Topic VII.

A. At the convention at The Hague in 1899 three declarations were made as follows:

1. To prohibit the launching of projectiles and explosives from balloons or by other similar new methods.
2. To prohibit the use of projectiles, the only object of which is the diffusion of asphyxiating or deleterious gases.
3. To prohibit the use of bullets which expand or flatten easily in the human body, such as bullets with a hard envelope, of which the envelope does not entirely cover the core, or is pierced with incisions.

(1) The first of the above declarations was ratified for a period of five years by the United States. Should the prohibition be renewed?
(2) Should the second declaration be adopted?
(3) Should the third declaration be adopted?

B. It was also voted that—

The conference expresses the wish that the questions with regard to rifles and naval guns, as considered by it, may be studied by the Governments with the object of coming to an agreement respecting the employment of new types and calibers.

What action should be taken upon this provision?

C. It was also voted that—

The conference expresses the wish that the proposal to settle the question of the bombardment of ports, towns, and villages by a naval force may be referred to a subsequent conference for consideration.

What regulations should be made in regard to bombardment?

CONCLUSION.

A. The following action should be taken on the three declarations of the convention at The Hague, 1899:

(1) The contracting powers agree to prohibit, for a term of five years, the launching of projectiles and explosives
from free balloons, or by other new methods of similar nature.

The present declaration is only binding on the contracting powers in case of war between two or more of them.

It shall cease to be binding from the time when in a war between the contracting powers one of the belligerents is joined by a noncontracting power.

(2) The nature and phrasing of the second declaration seems to be such as to make its adoption in the present form inexpedient.

(3) The third declaration should be made to conform to the principle embodied in the Laws and Customs of War on Land.

B. Discussion and study of the question of restriction upon invention and use of new types and calibers of guns subsequent to the conference in 1899 seems to show that such action would not necessarily lessen the burden of war, shorten its duration, or make it more humane. This being the opinion which seems to accord with the facts, it does not seem logical to impose any restriction, and such a limitation should not be adopted.

C. The bombardment, by a naval force, of unfortified and undefended towns, villages, or buildings is forbidden, though such towns, villages, or buildings are liable to the damages incident to the destruction of military or naval establishments, public depots of munitions of war, or vessels of war in port, and such towns, villages, or buildings are liable to bombardment when reasonable requisitions for provisions and supplies at the time essential to the naval force are withheld, in which case due notice of bombardment shall be given.

Steps should be taken to spare, as far as possible, edifices devoted to religion, art, science, and charity, hospitals and places where the sick and wounded are collected, provided they are not used at the same time for military purposes. The besieged should indicate these buildings or places by some particular and visible signs, which should previously be notified to the assailants.
Three Hague Declarations.

Discussion and Notes.

General.—Of the three declarations, the first received an unanimous affirmative vote. The second was opposed by Captain Mahan, representing the United States. The third was opposed by Great Britain and the United States, while Portugal abstained from voting.

History shows that it has been customary to put any new means of war under the ban for a time. At one time early in the twelfth century the Lateran Council denounced the crossbow. Later, those who used gun powder were denied quarter. The bayonet was looked upon as a barbarous instrument. Such means of warfare are no longer prohibited.

The use of poisoned bullets or weapons, the use of small explosive bullets (less than 400 grammes), and the use of arms and projectiles which cause unnecessary suffering are, however, prohibited.

The object of war is peace. The use of barbarous methods, the practice of treachery, and the unnecessary aggravation of suffering tends rather to prolong the war than to hasten peace. Instruments of war are not unlawful because they entail suffering, but because the suffering entailed bears no proportionate relation to the attainment of the end of war, viz., the bringing of the enemy to terms of surrender.

In Maine's International Law, being lectures delivered in 1887, there is a summary mentioning the attitude toward new inventions for warlike purposes. He says that—

One of the most curious passages of the history of armament is the strong detestation which certain inventions of warlike implements have in all centuries provoked, and the repeated attempts to throw them out of use by denying quarter to the soldiers who use them. The most unpopular and detested of weapons was once the crossbow, which was really a very ingenious scientific invention. The crossbow had an anathema put on it, in 1139, by the Lateran Council, which anathematized *arteum illam mortifera et Deo odibilem*. The anathema was not without effect. Many princes ceased to give the crossbow to their soldiers, and it is said that our Richard I revived its use with the result that his death by a crossbow bolt was regarded by a great part of Europe as a judgment. It seems quite certain that the con-
demnation of the weapon by the Lateran Council had much to do with the continued English employment of the older weapon, the longbow, and thus the English successes in the war with France. But both crossbow and longbow were before long driven out of employment by the musket, which is in reality a smaller and much improved form of the cannon that at an earlier date were used against fortified walls. During two or three centuries all musketeers were most severely, and as we should now think most unjustly, treated. The Chevalier Bayard thanked God in his last days that he had ordered all musketeers who fell into his hands to be slain without mercy. He states expressly that he held the introduction of firearms to be an unfair innovation on the rules of lawful war. Red-hot shot was also at first objected to, but it was long doubtful whether infantry soldiers carrying the musket were entitled to quarter. Marshal Mont Luc, who has left Memoirs behind him, expressly declares that it was the usage of his day that no musketeer should be spared (p. 138).

A (I). The use of balloons.—At The Hague in 1899 the following declaration was made:

To prohibit the launching of projectiles and explosives from balloons or by other similar methods.

This prohibition was adopted by the United States for a period of five years. The vote of the Hague committee was at first for perpetual prohibition of this method of conducting hostilities, but it was limited to five years.

The use of balloons was by this declaration prohibited only in case of “launching of projectiles and explosives.” It was admitted that it was allowed for certain purposes by Article 29 of the Second Convention, which, speaking of those who shall not be treated as spies, says:

To this class belong likewise individuals sent in balloons to deliver dispatches and generally maintain communication between the various parts of an army or territory.

This position in regard to balloons is a decided step in advance from that taken by Prussia in 1870. Bismarck maintained that an Englishman would properly be subject to arrest and trial by court-martial “because he had spied out and crossed our outposts and positions in a manner which was beyond the control of the outposts, possibly with a view to make use of the information thus gained to our prejudice.” Though persons captured from balloons were severely treated and imprisoned, none were executed
as spies, though some were condemned to death. (Parliamentary Papers, LXXII, 1871.)

Such persons as go in balloons lack the essential elements of spies, i.e., "acting secretly or under false pretenses." Persons in balloons can not, if they would, act secretly or under false pretenses. They are in full view. To such persons is now conceded the status of prisoners of war, and the making of observations by means of balloons is as legitimate as any other warlike operation.

There arise, however, certain questions in regard to the control of the use of balloons because of the increasing development of this means of locomotion.

It is reported that of the 64 balloons sent up from Paris in 1870–71 two were lost at sea, five were taken by the enemy, and the remainder accomplished in some degree their mission. Such a result of the use of balloons would warrant the continuance of their use.

The use of balloons has been most commonly for purposes of observation and the carriage of dispatches. With the further development of wireless telegraphy, it may be possible that the usefulness of balloons may be extended as means for transmitting and receiving messages. It is also stated that the movements of submarine boats may be detected at a greater depth from the balloon. Whatever may be the fact in such cases, it is practically provided for in the regulation adopted for warfare on land, which admits such uses and regards the persons engaged in such operations, if captured, as prisoners of war, and not as spies. In fact, such a use of balloons is regarded as a legitimate act of war.

The sole question, then, is in regard to the use of balloons or similar methods as means for the launching of projectiles and explosives.

Holls in The Peace Conference at The Hague (p. 95) says of the action of the committee having the matter in charge:

On the subject of balloons the subcommittee first voted a perpetual prohibition of their use, or that of similar new machines for throwing projectiles or explosives. In the full committee, on motion of Captain Crozier, the prohibition was unanimously limited to cover a period of five years only. The action taken was for humanitarian reasons
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alone, and was founded upon the opinion that balloons, as they now exist, form so uncertain a means of injury that they can not be used with accuracy. The persons or objects injured by throwing explosives may be entirely disconnected from the conflict, and such that their injury or destruction would be of no practical advantage to the party making use of the machines. The limitation of the prohibition to five years' duration preserves liberty of action under such changed circumstances as may be produced by the progress of invention.

In speaking of the proposition to restrict the period which the regulation in regard to the launching of projectiles from balloons should run, Captain Crozier said that he had originally voted for the regulation without limitation of time. He showed that the subcommittee had manifested a spirit of tolerance in regard to those methods tending to increase the efficacy of the means of carrying on war and a spirit of restricting of those methods which, without being necessary from the point of view of efficacy, seem to cause unnecessary suffering. No limit had been imposed on the perfecting of artillery, powder, explosives, and guns. Explosive bullets had been prohibited altogether, as had the launching of projectiles from balloons. His general conclusion was that it was the purpose to preserve efficacy at the risk even of increasing suffering if that was indispensable.

Captain Crozier admitted that the restriction on explosive bullets was a limitation which would be in the direction of a lessening of the suffering of war. It seemed difficult to him to justify, by humanitarian motives, the employment of balloons for the launching of projectiles and explosives. The lack of practical knowledge in regard to the possible use of balloons and the possible development of control through new inventions made uncertain the consequences of the use of this agency in war. It might be so developed as to make it the deciding factor in a critical moment of a conflict by concentrating the destruction of life and property in such a way as to bring to an end a struggle that otherwise must be long continued. (Conference Internationale de la Paix, 2e Partie, p. 75.) The possibilities of the development may be such as to make its use for launching projectiles and explosives a most economic and humane means of warfare. If all or many of the
possibilities which some think reside in the balloon are realized, it certainly should not be a prohibited means of warfare, because it may lessen, rather than increase, the sufferings incident to war. The use of the balloon or other means of aerial navigation for launching projectiles or explosives should therefore not be permanently prohibited.

Many of the objections which have been urged against balloon warfare have been urged against torpedoes, mines, etc. It is admitted also that at the present time balloons are not fully dirigible. Their motion is uncertain. The point at which projectiles or explosives launched from a balloon may fall is uncertain. Injury might be done to non-combatants when aimed at combatants. The limited weight of the projectile or explosives which a balloon might carry is not a serious practical objection that might not be overcome. Yet there are too many objections to allow the unrestricted use of balloons and other similar new methods of launching projectiles and explosives until the means of aerial navigation are under reasonable control, and only when under control should they be thus used. This is a demand which neutrals and noncombatants may properly make. This is a demand which on ordinary grounds of humanity may properly be made, because only when under control can the military objects sought in the use of such means be attained. How long it will be before the means of aerial navigation are developed to a degree which will give a reasonable control can not be known at present. That they may sometime be thus developed is not improbable. This being the case, while there should not be a permanent prohibition, there should be a temporary prohibition of the "launching of projectiles and explosives from balloons and other similar new methods."

The length of time for which the prohibition should run may conveniently be made five years, as this gives a reasonable period for development.

This will also give time for the development of rules for the government of the use of this agency. Such rules have already received consideration and discussion, and
could well be left to an international committee for formulation. (Fauchille, Le Domaine Aérien et le Régime Juridique des Aerostats, Paris, 1901; Annuaire de l'Institut de Droit International, 1902, p. 19; Nys, Droit International, I, p. 523.)

The objections raised against the use of balloons apply to "free balloons" and not to "anchored balloons." The "anchored balloons" are under control. These are not, therefore, subject to the restrictions applicable to the "free balloon," but remain as it were a part of the territory of the belligerent controlling the place of anchorage. The limitation to free balloons should be made in the rule.

In the discussion of this topic by the Naval War College in 1903 the conclusion was reached that—

The reasons that applied at the time of the peace conference are equally valid at the present time, therefore the article * * * from present indications should be renewed. (International Law Discussions, 1903, p. 23.)

To this may well be added "for a term of five years from the date of said agreement."

Conclusion.—The article would, according to the above discussions, read as follows:

The contracting powers agree to prohibit, for a term of five years, the launching of projectiles and explosives from free balloons or by other new methods of similar nature.

The present declaration is only binding on the contracting powers in case of war between two or more of them.

It shall cease to be binding from the time when in a war between the contracting powers one of the belligerents is joined by a noncontracting power.

A (2) Projectiles diffusing gases.—The discussion of the prohibition of the use of projectiles, the only object of which is the diffusion of asphyxiating or deleterious gases, showed support of the proposition on various grounds. The proposition was first brought forward by Captain Schéine in behalf of the Russian Government. The form of the proposition was at first to generally prohibit projectiles which diffuse asphyxiating and deleterious gases, but was subsequently made to apply not to projectiles which might on explosion produce gases as an incident of
explosion but to those projectiles only whose sole object was the diffusion of asphyxiating and deleterious gases. Captain Mahan, early in the discussion, maintained that such a means of warfare was more humane than such a means as dismembered or lacerated the body; that the use of such projectiles involved no cruelty or bad faith, and that their use should be a legitimate means of warfare. Others maintained that the use of such projectiles would poison the air in a manner analogous to the poisoning of the water supply which had long been prohibited as a means of carrying on war. Some maintained that such a method of carrying on war would be barbarous and more cruel than the use of bullets. It was generally admitted that no projectile of the nature prohibited had thus far been tested, nor was it certain that a projectile whose sole use would be the diffusion of gases would be produced. Doubtless some of the discussion was aimed against the use of lyddite, which does not seem to have justified the expectations raised in regard to its use. Nor is its use solely for the diffusion of gases, but more strictly as an explosive in recent wars, and the diffusion of gases has been simply incidental to the explosion.

In his report on the conference at The Hague, Captain Mahan states the position which he took on the use of projectiles the sole purpose of which is the diffusion of asphyxiating and deleterious gases. He says:

As a certain disposition has been observed to attach odium to the view adopted by this commission in this matter, it seems proper to state, fully and explicitly, for the information of the Government, that on the first occasion of the subject arising in subcommittee, and subsequently at various times in full committee and before the conference, the United States naval delegate did not cast his vote silently, but gave the reasons, which at his demand were inserted in the reports of the day’s proceedings. These reasons were, briefly: 1. That no shell emitting such gases is as yet in practical use, or has undergone adequate experiment, consequently a vote taken now would be taken in ignorance of the facts as to whether the results would be of a decisive character, or whether injury in excess of that necessary to attain the end of warfare—the immediate disabling of the enemy—would be inflicted. 2. That the reproach of cruelty and perfidy, addressed against these supposed shells, was equally uttered formerly against firearms and torpedoes, both of which are now employed without
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scruple. Until we knew the effects of such asphyxiating shells there was no saying whether they would be more or less merciful than missiles now permitted. 3. That it was illogical and not demonstrably humane to be tender about asphyxiating men with gas, when all were prepared to admit that it was allowable to blow the bottom out of an ironclad at midnight, throwing four or five hundred into the sea, to be choked by water, with scarcely the remotest chance to escape. If, and when, a shell emitting asphyxiating gases alone has been successfully produced, then, and not before, men will be able to vote intelligently on the subject. (Holls, Peace Conference at The Hague, p. 494.)

The proposition aiming to prohibit the employment of projectiles the only object of which is the diffusion of asphyxiating or deleterious gases was made with a view to avert unnecessary suffering in war. The uncertainty of the results of the use of such means was sufficient to condemn it in the eyes of many, yet the possibilities of the development of projectiles having this diffusion of gases as a partial object is not limited, as the declaration is aimed at projectiles whose sole object is the diffusion of gases. It is held that this prohibition would not apply to lyddite and certain other new explosives because the diffusion of gases is incidental. The prohibition hardly seems as was contended by the United States representatives sufficiently comprehensive. It may even happen as has been suggested that this prohibition may lead to the exclusion of some humane means of warfare.

The nature and phrasing of the second declaration seems to be such as to make its adoption in the present form inexpedient.

A (3) Explosive bullets.—The third declaration "to prohibit the use of bullets which expand or flatten easily in the human body, such as bullets with a hard envelope, of which the envelope does not entirely cover the core, or is pierced with incisions," was directed particularly against the "dumdum" bullet which had been used by British soldiers. When the above prohibition was discussed the British representative stated that in a war with a civilized State a soldier hit by a small projectile would be sufficiently wounded to check his advance. He claimed that it was otherwise
with the savage who in war even though he had been hit two or three times. Sir John Ardagh said:

The savage continues to advance, and before one has had time to explain to him that it is in flagrant violation of the decisions of the conference at The Hague he cuts off one’s head.

It was from such reasons that the British delegate contended that the projectile should be of such a character as to accomplish its purpose, i.e., to render the enemy hors de combat. Some maintained that the use of a bullet which expanded or flattened on entering the human body was practically the use of an explosive bullet in contravention of the declaration of St. Petersburg of 1868. It was maintained that the argument for the “dumdum” bullet was, in effect, an argument for a larger bullet merely.

As Captain Crozier, of the United States commission, reports:

This subject gave rise to more active debate and to more decided differences of view than any other considered by the subcommittee. A formula was adopted as follows: “The use of bullets which expand or flatten easily in the human body, such as jacketed bullets of which the jacket does not entirely cover the core or has incisions in it, should be forbidden.”

When this subject came up in the full committee the British representative, Maj. Gen. Sir John Ardagh, made a declaration of the position of his Government on the subject, in which he described their “dumdum” bullet as one having a very small portion of the jacket removed from the point so as to leave uncovered a portion of the core of about the size of a pin head. He said that this bullet did not expand in such manner as to produce wounds of exceptional cruelty, but that on the contrary the wounds produced by it were in general less severe than those produced by the Snider, Martini-Henry, and other rifles of the period immediately preceding that of the adoption of the present small bore. He ascribed the bad reputation of the “dumdum” bullet to some experiments made at Tübingen, in Germany, with a bullet from the forward part of which the jacket to a distance of more than a diameter was removed. The wounds produced by this bullet were of a frightful character, and the bullets being generally supposed to be similar to “dumdum” in construction had probably given rise to the unfounded prejudice against the latter.

The United States representative here for the first time took part in the discussion, advocating the abandonment of the attempt to cover the principle of prohibition of bullets producing unnecessarily cruel wounds by the specification of details of construction of the bullet, and proposing the following formula:
The use of bullets which inflict wounds of useless cruelty, such as explosive bullets, and in general every kind of bullet which exceeds the limit necessary for placing a man immediately hors de combat, should be forbidden."

The committee, however, adhered to the original proposition, which it voted without acting on the substitute submitted.

The action of the committee having left in an unsatisfactory state the record, which thus stated that the United States had pronounced against a proposition of humanitarian intent, without indicating that our Government not only stood ready to support, but also proposed by its representative a formula which was believed to meet the requirements of humanity much better than the one adopted by the committee, the United States delegate, with the approval of the commission and in its name, proposed to the conference at its next full session the above-mentioned formula as an amendment to the one submitted to the conference by the first committee. In presenting the amendment he stated the objections to the committee’s proposition to be the following: First, that it forbade the use of expanding bullets, notwithstanding the possibility that they might be made to expand in such regular manner as to assume simply the form of a larger caliber, which property it might be necessary to take advantage of, if it should in the future be found desirable to adopt a musket of very much smaller caliber than any now actually in use. Second, that by thus prohibiting what might be the most humane method of increasing the shocking power of a bullet and limiting the prohibition to expanding and flattening bullets, it might lead to the adoption of one of much more cruel character than that prohibited. Third, that it condemned by designed implication, without the introduction of any evidence against it, the use of a bullet actually employed by the army of a civilized nation.

I was careful not to defend this bullet, of which I stated that I had no knowledge other than that derived from the representations of the delegate of the power using it, and also to state that the United States had no intention of using any bullet of the prohibited class, being entirely satisfied with the one now employed, which is of the same class as are those in common use.

The original proposition was, however, maintained by the conference, the only negative votes being those of Great Britain and the United States. (Holls. Peace Conference at The Hague, p. 511.)

Professor Holland, in speaking on "Some lessons of the peace conference" (Fortnightly Review, vol. 72 (1899), p. 956), says:

Any general renunciation either of particular means of weakening an enemy, e.g., by capture of private property at sea, or of the employment against him of particular kinds of weapons, e.g., the "dum dum"
bullets, or any other novelty likely to be suggested by the progress of invention, is sure to meet with opposition, on the ground that such renunciation would unfairly affect nations which are compelled by their circumstances to rely especially on one or other of the practices which it is proposed thus to stigmatize. Nothing can be effectually prohibited which does not either cause suffering beyond the necessities of the case or conflict too seriously with the interests of neutrals.

Conclusion.--The third declaration prohibits "the use of bullets which expand or flatten easily in the human body, such as bullets with a hard envelope, of which the envelope does not entirely cover the core, or is pierced by incisions." The specific nature of this prohibition was pointed out by the representatives of the United States at The Hague conference. It is not certain that another form of bullet producing similar results, but not of the prohibited class, may not be invented. This at most is only one of a general category of bullets which it is well to prohibit, i.e., the class which produces unnecessary suffering. It would therefore seem better to aim at the general category in the prohibition rather than at one variety of bullet.

It would seem expedient that this third declaration should not be adopted. At the same time, some regulation should be adopted.

Many of the objections which apply to the second declaration in regard to asphyxiating gases apply to the expansive bullets. These objections apply, or may apply, to other agencies which may later be invented for or turned to warlike uses. The object of both declarations is to prevent unnecessary physical suffering and injury without lessening the efficacy of warlike measures. Such an aim is to be favored from all points of view, and is in full accord with the objects of war. Such being the case, a general prohibition should be adopted under which specific cases could be brought. Such a provision has been inserted in the Laws and Customs of War on Land, adopted by the conference at The Hague, by which it is prohibited "to employ arms, projectiles, or material of a nature to cause superfluous suffering." Specifications under such a prohibition could be made if thought advisable, e.g., there might be added an illustrative clause, "such as, explosive or expanding bullets, projectiles whose sole object is the dif-
fusion of asphyxiating and deleterious gases, etc., or other agencies which cause suffering disproportionate to the military ends to be gained by their use."

The third declaration should accordingly be made to conform to the principle embodied in the Laws and Customs of War on Land.

B. New types of guns.—It was voted that "the conference expresses the wish that the questions with regard to rifles and naval guns, as considered by it, may be studied by the Governments with the object of coming to an agreement respecting the employment of new types and calibers."

The consideration of the limitation of the use of new types and calibers of guns received much attention at the conference. On the matter there was a wide divergence of opinion. There was also a proposition looking to the limitation of the use of new kinds of powder and explosive materials. The reasons given in support of these propositions varied, but economy was frequently mentioned. It was shown, however, that often the reason for the adoption of a new explosive or type of gun was primarily one of economy. Propositions to limit the weight of gun, the caliber, the weight of the bullet, the initial velocity, the number of shots per minute, and the nature of the projectile were discussed. These limitations were to run for a period of five years if adopted.

The question was asked as to whether if the limitation of cannons to the type of the most perfect then in use would be understood to mean a limitation making it possible for the less advanced states to place themselves on a level with the more advanced. It was shown that this would introduce a difficulty in the way of obtaining evidence as to what form of cannon of those at the time in use was the best. Indeed, the state having such cannon would hardly care to give evidence of the fact and to disclose its points of excellence. The result of the discussion showed an unfavorable opinion on the part of the larger states, while Russia and several of the minor states favored the limitation.
In regard to the use of new kinds of powder, the discussion, in which Captain Crozier took a leading part, showed that a limitation was not practicable and might not be humane or economic. No state favored this restriction.

**Conclusion.**—Discussion and study of the question of restriction upon invention and use of new types and calibers of guns subsequent to the conference in 1899 seems to show that such action would not necessarily lessen the burden of war, shorten its duration, or make it more humane. This being the opinion, which seems to accord with the facts, it does not seem logical to impose any restriction and such a limitation should not be adopted.

It may be further said that if adopted the practical difficulties of carrying into effect such a regulation would probably be almost insurmountable.

**C. Bombardment of open towns.**—At The Hague conference in 1899 it was voted that—

The conference expresses the wish that the proposal to settle the question of the bombardment of ports, towns, and villages by a naval force may be referred to a subsequent conference for consideration.

This subject was quite fully discussed by the Naval War College in 1901 and 1903. (International Law Situations, 1901, pp. 5–37; International Law Discussions, 1903, pp. 23–27.)

**Conclusion.**—In accord with those discussions the following regulation seems advisable:

The bombardment by a naval force of unfortified and undefended towns, villages, or buildings is forbidden, though such towns, villages, or buildings are liable to the damages incident to the destruction of military or naval establishments, public depots of munitions of war, or vessels of war in port; and such towns, villages, or buildings are liable to bombardment when reasonable requisitions for provisions and supplies at the time essential to the naval force are withheld, in which case due notice of bombardment shall be given.

Steps should be taken to spare, as far as possible, edifices devoted to religion, art, science, and charity, hospitals and places where the sick and wounded are collected, provided they are not used at the same time for military purposes. The besieged should indicate these buildings or places by some particular and visible signs, which should previously be notified to the assailants.