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### Surprise Attack: Crime at Pearl Harbor and Now

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# Surprise Attack:

## Crime at Pearl Harbor and Now

In this issue, one of the United States Counsel at the Tokyo War Crimes Trial examines the legal and historical background of that trial which took place in Japan following World War II. Judge Robinson centers his discussion around the little-known provisions of the Convention Relative to the Opening of Hostilities, which was signed at The Hague in 1907. One of the primary purposes of that convention was to outlaw surprise attack such as that committed by the Japanese at Pearl Harbor. The first part of Judge Robinson's article appears in this issue; the second and concluding portion will be published next month.

by James J. Robinson • *Justice of the Supreme Court of the United Kingdom of Libya*

### I Judgment Day

ON THE AFTERNOON of November 12, 1948, in a stately courtroom at Tokyo, Japan, an eleven-nation, eleven-judge court of law was completing a trial of unique and historic significance in the progress of the law. The court, the International Military Tribunal for the Far East, had been conducting the trial of twenty-five defendants for two and one-half years, and now, by its chief judge, the court was delivering its judgment.

In this court for the first time in world history former political-military leaders of a nation were personally being tried on specific counts for starting wars by illegal surprise attack and thereby committing crimes including murder. One of the murder counts was based on the surprise attack at Pearl Harbor, Hawaii, on December 7, 1941. The crime of surprise attack, as codified, defined and prohibited by the Third Hague Convention of 1907, was charged as an armed attack commencing hostilities without a preceding five-point declaration of war as demanded by that treaty.

The courtroom scene on this judgment day dramatized the order, the

reason and the ultimate supremacy of law. The guns and bombs of armed forces were silent, the international relations of diplomacy were broken, but the law was carrying on. In that witness box, five hundred witnesses of more than twenty nations had testified to the facts; and at that high bench nearly two hundred lawyers of twelve nations had deliberated, with the judges, on applicable treaties and other laws. The court was a visible working partnership in the administration of justice, a partnership between the peoples and governments of the largest number of nations ever to ally themselves in the creation and in the daily work of a judicial criminal trial court.

The judgment being delivered this afternoon would now answer a crucial question for the anxiously listening defendants, for the trial lawyers, and for the four hundred spectators in the tensely quiet courtroom. The people of the rest of the world through radio and news dispatches would likewise immediately get the court's answer. The dominant question being answered was whether the Third Hague Treaty was in fact a mere scrap of paper, or whether it actually made surprise attack a crime and made surprise attackers personally punishable as criminals.

The answer as read by the chief judge was clear. The judgment upheld Hague III as ruling law and as a contributing source of criminal penalties for convicted surprise attackers.

Nevertheless, throughout the world today, only a decade after that trial and judgment, the problem of preventing surprise attack continues to alarm peoples and nations. The problem in its chief legal aspect today may be stated as follows:

As a means toward deterring or preventing future criminal surprise attacks such as Pearl Harbor magnified into nuclear world-wide annihilation of human life and civilization, can the people of many or all nations succeed in organizing jointly their allied power into well-known agencies of the law such as criminal courts and police, and into every-day working technologies of the law such as criminal codes, trials and law enforcing procedures?

It is the purpose of this paper to show that Hague III and the Tokyo trial in fact indicate not only an affirmative answer to this question but also

Views stated in this article are not presented as the views of any government or of an official or department of any government. The viewpoint is that of a lawyer working in and with courts of law. Statements from public records and other sources are authenticated by citations in text or in notes.

## Surprise Attack

specific procedures and legal precedents for appropriate joint action. Such organized action can serve not only to prevent surprise attack but also to enjoin direct and indirect aggression, to control disarmament and to strengthen the United Nations.

The approach taken in this paper is that of any experienced criminal law lawyer or judge of any nation. As a general principle he seeks to follow the maxim of the ancient Roman lawyer and judge, namely: *Via trita via tuta*, the well-worn road is the safe road. He asks the basic preliminary questions: What law, if any, has been violated? What court, if any, has jurisdiction? What sovereign nation or nations, if any, give legal authority and effectiveness to the law, to the court and to the judgment? And what public interests, if any, are served by a prosecution or conviction?

The foregoing questions will now be considered as they relate to Hague III, to the Tokyo trial and to the present public interest in preventing surprise attack.

## II The Law Violated: Hague Convention III of 1907

The Convention Relative to the Opening of Hostilities was signed as the Third Convention of the Second International Peace Conference, held at The Hague, Netherlands, in 1907.<sup>1</sup> Forty-seven nations have become parties to the treaty, which will here be called for brevity Hague III. Among the parties are Japan, and the eleven countries which joined in 1946-48 in prosecuting certain Japanese individuals for violating the treaty and other laws. These countries were Australia, Canada, China, France, Great Britain, India, The Netherlands, New Zealand, the Philippines, the Soviet Union and the United States.<sup>2</sup> The treaty was signed on October 18, 1907, by forty-two nations, of which twenty-five, including the principal powers, ratified.<sup>3</sup> There have been adherences by six nations. Sixteen nations have recognized that the treaty is binding on them by virtue of other treaties or of acts such as earlier ratification by Great Britain, France, The Netherlands or the United States.<sup>4</sup>

Russia ratified Hague III in 1909; the U.S.S.R. has recognized it as a binding treaty establishing legal rights and obligations of the Soviet Union.<sup>5</sup> In 1941, the U.S.S.R. protested against the surprise attack on the U.S.S.R. by Germany in violation of Hague III.<sup>6</sup> And in 1946-48 the Soviet Government upheld Hague III by full participation in the court, indictment and trial at Tokyo. The judgment held the Soviet Union and the ten other participating nations to be parties to the treaty. Germany signed the treaty in 1907 and ratified it. The latest ratification was by Brazil in 1914. The latest adherence was by Ethiopia in August, 1935, a few weeks before Mussolini attacked Ethiopia without declaration of war.<sup>7</sup> Italy, however, after signature in 1907 had not ratified and therefore did not become a party to the treaty. Mussolini's invasion of Ethiopia, therefore, was not a violation of Hague III.<sup>8</sup>

The treaty is brief and simple.<sup>9</sup> Its essence is stated in the first article in only thirty-six words, as follows:

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.

Of the foregoing provisions, those which are applicable to the surprise attack at Pearl Harbor may be reduced to the following nineteen words (with numerals placed before the five key

words which specify the five required conditions or circumstances):

... hostilities ... must not commence without a (1) previous and (2) explicit (3) warning, in the form ... of a (4) reasoned (5) declaration of war ...

The ultimatum clause of the treaty does not require discussion here because it was not involved in the Pearl Harbor attack nor in the Tokyo trial. The Japanese, however, in 1914 had used the ultimatum clause in declaring war on Germany when surprise was not needed.

There is also a provision for notification to neutral powers of a state of war (Article 2). The convention takes effect in case of war between two or more contracting powers (Article 3). Additional states may become parties to the treaty by formal notification to The Netherlands Government; a simple step which every state not yet a party should consider taking. If one of the contracting powers wishes to withdraw, it shall notify its denunciation to The Netherlands Government, to be effective one year after receipt (Article 7). This latter provision appears to be the only provision for repeal or for release of a party from the treaty. The international court at Tokyo in 1946-48 recognized the treaty to be in force and not superseded, obsolete, denounced nor repealed.<sup>10</sup> No pertinent change in its legal status has occurred since 1948.

The treaty, as stated in the judgment

1. THE PROCEEDINGS OF THE HAGUE PEACE CONFERENCE, Translation of Official Texts, Carnegie Endowment for International Peace, James Brown Scott, Director, THE CONFERENCE OF 1907 618 (1920). The list of "States which have become parties" is given in TREATIES IN FORCE, Department of State Publication 6427 (1956) page 217 (see note 3 below) as follows: Australia, Austria, Belgium, Bolivia, Brazil, Canada, Ceylon, China, Denmark, El Salvador, Ethiopia, Finland, France, Germany, Guatemala, Haiti, Hungary, India, Ireland, Japan, Liberia, Laos, Luxembourg, Mexico, The Netherlands, New Zealand, Nicaragua, Norway, Pakistan, Panama, the Philippines, Poland, Portugal, Rumania, Spain, Sweden, Switzerland, Thailand, the Union of South Africa, the Union of Soviet Socialist Republics, the United Kingdom, the United States. Other states which have become parties according to a U. S. State Department supplement are: Burma, Cambodia, Iceland, Indonesia and Vietnam.

2. TRIAL OF JAPANESE WAR CRIMINALS. Documents, Department of State Publication 2613 (1946).

3. (a) TREATIES IN FORCE, a List of Treaties and Other International Agreements of the United States, October 31, 1956. Compiled by Treaty Affairs Staff, Office of the

Legal Adviser, Department of State. Department of State Publication 6427 (1956) page 217. Also

(b) Treaty Affairs Staff records of Hague Convention III of 1907 (rewritten November 8, 1949 H J Z; 1955 supplements and older records) giving Signatures, Ratifications, Adherences and Recognitions. See also note 1. The statistics and names are subject to slight variations from time to time due for example to changes in name or political status of nations.

4. See note 3 (b).

5. Letter from the Ministry of Foreign Affairs of the U.S.S.R. to Embassy of The Netherlands, Moscow, dated Moscow, March 7, 1955; a copy in Treaty Affairs records, note 3 (b). And see notes 6 and 11 *infra*.

6. See complaint of Molotoff, NEW YORK TIMES, June 23, 1941; 3 Hyde, INTERNATIONAL LAW (2d ed. 1945) 1696.

7. See note 3 (b).

8. Statements and assumptions to the contrary are numerous but appear to be erroneous. For example, see Fenwick, INTERNATIONAL LAW (3d ed. 1948) 553.

9. For full text of treaty, see note 1, first citation.

10. Judgment, I.M.T.F.E., pages 12, 84, 520.



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of the International Military Tribunal for the Far East, was binding upon Japan at all times relevant to the charges there considered, and likewise upon all other nations concerned in the trial.<sup>11</sup> Japan had been bound by the treaty since ratifying it, with the Emperor promulgating it and in effect thereby ordering all Japanese individuals to respect and obey it, in December, 1911, thirty years before the Japanese defendants caused the surprise attack to be made at Pearl Harbor.<sup>12</sup> It is useful and appropriate to illustrate the five requirements of the treaty by observing how each of them was violated by the militarist-political leaders of Japan in their commencement of hostilities on December 7 and 8, 1941, at Pearl Harbor and at the other places listed in the judgment.

The investigation, indictment and trial served to clear the innocent as well as to convict the guilty. The term "militarist-political leaders" of Japan was used to refer to those few Japanese whom the International Tribunal described as "militarist conspirators".<sup>13</sup> They were leaders who, in the judgment of the court, in or prior to 1941 had taken totalitarian control of the Japanese armed forces, civil government and people. They had complete official and personal responsibility for the violation of Hague III.

Even among the defendants in the Tokyo trial not all shared in the responsibility for the Pearl Harbor attack. Foreign Minister Togo, for example, showed by his testimony, and by his recent book, *The Cause of Japan*, that he "fought" the Navy and Army high command in their demand for a surprise attack, a type of attack which he called "irresponsible" and without "legitimacy".<sup>14</sup> He considered the surprise attack also impractical as a means of correcting the injustices which he believed that other nations had done to Japan.

The Emperor of Japan, according to testimony at the trial, directed that the commencement of hostilities not be made by surprise. Admiral Shimada testified on cross-examination by the writer that the Emperor had told him, as Navy Minister, and Admiral Nagano, as Chief of the Naval General Staff, that the legal warning must be given prior to any attack on the United States.<sup>15</sup> Only a few military leaders knew that surprise attack was to be used.<sup>16</sup> Leading Japanese lawyers are reported to have advised the Japanese Government and Navy that surprise attack would violate Hague III. Japanese and Nisei residents at Pearl Harbor committed no acts of hostility or sabotage.<sup>17</sup> Many of the Japanese people in Japan and elsewhere were shocked by the attack, deplored its violation of treaty and other laws and of *bushido* (honorable warrior) principles, and foresaw its suicidal consequences for their country.

The basic requirement of Hague III is provision number (5) as listed above, namely, that the attacking nation must make a declaration of war. The declaration of course is not re-

quired to disclose the place at which the first attack will be made.

The trial clearly exposed the misleading confusion that has been raised on this point of whether Japan ever made or tried to make a legal declaration of war. The Japanese Ambassadors at Washington delivered to Secretary Hull on December 7, 1941, a "note" terminating the diplomatic talks. This note had no resemblance to a Hague III declaration of war. The Japanese themselves recognized in effect that this paper was not a declaration of war because they prepared a declaration of war after the attack. It was received by the U. S. Government in Washington sixty-six hours after the attack.<sup>18</sup> The note terminating the diplomatic talks has nevertheless often been called by Japanese defense sources a "declaration of war". Many unfortunate examples of this erroneous statement are found in the record of the trial and in Japanese writings about the trial.<sup>19</sup>

Foreign Minister Togo testified that Admiral Nagano and other Navy leaders tried to get him not to send even that "note", leaving the diplomatic talks to continue treacherously during the attack. Togo testified also that Admiral Shimada and Admiral Nagano later during the Tokyo trial "warned" him not to disclose these facts in his testimony (Transcript, page 35,538); and Shimada admitted on the witness stand that he and Nagano had "requested" Togo not to testify to these facts (Transcript, page 37,031).

The declaration of war required by Hague III must not only exist but it must comply with the four other requirements stated above. It must be (1) a "previous" warning declaration of war, delivered prior to the commencement of hostilities. Japanese de-

11. *Ibid.*

12. See notes 3 (b) and 11.

13. Judgment, I.M.T.F.E., pages 1, 139, also 15, 84, 520 *passim*.

14. Togo, *THE CAUSE OF JAPAN* (1956) 198, 199, 215.

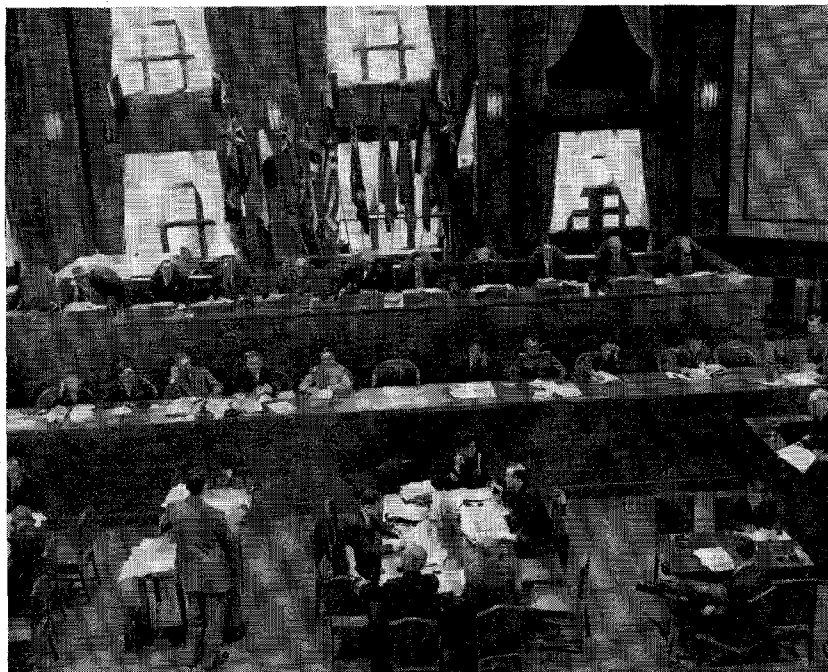
15. Transcript, I.M.T.F.E., pages 34, 704-713.

16. Togo, *op. cit.*, page 197; and Transcript, *passim*.

17. No evidence of sabotage by residents of Japanese blood at Pearl Harbor was introduced in the trial and no evidence was or is known by the writer to exist. Frequent statements that there was no sabotage have been accepted without challenge. See, for example, Lord, *DAY OF INFAMY* (1957) 210.

18. Transcript, I.M.T.F.E., pages 11, 236-7.

19. See Admiral Fukudome, *HAWAII OPERATION*, 81 U. S. NAVAL INSTITUTE PROCEEDINGS (December, 1955) 1323-1324.



Signal Corps, U.S. Army

Admiral Richardson (far right) testifying at the Tokyo trials. The author is seated at the counsel table in the center foreground (back to camera on the left). The American defense counsel is at the lectern.

fense sources have declared that the required previous declaration of war may legally be made "only one-half second" previous to commencing hostilities.<sup>20</sup> Such assertions attempt to change the legislative wording, intention and effect of Hague III. A chief draftsman of Hague III, Renault, of France, said that such a "warning" would be "formalistic" and "useless".<sup>21</sup> It would also be an impossibility. Both the wording and also the legislative history and background of Hague III, as described later, show that the statement cannot be legally supported.

All statements about the required length of the warning period between declaration of war and attack are irrelevant so far as the Pearl Harbor attack is concerned because no previous declaration of war whatever was given.

Surprise attack of the Pearl Harbor type was defended at the trial as though it were a normal, legal, successful and honorable naval operation. An American defense lawyer, experienced in American criminal trial technique, in cross-examining a prosecution witness, Admiral J. O. Richardson, asked the Admiral whether surprise attack is not a "normal" military

operation, which the United States itself would use as needed. The defense lawyer was confusing the term "surprise attack" in its relevant criminal law meaning with its irrelevant operational meaning, that is, an unexpected attack made in due course of legal warfare. This confusion disregards the caution given by international law authorities. As Hershey points out, "the surprise of a nation must not be confounded with that of an army or fleet".<sup>22</sup> It is the surprise of a nation, not of military and naval forces, that Hague III primarily forbids.

Admiral Richardson, who had made a special Naval War College study of the Japanese surprise attack policy in and since 1904, replied to the defense lawyer's question by stating that the Pearl Harbor attack plan of *commencing* a war by surprise attack was quite "normal" for Japan but that such a plan would be wholly abnormal for the United States.<sup>23</sup>

The court in its judgment characterized as "unprincipled" the attackers who reduce the warning time too much.<sup>24</sup> On the proper interpretation of the words "previous" and "warning", however, the court appears to disregard the fact, as shown later in

this paper, that the framers of the treaty at Ghent and at The Hague indicated in effect that the warning period, while not stated in hours, must be a *reasonable* period under all of the circumstances of the particular situation. That general standard of "reasonableness" is well recognized in law. The requirement of "previous warning", the treaty draftsmen declared, would otherwise be "evaded" and become "illusory".<sup>25</sup> The court elsewhere in its judgment indicated that under Hague III the interval between declaration of war and the attack should be at least sufficient to allow "transmission of the warning [that war had been declared] to the armed forces in outlying territories and to permit them to put themselves in a state of defense—or they may be shot down without a chance to defend themselves".<sup>26</sup> Japanese Foreign Minister Togo appears to have supported this same interpretation in his courageous but losing "fight" to make the Japanese high command obey Hague III.<sup>27</sup>

The judgment shows that the first and only declaration of war that was received by the United States Government from the Japanese Government was a merely formal declaration, stating no substantial reasons. This statement, the Japanese so-called declaration of war, was received on December 10, 1941.<sup>28</sup> Against Great Britain, no previous declaration of war was even claimed by the Japanese to have been attempted.<sup>29</sup> Prime Minister Churchill, in his brief letter notifying the Japanese Ambassador on December 8, 1941, that the United Kingdom was declaring war on Japan, cited and quoted Hague Convention III, and the violation of this Treaty by Japan's surprise attacks on the United Kingdom on December 7, 1941, as the United Kingdom's reason and ground for its declaration of

20. *Ibid.*, page 1323.

21. See 21 ANNUAIRE DE L'INSTITUT DE DROIT INTERNATIONAL—1906, 282.

22. Hershey, THE ESSENTIALS OF INTERNATIONAL PUBLIC LAW AND ORGANIZATION (1939) 561.

23. Transcript, I.M.T.F.E., pages 11, 291.

24. Judgment, page 988.

25. 21 ANNUAIRE DE L'INSTITUT DE DROIT INTERNATIONAL—1906, 275-277, 282, 293; 1 PROCEEDINGS HAGUE PEACE CONFERENCES, Conference of 1907, page 133. On "reasonable" rule applied to neutrals, see *ibid.*, page 135.

26. Judgment, pages 987, 988.

27. Togo, *op. cit.*, page 209.

28. Transcript, pages 11, 236-7.

29. Transcript, pages 34, 726.

war.<sup>30</sup> President Roosevelt gave similar grounds for the declaration of war by the United States.

The declaration of war under Hague III not only must be "previous" but it also must be (2) an "explicit" warning declaration of war, not ambiguous or uncertain. Obviously a note stating that it terminates diplomatic talks falls completely short of being an "explicit" or "*non équivoque*" (French text of Hague III) declaration of war. The fact that the Japanese here again evaded the treaty was stated by the court. The court, however, did not expressly point out that in any event the note was of no significance because it was not a declaration of war.<sup>31</sup>

The declaration of war must be (3) a declaration of such a nature that it is a "warning". "Warning" means, by dictionary definition and as interpreted by The Hague conference debates,<sup>32</sup> putting the receiving nation on guard; informing it in clear and plain terms that hostilities and war are about to be commenced against it because of the reasons stated, leaving open the possibility that it can correct the stated reasons without war, or at least permitting it to notify its armed forces of war. Obviously, Japan gave no "warning" that it was going to make an attack.

The declaration, finally, must be (4) a "reasoned" declaration of war, stating the reasons why the attacking nation is commencing war against the nation to be attacked. The draftsmen of Hague III at Ghent and at The Hague, as Renault pointed out,<sup>33</sup> believed that the nation about to be attacked was entitled to receive such a complaint or statement.<sup>34</sup> They believed also that the other nations of the world were entitled to receive such a statement of the reason or of the excuse of the attacking nation for assuming the vast and awful responsibility of starting a war. The statement would enable the other nations to judge where the fault lay, to see whether they might help to prevent war, and, if war commenced, to provide protection for their own interests. The necessity of making such a statement, the treaty-makers believed, might also help to deter an aggressor from making an unjustifiable attack.<sup>35</sup>

In interpreting and applying Hague III, lawyers and judges can well use the established process of reference to the background and legislative history of the law.

In Hague III there is man's instinct of self-preservation against being killed by stealthy surprise attack. There is the common human revulsion against the injustice and cowardice of murder by a stab-in-the-back or by a bomb or a nuclear missile dropped on unwarned human beings *in time of peace*. This instinct and this revulsion are chief factors in the origin and the ruggedness of the treaty. The common sense moreover of the people of the various nations does not tolerate the idea of mutual national or racial extermination by surprise war or by economic ruin in armament races. The treaty finds fundamental support also in the people's faith in the rule of justice that he who first attacks with the sword shall perish by the sword.<sup>36</sup> The legal historian Pollock has observed that "law is the sense of justice taking form in people and races". The law of Hague III may be said to be the sense of justice taking that form internationally in the human race.

The law has been slow in taking form. Grotius in the seventeenth century stated his opinion that international law required a declaration of war before commencing hostilities.<sup>37</sup> The reason for this requirement, said Grotius,

was not that they [the nations] might do nothing secretly 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 . . .

This reason for requiring a declaration of war correctly recognizes the fact that it is commonly a military dictator's "private audacity" by which he throws the people of his nation into total war by his surprise attack on the people of another nation. The opinion of Grotius, however, that the prevailing law at that time required a declaration of war was not accepted by most international lawyers.<sup>38</sup>

Three centuries were to pass before the opinion of Grotius became law by

the enactment of Hague III in 1907. Lawyers and public leaders over many years urged that the ages-old dispute be settled by codification in a treaty specifically requiring declaration of war. An American lawyer, David Dudley Field, included the provision in his 1872 draft code of international law, which had a wide circulation in Europe.<sup>39</sup>

At the meeting of the Institute of International Law, at Ghent, Belgium, in September, 1906, a resolution was proposed to state the wording and to recommend the adoption of a treaty to require a declaration of war.<sup>40</sup> The debate on the resolution continued for two days.

Renault, legal adviser of the French Ministry of Foreign Affairs and likewise a judge of the Court of Arbitration, as chairman of the committee on draft, explained "the essential terms of the text". These terms, as explained by Renault, were to become in the next year the precise terms of Hague III; and in 1948 they were to receive the same interpretation at Tokyo.

Quoting the key words of the Resolution, Renault explained each word, as follows:

A warning [declaration of war] *explicit*—the reason for requiring a warning is to dispel uncertainty; a warning *previous*—because if I stab a person with a dagger, as a warning to him that I am stabbing him it is useless to say that I am stabbing him, because he who is receiving the stab is feeling it. The warning, however, is not necessarily formalistic and uniform. . . . Because the warning must be *previous*, it follows that between the declaration of war and the commencement of hostilities, there must be a delay such that this condition [of previous warning] cannot become *illusory*.<sup>41</sup> (Italics added.)

30. Churchill, *THE GRAND ALLIANCE* (1950) 610.

31. Judgment, pages 976, 978, 986.

32. I PROCEEDINGS HAGUE PEACE CONFERENCES, 1907, 131-133; 3 *ibid.* 160, 163.

33. I PROCEEDINGS HAGUE PEACE CONFERENCES, 1907, 131-136; 3 *ibid.* 159-170.

34. *Ibid.*

35. *Ibid.*

36. See Charpentier, *Où Va la Justice?*, LA REVUE DE PARIS (October, 1955, page 44); and Toynebee, *WAR AND CIVILIZATION* (1950) 142.

37. Grotius, *DE JURE BELLI AC PACIS* (1625).

38. Hershey, *op. cit.*, page 559; Fenwick, *op. cit.*, page 532.

39. ANNUAIRE DE L'INSTITUT DE DROIT INTERNATIONAL—1906, pages 48, 53.

40. *Ibid.*

41. *Ibid.*, pages 282-283.

The next year, at the Second Peace Conference at The Hague in 1907, Russia proposed to the other powers that provisions relative to the opening of hostilities be codified. The Russians considered that international law should clearly forbid such an attack as Japan had made on Russia in commencing the Russo-Japanese war of 1904-05. Russia considered, moreover, that a treaty law against surprise attack was necessary also to reduce for all nations the paralyzing costs of armaments. The Russian delegate, Colonel Michelson, forcefully argued this point.<sup>42</sup>

In the sessions of The Hague Conference in 1907 and in the later ratification discussions throughout the world, the treaty received unique support by the nations and peoples of the world. It was the general convention among the thirteen conventions signed at The Hague Conference of 1907 that was unanimously signed or adhered to,<sup>43</sup> and that eventually received the final approval of the largest number of the forty-four participating nations.<sup>44</sup> It was the only general convention that was approved without any reservations whatsoever.<sup>45</sup>

Even those who repeatedly violated the treaty, namely Hitler and Tojo and their associates,<sup>46</sup> did not seek to withdraw from it. In view of the popular support for the treaty in all nations, and because of the incriminating nature of a withdrawal, it appears to be doubtful that any withdrawals will be made. For the same reasons, it appears to be reasonable to assume that sound and simple legal proposals for strengthening or supplementing this treaty or for redrafting it in a concise code, with a few other universally denounced crimes against public security, would receive strong popular support.

### III

#### The Court Having Jurisdiction: The International Military Tribunal for the Far East

A court of law, like a ship underway or like an airplane in flight, is a place where every person having duties is held strictly personally responsible for due performance of those duties. Certain legal duties were placed upon persons and nations by Hague Convention

III, as supplemented by the law of war. No court of law, however, was established during the period from 1907 to 1945 to hold personally responsible any person who should violate those legal duties. The treaty left any provision for a court to be made under the law of war. Such provision was only made at the end of World War II, as described below.

Hague III during that period (1907-1945) was violated by seventeen clearly provable violations. The offenders, like ordinary criminals, have sought to belittle the law by pointing to the number and the enormity of the violations, committed chiefly by themselves. Most of the violations, however, were committed in only three years of that thirty-eight year period, in 1939, 1940 and 1941. There were only two principal offenders. And in the end they brought only ruin and death to their own countries and to themselves. The importance of the violations of the law, however, is indicated by the fact that violations commenced both World Wars.

Hitler and Germany committed seven violations. The violations were in 1939 against Poland, in 1940 against The Netherlands, Belgium, Luxembourg, Denmark and Norway, and in 1941 against the Soviet Union.<sup>47</sup> Tojo and associates and Japan committed six violations. The violations were in 1931, 1937, 1940 and 1941 against China, and in 1941 against the United States and Great Britain.<sup>48</sup> There was also a third offender. Stalin and the Soviet Union committed two violations. The violations were in 1939 against Poland and against Finland.<sup>49</sup>

In 1914, German militarists and the German Empire commenced the hostilities of World War I by two violations. These were against Belgium and Luxembourg.<sup>50</sup>

There have been three other notorious attacks without warning. They were not surprise attacks in violation of Hague III, however, because one or both nations concerned were not parties to Hague III. These attacks were by Mussolini and Italy in 1935 against Ethiopia, by Hitler and Germany in 1941 against Yugoslavia, and by Lee Kwon Mu and other North Korean or Chinese Communist attackers in 1950 against Korea.

No court was established in 1919 at the end of World War I by the victorious Allied Powers for the trial of German leaders who had commenced the war in 1914 by violating Hague III and other treaties. The Allies, instead of simply setting up military or treaty courts or commissions to apply Hague III and other treaties to German individuals who had admittedly violated them, made a legal muddle of the criminal law situation.<sup>51</sup> Evasion of responsibility and playing of politics or policy by some Allied leaders caused the legal adviser to the American Peace Commission at Versailles in 1919 to describe the failure to prosecute the chief German leader as a game of "passing the buck"<sup>52</sup>

At the end of World War II in 1945 there were many cynical predictions that history would repeat itself. It was asserted that again no court would be established to bring the criminal violators of Hague III and other treaties to justice. The American people, however, the Congress and the press, and the people of Great Britain, of China and of other nations, were demanding legal prosecutions. Governmental policy, moreover, as shown by the Potsdam Declaration of July 26, 1945, promised the joint prosecution of "irresponsible militarism" in Japan and for establishing peace and international law in the Pacific areas.<sup>53</sup>

42. 3 PROCEEDINGS HAGUE PEACE CONFERENCES, 1907, 3, 159-170; 4 *ibid.* 131-133.

43. See note 3; Hershey, *op. cit.*, page 561; 1 PROCEEDINGS HAGUE PEACE CONFERENCES, 698-703, Table of Signatory States and Reservations; and pages 599-690 Conventions and Final Act; also Robinson, *Hague Convention III and the Tokyo War Crimes Indictment*, paper in PROCEEDINGS, SECOND INTERNATIONAL CONFERENCE OF THE LEGAL PROFESSION, International Bar Association, The Hague, 1948.

44. *Ibid.*

45. *Ibid.*

46. Hitler, on December 14, 1941, commended Oshima and Japan for using surprise attack at Pearl Harbor. He said that his policy too was not to "waste time declaring war", but to strike "suddenly and without formality". See Harris,

TYRANNY ON TRIAL, *The Evidence at Nuremberg* (1954), page 171; and at page 225: "To Hitler, the success of any military action depended in large part upon the factor of surprise. All of his invasions were undeclared".

47. 6 Hackworth, *DIGEST OF INTERNATIONAL LAW*, 169; 3 Hyde, *op. cit.*, 1693; *NAVAL WAR COLLEGE INTERNATIONAL LAW SITUATIONS* (1933).

48. *Ibid.*

49. *Ibid.*

50. Invasion of Belgium and Luxembourg, House and Seymour, *WHAT REALLY HAPPENED AT PARIS* (1921) 235-236. The treaty of neutrality also was violated.

51. House and Seymour, *op. cit.*, page 475.

52. *Ibid.*

53. Judgment, I.M.T.F.E., vol. *Annexes*, page 1. The Potsdam Declaration.



In regard to the necessity for courts, the nations had permitted the situation to develop into an emergency, and the armed services were required to meet the emergency. Fortunately, the participation by the American Armed Services in the war crimes trials in the Pacific areas became a direct responsibility of certain able officials, and especially of a Secretary of the Navy and of a General of the Army who were supremely capable, hard-working, conscientious and uncompromising Americans. To these two leaders the crucial and immediate responsibility of helping to provide fair trials for Japanese war crimes cases was both a trust and a challenge.

Secretary of the Navy James Forrestal on January 15, 1945, in announcing to the Navy the establishment of the national War Crimes office by the State, War and Navy Departments,<sup>54</sup> stated that

Enemy persons who commit murders, atrocities, and other violations of the laws of war against members of the armed forces of the United States or against other Americans

are to be brought to trial on evidence collected, and under "arrangements for trial" prepared, by the War Crimes office.

The requirement that "trials be arranged" necessarily involved establishment of trial courts of law. The requirement that the trials be for "violations of the laws of war" meant that under Navy authority no Japanese would be tried for an act not defined and prohibited specifically as a crime by a treaty law or laws, or for an *ex post facto* offense. "The laws of war" of course included Hague III of 1907; and Hague III clearly imposed on Japanese Government leaders the duty not to plan and direct surprise attacks against the armed forces and people of other nations that were parties to that treaty agreement.

The alternative to a treaty court system was a military court system. But who would establish such courts in the Pacific areas? The questions persisted: Will the war crimes fiasco of 1919 make a repeat performance in 1945? Will courts of law again not be established to bring to justice the violators of Hague III and of other laws



Scene at the Tokyo Trials on judgment day just prior to the reading of the verdicts.

for the prevention or control of war?

A clear, straight answer to these questions came in September, 1945.

The answer came in the Pacific area from the General of the Army.

"I do not propose to pass the buck!" were decisive words in the answer.

The speaker, tall and thin, in khaki summer uniform, was sitting on a worn divan in a large, barracks-like room in the Customs Building, Yokohama, Japan. The day was September 12, 1945, ten days after the Japanese had signed the instrument of surrender. The room was part of the speaker's advance headquarters as Commander-in-Chief, United States Army Forces Pacific, and as Supreme Commander for the Allied Powers in the Pacific. The speaker's khaki shirt was open at the collar. On the collar was a circle of five stars. He was speaking slowly and in a clear, raised voice; his shoulders and his hands, sometimes holding his well-known underslung pipe, moved in emphatic gestures as he spoke.

The circle of Army and Navy officers to whom General MacArthur was speaking included the Chief of Staff and three other officers of his headquarters staff. There were also four officers, two Navy and two Army, who were a team from the U. S. War Crimes Office at Washington. They had arrived

that day after being at Pearl Harbor, at Guam and at Manila, where they had likewise executed their orders to "offer to Pacific commanders any assistance desired in war crimes matters."

"I received today", the General was saying, (as I heard and recorded his words), "a radiogram from Washington which you have seen. It directs me to proceed to arrange trials of war criminals. . . The Trials must be conducted in the full light of publicity. They must be fair and free from vengeance or politics. They must be examples to the world of law and justice. We shall be criticized but we shall strive for the verdict of history."

At long last Hague III was going to have a court and a hearing. The treaty was therefore to be law in the true legal sense as defined in an opinion of the U. S. Supreme Court (Holmes, J.) as follows:

Law is a statement of the circumstances in which the public force will be brought to bear upon men through the courts.<sup>55</sup>

The "public force" of law, specifically Hague III, was going to be "brought to bear upon men through the courts." Other treaties and charges and courts also were to receive due attention.

54. NAVY DEPARTMENT BULLETIN, January 15, 1945. 45-8, War Crimes Office, Announcement of Establishment.

55. Holmes, J., in *American Banana Co. v. United Fruit Co.*, 213 U. S. 347 (1909).