hitler began in 1939 his repeated violations of Hague Convention III, after marching into the Rhineland on March 7, 1937, in violation of the Treaties of Versailles and Locarno. He declared, at a high command conference on November 23, 1939:

> I shall attack England and France at the most favorable and quickest moment. Breach of the neutrality of Belgium and Holland is meaningless. No one will question that when we have won.

And on the 10th of May, 1940, as you well know, the German forces invaded the Netherlands, Belgium and Luxemburg. The memoranda handed by the German Ambassadors to the Netherlands

and Belgian Governments on that day of invasion, alleging false reasons and false purposes for the commencement of hostilities, were not legal compliance either in content or in timing with Hague Convention III. The Nuremberg war crimes indictment, filed October 18, 1945, listed in an appendix, with twenty-five similar charges of international bad faith, these three violations of Hague Convention III by Hitler and the German defendants and also four other violations, namely, the commencement of hostilities against Poland on September 1, 1939, against Norway and Denmark on April 9, 1940, and against the Soviet Union on June 22, 1941.

The Nuremberg war crimes judgment, read on August 31, 1946, declared the invasion of the Netherlands, Belgium and Luxemburg to have been "entirely without justification" and "plainly an act of aggressive war."

The judgment further stated:

> The Charter makes the planning and waging of a war of aggression or a war in violation of international treaties a crime; and it is therefore not strictly necessary to consider whether and to what extent aggressive war was a crime before the execution of the London agreement.

No comment on this statement is offered here because this is not considered to be the time nor the place in which to comment upon the extent to which the Nuremberg case and the Tokyo case may be either alike or different.

(B)

The text of Hague Convention III, even more than its history, indicates the answer to the question whether the Convention is a standard for determining that a war is or is not one of aggression.

The wording of the treaty is brief and simple. It begins with a preamble. Then comes Article 1 followed by two other short operational articles. The remaining five articles deal with the method of ratification and similar details. Article 1 is the essence of the treaty with respect to the commencement of hostilities. It consists of only thirty-five words. It reads as follows:

Article 1

> The Contracting Powers recognize that hostilities between themselves must not commence without previous and explicit warning, in the form either of a reasoned declaration of war or of an ultimatum with conditional declaration of war.

The treaty is a procedural rule or statute. It states only essential procedural provisions, omitting administrative details. It leaves such details properly to a flexible ministerial or judicial discretion, subject to the usual standards such, for example, as reasonableness under the circumstances of the particular case.

The Convention is concerned primarily with commencement of hostilities and secondarily with declaration of war. A

State at peace with another State cannot legally commence, that is, originate or open, hostilities without first having delivered to the other State the prescribed warning declaration. The Convention does not, of course, require a warning declaration by a State joining hostilities in self-defense against hostilities already commenced or opened by an attacking State, because hostilities already commenced cannot possibly be commenced or opened by the defending State.

How long an interval of time between the warning and the commencement of hostilities does the treaty require? The interval must be sufficiently long to comply with the treaty's words, "warning," "previous," and "explicit." What do these words mean? The word "warning" is considered to be used in its usual meaning, that is, a warning is the act or fact of putting another on guard, of intimating danger, evil consequences or penalties of an act or course of conduct unless it is changed or redressed.

The warning is described by the treaty as "previous" to the commencement of hostilities; that is, going before or leading the way or preceding the first hostilities or acts of warfare, such as firing the first shot or dropping the first bomb or killing the first persons in the other State's territory by armed attack.

The warning is described by the treaty as "explicit," or in the French original as "non équivoque," which might be translated "unequivocal" rather than "explicit." That is, the warning must be clear, plain, straightforward, unambiguous, clearly informing

the receiving State that the warning State will commence hostilities against the receiving State.

In other words, the treaty creates a condition precedent: before a State can legally commence hostilities it must first have given an explicit warning of hostilities to the State which it is going to attack.

Since the treaty requires an interval, and since it does not specify the exact length of the interval, it appears to require that the interval be of reasonable length under the existing circumstances. The question arises: what would be a "reasonable" interval. The answer appears to depend in part at least on the intention of the plenipotentiaries and other national representatives who drafted and agreed to the treaty. The Netherlands at the Conference here in 1907 proposed a twenty-four hour interval and Russia supported the proposal, but the proposal was rejected by a vote of sixteen to thirteen, with five abstentions. The intention of the majority appears to have been to leave the period to be determined by the standard of reasonableness according to the circumstances prevailing in a given case; otherwise the treaty would be meaningless.

The test of reasonableness appears to depend on what purpose is conceived generally to be the objective of the treaty. The preamble states that the purpose of the Convention is "to ensure the maintenance of pacific relations," by providing that "hostilities do not commence /ne commencent pas/ without previous warning." A

warning of impending hostilities, stating reasons for them or their purpose, as specifically required by the Convention, would be a futile gesture so far as maintaining pacific relations is concerned, unless it would give enough time for the nation receiving the warning, and other nations also, to endeavor to avert the hostilities by making them unnecessary or inadvisable. The purpose of hostilities is presumed to include obtaining redress for a wrong or executing a legal duty or asserting a legal right such as the right of conducting self-defense against attack, according to Grotius and other authorities, and without entering upon the application of the Pact of Paris. If the purpose of the treaty is to provide an opportunity for the warned State to redress the wrongs complained of or to meet the conditions stated as reasons for war by the warning State, or to provide an opportunity to permit a third power to offer mediation, good offices, or other assistance in averting war, the interval required would appear to be an interval sufficient for such opportunity to operate.

Grotius stated a consideration which is a fundamental reason for requiring a reasonable interval. Even three centuries before Hague Convention III, he championed the view that international law required a declaration of war to precede or to accompany the commencement of hostilities in every case. Grotius declared:

> The cause for which nations have required a declaration for a lawful war was not, as some allege, that they might do nothing secretly or by a clever trick, for that consideration belongs rather to the perfection of gallantry

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than to law, . . . but that it might appear with certainty that the war was not waged by private audacity, but by the will of the peoples on either side or their heads. . . .

The peoples of democratic countries have raised legal safeguards which are designed to protect them against "private audacity" in throwing them into war, and to require an expression of the people's will before their nation goes to war. These safeguards include parliamentary discussions and votes for or against war.

Such safeguards, however, make the people even more vulnerable, as already observed in the history of Hague Convention III, as victims of the sudden surprise attacks which dictators can make against democratic peoples without being delayed by constitutional or other formal proceedings. dures.

This fact, together with the modern weapons of total warfare which science is making available for such sudden surprise attacks against all the people of a nation, have made it imperative that democratic peoples especially support and enforce the provisions of Hague Convention III with the most rigorous vigilance and united power.

Certainly Grotius was speaking modern as well as ancient wisdom when he said that the people's will should be given an opportunity to determine for or against war. The interval between the warning declaration, "reasoned" or conditional, and the commencement of hostilities, therefore, should be adequate for that determination.

(next page numbered 17b)

The time allowed by Japan in its ultimatum to Germany in August, 1914, was one week. Perhaps a day or even an hour could be a reasonable time in some circumstances. Even a short period, and *a fortiori*, a long period, could be made subject, by the express terms of the warning, to being reduced or ended immediately if the State receiving the warning should proceed to mobilize its forces instead of indicating a good faith consideration of the reasons and conditions stated in the warning. The allowance by the warning power of a mere token interval, such as a one minute interval or such as the thirty minute interval which some of the Japanese defendants say that they proposed for the final Japanese note which Japan delivered to the United States on December 7, 1941, and which the prosecution attacked as ambiguous, deceptive, and delivered after the Pearl Harbor attack was commenced, would appear to be difficult to justify under any reasonable interpretation of the words of the treaty or of the purposes of the treaty.

Kota Bahru was never related to time in accordance with Hague III + no attempt was ever made by Japan to notify England.

(next page numbered 18)

A study of the text of Hague Convention III shows therefore that the Convention prescribes a legal procedure which must precede the outbreak of hostilities between nations.

Legal procedure is considered to be the guardian of legal rights. The rights of individuals under national systems of criminal law depend for their protection chiefly upon strict compliance with the provisions of duly established procedural laws. And the rights of nations under international law depend, as pointed out by Professor Stowell, who was a student under Professor Louis Renault, the rapporteur of Hague III, upon the observance of procedural limitations upon force.

He asserts:

> Whenever there is a patent disregard of any of the limitations imposed upon the use of force, such force ceases to be legitimate and must be regarded as an abuse violating the peace of nations and constituting an unjust aggression against the defending state. . . . The first of these limitations is the requirement that the . . . state using force . . . strictly observe every provision of the rules of procedure. There is no principle of international law more vital, for it is essential to insure the protection of international society

from the worst abuses of force. . . . Whenever there is a violation of the rules of procedure, recourse to war or other force ought to be considered as unjust, irrespective of the merits of the case.

In other words, a State attacked has the legal right under Hague Convention III to receive an explicit warning at a reasonable time before hostilities are commenced against it. If these Convention conditions are not met, the attack is one of aggression, within the definition by Oppenheim that an aggressive war is a war undertaken in defiance of the legal rights of other States.

The foregoing discussion indicates the reasoning by which counsel may consider that Hague Convention III is shown by its history and by its text to be not a dead letter or scrap of paper but a working standard for determining that a given war is or is not in fact a war of aggression. Using the treaty as a legal standard, one definition or classification may be stated as follows: A war in which hostilities are commenced in intentional or reckless violation of Hague Convention III is a war of aggression.

II

The second question regarding Hague Convention III is stated as follows:

In the preparation of an indictment, does Hague Convention III provide lawyers with the legal foundation and indicate to them the essential legal elements for charging acts of aggression as war crimes?

Hague Convention III was only one, of course, of the numerous treaties and other laws upon which the 55 counts of the Tokyo indictment were based. The legal conclusions which are indicated by the indictment to have been made by counsel in drafting it are discussed here without consideration of or reference to any legal decisions which the Tribunal may later hand down in its judgment. No new matter of law, of fact or of legal argument, not comprehended within the Tokyo indictment and transcript, is presented here.

This Conference of lawyers, considering in this round-table discussion the progressive development of international criminal law, is necessarily concerned with the legal foundations and elements of war crimes indictments. Such indictments represent in some respects the most extensive practical steps yet taken in international criminal law. Indictments for war crimes, moreover, deal with questions which are closely related to other problems before this Conference. Among these problems is the codification of international criminal law, both the defining

of international crimes and also the prescribing of international criminal procedure. Consideration also is being given here to the international administration of justice, which necessarily involves plans and provisions for a working system of international criminal courts and police. A Conference of lawyers facing problems of such difficulty and importance is entitled to have before it the facts regarding current related activities. For these reasons, therefore, an analysis of the above stated question, with specific reference and limitation to the wording of Hague Convention III and the Tokyo indictment appears to be appropriate for discussion before this symposium of the Conference. In considering the question stated, a division of subjects will be made as follows:

(A) The function of an indictment, particularly in a war crimes case;

(B) The essential legal elements necessary to be stated in a war crimes indictment;

(C) Analysis of a specimen count in the Tokyo war crimes indictment (Count 39);

(D) Hague Convention III as a basis for charging certain war crimes.

(A)

<u>The function of an indictment</u>, particularly in a war crimes case.

In a criminal prosecution in most jurisdictions the basic and indispensable document is the written accusation, commonly

called the indictment. A principal function of the indictment is to inform the accused of the acts which he is alleged to have committed and to indicate to him the law which his acts are alleged to have violated, in order that he may prepare his defense both on the facts and on the law. It is the indictment, therefore, in a war crimes case which is designed especially to demonstrate to the accused and to all other persons that the case is in strict accord with two fundamental principles of criminal justice, namely, the principles that no act is a crime unless there is a law which makes it a crime (the nullum crimen rule) and unless that law was in effect when the act was committed (the ex post facto rule). The indictment shows further that the case is a legal prosecution in which the people of the international community, and particularly the people who have suffered injuries to their legal rights, are placing before a court the allegations of those injuries, both in fact and also in law, and are asking for a legal penalty which will help to prevent a repetition of such wrongs.

(B)

The essential legal elements necessary in a war crimes indictment.

The indictment must set forth the circumstances required by the law as grounds for the law's operation through the process of legal prosecution. In drawing up the Tokyo indictment the prosecutors obviously had to consider, first, the circumstances which constitute in general a war crime, and second, the particular circumstances which constitute specific war crimes committed

by violating Hague Convention III.

The circumstances or essential elements which an indictment must include in order to be in general a legal charge of a war crime are shown by authoritative court decisions and other writings to be substantially the following elements, presented here as a working list and without prejudice to a better arrangement or statement:

A war crime, if properly to be prosecuted or penalized, has the following essential elements: (1) a person or persons, but not necessarily usually in the armed forces or government of a nation, (2) injures or destroys, (3) with criminal intent, that is intentionally, or in reckless disregard of legal duty, (4) a person or persons, property or government of another nation, (5) in any place, (6) in connection with war and in time of declared or undeclared war or of acts of unlawful belligerency, such as the commencement of armed hostilities and war aggression illegally in time of peace, and (7) in violation of a specific legal duty previously established and defined by existing treaty or other competent international authority.

(C)

Analysis of a specimen count in the Tokyo war crimes indictment.

Count 39 is selected because it charges the Pearl Harbor attack, a principal instance of commencing hostilities in violation of Hague Convention III. Count 39 reads as follows:

INDICTMENT

Count 39

The same accused as in Count 38 [DOHIHARA, HIRANUMA, HIROTA, HOSHINO, KAYA, KIDO, KIMURA, MATSUOKA, MUTO, NAGANO, OKA, OSHIMA, SATO, SHIMADA, SUZUKI, TOGO and TOJO, together with other persons], under the circumstances alleged in Counts 37 and 38, by ordering, causing and permitting the armed forces of Japan to attack the territory, ships and airplanes of the United States of America, with which nation Japan was then at peace, at Pearl Harbor, Territory of Hawaii, on the 7th December, 1941, at about 0755 hours (Pearl Harbor time), unlawfully killed and murdered Admiral Kidd and about 4,000 other members of the naval and military forces of the United States of America and certain civilians whose names and number are at present unknown.

This count will now be analyzed under the seven headings of the essential elements of a war crime charge, as stated above

(1) The seventeen persons named as defendants are generals, admirals, and other leaders in the armed forces and government of Japan.

(2) The acts of injuring and destroying are alleged as "ordering, causing and permitting the arred forces of Japan to attack," and "killed and murdered." Other acts incorporated by reference from Count 37 include "initiating unlawful hostilities." The words "the armed forces of Japan" may appear to have been based on the alleged use by the defendants of a Japanese naval air task force of about 22,000 men, 22 combat surface vessels, including 6 aircraft carriers with 360 bombers and other combat aircraft, and supporting battleships, cruisers, and destroyers, and 30 regular size submarines. As

perhaps a collateral matter "the armed forces" as alleged in the indictment may be understood to have been reduced by losses, during the operation, of 64 men. some airplanes, and 5 midget submarines.

(3) Criminal intent is alleged in the word "unlawfully" placed before the alleged acts "killed and murdered"; and from Count 37 come also the words "each of the accused intended that such hostilities should be initiated in breach of such Treaty Article /Hague Convention III/, or were reckless whether such Treaty Article would be violated or not." Also incorporated from Count 37 is the allegation that the accused intended to kill and murder all such persons as might happen to be present at the time and place of attack.

Count 37 cites Hague Convention III as the basis for alleging the hostilities to be unlawful. Count 38 cites as its basis treaties other than Hague III. Therefore in analyzing Count 39 in its relationship to Hague III, references are made to Count 37 and not to Count 38.

(4) The persons and property "of another nation" which are alleged to have been injured and destroyed by the Japanese defendants are stated as "Admiral Kidd and about 4,000 other members of the naval and military forces of the United States of America and certain civilians" and "the territory, ships and airplanes of the United States of America." As perhaps a collateral matter/ here, the allegations of the indictment may be understood as referring to the killing of the Admiral and 2,395 other Americans, according to the evidence as later introduced, and to extensive damage

to territory, installations, ships and planes of the United States.

(5) The place alleged is "at Pearl Harbor, Territory of Hawaii."

(6) The time alleged is "on the 7th December, 1941, at about 0755 hours (Pearl Harbor time)" and while Japan and the United States were "then at peace." It is alleged also by reference to Count 37 that the attack occurred before a warning declaration; and that the accused Japanese were at that time participating in the execution of a plan and conspiracy for the initiation of unlawful hostilities against the United States and other nations in violation of Hague Convention III.

(7) The specific legal duty which Count 39 of the indictment expressly and particularly alleged, by reference to Count 37, as that which the defendants violated was the duty not to commence hostilities without a warning declaration. Of course, the Tokyo indictment did not expressly restrict the legal foundation of even this one count of its 55 counts to this one duty. The duty not to initiate a war of aggression was presented by the entire indictment as a broad duty. Prosecuting counsel cited to the Tribunal Lord Wright's statement that "To initiate a war of aggression is . . . the chief of war crimes. It differs in its universal scope from the specific offences which are included in the breache of the particular laws of war." It is therefore to be understood that the discussion here of Count 39 and of Hague III is to illustrate and to analyze the essential elements which are necessary

as a minimum but legally sufficient requirement for a war crimes indictment. To make this analysis still more specific, Hague Convention III will now be considered.

(D)

The use of Hague Convention III in the preparation of an indictment.

The history of Hague Convention III has shown that the Convention was enacted into law by a competent international conference of nations, the Second Hague Peace Conference, with legal signatures and ratifications or adhesions. Moreover, the Convention also was duly promulgated by the executive authority in the nations directly concerned, and it was thus made binding upon each individual in each of those nations from the date of the Convention's promulgation as the law of the land.

The Pearl Harbor attack is alleged to be a breach of Hague Convention III, in Counts 37 and 39 of the Tokyo indictment. A comparative analysis of the provisions of Hague III and of the allegations of Count 39, made under the headings of the essential legal elements of a war crimes charge, will indicate whether Hague III provides a sufficient legal basis for charging such acts of aggression as war crimes.

In general, Hague Convention III does not follow a common or usual form of a statutory definition of a criminal offense as contained in national criminal codes. That fact, however, appears to be a matter of form rather than of substance.

(1) Persons upon whom the treaty places the duty of compliance are indicated to be those who, as leaders in the armed forces or government of a Contracting Power, have the authority to order, cause or permit that nation's armed forces to commence hostilities against another Contracting Power without the required warning declaration first having been made. A Contracting Power cannot do an act of hostile attack, such as bombing, shooting or burning; only individual leaders and government officials do these acts either in person or by orders to subordinates. Moreover, each individual citizen is made personally responsible for obedience and respect to the terms of a treaty by the executive head of the nation when he promulgates the treaty. Hague Convention III, under the law of Japan, was thus proclaimed by the Emperor of Japan. This fact of personal responsibility is recognized in war crimes cases by the judicial decisions of the highest national courts, as in the case of Ex parte Quirin, 317 U. S. 1.

In Count 39, the persons named as the accused were indicted in accordance with this interpretation of Hague III.

(2) The acts forbidden by the Convention are described by the words "hostilities . . . must not commence . . . ." The expression "commencement of hostilities" has an established and clear meaning. It includes such acts as those alleged in Count 39, namely, "ordering, causing and permitting the armed forces . . . to attack the territory . . ." of another treaty power; and such acts as, from Count 37, initiating illegal hostilities; and the

further act of killing members of the forces of the other treaty power. The expression "commencement of hostilities" would include also such acts as dropping bombs and firing guns, either in person or by orders to subordinates.

The illegality of specific acts of armed hostilities such as the act of killing may be viewed as established either directly and solely by Hague Convention III; or by that Convention as interpreted or as supplemented by other treaty provisions such as Hague Convention IV, Article 23b, "it is especially forbidden . . . to kill or wound treacherously . . . individuals belonging to the enemy nation or army"; or by Hague Convention IV, clause 4, removing from such killing the defense of justification as being a killing in a lawful belligerency; or by established principles of criminal law such as the principle that killing in the perpetration of another illegal act dangerous to life may be criminal homicide.

(3) The criminal intent comprehended by the Convention is indicated in part by the emphatic, mandatory term "must not." Either the intentional doing of the forbidden acts or the reckless disregard of legal duty in connection with acts as alleged as the criminal intent in Count 39, is within the effective scope of the treaty.

(4) The persons and property of another nation which the Convention would protect from injury and destruction by the acts of aggression are comprehended within the term "hostilities," which necessarily involves such injury and destruction, and within

the words of the Convention, "between themselves," referring to "The Contracting Powers." The international quality of a war crime in general is demonstrated by these words in the Convention which specify the necessity that the offender and the victim be connected with different nations.

(5) The Convention imposes no restriction in regard to the place where the offense may be committed. In view of this fact, the indictment for an offense under Hague III may apply the general rule applicable in war crimes cases that a war crime can be committed in any place.

(6) The Convention imposes no limits with respect to the time of the commission of the crime or crimes, except to require that before the hour when hostilities are begun by the attacking Power the required warning declaration of war must have been given to the Power attacked. In Count 39, supplemented by Count 37, the hour and date alleged as the beginning of hostilities were not preceded by a warning declaration.

Under the Convention, at the time when a nation commences hostilities against another nation without a warning declaration of war, the attacking nation is factually at war with the nation attacked, but it has no legal rights as a belligerent, or, in other words, in legal effect it is still at peace with the other nation. To conclude otherwise would be to make Hague III a dead letter and to allow the attacking nation to gain legal rights by its violation of Hague III and other laws. Therefore, the words "then at peace", in Count 39, express accurately the legal effect

of Hague III.

At the same time the attacking nation has violated the Convention by initiating the actual war. Moreover, if the attacking nation later declares war, it thereby expressly recognizes that the war actually began with the opening attack. For these reasons, although the violation was committed in time of peace in a legal sense as well as in a chronological sense and with respect to Hague III, still it was committed also in time of war from a factual standpoint. It was a time of war when viewed from the standpoint of the initial attack by armed force, which was being resisted by the attacked nation in self-defense, or from the viewpoint of the initial attack continuing into a war later declared by the attacking nation. For these and related reasons the violation may accurately be classified as a war crime.

(7) Hague Convention III of 1907 established and defined the specific legal duty not to commence hostilities without a warning declaration.

The foregoing analysis indicates that in the preparation of an indictment, Hague Convention III provides lawyers with the legal foundations and the essential legal elements for charging as a war crime and an act of aggression the commencement or initiation of hostilities in violation of that Convention.

In closing it appears to be appropriate to mention here a citizen of the Netherlands, the late Captain C. Hen, who was master of the former Dutch ship Tjisalak. His fate has impressed the writer with the importance of prosecuting and preventing

war crimes. The Tjisalak, on March 26, 1944, was in the Indian Ocean en route from Melbourne, Australia, to Colombo, Ceylon. The ship was over ~~five~~ two hundred miles south of Colombo when it was sunk by a Japanese submarine, the I-8, commanded by Commander Ariizumi. Captain Hen and a hundred capturod members of his crew and passengers, including one woman, were brought aboard the submarine. The captain, with his hands bound behind him, was taken before the submarine commander for questioning. The captain asked the commander to be kind and lenient with the captain's crew. Captain Hen said, "It is contrary to internacinal law to bind our hands behind our backs." As that statement was interpreted to him, the Japanese commander exclaimed, "Bakayaro! /You fool!/ This is war!" and proceeded with his crew to kill Captain Hen and the rest of the hundred victims by shooting, slashing with swords and bayonets, compelling the victims to run the gantlet between lines of attackers, and finally throwing the victims or their bodies overboard to the sharks.

That is the issue with which lawyers have been dealing at Tokyo. That is the issue with which lawyers are dealing at The Hague. The issue is "International Law versus War." The issue is sharply raised by those who declare, with Commander Ariizumi, that one is a fool if he depends upon international law as against war.

On the side of international law, however, are treaties such as Hague Convention III, with its service record of forty years.

It has suffered many wounds and bears many scars, but it is still a force which any violator may challenge only at the risk of placing his neck in a noose.

Also on the side of international law is a long line of brave and faithful servants like Grotius and Captain Hen and those who worked here at the Conference of 1907. Their work deserves all of the assistance which is necessary to perpetuate and extend it.

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D. Is Hague Convention III of 1907, relative to the openingof hostilities, binding on Japan?

Firstly, in order to answer this question properly, it is [redacted] necessary to set forth the events and circumstances leading up to the Hague Convention No. III of 1907 relative to the opening of hostilities.

Japan has had a principal but involuntary responsibility for the origin and development of Hague Convention III. Japan was charged by China with beginning the Sino-Japanese war of 1894-95 by commencing hostilities without a declaration of war by the capture by a Japanese cruiser of the Chinese transport Koshung. Japan was charged by Russia ten years later with treachery in commencing hostilities in the Russo-Japanese war of 1904-05 by attacking the Russian fleets at Chemulpo and Port Arthur on February 8, 1904, two days before Japan declared war on Russia on February 10. Japan had in fact commenced hostilities by capturing the Ekaterinoslav, a Russian cruiser, on the morning of February 6, at least fourteen hours before the delivery at the Russian capital of the Japanese note breaking off diplomatic relations. Japan denied the Russian accusations of treachery. Russia, however, proposed to the powers in their plans for the Second Peace Conference that provisionsrelative to the opening of hostilities be modified by that Conference, which met at The Hague on June 15, 1907. The result was Hague Convention III.

This Convention had a truly international blood lineage and birth ceremony. After it was proposed by the Russians, its text was presented by the French, based on a recommendation by the Institute of International Law adopted at Ghent in 1906. The delegations of Germany, Great Britain, Japan, and Russia on the Conference Subcommission expressly declared themselves in accord with the proposal. In the sessions of the Second Peace Conference, and in the later discussions throughout the world on ratification and adhesion, the Convention received unique support by the nations of the world. It was the only general convention among the thirteen conventions signed at The Hague Conference of 1907. A total of twenty-five Powers signed and ratified the convention, and six Powers later adhered to it. Furthermore, it is not restricted by any "general participation" clause, nor by any limitation to land warfare or to sea warfare, a limitation in some of the other conventions which reflected special and diverse natio nal interests and strategy. The permanency of its support by the nations and peoples of the world, moreover, is indicated by the fact that, although Article 7 provides that any nation may withdraw from the Convention upon one year's notification to theNetherlands Government, no nation has denounced and withdrawn from the Convention.

Secondly, the opinions of [redacted] leading Authorities on the subject of the Hague III convention relative to the opening of hostilities may shed some light on the question whether the convention is binding on the signatories.

In the Seventh Edition of Wheaton's International Law, Dr. B. Keith discusses the history and the principle of declaration of war. Dr. Keith points out that a formal declaration of war to the enemy was once considered necessary to legalize hostilities between nations. It was uniformally practiced by the ancient Romans, and by the states of Modern Europe until about the middle of the Seventeenth Century. In the Seventeenth Century formal declarations were not regarded essential. From the Eighteenth Century previous notifications became exceptional. Out of some one hundred twenty wars that took place between 1700 and 1872 there were barely ten cases in which a formal declaration preceded hostilities. In the latter part of the Nineteenth Century, however, it became customary to publish a manifesto, within the territory of the state declaring war, announcing the existence of hostilities and the motives for commencing them. This publication perhaps was considered necessary for the instruction and direction of the subjects of the blelligerent state in respect to their intercourse with the enemy, and regarding certain effects which the law of nations attributes to war in form. Dr. Keith also points out that apart from the conclusions to be drawn from actual practice, there was by no means unanimity of opinion among jurists and publicists. On the whole, continental writers urged the necessity of a previous declaration.

Dr. Keith then cites examples from the period between 1870 and 1904 to show that in some case there were formal declarations while in others there were none. Among the latter group were the hostilities of 1884-1885 between

France and China, the Serbian invasion of Bulgaria of 1885, the Sino-Japanese War of 1894, the Greek invasion of Turkey of 1897, and the allied action against China on June 17, 1900. In the Russo-Japanese War, 1904, Japan attacked the Russian Fleets two days before she formally proclaimed war. Russia thereupon accused the Japanese of treacherous conduct. Diplomatic relation between the two powers had been going on fruitlessly since the preceding July, and were severed on February 6, by the Japanese note declaring that "The Imperial Government of Japan reserve to themselves the right to take such independent action as they may deem best to consilidate and defend their menaced position, as well as to protect their established rights and legitimate interests." A few hours before the delivery of this note however, the Japanese captured a Russian cruiser, as the Russian Fleet appeared on February 4 between Port Arthur and the Japanese Coast.

As has been pointed out above, though a practice developed to issue a general manifesto, this practice was uncertain and was only a matter of courtesy rather than of legal obligation. Dr. Keith says that because of this unsatisfactory state of the matter the Hague Conference of 1907 took up the question, and laid down definite rules in its third convention, which is now binding on the belligerents.

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Thirdly, a careful study of the judgments of International Tribunals dealing with Hague III of 1907, relative to the opening of hostilities may have a definite bearing on the question whether the convention is binding on the Signatories.

In the case of ARAKI et., al. tried before the International Military Tribunal for the Far East, the following excerpt of the judgment is set forth on page 68:

THIRD HAGUE CONVENTION

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The Third Convention concluded by the Powers in Conference at the Hague in 1907 was the Convention Relative to the Opening of Hostilities. (Annex No. B-16). The Convention was signed and ratified by, or on behalf of, Japan and each of the Powers bringing the Indictment, except China; but China adhered to the Convention in 1910. A total of twenty-five Powers signed and ratified the Convention, including Portugal and Thailand, and six Powers later adhered to it. This Convention does not contain a "general participation clause". It provides that it shall take effect in case of war between two or more of the Contracting Powers, it was binding upon Japan at all relevant times mentioned in the Indictment. By ratifying this Convention, Japan agreed, among other things: "

> " That hostilities between her and any other Contracting Power must not commence without previous and explicit warning, in the form eitherof a declaration of war, giving reasons, or of an ultimatum with conditional declaration of war. "

And in the same judgment on page 985, the Tribunal again came to the conclusion that Hague III Convention of 1907 was binding on Japan. It states as follows:

> " Hague Convention No. III of 1907, relative to the opening of hostilities, provides by its first Article "The Contracting Powers recognise that hostilities between themselves must not commence without previous and explicit "warning in the form either of a reasoned declaration of war or of an ultimatum with conditional declaration of war". That Convention was binding on Japan at all relevant times. "

The International Military Tribunal at Nurnberg, in the case of GOERING et., al., made the following finding on page 16863:

> "The plans for the economic exploitation of the USSR, for the removal of masses of the population, for the murder of Commissars and political leaders, were all part of the carefully prepared scheme launched on the 22nd June without warning of any kind, and without the shadow of legal excuse. It was plain aggression.

And again on page 16867 of the Nunnberg Judgment, the Tribunal found the following:

"The Charter defines as a crime the planning or waging of war that is a war of aggression or a war in violation of international treaties. The Tribunal has decided that certain of the defendants planned and waged aggressive wars against twelve nations, and were therefore giulty of this series of crimes. This makes it unnecessary to discuss the subject in further detail, or even to consider at any length the extent to which these aggressive wars were also "wars in violation of international treaties, agreements or assurances." These treaties are set out in Appendix C of the Indictment. Those of principle importance are the following."

HAGUE CONVENTIONS

"In the 1899 Convention the signatory powers agreed: "before an appeal to arms . . . to have recourse, as far as circumstances allow, to the good offices or mediation of one or more friendly powers." A similar clause was inserted in the Convention for Pacific Settlement of International Disputes of 1907. In the accompanying Convention Relative to Opening of Hostilities, Article I contains this far more specific language:

I "The Contracting Powers recognize that hostilities between them must not commence without a previous and explicit warning, in the form of either a declaration of war, giving reasons, or an ultimatum with a conditional declaration of war."

"Germany was a party to these conventions."

In view of the above quoted authority together with the judgments of the International Military Tribunals of Nurnberg and the Far East, as established legal precedents, it is safe to proceed on the legal assumption that Japan is bound by the Hague ConventionIII of 1907 relative to the opening of hostilities.

Therefore, the next question for consideration, is as follows:

"Is Hague Convention III of 1907, relative to the opening of hostilities, sufficient as a basis of a criminal offense?"

A logical way to deal with this question is to determine "what is International Law?" Here again it is well to look to authorities on this subject. A simple definition of International Law may be found in Volume I, Fourth Edition of Oppenheim's International Law, as edited by McNair. It is thus stated:

"Laws of Nations or International Law is the name for the body of customary and convnetional rules which are considered legally binding by civilized states in their intercourse with each other. Such part of these rules as is binding upon all the civilized States without exception, as, for instance, the law connected with legation and treaties, is called universal International Law in contradiction to particular International Law which is binding on two or a few States. But it is also necessary to distinguish general International Law. This name must be given to the body of such rules as are binding upon many states, including leading Powers.

General International Law, as, for instance, the Declaration of Paris of 1856, has a tendency to become universal International Law.

we may ask ourselves" What are

At this particular point the sources of international law? i[redacted]n. Oppenheim on International Law. Volume I, edited by McNair states on page 25, as follows:

> "Treaties and customs are, therfore exclusively the sources of the Law of Nations.
>
> Customs is the older and the original source of International Law in particular as well as law in general. ---International jurists speak of a custom when a clear and continuous habit of doing certain actions has grown up under the aegis of the conviction that these actions are, according to International Law, obligatory or right."

← And on page 26 it is stated:

> "Whereever and as soon as a line of international conduct frequently adopted by states is considered legally obligatory or legally right, the rule which may be abstracted from such conduct is a rule of customery International Law.

And on page 26 relative to Treaties, it is stated:

> "Treaties are the second source of International Law, and a source which has of late become of the greatest importance. As treaties may be concluded for innumerable purposes, it is necessary to emphasize that such treaties only are a source of International Law as either stipulated new rules for future international conduct or confirm, define, or abolish existing customary or conventional rules. Such treaties must be called law-making treaties."

And on page 700 relative to Treaties, it is stated:

> "International treaties are conventions, or contracts, between two or more States concerning various matters of interest."

And on page 702, the following is stated:

> "In one class treaties is to be divided into two classes. In one class are treaties concluded for the purpose of confirming, defining, or abolishing existing customary rules, and of establishing new rules for the Law of Nations. Treaties of this kind ought to be termed law-making treaties."

From the above just quoted, one cannot help but come to the conclusion that Hague III of 1907, relative to the opening of hostilities is a law-making treaty. As stated above, before the Convention of Hague III of 1907, the issuance of a declaration of war prior to the opening of hostilities was customary in a good many instances. Since no written law existed regarding the opening of hostilities by any nation at any time whatever, even in the midst of profound peace, the Powers met at The Hague in 1907, to give written law to the custom of serving a declaration of war prior to the opening of hostilities, and to do away with, once and for all, any uncertainty that heretofore existed. On pages 702 to 703 including the footnotes, it is authoritatively stated that the Hague Conventions of 1907 is a law making treaty, [redacted] as follows:

> "Law-making treaties have been concluded ever since International Law came into existence. It was not until the nineteenth century, however, that there were law-making treaties of world-wise importance. Although at the Congresses at Munster and Osnabruck all the European Powers then existing, with the exception of Great Britain, Russia, and Poland, were represented, the Westphalian Peace of 1648, to which Franch, Sweden, and the States of the German Empire were parties, and which recognised the independence of Switzerland and the Netherlands and the practical sovereignty of the 332 States of the German Empire, and was not of world wide

"importance, in spite of the fact that it contained various law-making stipulations. And the same may be said with regard to all other treaties of peace between 1648 and 1815. The first law-making treaty of world-wide importance was the Final Act of the Vienna Congress, 1815."

And in the foot note of said pages is listed the law-making treaties of world-wide importance as follows:

"The Final Act of the Vienna Congress--signed on June 9, 1815, by Great Britain, Austria, France, Portugal, Prussia, Russia, Spain, and Sweden-Norway, comprise law-making stipulations of world-wide importance concerning four points---namely, the perpetual neutralization of Switzerland--; free navigation on so-called international rivers--; the abolition of the negro slave trade--; ad the different classes of diplomatic envoys--. In addition to the foregoing--, the following examples may be mentioned: The treaties of London of 1831 and 1839 ---; the Declaration of Paris of 1856; the Geneva Conventions of 1864 and 1906 for the amelioration of the conditions of the wounded of armies in the field--; the Declaration of St. Petersburg of 1868 dealing with explosive and other projectiles --; the Final Act of the Hague Peace Con ference of July 29, 1899--; Holls, The Peace Conference at The Hague (1900); and Merignhac, La conference internationale de la paix (1900); The Hague Coventions of 1907--; the Protocol of Signature of the Statute of the Permanent Court of International Justice, December 16, 1920;"

Since the acceptance of authoritative opinions may be discretionary with international courts of justice, it is fitting at this time to set forth decisions of international courts of justice, regarding international law, its sources and effect it has upon NATIONS OF the world. In a judgment rendered recently by the Nurenberg International Military Tribunal in the case of Georing, et.,al., the Tribunal stated on page 16874-75 as follows:

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- - -"The Hague Convention of 1907 prohibited resort to certain methods of waging war. These included the inhumane treatment of prisoners, the employment of poisoned weapons, the improper use of flags of truce, and similar matters. Many of these prohibitions had been enforced long before the date of the Convention; but since 1907 they have certainly been crimes, punishable as offences against the laws of war; yet the Hague Convention nowhere designates such practices as criminal, nor is any sentence prescribed, nor any mention made of a court to try and punish offenders. For many years past, however, military tribunals have tried and punished individuals guilty of violating the rules of land warfare laid down by this Convention. - - - It must be remembered that international law is not the product of an international legislature, - - - The law of war is to be found not only intreaties, but in the customs and practices of states which gradually obtained universal recognition, and from the general principles of justice applied by jurists and practised by military courts. This law is not static, but by continual adaptation follows the needs of achanging world. Indeed, in many cases, treaties do no more than express and define for more accurate reference the principles of law already existing - - -."

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And ~~again on page 16876~~ as follows:

"It was submitted that international law is concerned with the actions of sovereign states, and provides no punishment for individuals; and further, that where the act in question is an act of state, those who carry it out are not personally responsible, but are protected by the doctrine of the sovereignty of the State. In the opinion of the Tribunal, both these submissions must be rejected. That international law imposes duties

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MAY IT BE SAID THAT THE VIOLATIONS OF THE HAGUE CONVENTION (1907) RELATIVE TO OPENING OF HOSTILITIES, ESPECIALLY DURING THE 1930'S, HAVE BEEN SO NUMEROUS AND FLAGRANT, AND SO FREE FROM ANY RESULTING PENALTY THAT THE CONVENTION HAD BECOME IN FACT A MERE DEAD LETTER?

It is conceded that there were numerous violations of Hague III (1907) relative to the opening of hostilities in that certain Dictator Governments commenced hostilities without first serving an explicit and previous warning in the form either of a ~~xxxxxxxxxxx~~ reasoned declaration of war, or an ultimatum with a conditional declaration of war.

On the other hand, Hague Convention III, relative to the opening of hostilities, since its inception, has had a history of unfailing compliance and approval by the peace-loving, law-abiding, free people and democratic governments of the world. Worthy of note is the fact that Japan, on August 15, 1914, strictly complied with Hague III (1907) relative to the opening of hostilities. On that day, Japan commenced hostilities against Germany by delivering to Germany an ultimatum making specific demands upon her, thereby having given strong evidence of recognition of the Hague Convention III (1907).

To shed further light on this question, reference is made to authoritative opinions including decisions of Courts of Justice. In Oppenheim's book on International Law, Vol. I, Fourth Edition, edited by McNair, the following is set forth on pages 15-16:

> "It is inevitable that the Law of Nations must be a weaker law than Municipal Law, as there is not, and cannot be, an International Government above the national ones which could enforce the rules of International Law in the same way as a national Government enforces the rules of its Municipal Law. This weakness becomes particularly conspicuous in time of war, for belligerents who fight for their existence will always be apt to brush aside such rules of the Law of Nations concerning warfare as are supposed to hinder them in the conduct of their military operations. But a weak law is nevertheless still law, and the Law of Nations is by no means so weak a law as it sometimes seems to be. Those who deny to International Law the character of law because they identify the conception of law in general with that of Municipal Law and because they cannot see any law outside the State, confuse cause and effect.
>
> The Governments and Parliaments of the different States are of opinion that they are legally, as well as morally, bound by the Law of Nations. Likewise, the public opinion of all civilized States considers every State legally bound to comply with the rules of the Law of Nations, not taking notice of the opinion of those theorists who maintain that the Law of Nations does not bear the character of real law. And the several States not only recognize the rules of International Law as legally binding in innumerable treaties, but emphasize every day the fact that there is a law between themselves."

And in the Case of Goering et.,al., tried at Nuremberg by an International Tribunal, the Cour on page 1687 of the Judgment, held as follows:

> "It was submitted that international law is concerned with the actions of sovereign states, andprovides no punishment for individuals; and further, that where the act in question is an act of state, those who carry it out are not personally responsible, but are protected by the doctrine of the sovereignty of the State. In the opinion of the Tribunal, both these submissions must be rejected. That international law imposes duties

and liabilities upon individuals as well as upon states has long been recognized. In the recent case of Ex Parte Quirin (1942 317 US 1), before the Supreme Court of the United States, persons were charged during the war with landing in the United States for purposes of spying and sabotage. The late Chief Justice Stone, speaking for the Court, said:

> "From the very beginning of its history this Court has applied the law of war as including that part of the law of nations which prescribes for the conduct of war, the status, rights and duties of enemy nations as well as enemy individuals."

He went on to give a list of cases tried by the Courts, where individual offenders were charged with offences against the laws of nations, and particularly the laws of war. Many other authorities could be cited, but enough has been said to show that individuals can be punished for violations of international law. Crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced."- - -.

Thus the above statement of the law, by the Nuremberg International Tribunal, was also adhered to by the International Military Tribunal for the Far East. In the case of Araki et. al., this Tribunal , on page 26 of its judgment stated as follows:

> "In view of the fact that in all material respects the Charters of this Tribunal and that of Nuremberg Tribunal are identical, this Tribunal prefers to express its unqualified adherence to the relevant opinions of the Nuremberg Tribunal rather than by reasoning the matters anew in somewhat different language to open the door to controversy, by way of conflicting interpretations of the two statements of opinions."

Although the violation of Hague III of 1907 relative to the opening of hostilities was submitted to the International Military Tribunal for the Far East in the case of Araki Et. al., by way of Counts 37 to 43 in the indictment, the Tribunal found it unecessary to render an opinion on the extent of the violations on grounds that Hague III was pleaded in a manner in which the court had no jurisdiction, according to the Charter, over a crime of conspiracy to commit murder and further that the accused are guiltly of the Crime of Aggressive War, which is the greatest crime including all the evils of war.

~~In the case of Araki et. al., some of the accused were charged, among other counts, with the unlawful opening of hostilities in violation of Hague III as set forth in counts 37 to 43.~~

~~In the case of Araki et. al., some of the Defendents were being charged, among other counts, with the unlawful opening of hostilities in violation of Hague III as set forth in counts 37 - 43 of the Indictment.~~

Counts 37 - 38 charged certain accused with conspiring to murder members of the armed forces and civilians of the United States, the Philippines, the British Commonwealth, the Netherlands and Thailand by initiating unlawful hostilities against those countries in breach of the Hague Convention No. III of 18th Oct 1907.

Counts 39 to 43 charged the same accused with the commission on 7th and 8th December 1941 of murder at Pearl Harbour (count 39), Kohtu Bahru (count 40), Hong Kong (count 41), on board H.M.S. Petrel at Shanghai (count 42), and at Davao (count 43).

Although this is not the way the writer intended to charge the remaining untried Cabinet ministers of the TOJO Cabinet, nevertheless, the Judgment of the Military Tribunal for the Far East on counts 37 to 43 was being looked upon with considerable importance as establishing a legal precedence on Hague III of 18 Oct 1907.

The Court rendered the following decision:

"Counts 37 and 38 charge conspiracy to murder. Article 5, subparagraphs (b) and (c) of the charter, deal with conventional War Crimes and Crimes against Humanity. In sub-paragraph (c) of Article 5 occurs this passage: "Leaders, Organizers, instigators and accomplices participating in the formulation or execution of a common plan or conspiracy to commit any of the foregoing crimes are responsible for all acts performed by any person in execution of such plan." A similar provision appeared in the Nuremberg Charter although there was an independent paragraph and was not, as in our Charter incorporated in sub-paragraph (c). The context of this provision clearly relates it exclusively to sub-paragraph (a), Crimes against Peace, as that is the only category in which a "common plan or conspiracy" is stated to be a crime. It has no application to Conventional War Crimes and Crime gainst Humanity as conspiracies to commit such crimes are not made criminal by the Charter of the Tribunal. The prosecution did not challenge this view but submitted that the counts were sustainable under Article 5 (a) of the Charter. It was argued that the waging of aggressive war was unlawful and involved unlawful killing which is murder. From this it was submitted further that a conspiracy to wage war unlawfully was a conspiracy also to commit murder. The crimes triable by the Tribunal are those set out in the Charter. Article 5 (a) states that a conspiracy to commit the crimes therein specified is itself a crime. The crimes, other than conspiracy, specified in Article 5 (a) are "planning, preparation, initiating or waging of aggressive war or otherwise. We hold therefore that we have no jurisdiction to deal with charges of conspiracy to commit murder as contained in counts 37 and 38 and decline to entertain these charges." (P. 33 & 34 of Judgment)

So far, the Tribunal has not decided the question relative to the violations of Hague III of 1907. Because of the way counts 37 & 38 were pleaded, the Court stated that under the Charter it had no jurisdiction to dealwith charges of conspiracy to commit murder.

The Tribunal then went on to say: (Pages 35-37 of the Judgment)

"Counts 39 to 52 inclusive (omitting count 44 already discussed) contain charges of murder. In all these counts the charge in effect is that killing resulted from the unlawful waging of war at the places and upon the dates set out. In some of the counts the date is that upon which hostilities commenced at the place named, in others the date is that upon which the place was attacked in the course of an alleged illegal war already proceeding. In all cases the killing is alleged as arising from the unlawful waging of war, unlawful in respect that there had been no declaration of war prior to the killings (counts 39 - 43, - - -, - - -) - - -. If, in any case, the finding be that the war was not unlawful then this involves unlawful killings not only upon the dates and at the places stated in these counts but at all places in the theater of war and at all times thoughout the period of the war. No good purpose is to be served, in our view, in dealing with these parts of the offences by way of counts for murder when the whole offence of waging those wars unlawfully is put in issue upon the counts charging the waging of such wars.

The foregoing observations relate to all counts enumerated; i.e., counts 39 - 52 (omitting 44). Counts 45 - 50 are stated obscurely. They charge murder at different places upon the dates mentioned by unlawfully ordering, causing, and permitting Japanese armed forces to attack those places and to slaughter the inhabitants thereby unlawfully killing civilians and disarmed soldiers. From the Language of these counts it is not quite clear whether it is intended to found the unlawful killings upon the unlawfulness of the attack or upon subsequent breaches of the laws of war or upon both. If the first is intended then the positions is the same as in the earlier counts in this group. If breaches of the laws or war are founded upon, then that is cumulative with charges in counts 54 and 55. For these reasons only and without finding it necessary to express any opinion upon the validity of the charges of murder in such circumstances we have decided that it is unnecessary to determine Counts 39 to 43 inclusive - - - . (~~Pages 35 - 37 of Judgment~~)

Here again the Tribunal has deemed it unnecessary to pass upon Hague III of 1907, relative to opening of hostilities. The court decided that the whole offence of wagin g war was unlawful and therefore declined to deal with the offences of murder by way of counts. As the Court stated: "No good puppose is to be served, in our view, in dealing with these parts of the offence, by way of counts for murder when the whole offence of waging those wars unlawfully is put in issue upon the counts charging the waging of such wars."

And again on pages 985 - 990 the Tribunal stated as follows:

> "Hague Convention No. III of 1907, relative to the opening of hostilities, provides by its first Article "The Contracting Powers recognise that hostilities between themselves must not commence without previous and explicit warning in the form either of a reasoned declaration of war or of an ultimatum with conditional declaration of war." That Convention was binding on Japan at all relevant times. Under the Charter of the Tribunal the planning, preparation, initiation, or waging of a war in violation of international law, treaties, agreements or assurances is declared to be a crime. Many of the charges in the indictment are based wholly or partly upon the view that the attacks against Britain and the United States were delivered without previous and explicit warning in the form either of a reasoned declaration of war or of an ultimatum with conditional declaration of war. For reasons which are discussed elsewhere we have decided that it is unnecessary to deal with these charges. In the case of counts of the indictment which charge conspiracy to wage aggressive wars and wars in violation of international law, treaties, agreements or assurances we have come to the conclusion that the charge of conspiracy to wage aggressive wars has been made out, that these acts are already criminal in the highest degree, and that it is unnecessary to consider whether the charge has also been established in respect of the list of treaties, agreements and assurances - including Hague Convention III - which the indictment alleges to have been broken. We have come to a similar conclusion in respect to the counts which allege the waging of wars of aggression and wars in violation of international law, treaties, agreements and assurances. With regard to the counts of the indictment which charge murder in respect that wars were waged in violation of Hague Convention No. III of 1907 or of other treaties, we have decided that the wars in the course of which these killings occurred were all wars of aggression. The waging of such wars is the major crime, since it involves untold killings, suffering and misery. No good purpose would be served by convicting any defendant of that major crime and also of "murder" eo nomine. Accordingly it is unnecessary for us to express a concluded opinion upon the exact extent of the obligation imposed by Hague Convention III of 1907. It undoubtedly imposes the obligation of giving previous and explicit warning before hostilities are commenced, but it does not define the period which must be allowed between the giving of this warning and the commencement of hostilities."

This undoubtedly brings up a point which has been the subject of controversy amongst International Lawyers since the Inception of Hague III (1907) relative to the opening of hostilities.

The question is:

> "Since Hague III (1907) imposes the obligation of giving previous and explicit warning before hostilities are commenced, how much time must be allowed between the giving of this warning and the commencement of hostilities?"

The Language of Article One is so clear and simple, that outside of the fact that it does not specify how much time (in figures) must be allowed, it nevertheless plainly states that an explicit warning in the form of a reasoned declaration of war or an ultimatum with a conditional declaration of war must be given to the other side previous to the commencement of hostilities.

Without any further study as to how much time (in days, hours, minutes or even seconds) is necessary to comply with the word "previous", it must be said that the giving of notice, even a second before the opening of hostilities, is a previous notice. But that the giving of notice at the same moment hostilities are commenced, or at any time there after, does not comply with the word previous. This reasoning is in its simplest form and does not require any further explanation.

However, in order to answer the question proposed herein above, it is necessary to go back to the minutes of the meetings of the Second Conference of Hague III (1907) to see what was in the minds of the framers of Article I, especially with regards to the word "previous". Did the Framers mean that the word "previous" required notice of (a second, a minute, an hour, a day or a reasonable time) prior to the Commencement of Hostilities?

At the second meeting of the Second-Subcommission on July 5 1907, at the Hague III Conference relative to the opening of hostilities the following minutes are set forth:

Typed

"The floor then being given to General Amourel, he reads the following statement of the arguments in support of the French proposition.

" Position of the French Delegation "
Article 1

(a) The contracting Powers recognize that hostilities between themselves must not commence without a previous and explicit warning, in the form either of a reasoned declaration of war or of an ultimatum with conditional declaration of war.

(b) In beginning the discussion of the draft regulations on the opening of hostilities which the French proposition has had the honor to submit to your consideration, it is assuredly not inadvisable to furnish you with some explanations intended to support the terms of the proposition.

(c) In the first place it is not thought necessary to consider the supposition of a war undertaken without some serious and apparent reason, or without some incident having arisen susceptible of giving rise to a discussion. An aggressive attack in time of ordinary peace and without any plausible notiveis no longer compatible with the public sentiment in the nations of thecivilized world which we are representing here.

(d) The war will then have for its cause some fact at least possessing a certain gravity and capable of producing an exchange of explanations. Then will ordinarily commence a period of diplomatic negotiations, during the course of which each Power will seek to induce the other to agree to such terms as may be required to satisfy its interests. If they fail to reach such an agreement one of the Powers may have recourse to a threat of war setting forth in an ultimatum the concessions which it requires. It will generally be the case that a period will be specified for the reply and after this the appeal to arms may be resorted to.

(e) When the events develop in this manner at the beginning of a war between two nations there can be no doubt that there will be a sufficient declaration of war. The ultimatum itself expresses an unmistakable preliminary notification. It states the concessions which are demanded and consequently the cause for war in case of their denial. And finally it places a time limit before the beginning of the war, according to the happy expression of our colleague of the Russian delegation, since the state of war dates from the expiration of the period given for the reply.

(f) But it may sometimes happen that the provoking cause of the conflict will not be followed by any diplomatic negotiations. In certain cases the moral or material damage done toa State may appear to it so grave that it is not deemed possible to seek reparation in any other way thanby force of arms. This same thing sometimes occurs in conflicts between individuals when the seconds of one party receive instructions toaccept nothing but an encounter.

(g) Then it may also happen that during the course of diplomatic negotiations these may take such a trend that the complainant can no longer hope to (169) obtain satisfactory conditions in this way. It may therefore,

very well be decided to completely discontine the negotiations at this point and resort to force to secure the satisfaction that is judged to be necessary.

In these two cases, whether war breaks out immediately or during the negotiations, it will commence through the sudden or unexpected manifestation of the expressed determination of one of the parties in dispute. But it would seem that even in these cases the opening of hostilities should be accompanied by the same guarantees as are granted when the conflict follows an ultimatum.

When there is an ultimatum it contains a statement of the cause for the war an it gives an unmistakable preliminary notification of hostilities. We demand that a notification be given to the adversary containing these things in those case in which one of the p rties decides to fght without having entered upon, or during the progress of, a diplomatic discussion.

There is no necessity for justifying the requirement that the notification should be unmistakalbe. And it also ought to be preliminary. By that we understand that it oughtto precede hostilities. But these might begin as soon as the notification has reached the adversary. The limitation on thetime for beginning the war will thus be less clearly fixed than in the cases in which there is an ultimatum. We arettherefore of the opinion that the fact is that the necessities of modern warfare do not admit of making a demand on the attacking party for any greater delays than such as are absolutely necessary in order that the opposing party may know that force is to be employed against him.

We also believe that the reasons for thedeclaration of war ought to be stated. It is thought that this condition should be readily accepted becausethe Powers, having resolved to resort to fighting only when they are convinced that they are in the right, ought not to hesitate to publicly proclaim their reasons. Furthermore, it is particularly desirable that the cause for the war should be communicated to the States not involved in the conflict but who are bound to suffer from its consequences and who have a right to know why they suffer. And finally these ame States, if they are informed as to the cause of the war, may perhaps be more disposed to tender their good offices while observing respect toward the interests in question.

These are the explanations for the terms of the first article of our draft regulations.

for ratification
In presenting Article I/before the Second Commission of the Hague Conference, General Amourel, in explanation of his proposition, stated:

> "We demand that notification be given to the adversary containing THESE THINGS in THOSE CASES in which one of the parties decides to fight without having entered upon, or during the progress of a diplomatic discussion."

What General Amourel referred to by the expression "THESE THINGS" and "THOSE CASES" is clearly understood by a careful analysis of his explanation. As to the expression "THESE THINGS", General Amourel was referring to a sufficient declaration of war and an Ultimatum. To quote General Amourel, he stated:

> "When the events develop in this manner at the beginning of a war between two nations there can be no doubt that there will be a SUFFICIENT DECLARATION OF WAR. The ULTIMATUM ITSELF EXPRESSES AN UNMISTAKABLE PRELIMINARY NOTIFICATION. IT STATES THE CONCESSIONS WHICH ARE DEMANDED AND CONSEQUENTLY FOR WAR IN CASE OF THEIR DENIAL. AND FINALLY IT PLACES A TIME LIMIT BEFORE THE BEGINNING OF THE WAR according to the happy expr ession of our colleague of the Russian delegation, since the state of war dates from the expiration of the period given for the reply."

General Armour explained that
in the case of commercial
negotiations and of loans,
by a declaration of war
the limitation on the time
for beginning the war would
be less clearly fixed than
in the case in which there
is an ultimatum. But
even in such cases,
a reasonable period
of delay should be given
in order to let the
opposing party know that
force is to be employed
by which him. The General states
the following:

"There is no necessity
for justifying

Therefore a complete interpretation of General Amourel's explanation of Article I, of Hague Convention III (1907) relative to the opening of hostilities should be as follows:

> "We demand that notification be given to the adversary containing These Things ~~xxxxxxxxxxxx~~ ("The ultimatum--expresses an unmistakable preliminary notification. It states the concessions which are demanded and consequently the cause for war in case of their denial. And finally it places a time limit before the beginning of the war--.") in Those Cases in which the ~~xxxxxxxxxxxx~~ one of the parties decides to fight <u>without having entered upon, or during the progress of a diplomatic discussion.</u>"

(article I)

General Amourel further explained to the Convention that the French proposition meant that in either case where war starts after diplomatic negotiations, or ~~xxxx where there~~ are ~~no~~ diplomatic negotiations, it should not commence unless the party who decides to fight, gives his adversary the same ~~limit of time and~~ garantees as provided in an ultimatum. General Amourel ~~explained~~ the guarantees of an Ultimatum to include ~~the following~~

1. It express an unmistakable preliminary notification.
2. It states the concessions which are demanded and consequently the cause for war in case of their denial.
3. It places a time limit before the beginning of the war.

To Quote from the General's argument in support of Article "I", he stated:

> "In these two cases, whether war breaks out immediately or during the negotiations, it will commence through the sudden or unexpected manifestation of the expressed determination of one of the parties in dispute. <u>But it would seem that even in these cases the opening of hostilities should be accompanied by the same guarantees as are granted when the conflict follows an ultimatum.</u>

General Amourel also explained those garantees of and ultimatum include:

1. an ummistakable preliminary notification.
2. It states the concessions which are demanded and consequently the cause for war in case of their denial.
3. It places a time limit before the beginning of the war.

What General Amourel thus far said may be correctly interpreted as follows:- "We demand that notification be given to the adversary, containing a sufficient declaration of war or an ultimatum, which expresses an unmistakable preliminary notification and it states the concessions which are demanded and the cause for war and a time limit before the beginning of war."

Now to completely analyse the explanation of Article I, by General Amourel, it is necessary to see what he was referring to by the expression, "THOSE CASES". Looking back to General Amourel's explanation we find "THOSE CASES" he was referring to; and they are as follows:

1. "The war will have for its cause some fact at least possessing acertain gravity and capable of producing an exchange of explanations. Then will ordinarily commence a period of diplomatic negotiations, during the course of which each Power will seek to induce the other to agree to such terms as may be required to satisfy its interest,"

and

2. "But it may sometimes happen that the provoking cause of the conflict will not be followed by any diplomatic negotiations. In certain casesthe moral or material damage done to a State may appear to it so grave that it is not deemed possible to seek reparation in any other way than by force of arms. Then again it may also happen that during the course of diplomatic negotiations these may take such atrend that the complainant can no longer hope to obtain satisfactory conditions in this way."

The two cases just stated are "THOSE CASES" which General Amourel was referring to in his explanation.

Therefore a complete interpretation of General Amourel's explanation of Article I, of Hague III (1907) relative to the opening of hostilities, would be as follows: (We demand that notification be given to the adversary, containing a sufficient declaration of war or an ultimatum, which expresses an unmistakable preliminary notification and it states the concessions which are demanded and the cause for war and a time limit before the beginning of war in the two cases I have mentioned.).

It is therefore logical to conclude that in the case of an ultimatum, an oponent must give his adversary a fixed time or sufficient time to reply to the demands, before commencing hostilities. Or in the case where an oponent desires to commence war without any diplomatic relations, such being considered useless, it is obligatory to serve a declaration of war on the adversary giving sufficiently reasonable time to warn its armed forces in order that they may prepare themselves in a state of defense in order to avoid being shot down without a chance to defend themselves. This expression finds itself in the judgment of the International Military Tribunal for the Far East in the case of Araki et., al on page 990 in which it is set forth as follows:

> "This matter of the duration of the period between warning andhostilities is of course vital. If that period is not sufficient to allow of the transmission of the warning to armed forces in outlying territories and to permit them to put themselves in a state of defence they may be shot down without a chance to defend themselves."

In the case of a declaration of war, the time fixed for the commencement of hostilities may or may not be disclosed by an opponent to his adversary. However, the time between the delivery of the declaration of war and the opening of hostilities must be sufficient to allow of the transmission of the warning to armed forces in outlying territories in order to permit them to put themselves in a state of defense so that they may not be shot down without a chance to defend themselves. This means that upon receipt of such declaration of war, and adversary must immeddately notify all its outlying posts as quickly as physically and scientifically possible, because it does not know where or when the attack is going to take place. Under such circumstances, it is still possible for an opponent to make a surprise attack.

Hague Convention III Relating to Opening of Hostilities.

On the 7th day December 1941, the Imperial Japanese military forces attacked the Territories of the United States of America and the British Commonwealth of nations.

It is the contention of both the United States of America and the British Commonwealth of Nations that such an attack was commenced by Japan without a previous and explicit warning, in the form either of a reasoned declaration of war or of an ultimatum with conditional declaration of war.

The law in question is whether such an attack was in violation of the Third Hague Convention of 1907. ~~regarding Opening of Hostilities~~

The convention in question is entitled " Convention Relative to

to the "Opening of Hostilities" and comprises eight articles of which 1 and 7 are relevant for the present.

Article 1. states as follows: "the contracting Powers recognize that hostilities between themselves must not commence without previous and explicit warning, in the form either of a reasoned declaration of war or an ultimatum with conditional declaration of war."

Article 7. ~~states as follows~~: "enables any of the contracting parties to ~~withdraw~~ ~~the present~~ from the convention upon one year's notification to the Netherlands Government

~~Since none of the contracting parties~~ ~~has~~ ~~submitted~~ a notification of withdrawal ~~to the Netherlands Government~~, it ~~is~~ needless to discuss ~~any~~ article 7 any further.

The Sufficiency of Hague III to be the basis of a criminal offense

Before considering the sufficiency of Hague III it is necessary to consider what is

I
- A International Law
- B. How is international Law made
  - 1. Conventions
  - 2. Treaties
- C Penalties - How imposed.

II
- A History of Declarations of War
- B. Cause of Hague III
- C necessity for law regulating giving of Facilities

III Discussions of Secon Commission
- A. Regarding Openning of Hostilities
- b. " " "
  - 1. French version
  - 2. Netherlands Version

IV Violations of Hague III during its negotiation

A. By Germany

B. By Russia

C Does a violation of a law left unprosecuted, make the law null and void?

~~V Authorities &c~~

Contention of Defense

1. Hague III is not law, and it establishes no legal duty on any state or on any individual. The Convention is characterized as a mere technical rule for determining the date when war commences or as a survival of "autumn chivalry" having no place in modern war.

2. The violations of the Convention as shown by its history, especially during the 1930's have been so numerous, so flagrant, and so free from any

resulting penalty that the Convention had become in fact a mere dead letter.

3. That Hague III is nothing but a bluff or Simulacrum and there is no need to respect such a childish Treaty at the outbreak of war in which the fate of a nation is at stake"

VI ~~Court Decisions~~ Hague III of 1907 is binding on all signatories

~~a. Nuremberg.~~

~~b. Tokyo.~~

a. Egypto (Dr Kälin (Pols decision)

b. Nuremberg.

c. Tokyo.

What is

III International Law?

A simple definition of International Law is ~~Fenwick~~ Oppenheims International Law or Edited by McNair Vol 1 Fourth Edition.

It is stated thus:

"Laws of Nations or International Law is the name for the body of customary and conventional rules which are considered legally binding by civilized States in their intercourse with each other. Such part of these rules as is binding upon all the civilized States without exception, as, for instance, the law connected with ~~legations~~ legations and treaties, is called universal International Law. ~~which is binding on two~~ in contradistinction to particular International Law which is binding on two or a few States. But it is also necessary to distinguish general International Law. This name must be given to the body of such rules as are binding upon many States including leading powers.

General International Law, as, for instance, the

Declaration of Paris of 1856 has a tendency to become universal International Law.

International Law.

a. How is it made

1. Conventions

2. Treaties.

B Penalties, ~~etc~~

& How Imposed.

P44 Violation of Hague Regulations is an International delinquency

456 - Mode of Punishing War Crimes.

456. — Right of Belligerents to punish War Criminals.

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Page 5

Page 15

1. Japs charged with the responsibility

of

1.

1.

1. Increase — Japs say that we had prior knowledge of Japs Cablegrams of their preparations for war — Pros argued that since the Japs did not know of any interception by the U.S., they cannot use that as a defense

Page 9.

Count 37 charges certain accused with conspiring to murder members of the armed forces and civilians of the United States, the Philippines, the British Commonwealth, the Netherlands and Thaliand by initiating unlawful hostilities against those countries in breach of the Hague Convention No. III of 18th October 1907.

Page 10.

Counts 39 to 43 charge the same accused with the commission on 7th and 8th Decemner 1941 of murder at Pearl Harbour (Count 39) Kohta Behru (Count 40) Hong Kong (Count 41) on board H. M. S. PETREL at Shanghai (Count 42) and at Davao (Count 43).

Pages 33, 34.

The Court says the following:

Counts 37 and 38 charge conspiracy to murder. Article 5, sub-paragraphs (b) and (c) of the Charter, deal with Conventional War Crimes and Crimes against Humanity. In sub-paragraph (c) of Article 5 occurs this passage: "Leaders, organizers, instigators and accomplices participating in the formulation or execution of a common plan or conspiracy to commit any of the foregoing crimes are responsible for all acts performed by any person in execution of such plan." A similar provision appeared in the Nuremberg Charter although there it was an independent paragraph and was not, as in our Charter incorporated in Sub-paragraph (c). The context of this provision clearly relates it exclusively to sub-paragraph (a), Crimes against Peace, as that is the only category in which a "common plan or conspiracy" is stated to be a crime. It has no application to Conventional War Crimes and Crime against Humanity as conspiracies to commit such crimes are not made criminalby the Charter of the Tribunal. The Prosecution did not challenge this view but submitted that the counts were sustainable under Article 5 (a) of the Charter. It was argued that the waging of aggressive war was unlawful and involved unlawful killing which is murder. From this it was submitted further that a conspiracy to wage war unlawfully was a conspiracy also to commit murder. The crimes triable by the Tribunal are those set out in the Charter. Article 5 (a) states that a conspiracy to commit the crimes therein specified is itself acrime. The crimes, other than conspiracy, specified in Article 5 (a) are "planning, preparation, initiating or waging" of a war of aggression. There is no specification of the crime of conspiracy to commit murder by thewaging of aggressive war or otherwise. We hold therefore that we have no jurisdiction to deal with charges of conspiracy to commit murder as contained in Counts 37 and 38 and decline to entertain these charges.

Pages 35, 36, 37.

The Court says the following:

In sofar as the opinion expressed above with regard to Counts 37, 38, 44, and 53 may appear to be in conflict with the judgment of the Tribunal of the 17th May, 1946, whereby the motions going to the Tribunal's jurisdiction wefe dismissed, it is sufficient to say that the point was not raised at the hearing on the motions. At a much later date, after the Nuremberg judgment had been delivered, this matter was revised by counsel for one of the accused. On this topic the Tribunal concurs in the view of the Nuremberg Tribunal. Accordingly, upon those counts, it accepts the admission of the Prosecution whith is favorable to the defendants.

Pages 35, 36, 37 (cont.)

Counts 39 to 52 inclusive (omitting Count 44 already discussed) contain charges of murder. In all these counts the charge in effect is that killing resulted from the unlawful waging of war at the places and upon the dates set out. In some of the counts the date is that upon which hostilities commenced at the place named, in others the date is that upon which the place was attacked in the course of an alleged illegal war already proceeding. In all cases the killing isalleged as arising from the unlawful waging of war, unlawful in respect that there had been no declaration of war prior to the killings (Counts 39 to 43, 51 and 52) or unlawful because the wars in the course of which the killings occurred were commenced inviolation of certain specifeid Treaty Articles (Counts 45 to 50). If, in any case, the finding be that the war was not unlawful then the charge of murder will fall with the charge of waging unlawful war. If, on the other hand, the war, in any particular case, is held to have been unlawful then thisinvolves unlawful killings not only upon the dates and at the places stated in these counts but at all places in the theater of war and at all times throughout the period of the war. No good purpose is to be served, in our view, in dealing with these parts of the offences by way of counts for muder when the whole offence of waging those wars unlawfully is put in issue upon the counts charging the waging of such wars.

The foregoing observations relate to all the counts enumerated; i.e., Counts 39 to 52 (omitting 44). Counts 45 to 50 are stated obscurely. They charge murder at different places upon the dates mentioned by unlawfully ordering, causing, and permitting Japanese armed forces to attack those places and to slaughter the inhabitants thereby unlawfully killing civilians and disarmed soldiers. From the language of these counts it is not quite clear whether it is intended to found the unlawful killings upon the unlawfulness of the attack or upon subsequent breaches of the laws of war or upon both. If the first is intended then the position is the same as in the earlier counts in this group. If breaches of the laws of war are founded upon then that is cumulative with the charges in Counts 54 and 55. For these reasons only and without finding it necessary to express any opinion upon the validity of the charges of murder in such circumstances we have decided that it is unnecessary to determine Counts 39 to 43 inclusive and Counts 45 to 52 inclusive.

Page 68.

THIRD HAGUE CONVENTION

The Third Convention concluded by the Powers in Conference at the Hague in 1907 was the Convention Relative to the Opening of Hostilities. (Annex No. B-16). The Convention was signed and ratified by, or on behalf of, Japan and each of the Powers bringing the Indictment, except China; but China adhered to the Convention in 1910. A total of twenty-fivePowers signed and ratified the Convention, including Portugal and Thailand, and six Powers later adhered to it. This Convention does not contain a "general participation clause". It provided that it shall take effect in case of war between two or more of the Contracting Powers, it was binding upon Japan at all relevant times mentioned in the Indidtment. By ratifying this Convention, Japan agreed, among other things:

> That hostilities between her andany other Contracting Power must not commence without previous and explicit warning, in the form either of a declaration of war, giving reasons, or of an ultimatum with conditional declaration of war.

(Page 63 of pub. IMTFE Apchi et al

Pages 985 to 990.

THE JAPANESE NOTE DELIVERED IN WASHINGTON ON 7th DECEMBER 1941

U Hague Convention No. III of 1907, relative to the opening of hostilities, provides by its first Article "The Contracting Powers recognise that hostilities between themselves must not commence without previous and explicit "warning in the form either of a reasoned declaration of war or of an ultimatum with conditional declaration of war". That Convention was binding on Japan at all relevant times. Under the Charter of the Tribunal the planning, preparation, initiation, or waging of a war in violation of international law, treaties, agreements or assurances is declared to be a crime. Many of the charges in the indictment are based wholly or partly upon the view that the attacks against Britain and the United States were delivered without previous and explicit warning in the form either of a reasoned declaration of war or of an ultimatum with conditional declaration of war. For reasons which are discussed elsewhere we have decided that it is unnecessary to deal with these charges. In the case of counts of the indictment which charge conspiracy to wage aggressive wars and wars in violation of international law, treaties, agreements or assurances we have come to the conclusion that the charge of conspiracy to wage aggressive wars has been made out, that these acts are already criminal in the highest degree, and that it is unnecessary to consider whether the charge has also been established in respect of the list of treaties, agreements and assurances - including Hague Convention III - which the indictment alleges to have been broken. We have come to a similar conclusion in respect to the counts which allege the waging of wars of aggression and wars in violation of international law, treaties, agreements and assurances. With regard to the counts of the indictment which charge murder in respect that wars were waged in violation of Hague Convention No. III of 1907 or of other treaties, we have decided that the wars in the course of which these killings occurred were all wars of aggression. The waging of such wars is the major crime, since it involves untold killings, suffering and misery. No good purpose would be served by convicting any defendant of that major crime and also of "murder" eo nomine. Accordingly it is unnecessary for us to express a concluded opinion upon the exact extent of the obligation imposed by Hague Convention III of 1907. It undoubtedly imposed the obligation of giving previous and explicit warning before hostilities are commenced, but it does not define the period which must be allowed between the giving of this warning and the commencement of hostilities. V

Pages 985 to 990 (cont.)

The position was before the framers of the Convention and has been the subject of controversy among international lawyers ever since the Convention was made. This matter of the duration of the period between warning and hostilities is of course vital. If that period is not sufficient to allow of the transmission of the warning to armed forces in outlying territories and to permit them to put themselves in a state of defence they may be shot down without a chance to defend themselves. It was the existence of this controversy as to the exact extent of the obligation imposed by the Convention which opened the way for TOGO to advise the Liaison Conference of 30th November 1941 that various opinions were held as to the period of warning which was obligatory, that some thought it should be an hour and a half, some an hour, some half an hour. The Conference left it to TOGO and the two chiefs of Staff to fix the time of the delivery of the Note to Washington with the injunction that that time must not interfere with the success of the surprise attack. In short they decided to give notice that negotiations were broken off at so short an interval before they commenced hostilities as to ensure that the armed forces of Britain and the United States at the points of attack could not be warned that negotiations were broken off. TOGO and the naval and military men, to whom the task had been delivered, arranged that the Note should be delivered in Washington at 1.00 p.m. on 7th December 1941. The first attack on Pearl Harbor was delivered at 1.20 p. m. Had all gone well, they would have allowed twenty minutes for Washington to warn the armed forces at Pearl Harbor. But so anxious were they to ensure that the attack would be a surprise that they allowed no margin for contingencies. Thus, through the decoding and transcription of the Note in the Japanese Embassy taking longer than had been estimated, the Japanese Ambassadors did not in fact arrived with the Noted at Secretary Hull's office in Washington until 45 minutes after the attack had been delivered. As for the attack on Britain at Kota Bharu, it was never related to the time (1.00 p.m.) fixed for the delivery of the Note at Washington. This fact has not been adequeately explained in the evidence. The attack was delivered at 11.40 a.m. Washington time, one hour and twenty minutes before the Note should have been delivered if the Japanese Embassy at Washington had been able to carry out the instructions it had received from Tokyo.

We have thought it right to pronounce the above findings in fact for these matters have been the subject of much evidence and argument but mainly in order to draw pointed attention to the defects of the Convention as framed. It permits of a narrow construction and tempts the unprincipled to try to comply with the obligation thus narrowly construed wile at the same time ensuring that their attacks shall come as a surprise. With the margin thus reduced for the purpose of surprise no allowance can be made for error, mishap or negligence leading to delay in the delivery of the warning, and the possibility is high that the prior warning which the Convention makes obligatory will not in fact be given. TOJO stated that the Japanese Cabinet had this in view for they envisaged that the more the margin was reduced the greater the possibility of mishap.

THE FORMAL DECLARATION OF WAR

The Japanese Privy Council's Committee of Investigation did not begin the consideration of the question of making a formal declaration of war upon the United States, Great Britain and the Netherlands until 7.30 a.m., 8th December (Tokyo time) when it met in the Imperial Palace for that purpose at that time. SHIMADA announced that the attacks had been made upon Pearl Harbor and Kota Bahru; and a bill declaring war on the United States and Great Britain, which had been drafted at the residence of HOSHINO during the night, was introduced. In answer to a question during the deliberations on the bill, TOJO declared in referring to the peace negotiations at Washington that, "those negotiations were continued only for the sake of strategy". TOJO also declared during the deliberations that war would not be declared on the Netherlands in view of future strategic convenience; and that a declaration of war against Thailand would not be made as negotiations were in progress between Japan and Thailand for the conclusion of "an Alliance Pact". The Bill was approved; and it was decided to submit it to the Privy Council. The Privy Council met at 10.50 a.m., 8th December 1941 and passed the Bill.

Pages 985 to 990 (cont)

The Imperial Rescript declaring war against the United States and Great Britain was issued between 11.40 and 12.00 a.m., 8th December 1941 (Washington time, 10.40 p.m. and 11.00 p.m., 7th December) (London time, 2.40 a.m. and 3.00 a.m., 8th December). Having been attacked, the United States of America and the United Kingdom of Great Britain and Northern Ireland declared war on Japan on 9th December 1941 (London and Washington, 8th December). On the same day the Netherlands, Netherlands East Indies, Australia, New Zealand, South Africa, Free France, Canada and China also declared war on Japan. The next day, MUTO stated in a conversation with the Chief of Operations of the Army General Staff that the sending of Ambassador Kurusu to the United States was nothing more than a sort of camouflage of events leading to the opening of hostilities.

Page 994.

The Tribunal is further of opinion that the attacks which Japan launched on 7th December 1941 against Britain, the United States of America and the Netherlands were wars of aggression. They were unprovoked attacks, prompted by the desire to seize the possessions of these nations. Whatever may be the difficulty of stating a comprehensive definition of "a war of aggression", attacks made witht the above motive cannot but be characterised as wars of aggression.

The Tribunal in its ~~open~~ obite dictum on Hague III stated as follows:

> "TOGO and the military men to whom the text had been delivered arranged that the note should be delivered to Washington at 1 p.m. on 7 December 1941. The first attack on Pearl Harbor was delivered at 1:20 p.m. Had all gone well, that would have allowed 20 minutes for Washington to warn the Armed Forces at Pearl Harbor."

This statement is merely the Court's re-statement of the facts. It seems that the Court was stating the facts which were in the minds of the Japanese who wanted the surprise attack to be successful. The Court merely stated that the Japanese had in mind to deliver the note at 1 o'clock which would allow the United States Government twenty minutes to warn its outposts before the attack on Pearl Harbor took place. It did not decide or even intimate that the final note was a declaration of war or an ultimatum with a condition attached. It did not even intimate that that final note was a compliance with Hague III. It did not even intimate that had the final note been delivered at 1 o'clock the Japanese would not have violated Hague III.

9 April 1948

Memorandum for: Summation Committee

From : Captain Robinson

Subject : Prosecution Rebuttal Summation

Item (1) - Defense Misstatements of Fact and Fallacious Arguments with respect to Hague Convention III

The Defense Summation for SHIMADA, the Defense Summation Section "E" --"On Some Question of International Law, " and the Defense Summation Section "B"--"Answer of the Defense to Prosecution's Argument on International Law," present interpretations and arguments regarding Hague Convention III which, it is submitted, are erroneous, misleading and even harmful not only to this case but even to international law and world peace. The Defense attacks Hague III on the following points:

(a) The wording of the treaty;
(b) Its interpretation by Westlake and other authorities; and
(c) Its objects or functions.

(a) Defense Changes in the Words or Text of Hague III.

Defense Summation "E" (p.6) charges the Chief of Counsel with changing the language of Hague III when he said that the Convention provides that the contracting powers "shall not" commence hostilities without warning, whereas, Defense Counsel say, the accurate rendition of the official French text is "should not" or "ought not", instead of "shall not" or "must not." Defense Summation "B" (p.34) likewise uses the words "should not2 instead of shall not." Both "E" and "B", however, present the French text "ne doivent pas," the verb being the present tense of the indicative "devoir," meaning "to be obliged to do something," or "must." The imperative "must" is the official translation of the official report of the Hague Conference leader and Reporter, Louis Renault, as stated in Reports to the Hague Conferences of 1899 and 1907 (1917), p.502. By this verb Hague Convention III was made a categorical imperative, a definite command, by which the forty-five participating nations created a legal duty and obligation.[a]

The Defense, therefore, it is submitted, commits the double offense, first, of changing the plain words and text of a statute, and, second, of falsely accusing the Prosecution of committing that offense.

(b) Misleading Citation of Westlake and Grotius.

Defense Summation "E" (p.7) cites Westlake as authority for Defense Counsel's statement that "This language (of Hague III) never rose higher

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[a]Oppenheim, cited in Defense Summation "B", p. 38; Hershey, Essentials of International Public Law and Organization (1939) 562; Stowell, Convention Relative to the Opening of Hostilities, 2 American Journal of International Law (1908) 50, at p. 60.)

than a statment of policy." And Defense Summation "B" (p. 37) says that "Westlake thinks that the Convention did not seriously affect the previous law on the subject." Defense Counsel appear to have been misled in the following manner; Westlake, at the page cited by counsel, page 28 in his International Law, Part II (2d Edition 1913, states that Hague III now forbids "the old de facto wars" and that "the declaration (of war) must be in writing since it must contain . . . reasons, and it must be directly addressed to the government to be affected . . . But . . . the interval by which the warning must precede hostilities is wholly undefined. . . . . The commencement of war as between the belligerents remains, therefore, on its Gortian footing, only with less indifference to form." This last sentence appears to be the sentence relied upon by Defense Counsel as quoted above.

Westlake, however, had pointed out in preceding pages that Grotius insisted on what Westlake called the "Grotian footing," namely, that international law required a declaration of war preceding or accompanying hostilities in every case. This view of Grotius was shared by Westlake but it was not shared by many other authorities, in whose opinion, therefore, Hague III, as Stowell says, "modifies the law which existed previously and that is a real piece of international legislation . . ." (Stowell, id., 60). The Defense, therefore, is in error in attempting to minimize and nullify Hague III by calling it a mere statement of policy or a repetition of existing law, and in citing Westlake to prove that it does not specifically require a declaration of war before commencing hostilities.

(c) The Inadequate Defense Statements of the Objects or Functions of Hague III.

Defense Summation "E" erroneously indicates that there are only two views of the purpose or function of Hague III, namely, the view which Counsel calls "the popular view" that it is intended "to insure against a nation's being made the victim of a 'surprise attack'" (p. 45), and the view that it is a "technical" rule for the formal determination of the precise moment when a war starts (p. 49). Defense Summation "B" (pp. 34-35) Likewise mentions both of these views and, like Defense Summation "E", rejects both of them as immaterial in the present case in an effort to show that no sound reason is left for sustaining Hague III as applicable to the surprise attacks at Pearl Harbor, Kota Bahru and elsewhere in December 1941.

A third view, however, is disregarded by Defense Counsel, except for a passing quotation in Defense Summation "B" (p. 35). This veiw is the one stated by Grotius when he said: "The cause for which nations have required a declaration for a lawful war was not, as some allege, that they might do nothing secretely or by a clever trick, for that consideration belongs rather to the perfection of gallantry than to law, . . . but that it might appear with certainty that the war was not waged by private audacity, but by the will of the peoples on either side or their heads; for that is the source of its peculiar effects, which have no place in a contest with brigands or in one between a king and his subjects" . . .

Grotius 3.3.11, quoted in Westlake, id,, 20. The "peculiar effects" of war, to which Grotius refers, appear to include abrogation of treaties, and the coming into effect of international law fules such as the laws of war nd of neutrality. To these effects it would now b proper to add additional modern reasons for upholding the requirements of Hague III. A first reason is to use Hague III as a safeguard that modern wars shall be begun only "by the will of the people" concerned and not "by private audacity" of irresponsible militarists who, by misrepresentations of reasons and by dictatorial usurpation of governmental power, throw the people of their country into totalitarian war. Such irresponsible militarists thereby compel the people to pay the cost of the war in lives and property and national disaster, while at the same time untold damage is done to the peoples of the countries attacked.

A further reason for upholding Hague III on the basis stated by Grotius is to protect the peoples of democratic countries, whose constitutions require that war and hostilities be commenced only after constitutional formalities for expressing the people's will, against the sudden surprise attacks which dictators can make against democratic peoples without being delayed by constitutional formalities.

A third further reason for upholding Hague Convention III on the basis stated by Grotius is the unanimity by which that Convention was supported by the nations of the world, including not only their plenipotentiaries and governments, but presumably the people themselves. It should be borne in mind that Hague Convention III was the only general convention of the thirteen conventions signed at The Hague Conference of 1907 which was approved by all of the participating nations without any reservations whatsoever. It should be observed further that, although Article 7 provides that any nation may withdraw from the Convention upon one year's notification to the Netherland Government, no nation has denounced and withdrawn from this Convention. Such popular international legislation can not be considered to have been destroyed merely becsuse it was violated by the German, Italian and Japanese militarist dictators, as defense counsel argue. Until made it their law, it requires respect and vindication.

A fourth reason for upholding Hague III is related to a reason which was forcefully presented by its Russian proponents at the Hague Conference in urging the conference to fix a time interval. It was pointed out that the people of the participating nations would be relieved of the tax burdens of maintaining armaments on an emergency basis to the extent that they were protected against surprise attacks.[a] The conference did not include a fixed interval but a later inclusion of such provision was contemplated. The Treaty therefore offers present and future possibiliities of economy in the armament burdens of the people.

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[a]The Reports of the Hague Conferencesof 1899 and 1907 (1917) 502, and Deuxieme Conference Internationale de la Paix Actes et Documents (La Maye 1907) Tome III, pages 163-179.

Item (2) - "Surprise Attack" -- Misleading or confusing application of the Evidence as basis for Argument that Hague Convention III was not violated by SHIMADA and other Defendants.

The Defense Summation for SHIMADA (p. 61) states: "Suffice it to say that the 'surprise attack' contemplated by the (Japanese) Navy . . . was the same kind as fully explained in the U. S. Rulesof Land Warfare, the British Manual of Military Law, and the Japanese Naval Manual, all of which provide that a surprise attack is still possible even under the terms of the Hague Convention III relative to the commencement of hostilities."

The first citation given by defense counsel as supporting this assertion (T. 36,117) is merely an assertion made by the same c ounsel in framing a question which on objection by the Chief of Counsel was disallowed by the Tribunal as an unsupported assertion of matters not in evidence.

The other citation (T. 42,455) (Defense Summation "E" - "On Some Questions of International Law") quotes the United States Rules of Land Warfare to the effect that "it is still possible . . . to make assudden and unexpected declaration of war and thus surprise an unprepared enemy." This citation does not support the arguement of dounsel because it is not applicable to the decisive facts inevidence. Of course, the prosecution has never contende that Hague Convention III has outlawed surprise tactics when employed in lawful warfare in which hostilities have been lawfully commenced under Hague III following a declaration of war. It is undisputed that the prosecution has not prosecuted a single Japanese admiral or seaman or any otherpersonnel in the Japanese Navy for taking part in the operational exectuion of the surprise attack at Pearl Harbor or elsewhere. On the contrary, the prosecution has given the Japanese naval operating personnel, from the commanding admirals down to the lowest rated seamen, full benefit of the assumption that each of them honestly and reasonalby relied on SHIMADA and his government associates to obey Hague III beofre or while ordering them to commence operations at Pearl Harbor.

The defense spent much time and effort in the cross-examaination of defendant TOGO in an effort to show that TOGO did not understand that the Navy was talking about a legal surprise attack. But the testimony of TOGO showed that he fully understoood the distinction between a legal surprise attack made during war, and an illegal or treacherous surprise attack made before war had been legally commenced under Hague Convention III. TOGO under cross-examination and otherwise repeatedly showd that he correctly understood that the type of surprise attack which ITO, NAGANO and SHIMADA had in mind was the latter or illegal type (T. 35,839-40, 35,848, 35,851). For examply, TOGO testified (T. 35,834) that, in the presence of SHIMADA as Navy Minister, "It was NAGANO (Chief of Naval General Staff) who first mentioned the matter of a surprise attack; and then, after that, ITO (Vice Chief of Naval Gerneral Staff) requested that the diplomatic negotiations

(then going on at Washington) be left unterminated" -- that is, even until the surprise attack would have been made. Moreover, TOGO testified (T. 35,840) that Admiral SHIMADA and Admiral NAGANO confessed to him that they had wanted to attack Pearl Harbor without any notice being given, and further that they did not want TOGO to say anything, in this Tribunal or elsewhere, about their having requested TOGO as Foreign Minister to avoid making any notification to the United States before commencing war and armed hostilities.

It is submitted that there was no confusion in the Mind of SHIMADA and his policy-making associates in regard to the illegality of the "surprise attack" which they were planning. Or, even accepting as true and material their own explanations of their recklessly reduced time margins, they knew the illegal type of attack which they were risking -- and which they actually made at Pearl Harbor and their other surprise attack targets.

The surprise attack aspects of the defendants' violations of Hague III, while important, were not necessarily the most important violations of that treaty by the defendants. As Item (1) of this summation shows, the greatest significance of Hague III is in its governmental, legal, procedural and popular attributes rather than in its operational provisions for armed hostilities.

Item (3) - <u>Erroneous Defense Arguments that Professional Military Men may be endangered by this Trubunal's Judgment in this Case.</u>

The Defense Summation for SHIMADA (pp. 87-90), the Defense Summation "B" (pp. 94, 95 and 110), and other defense summations, argue that a judgment by this Tribunal of guilt under the indictment and the evidence in this case, against Admiral SHIMADA, General TOJO, and other active military-political leaders among the accused, would furnish a precedent for illegal execution of any and all professional military leaders in any future wars. Defense Counsel for SHIMADA seeks to confine this apprehension, so far as SHIMADA is concerned, to his activities prior to 18 October 1941, when he began his long term as war-time Minister of the Navy in the cabinet of General TOJO. Because of this prosecution, Defense Counsel professes apprehension (pp. 87-90) for the "professional soldier enforcing and carrying out the directive of the policy makers of his nation in compliance with the acknowledged laws of war," and for the "protective forces of the nations of the world, the military and the naveal." Counsel pictures these professional soldiers, sailors and airmen listening "with rapt attention to the utterances of this Tribunal" for help and guidance in solving what Counsel sympatheticall calls "the vexing problem of deciding when his conduct is criminal and when it is commendable." Under the evidence in this case Counsel is obviously talking about some persons other than SHIMADA in the foregoinh description. This argument is therefore irrelevant in this case and may be taken by military men to underestimate both their courage and their intelligence. Moreover, it it difficult to follow Counsel in attempting to split the evidence of the activities, the associations and the international policies of SHIMADA from 1932 to 1945.

How can Counsel seriously feel that ay judgment by this Tribunal regarding SHIMADA will cause any apprehension on the part of the exclusively professional military and naval men in their future performance of duty? There would be no basis whatever for such apprehension, it is submitted, because of the following reasons. In the first place, men of the military and naval and air services all over the world, both now and hereafter, can readily see as a fact that neither in this trial nor in any other trial for war crimes has a single prosecution been brought by what Defense Counsel call a "victorious enemy" against a single Japanese who was a member of the Japanese Army, Navy or Air Forces, and who simply followed his clear line of professional or operational duty, as described above by defense counsel. In the sedond place, all professional military men can see that out of the millions of ma who have served in the Japanese armed services, only eighteen have been charged with offense committed upon a combined governmental and military level under this indictment, and not one of the eighteen, as shown by the indictment and the evidence, has been exclusively a military man carrying out military orders. In the third place, the judgment in this case, instead of being ground for apprehension as feared by Defense Counsel, may well provide concrete assistance to military men by showing specifically what conduct by a combined military and policy-making officer is clearly and indisputanly criminal. It is particularly easy to identify such conduct when it has been part of policies and operations which have been described by the President of the United States,

whom Defense Counsel have quoted, when he declared in his boradcast of 10 December 1941 on the Pearl Harbor attack that it was conduct characterized "by the principles of gangsterism."

Professional military men in fact may well be expected to welcome, rather than fear, an adjudication upholding the honor of the military profession. No one will profit more nor be protedted more than the military and naval career men by the enforcement of treaties such as Hague III and the laws of war for the protection of prisoners of war, including military commanders and the captains and crews of torpedoed ships, against those military leaders who scrapped treaties in order to win military advantage over other military leaders who obeyed the rules of the game and who have been unjustly penalized for their obedience, - some of them even at the cost of their lives. This unfairness to law-abiding military men is increased and encouraged especially if the penalties for such violations are not enforced. "The traditions of fighting men are long and honorable," Wrote the Supreme Commander for the Allied Powers, in approving the findings and sentence against Gerneral YAMASHITA. "The soldier, be he friend or foe, is charge with the protection of the weak andunarmed . . . . When he violates this sacred trust, he not only profanes his entire cult, but threatens the very fabric of international society." So in the present case the only professional military men who could be properly alarmed by the conviction of these defendants would be those military men against whom evidence likewise could be produced showing that they laid aside strictly military duties and became political office-holders and policy-makers, that they disobeyed orders from their Commander in Chief, that they violated or were repeatedly guilty of neglect of duty with regard to upholding their country's treaties and other laws, and that they evaded their responsibility for the good name of their Navy or Army and, therefore, of their brave and worthy subordinates in those armed services, and who likewise failed to stand behind their subordinates such as the conscientious Admiral ABE, or to reprimand and court-martial, instead of promoting, such ruthless gangsters as Commander ARIIZUMI and other subordinates whose murdered victimes over a preiod of years have been shown to number many hundreds, but knowledge of whose crimes the defendant SHIMADA, for example, solemnly swore to this Tribunal that he had never received prior to this trial. That is not the type of a military record which military men generally would consider to be the basis for any precedent which they might fear as later applicable to their own record. It is a long record stained with innocent blood, either recklessly or intentionally or both.

In fact, if military men have this "ever present fear of ultimate punishment at the hands of a victoroius enemy," which Defense Counsel portray (p. 87), that fear can more properly be based on failure to convict irresponsible or criminally responsible military men for causing the deaths of other military men whom they capture and hold as prisoners of war, - regardless of which country may later "win the war." In other words, lawless military commanders in the future, as in the past, will murder military prisoners of war regardless of any pretended excuse based on former war crimes convictions. And on the other hand, the only real hope for curbing such potential murderes in the future is to show them in advance that they will certainly be held personally responsible before

competent international military or criminal courts for such clear violations of the law of war, according to strong precedents such as this present prosecution can establish. Of course, any assumption that military men must fear illegal execution by drum-head courts after losing any subsequent war presupposes a world conquered or controlled by lawless gangsters and murderers, in which event military men will merely be sharing the same fate as the rest of their fellow-countrymen.

Item (4) - Inaccurate or Misleading References in Defense Summations to the Death Penalty.

The Defense Summation for SHIMADA (p. 47), Defense Summation "B" (p. 75), Defense Summation "E" (p. 53), and other defense summations, refer to the death penalty as though it were only a matter of personal choice of the Prosecution or even a matter for the determination solely of the Tribunal. Such suggestions or implications are contrary to the unquestioned fact that it is the law of war which provides for the death penalty for war crimes, subject of course to a more lenient punishment in the discretion of the Court.[a] Furthermore, the requirement of "stern justice" in the Potsdam Declaration of 26 July 1945 further places the matter of penalty beyond any mere personal choice of any person connected with this trial, based on such considerations as vengeance or of sympathy for either the defendants or the countless dead victimes of their actions. It has been the Prosecution's function not to consider penalties but simply to produce the evidence in all its seriousness, including the vast numbers of dead and living victims, the still-continuing human suffering and losses on a global scale, and the indications in the evidence of the desperate need for deterrence of such offenses. The Defense Allusions to the Prosecution's attitude toward the penalty are therefore ill-advised and baseless. The Defendants' respective acts, under the evidence and the law as established by solemnly executed treaties, by courts and by long established custom, have placed the determination of the appropriate penalties above any mere personal influence or decision.

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[a] Oppenheim, International Law (1944) 456; Lachs, War Crimes (1945) 63; U. S. Rules of Land Warfare, War Department Technical Manual.

Item (5) - Material Misstatements of the Law Defining the Crime of Making Aggressive War, and Governing the Defenses of Self-Defense and of Self-Adjudication.

The defense state that "the perpetration of aggressive war is the crux of the charges here brought," and that "the burden of proof . . . as to all the facts and circumstances essential to the guilt of the accused including the criminal intent are upon the prosecution." On these propositions the prosecution agrees with the defense. The defense, however, fail to agree among themselves on what facts and circumstances constitue aggressive war. At least one defense counsel takes the defeatist attitude that the offense can not be defined[a] and, apparently, never can be defined until a world-state is created, but others have no difficulty in identifying essential elements of the offense.[b] Both groups, however, emphasize the necessity of criminal intent and declare that the defendants acted without criminal intent.

The prosecution, as it has indicated elsewhere in this Summations, considers that the essential legal elements of the crime or crimes involved in making aggressive war are made clear by the controlling authorities. In general, a war of aggression may be viewed with Oppenheim as "a war undertaken in defiance of existing legal rights of other states,"[c] or with Lord Wright, asquoted by the Chief of Counsel in the Opening Statement of the Prosecution, "A War of aggression falls outside that justification" of self-defense. "To initiate a war of ggression is the chief of war crimes."

These statements, like the statment that a war crime in general is "a violation of the laws and customs of war," do not draw the definite lines showing the few specifications of fact and circumstance which must be alleged in the indictment and must be proved at the trial to establish guilt of the crime or crimes involved in making aggressive war. Specifying these essential items as stated in the authoritative treaties, decisions and test writers, it is observed that a war crime, including the initiation of aggressive war and related offenses, if properly to be prosecuted or penalized, has the following essential elements: (1) An act or omission or series of acts or omissions by which (2) aperson, usually in the government or armed forces of a nation, (3) intentionally or recklessly (the criminal intent) injures or destroys (4) a person, property or government of another nation, (5) in any place, (6) in time of war and in

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[a] T. 42,172, "The dulcet term 'aggressive war' . . . is amorphous, elusive and indefinable;" T. 42, 180, "too vague to be defined;" T. 42,206; T. 42,219.

[b] T. 43,220 -- ". . .aggressive war, that is, a war without just provocation or excuse."

[c] Oppenheim, International Law (6th ed., Lauterpacht, 1944) II, 147; see also p. 155, note 1, for the "Definition of Aggression" in the Russian Treaties of 1933, as follows: "The aggressor in an international conflict is the state which is first to commit any of the following acts: . . . an attack by armed land, naval, and air forces even without a declaration of war, upon the territory, naval vessels, or aircraft of another state; . . ."

connection with war, declared or undeclared, including the time of direct preparation for a war of aggression, and (7) in violation of a specific legal duty previously established ad defined by existing treaty or other competent international authority.[d]

By applying each of the foregoing specifications as a test or check of the allegations and evidence in this case, it is observed, first, that the particular law or treaty which is violated (specification No. (7) above) is commonly the determining element in classifying an offense as one of military aggression, and second, that the only specification which the defense emphasize as lacking in proof in the present case is the item of criminal intent (specification number (3) in the foregoing list). On the first point, if the treaty violated is Hague III, for example, one offense committed may be the initiation of a war of aggression. The charter of this Tribunal expressly recognizes jurisdiction as existing over what the charter calls "crimes against peace" such as be planning, preparing, initiating or waging of a war of aggression in violation of international law or treaties. Furthermore, as an example of a type of joint war crime, a conspiracy to initiate aggressive war may be defined, without attempting to state an exclusive definition, by listing essential elements as follows: If two or more persons in the government or armed forces of a nation join or conspire in acts or omissions in which they intentionally or recklessly injure or destroy a person, property or government of another nation, in any place, in time of and in connection with war or preparation for war, and in violation of Hague Convention III, each person is guilty of the war crime of conspiracy to initiate aggressive war.

In regard to criminal intent, the defense appear to have confused motive with intnet. Defense counsel are no doubt aware of the well known rule of criminal law that the motive with which the accused intentionally commits a forbidden act is immaterial. In the present case, even if any defendant acted solely from patriotic and unselfish motives, his guilty intent to injure and destroy persons, property and governments of other nations is the required criminal intent for intiating or waging aggressive war or for other intentional war crime.

The defense declare further that there was no criminal intent because the defendants acted in self-defense. The defense argues that the necessity of self-preservation justified Japan and the individual defendants in initiating and waging war against the nations which they attacked. In order to sustain this defense, however, it is necessary for the defendants to show the following circumstances: first, that they and the rest of the Japanese nation were actually threatened with an attack by armed violence

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[d] A comparable definition is presented by Lachs in "War Crimes" (1945) 100, and a similar definition is ppesented by Lauterpacht in an unpublished monograph dealing with German war crimes.

or that they honestly, reasonably and without personal contribution, believed themselves to be so threatened; and second, that the armed violence so used by them was not unreasonable or excessive.

In describing the necessity which justifies violations of rights of other states as a measure of self-preservation, the precedent and test frequently cited by the authorities is the action of Secretary of State Webster in the Caroline case. Webster stated that in order to justify the force used by Canadian authorities on American soil, the defendants must show a "necessity of self-defense, instant, overwhelming, and leaving no choice of means and no moment for deliberation . . .", and also that the "local authorities of Canada did nothing unreasonable or excessive, since the act justified by the necessity of self-defense must be limited by that necessity and kept clearly within it."[e]

Defense counsel state that "No treaty or agreement precludes a nation from fighting in self-defense or determining for itself what state of affairs provokes that right. This latter clause is not an accurate statement of law; as applied by defense counsel it is a declaration of anarchy. The responsibility of nations and of individuals for such offenses is well recognized. The only difficulty heretofore has been the lack of enforcement of the penalties for such criminal responsibility. The means of the enforcement or the assertion of legal rights which is recognized by international law, is war, such as the defensive war fought by the Allies against the Japanese aggression. Included with war and as a continuation of the legal redress achieved by victorious military force, the use of military tribunals and of military police in enforcing the penalties for such aggression is well recognized in international law. Therefore, a defendant who violates existing international law, thinking that no courts or police will ever bring him to justice, has no grounds, when actually brought to justice, to claim that such procedure is ex post facto. The defendant may be surprised by the fact of being prosecuted for his crime, but it is merely his surprise which is ex post facto and not the law which was, of course, in existence when the defendant violated it.

It is readily observed that the acts of the defendants in the armed attacks charged and proved in this case practically without dispute or contradiction, did not fulfill any of the foregoing requirements for legal self-defense. No evidence was presented by the defense to indicate that any armed attack upon Japan with force and violence by the nations which the Japanese themselves attacked with force and violence, was even reasonably to be anticipated. Furthermore, the evidence is abundant that even if there had been some actual prospect of armed violence directed against

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[e]Quoted in Hershey, The Essentials of International Public Law and Organization (1939) p. 233; Oppenheim, International Law (6th ed., Lauterpacht, 1944) I, Section 130.

[f]Defense Summation for SHIMADA, p. 49.

Japan, nevertheless the all-out Japanese attacks at Pearl Harbor and elsewhere would have been unreasonable and excessive so far as the right of self-defense was concerned.

As a matter of fact, the evidence establishes clearly that the defendant's reasons for their attack at Pearl Harvor were based strategically on what the Emperor called "Thief-at-Fire" tactics in connection with the Axis attacks in Europe and tactically upon the military expediency of destroying the United States Fleet in order to protect the left flank of Japanese naval and military attacks whichthe Japanese were planning to direct southward in the Pacific.

The Japanese attacks therefore were on a par with the attack made by Germany on Belgium in August 1914. The condemnation of that attack by international law authorities is equally applicable to the Japanese attack under a plea of self-defense. That condemnation has been well stated by Hershey as follows:

> "The plea of necessity entered by Germany in defense of the invasion of Belgium in August, 1914 cannot be justified on any of the grounds indicate . . . . . On the part of Germany, this was either a case of self-defense against acts of ggression committed or intended to be committed by France (for which no proof has ever been presented); or a case of so-called political or military necessity based on political motives (raison d'etat) or strategical considerations (Kriegsraison). The acceptance of this monstrous doctine would result in international anarchy and is the very negation of law in international relations."g

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gHershey, The Essentials of International Public Law (1939) 234.

INTERNATIONAL LAW

What is International Law?

A simple definition of International Law is in Oppenheim's 'International Law' as edited by McNair, Vol. I, Fourth Edition.

It states thus:

"Laws of Nations or International Law is the name for the body of customary and conventional rules which are considered legally binding by civilized states in their intercourse with each other. Such part of these rules as is binding upon all the civilized States without exception, as, for instance, the law connected with legation and treaties, is called universal International Law in contradiction to particular International Law which is binding on two or a few States. But it is also necessary to distinguish general International Law. This name must be given to the body of such rules as are binding upon many states, including leading Powers.

General International Law, as, for instance, the Declaration of Paris of 1856, has a tendency to become universal International Law.

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VOLUME 1

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18. Treaties are the second source of International Law, and a source which has of late become of the greatest importance. As treaties may be concluded for innumerable purposes, it is necessary to emphasise that such treaties only are a source of International Law as either stipulate new rules for future international conduct or confirm, define, or abolish existing customary or conventional rules. Such treaties must be called law-making treaties.

Page 700.

491. International treaties are conventions, or contracts, between two or more States concerning various matters of interest.

Page 702.

In one class treaties is to be divided into two classes. In one class are treaties concluded for the purpose of confirming, defining, or abolishing existing customary rules, and of establishing new rules for the Law of Nations. Treaties of this kind ought to be termed law-making treaties.

Pages 702 - 703.

Law-making treaties have been concluded ever since International Law came into existence. It was not until the nineteenth century, however, that there were law-making treaties of world-wide importance. Although at the Congresses at Munster and Osnabruck all the European Powers then existing, with the exception of Great Britain, Russia, and Poland, were represented, the Westphalian Peace of 1648, to which France, Sweden, and the States of the German Empire were parties, and which recognised the independence of Switzerland and the Netherlands and the practical sovereignty of the 332 States of the German Empire, was not of world-wide importance, in spite of the fact that it contained various law-making stipulations. And the same may be said with regard to all other treaties of peace between 1648 and 1815. The first law-making treaty of world-wide importance was the Final Act of the Vienna Congress, 1815. But it must be particularly noted that not all of these are pure law-making treaties, since many contain other stipulations besides those which are law-making.

The Final Act of the Vienna Congress (Martens, N.R., ii. P. 379; see Angeberg, Le congres de Vienne et les traites de 1815 (4 Vols., 1863)), signed on June 9, 1815, by Great Britain, Austria, France, Portugal, Prussia, Russia, Spain, and Sweden-Norway, comprised law-making stipulations of world - wide importance concerning four points ---namely, the perpetual neutralisation of Switzerland (Article 118, No. 11) (see above, 98); free navigation on so-called international rivers(Articles 108-117) (see above, 178); the abolition of the negro slave trade (Article 118, No. 15) see above, 340h); and the different classes of diplomatic envoys (Article 118, No. 17)(see above, 364). In addition to the foregoing and to the treaties enumerated in Appendix B of this volume, the following examples may be mentioned: the Treaties of London of 1831 and 1839 providing for the neutralisation of Belgium (see above, 99); the Declaration of Paris of 1856 (see below, vol. ii 177); the Geneva Conventions of 1864 and 1906 for the amelioration of the conditions of the wounded of armies in the field (see below, vol. ii. 118-124); the Declaration of St. Petersburg of 1868 dealing with explosive and other projectiles (see below, vol. ii 111); the Final Act of the Hague Peace Conference of July 29, 1899 (see above, 49; Martens, N.R.G., 2nd Ser., xxvi. P. 920; Holls, The Peace Conference at The Hague (1900); and Merignhac, La conference internationale de la paix (1900)); the Hague Conventions of 1907 (see above, 50, and below, vol. ii. 19,68); the Protocol of Signature of the Statute of the Permanent Court of International Justice, December 16, 1920; L.N. Treaty Series, vi. p. 380 (see below, vol. ii. 25ab-25ag); and the Minorities treaties (see above, 340b-340e).

HAGUE CONVENTION III

On the 7th day December 1941, the Imperial Japanese military forces attacked the territories of the United States of America and the British Commonwealth of Nations.

It is the contention of both the United States of America and the British Commonwealth of Nations that such an attack was commenced by Japan without a previous and explicit warning, in the form either of a reasoned declaration of war or of an ultimatum with conditional declaration of war.

The convention in question is entitled "Convention Relative to the Opening of Hostilities" and comprises eight articles of which (1) and (7) are relevant for the present.

Article (1) states as follows:

> "The contracting Powers recognize that hostilities between themselves must not commence without previous and explicit warning, in the form either of a reasoned declaration of war or an ultimatum with conditional declaration of war."

Article (7):

> "Enables any of the contracting parties to withdraw from the Convention upon one year's notification to the Netherlands Government."

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It is inevitable that the Law of Nations must be a weaker law than Municipal Law, as there is not, and cannot be, an international Government above the national ones which could enforce the rules of International Law in the same way as a national Government enforces the rules of its Municipal Law. This weakness becomes particularly conspicuous in time of war, for belligerents who fight for their existence will always be apt to brush aside such rules of the Law of Nations concerning warfare as are supposed to hinder them in the conduct of their military operations. But a weak law is nevertheless still law, and the Law of Nations is by no means so weak a law as it sometimes seems to be. Those who deny to International Law the character of law because they identify the conception of law in general with that of Municipal Law and because they cannot see any law outside the State, confuse cause and effect.

Pages 15 - 16.

The Governments and Parliaments of the different States are of opinion that they are legally, as well as morally, bound by the Law of Nations. Likewise, the public opinion of all civilised States considers every State legally bound to comply with the rules of the Law of Nations, not taking notice of the opinion of those theorists who maintain that the Law of Nations does not bear the character of real law. And the several States not only recognise the rules of International Law as legally binding in innumerable treaties, but emphasise every day the fact that there is a law between themselves.

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The sources of International Law are therefore twofold--namely: (1) express consent, which is given when States conclude a treaty stipulating certain rules for the future international conduct of the parties; (2) tacit consent, that is, implied consent or consent by conduct, which is given through States having adopted the custom of submitting to certain rules of international conduct. Treaties and custom are, therefore, exclusively the sources of the Law of Nations.

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Definition of Declaration of War:

A declaration of war is a communication by one State to another that the condition of peace between them has come to an end, and a condition ofwar has taken its place. In former times, declarations of war used to take place with greater or lesser solemnities; but during the last few centuries all these formalities have vanished, and nowadays it may tke place through a simple communication. The only two conditions with which, according to Article 1, declarations of war must comply, are, that they must be unmistakable, and that they must state the reason for resort to arms.

Page 239.

Definition of Ultimatum:is as follows:

Ultimatum is the technical term for a written communication by one State to another which ends amicable negotiations respecting a difference, and formulates, for the last time and categorically, the demands to be fulfilled if other measures are to be averted. An ultimatum may be simple or qualified. It is simple, if it does not include an indication of the measures contemplated by the Power sending it. It is quaified, if it does indicate the meaasures contemplated, whether they be retorsion, or reprisals, pacific blockade, occupation of a certain territory, or war. Now, Article 1 of Convention III. provides for a qualified ultimatum, for it must be so worded that the recipient can have no doubt about the commencement of war in case he does not comply with its demands. For this reason, if a State has sent a simple ultimatum to aother, or a qualified ultimatum threatening a measure other than war, it is not, in case of non-compliance, justified in commencing hostilities at once without a prevous declaration of war.

An ultimatum is, theoretically at least, not compulsion, although it may havethe same effect, and although compulsive means, or even war, may (subject to the obligations of the Covenant and othe General Treaty for the Renunciation of War) be threatened in the event of a refusal to comply with the demands made. Similarly, withdrawal of diplomatic agents, military and naval demonstrations, and the

ENFORCEMENT OF INTERNATIONAL LAW

Pages 13 - 14 of Oppenheim's International Law. Vol I, edited by McNair.st

9. But how do matters stand concerning the third essential condition for the existence of law? Is there a common consent of the community of States that the rules of international conduct shall be enforced by external power? There cannot be the slightest doubt that this question must be affirmatively answered. The heads of the civilised States, their Governments, their Parliaments, and the public opinion of the whole of civilised humanity, agree and consent that the body of rules for international conduct which is called the Law of Nations shall, if necessary, be enforced by external power, in contradistinction to rules of international morality and courtesy, which are left to the consideration of the conscience of nations. In the absence of a central authority for the enforcement of the rules of the Law of Nations, the States have to takethe law into theirown hands. Self-help, and intervention on the part of other States which sympathise with the wronged one, are the means by which the rules of the Law of Nations can be and actually are enforced.

FIRST MEETING
of
SECOND COMMISSION
Junes 22, 1907

His Excellency Mr. A. Beernaert presiding.
The meeting was opened at 2:45 o'clock.

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The President then takes up the various preliminary questions that the Commission should settle, and proposes that it be divided into two subcommissions, and that the topics on the program be assigned among them as follows:

First subcommission: "Ameliorations in the laws and customs of war on land" and "Declarations of 1899."

Second subcommission: "Rights and duties of neutrals on land" and "Opening of hostilities."

His Excellency Mr. Beernaert reserves for himself the presidency of the first of these subcommissions and proposes the name of his Excellency Mr. Asser, delegate of the Netherlands, for the presidency of the second.

General AMOUREL announces that he intends in the name of the French Government to file two porjects, on "the rights andduties of neutrals" 1 and on "the opening of hostilities."2

With reference to the work of the second subcommission his Excellency Mr. Tcharykow asks the President to grant the floor to General YERMOLOW for a communication concerning the opening of hostilities.

Magr General YERMOLOW delivers the following address:

The question that our greatly honored President has just submitted to our attention is part of the Russian program and I therefore prermit myself to define its meaning in a few words.

Before having the honor to lay before the high assembly the precise terms in which it would seem possible to me to state this question, I beg your kind attention for some general considerations of this subject, and hope you will examine the question of the opening of hostilities in its most extended meaning, and clarify it by interchangeof views.

Gentlemen, the present state of this question, from the view-point of international legislation, is absolutely undetermined. Neither the lessons of history nor the profound study of the most eminent authors, nor the attentive reading of treatises on international law can furnish precise indications capable of establishing any point of view that is uniform and fixed.

Between the opinions of different States, as between those of jurists and writers of authority, there exists on this matter a wide divergence. If we consult the pages ofhistory we shall find instances most dissimilar. We shall find cases where the first gun-fire had been preceded by certain diplomatic steps, and others, on the other hand, when hostilities began without a declaration of rupture or war. In whatever way the facts of history present themselves it would seem, gentlemen, that since the question has never been settled by internationa act, each country has the right to assume thatits own point of view is the true one, and that each nation has the right to act as seems good to it. In short, really no written law exists, every opinion has a legal right to exist. It is incontestable that at the present time there is no written law prohibiting a nation from opening hostilities at any time whatever, even in the midst ofprofound peace.

Aside from this consideration, gentlemen, which, naturally, weighs heavier upon war preparations in time of peace, there are others that render the study of this question desirable. Thus we see thatin the present state of the question the precise point oftime in law, although very important, of the beginning of a state ofwar between belligeerents, can be defined only with great difficulty. Indeed, from what moment are the normal relationsof peace displaced by the relations of war? It is often impossible to say. Ho wever, the almost mathematical fixing of that moment, the circumscribing of war in time, just as it is already more or less circumscribed in space, is of capital importance. War nowadays affects too many interests, changes and dest oys too many relations andthings for it to be otherwise. This being so, gentlemen, the question that

1. Annex 24
2. Annex 20

arises is as follows: do you wish the present state ofthe question, the "status quo" of affairs, the principle, so to speak, of "carte blanche" to be sanctioned and maintained? Or, would you rather that the Powers come to an agreement in this matter in some way or other? I recall the attention of this high as embly to the fact that ifwe do not arrive at any decision, or any new principle, this will already be asolution of the question, which I for my part asthe representative ofthe Imperial General Staff would be quite ready to accept. It is true thatin this case we shall have to say to the nations that have sent ushere that nothinghas been changed, that all that was not legally prohobited in the past will remain legally permitted in the future. Our countries must bear the consequences of this olution.

What consequences? Why simply, gentlemen, armaments and preparations in tme ofpeace will have to increase.

The brief analysis of the question that issubmitted to your examination shows us that the question may have several solutions:

First: We might maintain and sanction the present indeterminate state,

or

Secondly: We might perhaps succeed in reaching a certain international regulation. We might, perhaps, distinguish between the moment of rupture of peaceful relations and that of the commencement of military operations.

The two momentsmight conicide or admit of a certain interval of time between them however short it might be.

Gentlemen, existing international legislation has already succeeded in limiting or rather in circumscribing war as to space: this restriction is attained by defining the territories over which war may legally extend without overstepping certain invioable and neutral limits. International lgislation has also distinguished between combatants and non-combatants. Why should we not also attempt to circumscribe war as to time by defining as exactly as possible the moment from which all must be quiet except the voce of arms? At the present time, this moment is of interest not only to the adversaries but to the entire world. It is from this moment that all other countries become neutrals, a situation which gives them certain rights and imposes on them ertain duties. By this fact alone you will see, gentlemen, thatthe precise moment of the opening of hostilities has great international importance. I have therefore the honor, gentlemen, to propose for your discussion the following terms: "Does the Conference wish to maintain the question in its present indeterminate state, or does it wish to regulate it to some extent.?"

In examining the question that I have justhad the honor to state, you will easily see, gentlemen, that if we succeed in introducing some international regulation, we shall thereby succeed perhaps in making some decisions that might contribute to the well-being ofthe nations. From this point of view the statement that I have had the honor to make tooyou will therefore be also in acord with the large, humanitarian and generous thoughts that have expired the First and continued to inspire the Second Peace Conference.

The President observes that the remarks ofMajor General YERMOLOW cannot be usefully examined by the Commission until presented in the form of a written proposal He asks him to file one.

Annex 20

PROPOSITION OF THE FRENCH DELEGATION

Article 1

The contracting Powers recognize that hostilities between themselves must not commence without a previous and explicit warning, in the form either of a reasoned declaration of war or of an ultimatum with conditional declaration of war.

Article 2

The existence of a state ofwar must be notified tothe neutral Powers without delay.

FIRST MEETING
(Second Subcommission)
June 29, 1907

His Excellency Mr. T.M.C. Asser presiding.
The meeting opens at 2:45 o'clock.

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The President, after thanking his Excellency Mr. Nelidow- - - - - - - - - -, invites the assembly to take up the study of the questions on the program, to wit:

Opening of hostilities.

Rights and duties of neutrals on land.

As he considers the second of these questions much the more difficult and complex and as the two propositions submitted on this subject, to his mind, do not offer a sufficient basis for discussion, he believes it preferable first to take up the first question (1) concerning which the French delegation has submitted a proposition.(2)

This suggestion having met with no objection, he reads the questionnaire prepared under his direction. (3)

The examination of the six articles of this questionaire gives rise to a preliminary exchange of views which, asthe President explains, cannot bind either the Governments or the speakers, and is not to figure in the minutes nor be communicated to the press.

According to his expression it is not a question of "the opening of hostilities" but of an "opening of peaceful discussion," which for the present wil not result in any vote.

Their Excellencies Lieutenant General Jonkheer den Beer Poortugael, Mr. Nelidow, Mr. A. Beernaert and Mr. Carlin take part in this exchange of views; then his Excellency Mr. Tcharykow reads the following declaration:

The delegation of Ru sia reserved the right, in the meeting of the 22nd to present to this subcommission a proposition relating to the openingof hostilities. Since then the subcommission has taken cognizance of the French proposition on the same subject. The Russian delegation takes pleasure in supporting this porposition. It containes, in fact, a solution ofthe question previously raised by us in the above-mentioned meeting and included as subject one in the present questionnaire, a solution which was the subject of the eulogistic and eloquent discourse of General Den Beer Poortugael and which conforms to the common interests of civilized nations, and we hope that in the course of the discussions to be held on other points on the program it will be possible to give useful development to the ideas expressed in the French proposition.

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(1) Opening of hostilities - See ante- second commission page 31(33)
(2) Annex 20.
(3) Annex 19.

(1) Opening of Hostilities (Second Commission page 31(33)
Can War break out suddenly without previous notice at the risk of taking everybody unawares, or is it necessary to give a formal
~~(2)~~ notification, stating the reasons.

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(2) Annex 20

PROPOSITION OF THE FRENCH DELEGATION

Article 1

The contracting Powers recognize that hostilities between themselves must not commence without a previous and explicit warning, in the form either of a reasoned declaration of war or of an ultimatum with conditional declaration of war.

Article 2

The existence of a state of war must be notified to the neutral Powers without delay.

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(3) Annex 19

QUESTIONNAIRE PREPARED BY HIS EXCELLENCY MR. T.M.C. ASSER, PRESIDENT OF THE SECOND SUBCOMMISSION OF THE SECOND COMMISSION, TO SERVE AS A BASIS FOR DISCUSSION.

1.
Is it desireable to establish aninternational understanding relative to the opening of hostilities?
(On the supposition of an affirmative response to this question)

2.
Is it best to require that the opening ofhostilities be preceded by a declaration ofwar or an equivalent act?

3.
Is it best to fix upon atime which must elapse between the notification of such an act and the opening of hostilities?

4.
Should it be stipulated that the declaration of war or equivalent act be notified to neutrals? And by whom?

5.
What should be the consequences of a failure to observe the preceding rules?

6.
What is the diplomatic form in which it is best to set out the understanding?

SECOND MEETING Second Subcommission

July 5,1907

His Excellency Mr. A. Beernaert presiding.

The meeting opens at 10:50 o'clock.

The minutes of the first meeting are adopted.

His Excellency Mr. ASER, President of the subcommission, being ill, his place is filled by his Excellency Mr. A. BEERNAERT, President of the Commission.

The President calls attention to the fact that but a single question is one the program for the day, this subject being the opening of hostilities, and in regard to it only two propositions have been submitted, one of them from the French delegation[1] and the other from the Netherland delegation 2.

His Excellency Lieutenant General Jonkheer DEN BEER POORTUGAEL takes the floor to explain this last proposition. He reads the following declaration which he had already formulated in the course of the preceding meeting in response to the questionnaire of his Excellency Mr. Aser.

****

1ST Q

(166) 1. With regard to the first question: "Is it desirable to establish an international understanding relative to the opening of hostilities?" my reply is, Yes.

In the first place I feel that I must state a fact which you know and which General Yermolow so eloquently expressed in our first meeting, namely, that there does not exist at present anything that can determine the situation. It is an error to suppose that the law of nations now requires a formal declaration of war or any equivalent procedure before the commencement of hostilities. I have already denied the correctness of any such idea. Positive law says nothing about it. We are living in a state of entire uncertainty about this question. Some say one thing, some say another. We can cite wars with, and as many without, preliminary declarations. Each State has a legal right to act as it sees fit about it.

It seems to me that it is more than time that this uncertainty should cease and that we should know where we stand in a matter of such serious consequence to the people.

2ND Q

II. The next question is: "Is it best to require that the opening of hostilities be preceded by a declaration of war or an equivalent act?"

In regard to this our point of view is the same as that of the Institute of International Law as expressed at the session of Ghent in September of last year.

It is in conformity with the spirit of modern international law, with that loyalty which nations owe to each other in their mutual relations, and with the interests common to all States, that hostilities should not begin until after a preliminary and unmistakable warning.

And why should this be? In my opinion it is based on reasons which are easy to see.

Demands are being made for the disarmament of nations. Why, then, should we not begin with things that are very easy of accomplishment? If that does not lead directly and ostensibly to the desired end, it will at least contribute indirectly to it in that the States will not have as much need of remaining armed in time of peace in order not to be taken unprepared.

1 Annex 20, 2 Annex 22

Another reason is that the commercial relations, which in these times are developed to such an extraordinary degree, make it necessary that there should be an exact determination of the moment of the commencement of a state of war which overturns and changes everything.

III. To the third question, "Is it best to fix upon a time which must elapse between the notification of such an act and the opening of hostilities?" I reply also in the affirmative.

That is why I have taken the liberty of amending the proposition of the French delegation, with which I am in other respects in accord.

It seems to me that in a matter of such importance as that which now occupies our attention it is desirable to be precise and avoid vague terms.

Now, if it is not precisely stated what is meant and sought to be gained by the use of the expression "preliminary notification," this warning may be sent to an adversary an hour, a half hour, or even less, before troops cross the frontier. It goes without saying that the preliminary requirement would not then do much good.

If it is desired to prevent surprises and to make it impossible for the notification to become in this regard a mereform, if it is really sought to contribute to the tranquil development of pacific relations between nations, then it is necessary to fix upon a delay and prescribe that a period of at least 24 hours must elapse. As it appears to me that this is the least that could be given I shall have the honor of proposing it.

(167) IV. "Should it be stipulated that the declaration of war or equivalent act be notified to neutrals? And by whom?" is the fourth question.

Such a stipulation is absolutely necessary. There are so many affairs of importance from one end of the earth to the other which are changed or affected the moment that war is commenced that neutral Governments and their subjects ought to be officially informed immediately, not only by the State which has declared war but also by all the States which have become belligerent parties to it, since it may happen that a State which declares war against another State may involve still other States in this war by reason of treaties of alliance by which they are bound. Neutral merchants and mariners, who at the outbreak of a war are often at long distances from their home ports, ought to be informed as to their situation.

The floor is then given to Colonel Michelson who reads the following declaration:

Gentlemen: During the course of the preceding session our delegate, Mr. Tcharykow, announced that the Russian delegation was supporting the French proposition. Since then the amendment of the Netherlands has been submitted.

In regard to the question of the opening of hostilities the Russian delegation is desirous of doing everything in its power to aid this Conference in arriving at a solution which shall be the most favorable to the cause of security and mutual confidence between nations. It is for this reason that I request to be allowed to submit to your benevolent attention the following additional considerations relating to the two above-named propositions advanced by the delegations from France and the Netherlands.

My colleague, General Yermolow, has explained to you the present state of the question.

I wish to point out to you today the advantages which the nations could derive from a solution of this question which would prescribe a more or less extended delay between the rupture of peaceful relations and the beginning of military operations.

As you cannot fail to understand, the problem of such a delay is intimately connected with the relationm which exists between the peace and war establishments of every country. Consequently a result of its adoption would be a more or less considerable reduction of expenditures.

The time may not be so far distant after all when we shall be able to distinguish between the troops and other preparations for war which every country in its own sovereign judgment deems requisite in its political situation, and those that it is compelled to maintain only through the necessity of being constantly in readiness for fighting. By establishing a certain interval between the rupture of peaceful relations and the beginning of hostilities, an opportunity would be afforded to such countries as may desire it to realize certain economies during times of peace. It is undeniable that these economies would be beneficial in every way, and could not fail to bring about a great relief from the burden of armed peace, a relief all the more acceptable becaise it would in no way affect the right of each nation to fix its own forces and armament solely in accordance with its own views and needs.

There is still another advantage to be derived from the proposed delay. It would leave to friendly and neutral Powers some precious time which they could use in making efforts to bring about a reconciliation, or to persuade the disputants to submit their causes of difference to the high Court of Arbitration here.

But, while speaking of this subject of a delay, we must not lose sight of what is at present possible. The idea of any considerable delay is not yet developed in the consciencesoff the people of the nations.

(168) Consequently it would perhaps not be wise to go too far with our desires, in order that we may not get beyond what is really possible in practice at the present day. So let us content ourselves with accepting the delay of twenty-four hours which has been proposed by the delegation of the Netherlands.1. Let us leave to the future the work of the future, and merely express our hope that in the future the benefits of a still longer delay will be secured.

The proposition of France, together with the amendment of the Netherland delegation, presents the happy advantage of being at this moment a line of demarkation between the past and the future.

We may hope that upon this line we may all meet and there all understand each other, and we may further hope that no person will desire to abandon it to raturn to the state of complete uncertainty in which we have heretofore been existing. A delay of twenty-four hours is not after all really a delay, it only affords sufficient time to warn the population and the troops that the crisis has arrived.

Gentlemen, you would no longer consider that peace, which has brought us together here, is something inferior to an armistice. You would not refuse to accord to peace in this, the Second Conference,that which was granted to an armistice by the First Conference as expressed in Article 36 of the Convention on the laws and customs of war.

The floor then being given to General Amourel, he reads the following statement of the arguments in support of the French proposition.2.

In beginning the discussion of the draft regulations on the opening of hostilities which the French proposition has had the honor to submit to your consideration, it is assuredly not inadvisable to furnish you with some explanations intended to support the terms of the proposition

In the first place it is not thought necessary to consider the supposition of a war undertaken without some serious and apparent reason, or without some incident having arisen susceptible of giving rise to a discussion. An aggressive attack in time of ordinary peace and without any plausible motive is no longer compatible with the public sentiment in the nations of the civilized world which we are representing here.

The war will then have for its cause some fact at least possessing a certain gravity and capable of producing an exchange of explanations. Then will ordinarily commence a period of diplomatic negotiations, during the course of which each Power will seek to induce the other to agree to such terms as may be required to satisfy its interests. If they fail to reach such an agreement one of the Powers may have recourse to a threat of war setting forth in an ultimatum the concessions which it requires. It will generally be the case that a period will be specified for the reply and after this the appeal to arms may be resorted to.

1. Annex 22. 2. Annex 20.

When the events develop in this manner at the beginning of awar between two nations there can be no doubt that there will be a sufficient declaration of war. The ultimatum itself expresses an unmistakable preliminary notification. It states the concessions which are demanded and consequently the cause for war in case of their denial. And finally it places a time limit before the beginning of the war according to the happy expression of our colleague of the Russian delegation, since the state of war dates from the expiration of the period given for the reply.

But it may sometimes happen that the provoking causs of the conflict will not be followed by any diplomatic negotiations. In certain cases the moral or material damage done to a State may appear to it so grave that it is not deemed possible to seek reparation in any other way than by force of arms. This same thing sometimes occurs in conflicts between individuals when the seconds of one party receive instructions to accept nothing but an encounter.

Then it may also happen that during the course of diplomatic negotiations these may take such a trend that the complainant can no longer hope to (169) obtain satisfactory conditions in this way. It may, therefore, very well be decided to completely discontinue the negotiations at this point and resort to force to secure the satisfaction that is judged to be necessary.

In these two cases, whether war breaks out immediately or during the negotiations, it will commence through the sudden or unexpected manifestation of the expressed determination of one of the parties in dispute. But it would seem that even in these cases the opening of hostilities should be accompanied by the same guarantees as are granted when the conflict follows an ultimatum.

When there is an ultimatum it contains a statement of the causes for the war and it gives an unmistakable preliminary notification of hostilities. We demand that a notification be given to the adversary containing these things in those cases in which one of the parties decides to fight without having entered upon, or during the progress of, a diplomatic discussion.

There is no necessity for justifying the requirement that the notification should be unmistakable. And it also ought to be preliminary. By that we understand that it ought to precede hostilities. But these might begin as soon as the notification has reached the adversary. The limitation on the time for beginning the war will thus be less clearly fixed than in the cases in which there is an ultimatum. We are therefore of the opinion that the fact is that the necessities of modern warfare do not admit of making a demand on the attacking party for any greater delays than such as are absolutely necessary in order that the opposing party may know that force is to be employed against him.

We also believe that the reasons for the declaration of war ought to be stated It is thought that this condition should be readily accepted because the Powers, having resolved to resort to fighting only when they are convinced that they are in the right, ought not to hesitate to publicly proclaim their reasons. Furthermore, it is particularly desirable that the causes for the war should be communicated to the States not involved in the conflict but who are bound to suffer from its consequences and who have a right to know why they suffer. And finally these same States, if they are informed as to the causes of the war, may perhaps be more disposed to tender their good offices while observing respect toward the interests in question.

These are the explanations for the terms of the first article of our draft regulations. As to the second article, you will doubtless perceive the necessity of giving notification of the existence of a state of war toneutral nations as soon as possible since it does not concern the belligerents alone but also gives rise to much trouble in the affairs of these neutral countries.

And furthermore, is it not necessary to do this if it be desired to place neutral States in a position to fill the role reserved for them by Articles 6 and 27 of the Convention of July 29, 1899?

Such, gentlemen, are the reasons which the French delegation had to explain to you in support of its proposition, and it would be happy if this proposition could meet with your approval.

His Excellency Baron Marschall von Bieberstein states that he accepts unconditionally the French proposal which in his opinion is in conformity with the principles of modern warfare.

The President observes that the only difference between the proposals of the delegations from France and the Netherlands is in the matter of the delay. It is agreed that there should be a preliminary notification, but what is to be the meaning of the expression? Shall one hour be regarded as sufficient? May the enemy cross the frontier within an hour or even within a few minutes after the time when the invaded nation has received the warning of war at its capital? Does it not seem that a delay of twenty-four hours should be a minimum acceptable to all concerned?

Major General Amourel remarks that in the statement of the French delega-
(170) tion the meaning of the term "preliminary" is plainly defined.
(170) We regret, he says, that we are not in agreement with the delegation of the Netherlands on this point, but we feel that we must adhere to the exact terms of our proposal and our explanation in regard to those things which concern belligerents.

He adds that on the other hand the French delegation would be willing to accept a delay between the declaration of war and its effects so far as concerns the situation of neutrals, because it thinks that the rights and interests of the belligerents would not be injured if it were admitted that the effects of the declaration of war with respect to the neutrals will commence only within a certain time after they shall have been notified of the state of war; it could undoubtedly accept any proposition made to that effect.

His Excellence Count Tornielli expresses the opinion that it is especially important to consider the situation of neutrals, whose duties can only begin at the moment when notification of the existence of war is officially and directly received by their Governments. He thinks that the determination of a period of delay founded solely on the interests of neutrals is rendered very difficult by inequality of distances, and he regards it as essential that there should be some regulation of the legal situation in which neutrals may find themselves after the declaration of war.

His Excellency Mr.Nelidow is of the opinion that this notification is extremely difficult to communicate in practice, and cannot be compared in this respect with an accession to a throne or a change in a government. He says: There are forty-seven States represented here. If any two of them should go to war they would be obliged to send notifications to the forty-five others, It would be necessary to find some method of notifying all of them as promptly as possible of the existence of hostilities.

After an exchange of views upon this subject between his Excellency Mr. Beernaert, who insists upon the necessity of an official notification as the time for the commencement of the delay after which responsibilities of neutrals shall begin, and his Excellency Mr.Nelidow, who advocates doing this through diplomatic channels, his Excellency Lieutenant General Jonkheer den Beer Poortugael presents the following amendement:

> Each of the belligerent States shall announce to the neutral Powers without delay the existence of a state of war by means of an official publication, and also, if possible through its diplomatic agents.

This amendment excites some remarks and his Excellency Mr.Beldiman asks if it would not be possible to reconcile these divergent views by specifying that this notification should be made by telegraph. He explains that in this age, when news of much less importance than a declaration of war, thanks to the use of electricity, makes the circuit of the earth in a few hours, the serious inconveniences so justly noted by his Excellency Mr.Nelidow might by this means be easily avoided.

His Excellency Mr.Nelidow having favored this suggestion, the President submits for the approval of the subcommission the following draft of the second paragraph of the Netherland amendment:

> The existence of a state of war must be notified to the neutral Powers without delay, and shall not take effect in regard to them until after the receipt of a notification, which may, however, be given by telegraph.

This text meets with no objection.

The President then states that the first question remains unsettled, and since all are in accord as to the necessity of an ultimatum there is nothing more left to determine except in regard to the point of an understanding as to whether it is advisable to determine the length of the delay which is implied by a preliminary modification.

(171)Lord Reay requests permission to reserve, as regards this question, the opinion of the British delegation, which it will make known at the next meeting.

Their Excellencies Mr.Choate and Mr.Keiroku Tsudzuki also request to be allowed to reserve expressions of opinion, stating that they desire to wait for instructions from their Governments.

The President states that under these conditions it is impossible to proceed at once to a vote and announces that the discussion of the subject will be continued next Friday. Before adjourning the meeting the President calls the attention of the subcommission to the necessity of having the propositions, which might yet arise relative to the rights and duties of neutrals, presented as soon as possible.

Colonel Borel announces the submission of some amendments which will be printed and distributed.

The meeting adjourns at 11:30 o'clock.

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Annex 20

PROPOSITION OF THE FRENCH DELEGATION

Article 1

The contracting Powers recognize that hostilities between themselves must not commence without a previous and explicit warning. In the form either of a reasoned declaration of war or of an ultimatum with conditional declaration of war.

Article 2

The existence of a state of war must be notified to the neutral Powers without delay.

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Annex 22

PROPSO ITION OF THE NETHERLAND DELEGATION

Amendments to the Proposition of the French Delegation 2

Article 1

The contracting Powers recognize that hostilities between themselves must not commence until the lapse of twenty-four hours after an explicit warning, having the form of a reasoned declaration of war, or of an ultimatum with conditional declaration of war, has officially come to the attention of the adversary's Government.

a Article 2

The existence of/state of war must be notified to the neutral Powers without delay, and shall not begin with regard to them until after the notification thereof has officially come to their attention.

THIRD MEETING
(Second Subcommission)
July 12, 1907

His Excellency Mr. T.M.C. Asser presiding.
The meeting opens at 10:45 o'clock.

In accordance with the order ofthe day, the President proposes to resume the general discussion on the opening of hostilities.

He recalls that at the last meeting, which he unfortunately was unable to attend, owing to illness, the representatives of Great Britain, the United States and Japandeclared their intention of reserving their opinions on the French proposition (3) until they hadreceivedinstructions from their Governments. He asks if they are prepared to give them to-day.

His Excellency Lord Reay then announces that the British delegation adheres to the French proposition.

His Excellency General Porter also adheres to it and reads the following declaration in explanation of his adhesion: The delegation ofthe United States of America, although cordially in sympathy with what has already been said on the subject of the opening of hostilities, is of the opinion that it is necessary to call the attention of the Commission to that provision of the Federal Constitution which bestows upon Congress the exclusive power to declare war, in the following terms: "The Congress shall have power to declare war, grant letters of mark and reprisal, and make rules concerning captures on land and water."

A power granted by the Constitution is not subject to any regulation or modification by law or by treaty; in other words, this power is independent of the legislative power and of the power to make treaties.

But it is with great satisfaction thatthis delegation can say to you that the proposition presented by the Grench delegation does not conflict with the above-cited constitutional provision, and for this the delegation of the United States of America takes pleasure in supporting it. However, it seems desirable to add here that although these facts are correct in regard to offensive military operations, the invariable policy of the United States Government has been to recognize in the President as commander in chief ofthe land and naval forces, the full power to defend the territory and property of the United States ofAmerica in case of invasion, and to excercise the right of national defense at any time and at any place.

His Excellency Mr. Keiroki Tsudzuki states in his turn that he has just received instructions from his Government to the effect that being attached, as it has always been, to the principle contained in the proposition of the French delegation concerning the opening of hostilities, it finds no difficulty in accepting the said proposition.

In conformity with the above-mentioned instructions the Japanese delegation accordingly gives its entire support to the French proposition.

Colonel Sapountzakis requests the floor in order to read the following statement: The Greek delegation has the honor to announce that in adopting the views set forth by the first delegate of Germany it accepts the first article ofthe French proposition in the form in which it was presented by the delegation of that country. - - - - - - - - - - - - - .

His Excellency Lieutenant General Jonkheer den Beer Poortugael submits to the subcommission some remarks of an academic nature upon the subject of the twenty-four hour delay in regard to which he had offered an ammendment to Article 1, andhe explains briefly the reasons which caused him to formulate it. He cites in support of his argument certain precedents which have been furnished by military history on several occasions of agreements of armistice.

Do I need, gentlemen, he says, to submit to your attention that if it has been found necessary to stipulate a delay after the termination of an armistice, it goes without saying that such a delay is even more necessary when the people are to pass from the tranquil condition of peace to the distressing condition of war. When an armistice is in effect the armies are on awar footing and are quite ready to return to the conflict, while in time ofpeace in order to be ina position to make a defense against the enemy almost everything has still to be done..

(3) Annex 20

I will mention as one instance the armistice concluded May 23/June 4, 1813, at Plesswitz, between the allied Germand and Russian armies commanded by General Barclay De Tolly, and the army of the Emperor Napoleon.

The first three articles in this agreement were:

Article 1. Hostilities shall cease at all points upon notification of this armistice.

Article 2. This armistice shall last until July 3/July 20, inclusive, with six additional days for its denunciation at the expiration of this period.

Article 3. Consequently, hostilities shall not be resumed before the expiration of six days after the termination of the armistice shall have been announced at the respective headquarters.

As you see, gentlemen, six days were allowed for the denunciation of an armistice while I am asking only twenty-four hours at the least in which to bfing about a change that is a hundred times more serious and difficult.

He then refers to the project for a codification of the laws and customs of war which was drawn up at Madrid in November, k892, by the Spanish, Portuguese and American military Congress. That Confress "being impressed with the necessity of bringing the purposes of the state of war into harmony with the sentiments ofhumanity ad with the scientific andmoral progress of our times," proposed that "when there is no fxed delay for the resumption of hostilities after an armistice, the belligerent Government commander that proposes to continue the conflict shal be obliged to notify the enemy a sufficient time in advance as to the exact date when hostilities will recommence."

The President thanks Lieutenant General Jonkheer Den Beer Poortugael for his statement.

His Excellency Mr. A. Beernaert observes that the question of a delay, as it is now submitted to the subcommission, presents a double aspect. The first concerns the belligerents, and it is to this that the discussion of Lieutenant General Jonkheer Den Beer Poortugael applies. The other one concerns neutrals and was considered by General Amourel at the last meeting when he stated that the French delegation would be in favor ofhaving a delay between the declaration of war and the beginning of its effects upon neutrals (Minutes of July 5).

In the opinion of his Excellency Mr. Beernaert a delay is obviously necessary from this second point of view.

It istrue, he says, that the principle of a simple telegraphic notification has been accepted; but this will not be sufficient to place neutral States in a position to fulfill their duties. Instructions must be transmitted from the capital to the frontiers and for this reason there should be a suitable delay, to begin from the moment at which the notification ofwar is received at the seat of government.

The President having invited the subcommission to express its opinion upon this subject, Lieutenant General Amourel remarks that discussion would thus be open on the second article when no vote has yet sanctioned the agreement which appears to have been reached as to the first article.

An exchange of opinions then takes place between the President, Major General Amourel, and Mr. Louis Renault, in order to determine whether it is best to refer this question to a committee of examination or whether it should be immediately put to vote in accordance with the request of the French delegates who maintain that the adoption ofArticle 1 should be sanctioned by a ballot. The President thinks such aballot not necessary in view of the support which has just been given to the French proposition by the representatives of the three Powers that had at first reserved their decisions.

His Excellency Mr. A. Beernaert on the other hand thinks that a vote is indispensable. The French plan, which requires a preliminary notification but which does not fixxupon any delay, is in his opinion unacceptable.

It is upon this delay of twenty-four hours, he says, that the subcommission should register its decision.

Mr. Louis Renault desires to set forth the manner in which the French delegation regards the question: Two texts are now up for discussion, his own and that of Lieutenant General Jonkheer den Beer Poortugael. He declares that if it should be decided to ask for their union and if they are to be together put to vote he will vote against the resulting draft.

His Excellency Mr. Keiroku Tsudzuki thinks it necessary to call attention to the fact that in the statement which he read at the opening of the meeting he was to be understood as supporting "entirely and exclusively both in form and substance" the French proposition to the exclusion of all amendments.

His Excellency Mr. Merey von Kapos-Mere suggests that an attempt might be made to reconcile the two points of view by taking two separate votes on the French proposition andthe Netherland ammendment.

His Excellency Mr. Carlin reminds the assembly that at the last meeting the French text had been considered as excluding the plan of any fixed delay. It is therefore necessary to take a vote upon this text in order to permit the different opinions to be shown.

The Swiss delegation, moreover, reserves the right to ask that the distinction to be established between the delay relative to belligerents and that which concerns neutrals should be determined by a double vote.

Colonel Ting statesthat the Imperial delegation of China has taken note of the French proposition and approves its wording. But he observes that this question being bound to give rise to eventual obligations, it would be very important to settle the point as to whether a declaration of war can be considered by the State toward which it is directed as a unilateral act and whether the latter can regard it as null and void. It might be well, moreover, he says, to define what is meant by the term "war," for it has often ben made under the name of an expedition as may be learned from numerous instances that can be found in the history of my own country.

His Excellency Baron Marschall von Bieberstein declares that the German delegation can accept no proposition involving a delay andfor this reason supports the French proposition. If it is adopted, the way will be clear, in discussing Article 2, toproceed to a special vote with regard to the delay tc be accorded to neutrals, as Mr. Carlin has pointed out.

His Excellency Mr. deQuesada wishes to make the following declaration in the name of the delegates of Cuba:

In view ofthe fact that paragraph 12 of Article 59 of the Constitution of Cuba mentions among the powers of Congress that of declaring war, it is not possible for the delegation to subscribe to an act that does not reserve to our Congress the right to determine the form and conditions of such a declaration.

The President announces thatthe first article is to be put to vote, but that the ballot will first be taken on the Netherland ammendment relative to the delay of 24 hours, and that if the latter is rejected the French text can in consequence be considered as adopted.

His Excellency Mr. Merey von Kapos-Mere expresses the opinion that it would be more logical and more in conformity withparliamentary usage to take the vte in the opposite order. He thinks that the French test should be put to vote first and asks that the preliminary question raised by this difference of views be settled first by a vote.

The vote then taken by the President on the Netherland ammendment results as follows:

Thirty-four delegations take part in the vote.

Voting for: Belgium, Brazil, Denmark, Dominican Republic, Ecuador, Luxemburg, Montenegro, Norway, Netherlands, Persia, Russia, Siam and Switzerland.

Voting against: Germany, United States of America, Bulgaria, Chile, Spain, France, Great Britain, Greece, Italy, Japan, Mexico, Panama, Portugal, Roumania, Salvador and Sweden.

Not voting: Austria-Hungary, China, Cuba, Serbia and Turkey.

The amendment is therefore rejected by 16 votes to 13 with 5 delegations not voting.

Upon anouncing the result ofthe vote the President asks if it does not imply the adoption of the first article of the French proposition.

Mr. Louis Renault remarks that the question is of sufficient importance to justify a separate vote, whereupon the French text is voted upon and unanimously carried with the exception of two votes, those of Brazil and the Dominican Republic, the representatives ofChina and Cuba declining to vote.