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The Laws of Air Warfare: Are There Any?[†]

Activity has increased within the United Nations recently to reexamine the laws of war, and to update them to meet the modern conditions of armed conflict. In a resolution adopted unanimously on 13 January 1969, UN Res 2444, the General Assembly emphasized the necessity for applying basic humanitarian principles to all armed conflicts and affirmed the three principles laid down by the International Committee of the Red Cross at their Vienna conference in 1965: First, that the rights of the parties to a conflict to adopt means of injuring the enemy are not unlimited; second, that the launching of attacks against the civilian populations *as such* is prohibited; and third, that "a distinction must be made between persons taking part in hostilities and the civilian population with the view of sparing the latter as much as possible."

The U.N. General Assembly Resolution then invited the Secretary General, in consultation with the International Committee of the Red Cross, to study how better to apply the existing laws of war for "the better protection of civilians, prisoners and combatants and for the further limitation on certain methods and means of warfare." All states were asked to ratify the Hague Laws of War Conventions of 1899 and 1907, the Geneva Gas Protocol of 1925, and the Geneva Conventions of 1949. Pursuant to that resolution, the Secretary General circulated for comment among member states and international organizations, a report entitled "Respect for Human Rights in Armed Conflicts."¹ His report contains a historical sur-

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†This article is based on an address by Colonel DeSaussure at the 1970 International Law Session of the Naval War College.

¹Report of Secretary General, Respect for Human Rights in Armed Conflicts, A/7720, 20 November 1969.

vey of the existing international agreements pertaining to the laws of war, urging those stated which have appended reservations to withdraw them.

The Secretary General requested that "special emphasis be placed on the dissemination of the conventions to military personnel at all levels of authority, and on the instructions of such persons as to the IR principles and on the IR application." The observation was made that both juridical and military experts are needed to study this subject "to achieve, under the conditions of modern warfare, an adequate comprehension of the full range of technical and legal problems."

The Secretary General makes no specific plea for a convention regulating air warfare, but he does seem to indict "massive air bombing" by noting that, in some cases, this type of warfare has contributed to a very broad interpretation of what constitutes a permissible military objective. He states that strategic bombing has, in some instances, been used for intimidating, demoralizing and terrorizing civilians "by inflicting indiscriminate destruction upon densely populated areas." In the replies to the report, only Finland specifically adverted to the need for a codification of the laws of air warfare.

U.N. resolution 2444 was the result of a UNESCO Conference on Human Rights in Teheran in April of 1968. There, a resolution was adopted by the Conference with only one abstention and no votes against. It was couched in stronger terms than those later used in U.N. Resolution 2444, referring to the widespread violence and brutality of our times, including "massacres, summary executions, tortures, inhuman treatment of prisoners, killing of civilians in armed conflicts and the use of chemical and biological means of warfare including napalm bombing."²

With the background of U.N. Resolution 2444 and the Teheran declaration, the ICRC expanded its scope of studies to include the application of the laws of war to the conduct of hostilities. A committee of experts of the ICRC convened in February, 1969, and formulated a report entitled "Reaffirmation and Development of the Laws and Customs Applicable in Armed Conflicts."³ It is the most authoritative treatment of the laws of war since World War II. It was the culmination of their observations made during the last 20 years of perennial armed conflicts, especially in Korea, the Middle East, Vietnam and the Yemen.

The tempo continues to increase for insuring respect for human rights in

²Final Act of the International Conference on Human Rights Resolution, XXIII, Teheran, April-May, 1968.

³International Committee of the Red Cross, Report of Experts, Prepared for Presentation to the 21st International Conference of the Red Cross at Istanbul, Turkey, in September, 1969.

armed conflicts. On September 18, 1970, the Secretary General issued a supplemental report on the subject.⁴ Shortly thereafter, on December 9, 1970, the General Assembly overwhelmingly adopted UN Res 2675 entitled "Basic Principles for the Protection of Civilian Populations in Armed Conflicts."⁵ Essentially, these basic principles were designed to separate out the civilian population from those "actively taking part in the hostilities" so that the former might be spared. Of particular interest were two fundamental principles which were specific in application. "Dwellings and other installations that are used only by civilian populations"; and "Places or areas designated for the sole protection of civilians, such as hospital zones or similar refuges" should not be "the object of military operations." The other six principles were more in the nature of general admonitions to spare the civilian populations as much as possible and to distinguish them from combatants.

This increased emphasis to the regulation of armed conflict by the ICRC as well as the U.N. General Assembly makes it imperative for air planners and flyers to know their rights and duties under the laws of war.

There is no dearth of opinion that in the matter of air warfare there are, in fact, no positive rules. Air Marshall Harris, the noted chief of the British Bomber Command in World War II, wrote shortly after its conclusion: "In the matter of the use of aircraft in war, there is, it so happens, no international law at all."⁶ This view has been echoed in more recent times by well-known international lawyers who have specialized in studies on the laws of war. "In no sense but a rhetorical one," wrote Professor Stone in 1955, "can there still be said to have emerged a body of intelligible rules of air warfare comparable to the traditional rules of land and sea warfare."⁷ Professor Levie labeled the nonexistence of a code governing the use of airpower in armed conflict one of the major inadequacies in the existing laws of war.⁸ While the view of Air Marshall Harris reflects a certain hopeless attitude toward any attempt to regulate this important form of warfare, the views of Professors Stone and Levie reflect pleas to focus effort on its regulation and clarification.

In view of the very substantial role of air power in modern armed conflicts and the history of how this role has increased from World War I

⁴Supplemental Report of the Secretary General, Respect for Human Rights in Armed Conflicts A/8052, 18 September 1970.

⁵UN GA Res 2675 (XXV) 109 in favor, none against, 8 abstentions.

⁶Harris, *Bomber Offensive* 177 (1947).

⁷Stone, *Legal Controls of International Conflicts* 609 (1959).

⁸Levie, Report to the New York Bar Association, *Major Inadequacies in the Existing Laws of Armed Conflict* (1970).

to Vietnam, it is surprising to reflect that only three provisions of international legislation ever came into force with the specific view of regulating air operations in wartime. The first of these was the 1899 balloon declaration adopted in plenary session at the First Hague Peace Conference without debate. It provided simply that "The Contracting Powers agree to prohibit, for a term of five years, the launching of projectiles and explosives from balloons or by other new methods of a similar nature." The declaration was proposed by the Russian delegate and supported by a remarkably prescient Dutch delegate who stated that "the progress of science . . . has been such that things hitherto beyond belief are realized today. We can foresee the use of projectiles or other things filled with deleterious gases, soporific, which, dropped from balloons in the midst of troops, would at once put them out of commission."⁹ The first balloon declaration expired by its terms in 1904, but at the Second Hague Peace Conference in 1907 the Russian delegation proposed its renewal. By this time, however, aircraft were looked upon no more as "too imperfect to be of any practical use in warfare"¹⁰ and the adoption of the second balloon declaration was far from unanimous.¹¹ The 1907 balloon declaration was to remain in force until the close of the projected third Peace Conference, intended to be held in 1915, but yet to be called. Like the first declaration, the second was only in force in a war exclusively between contracting parties. Since France, Spain and Russia, among others, did not adopt it, and Germany only on condition all other parties to the Conference would sign, it obviously never fulfilled its intended legal effect.

The third provision of conventional law specifically framed to regulate air warfare, is article 25 of the 1907 Hague Convention respecting the laws and customs of war on land (H.C. IV). That article provides, "The attack or bombardment, *by whatever means*, of towns, villages, dwellings, or buildings which are undefended is prohibited." The negotiating record shows that the words, "by whatever means," were inserted specifically, to regulate bombing attacks by air. It has been frequently referred to as a basis for seeking to limit the air operations of belligerents, and for protesting the declared illegal air activity of an enemy. However, undefended cities, in the historic sense, meant only those in the immediate zone of ground operations which could be seized and occupied by advancing ground forces without the use of force. In this sense the concept of the undefended locality has proved as empty in air combat as the balloon

⁹Scott, *The Hague Peace Conferences*, vol. 1, p. 659-660.

¹⁰Lawrence, *Principles of International Law*, p. 527.

¹¹29 States for (Germany on condition of unanimity); 6 against (France and Russia included); 10 States did not vote. Scott, *op. cit.*, vol. 1, p. 652.

declarations. These three provisions, so utterly ignored in the use of air-power by belligerents, are the total sum of formal rules ever agreed to by any states on the conduct of hostilities from the airspace.

One official and ambitious attempt was made to codify the laws of air warfare after World War I. At the Washington Conference on the Limitation of Armaments in 1921, a resolution was unanimously approved by the United States, the United Kingdom, France, Italy and Japan which called for a commission of jurists to convene at the Hague to study the subject. Legal experts from those countries and the Netherlands met there from December, 1922 to February, 1923, and framed an all-embracing codification of the subject intended to be a compromise between the "necessities of war and the requirements of the standards of civilization."¹² The Hague air rules were never ratified even by the parties to the Conference. They do reflect the only authoritative attempt to set down concisely the rules for air combat. Prior to World War II, certain nations did indicate their intent to adhere to these rules, notably Japan in 1938 in their China campaign, but by World War II their influence was minimal.

This paucity of conventional rules has left airmen stranded for authoritative and practical guidance. It is true that the airman is subject to the general laws of war to the same general extent as the sailor and the soldier, but where does he look for special rules governing his air activity? The British *Manual of Air Force Law* dispensed with any effort to formulate air warfare rules, by stating in a footnote that in the absence of general agreement, it was impossible to include in that manual a chapter on air warfare.¹³ The authoritative U.S. *Army Field Manual* (FM 27-10, July 1956) on the law of land warfare, apart from references contained in the Geneva Conventions of 1949, respecting the status of aircrews as prisoners of war and medical aircraft, refers to air activities in time of armed conflict in only four instances, certainly a very meagre source of guidance for the inquiring airman when one notes the extensive scope of intended guidance of the draft Hague Air Rules of 1923. The latter embraces subjects as to the marking of aircraft, aerial bombardment, the use of incendiary explosive bullets, the status of neutral, and of enemy, civil aircraft and of combatant and civil air crews. Yet, today's U.S. Air Force crewman, about to enter a combat theater, is still referred officially to the *Army Field Manual* for official instruction. In a similar vein, the Swiss *Army Manual* provides that "Air warfare is not a special category; in so far

¹²From the Rappoteur's Summary, *International Law and Some Current Illusions* (J. P. Moore, Rep. 1924).

¹³British *Manual of Air Force Law* 2 (1944).

as aerial operations aim at terrestrial objectives they are subject, in principle, to the rules of war on land, but only to the extent that the vector of the aerial weapons does not require special rules."¹⁴

The U.S. Air Force did undertake the task of drafting guidance on the subject of air warfare in 1956. After four years of research, a draft manual on the subject was finalized. However, the decision to release it for publication has never been made. The draft Air Force manual has been made available to the students of the Air Force Academy and the Air War College for research and discussion purposes. Because of its unofficial nature, however, it has not been available to aircrews and air planners. Its influence even within the U.S. Air Force is relatively slight.

As the world's greatest air power, as the most effective user of the airspace for combat operations, why has the United States held back in the promulgation of a complete set of rules regulating air warfare? Certainly it is not because of any incompatibility with the U.N. Charter. The Charter itself provides that "in order for the UN to take urgent military measures, Members shall hold immediately available national air force contingents for combined international enforcement action."¹⁵ The Charter provides the Security Council with authority to take such action *by air*, as well as by land and sea forces, as necessary to maintain or restore the peace.¹⁶ Obviously, any codification of the laws of air warfare are compatible with the provisions of the U.N. Charter as well as being extremely suited to the times when the Secretary General, the General Assembly, and the ICRC are seeking more effective means of protecting the civilian populations from the ravages of armed conflict. However, three fundamental dilemmas confront the effective codification of air rules, and may, in some degree, have influenced our own Air Force in refraining from taking the lead in this subject. The Air Force cannot, no more than could the Commission of Jurists at the Hague in 1923, fully lay down effective rules of air combat without a certain concordance among the major air powers as to how to resolve them. The first of these dilemmas is the permissible scope of the military objective. Inherent in this problem is whether, in air warfare, there is any realistic distinction to be made between combatants and noncombatants. Also, whether there is a middle category, the so-called quasi-combatant, which comprises either the industrial or auxiliary work force of the enemy within the permissible limits of the military objective. For example, is the Vietnamese hamlet, which bristles with the small and heavy armaments of the enemy, to be compared with the Abbey of Monte

¹⁴Manuel des lois et cotumes de la guerre pour l'arme suisse (1963), para. 44.

¹⁵Article 45.

¹⁶Article 42.

Cassino in World War II? Is the village which feeds, supports and shelters the Viet Cong to be equated to the large industrial cities of the Ruhr Basin in World War II?

U.N. Resolution 2444 stated that the civilian population should not be the object of attack as such. But what constitutes the legitimate, immune part of that population remains ill defined. Further, are civilians the direct object of attack when vital industrial and strategic targets are in the immediate vicinity; and how much incidental bombing of civilians in industrial areas or Viet Cong strongholds transfer the true civilian segment from the indirect-object category to the direct-object one? The late Professor John Cobb Cooper, in a lecture to the Naval War College in 1948, termed the definition of the military objective and the bombing of the civilian population the most crucial issue confronting any attempt to regulate this subject. The Secretary General does recommend an alternative to arriving at an acceptable and agreed-upon definition of the military objective. This would be an enlargement of the concept of safety or protected zones to include specified areas where women, children, elderly, and sick could be located with immunity from air attack. Such areas would contain no objectives of military significance, nor be used for any military purpose. They would have to be marked specially and clearly to be visible from the air.¹⁷

To be effective, there would have to be an adequate system of control and verification of these zones. This verification would be carried out either by some independent agency as the ICRC or by one or more nonbelligerent nations acting in the capacity of a protecting power.¹⁸ There is ample precedent¹⁹ for the creation of such protected areas (in the 1949 Geneva Conventions). The sick and wounded, and the civilian Geneva Conventions contain as annexes, draft agreements, hopefully to be signed by potential belligerents before the outbreak of hostilities, which provide for their establishment. It is specified that such zones are to comprise only a small part of the belligerent's territory, that they be thinly populated, and that they be removed and free from all military objectives or large industrial or administrative establishments. They may not be defended by military means (which includes the use of antiaircraft weapons, tactical fighter aircraft or guided weapons).

It seems to the writer that a concept of protected zones, incorporating a broader category of the civilian population to be sheltered, is indeed an alternative to the concept of the undefended town or the open city which

¹⁷See paras. 45-87, Secy. Gen. Report A/8052, 18 Sept. 1970.

¹⁸A/7720, note 2, *supra* at 49, 50.

¹⁹Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in the Field (TIAS 3362); and Geneva Convention for the Protection of Civilians (TIAS 3365).

has not found favor in actual practice.²⁰ There are some who do not believe the establishment of safety zones for potentially large segments of the civilian population is practicable. To be effective, it is thought that these zones would require thousands of square miles which would create insurmountable logistics problems and inevitably cause the areas to be used unlawfully for military advantages.²¹

However, the immunized areas need not be so broad. If one grants that the industrial work centre, for those actively engaged in work directly sustaining the war effort, or the village hamlet used as a military support base, really have no entitlement to immunity, the physical breadth of the protected areas visibly diminishes.²² As a realistic alternative to the elusive and vague scope of the military objective, who can deny their greater aptitude for understandable delimitations to air combat?

The Hague commission of jurists' definition of the military objective is a case in point. Military forces; military works; military establishments or depots; factories engaged in the manufacture of arms, ammunition, or distinctively military supplies; lines of communication or transportation used for military purposes, *only*, could be bombed from the air under those Rules. This was hardly broad enough to cover the enemy's marshalling yards, his industrial centers, his shipping facilities and his means of communication. Moreover, air bombardment of cities, towns and villages *not in the immediate neighborhood of ground operations* was prohibited.²³ This proved too limited when such cities and towns, far removed from the ground action, were known to be vital to the enemy's war effort. The totality of World War II saw both the Allies and the Axis expand considerably on the military objective. The German Luftwaffe destroyed Warsaw, Rotterdam and Coventry by air very early in the war.

The first thousand-bomber raid of the war was launched by the British on Cologne the night of 30 May 1942, and destroyed 12 percent of the city's industrial and residential sections and caused 5,000 casualties.²⁴ It set the tone for the whole British night-bomber offensive against the Third Reich: the concept that area bombing of important industrial centers was best suited to bring Germany to her knees. U.S. forces, with their superior

²⁰As to the inaptness of the term "undefended" to immunize towns, villages, dwellings from air attack, see Stone, *Legal Controls of Armed Conflict* (1959) 623. For a like view that an "open city" has little applicability in air warfare, see Jennings, *Open Towns* 22 BRIT. Y. B. INT'L. L. 258.

²¹See Levie, *op. cit. supra* note 8 at 45.

²²Perhaps the *workers* in a large industrialized centre, do recapture their immunity temporarily when they disperse to residential suburbs; but the hamlet held by and supporting the enemy keeps the civilians living there ever exposed to attack.

²³Hague Rules of Air Warfare Article 24(2) (1963).

²⁴See 28 Air Force Magazine 34 (1945).

navigational aids, did seek to confine their targets to individually selected and identified factories, oil refineries, industrial plants, and shipyards in Europe; but in the Far East, Tokyo and Yokohama were saturated with explosive and fire bombs because of the Japanese shadow industries, the war production and parts-making conducted in the individual home.

The first night air raid by U.S. superfortresses in the Far East occurred on 9 March 1945 over Tokyo, and it is reported that 280 of these bombers destroyed several square miles of the center of the city. In the Korean conflict, precision bombing was again emphasized by the Air Forces (mostly U.S.) of the U.N. Command. The repair ships, dock yards, and military warehouses of North Korea were bombed without too much damage to the surrounding city. In the Vietnamese conflict, again, area or saturation bombing has been reintroduced, this time to penetrate the vast jungle canopy which serves as a protective layer of the network of Viet Cong and North Vietnamese storage areas, communication and transportation complexes and command posts. And in preselecting air targets, proximity to ground operations is not even remotely a factor.

The Secretary of Defense recently termed U.S. air strikes in the North "limited duration protective reaction air strikes" against North Vietnamese missile and antiaircraft gun positions "in response to attacks on our unarmed reconnaissance aircraft."²⁵ On the other hand, the North Vietnamese continue to charge that U.S. aircraft have been attacking densely populated areas of the North such as Haiphong, Quanh Ninh, Ha Tay, and Hoa Binh killing a considerable number of North Vietnamese civilians.²⁶ And a U.S. Congressman fresh from a tour of Southeast Asia reports his belief that a large number, "perhaps thousands," of villages may have been destroyed by American Air Power in 1968 and 1969.²⁷ It must be left to the historians, at a time when careful factual inquiry is possible, to record to what extent the civilian population and their hamlets and villages have been destroyed by spill-over air attacks, or because they harbored military objectives. The Defense position has been repeatedly and clearly stated that "No US aircraft have been ordered to strike any civilian targets in North Vietnam at any time. United States policy is to target military targets only. There has been no deviation from this policy. All reasonable care is taken to avoid civilian casualties. . . . No dikes have been targeted in North Vietnam, in Nam Dinh or elsewhere and we have no knowledge that any pilot has disobeyed his orders."²⁸

²⁵Akron Beacon Journal 21 November 1970, page 1.

²⁶*Id.*

²⁷Akron Beacon Journal 19 April 1970, page 5.

²⁸Report of Sec. McNamara to House Armed Services Committee Feb. 1966 reported in 10 Whiteman, Digest of International Law 428.

It is an inevitable outgrowth of U.S. air strikes, however, that comparisons are made in today's press between the My Lai incident, the trial and conviction of Lt. Calley for premeditated murder under Article 118 of the UCMJ, and the deaths and injuries which air bombing brings. One correspondent distinguished the area bombing of industrialized cities in an all-out confrontation, such as World War II, which *may* in his view be permissible, from a conflict in which a technologically advanced nation such as the U.S. becomes immersed in an armed conflict involving a fairly primitive, agricultural-based country. In the latter type of conflict, it is argued incidental casualties to civilians from the air is more akin to the charges directed at Lt. Calley and other ground troops similarly charged.²⁹

Both the charter for the trial of major war criminals for Europe and for the Far East define the wanton destruction of cities, towns or villages, or devastation not justified by military necessity, as a war crime, and inhumane acts committed against the civilian population as a crime against humanity.³⁰ Several high German Air Force officers were indicted for war crimes, notably Field Marshall Goering, and Generals Milch and Speidel. However, none was tried for his part in air operations.³¹ It has been argued ably that the situation existed because both sides had equally participated in such attacks from the air, and therefore trial of Axis and Japanese leaders on this charge was inappropriate.³² But it must be conceded that failure to indict any officers for air campaigns reflected the fact there were no *clear cut* delimitations of the military objective on which to base a violation. As Professor Cooper observed, the concept was too vague.

The ICRC has drawn a distinction between occupation or tactical bombardments and strategic ones. In the former category are those air raids closely allied to ground fighting. The experts suggested the institution of open and immune localities for the protection of civilians. In strategic bombardments, the experts believed the military objective must be sufficiently identified by the attacking force, and that any loss of civilian life must be proportionate to the military advantage to be secured. Whenever the principle of proportionality might be violated, the combatant should refrain from attack.³³ The experts failed, however, adequately to define what constitutes a military objective, just as did the Hague Commission of Jurists.

²⁹See Sheehan, *Should We have War Crimes Trials?*, Akron Beacon Journal March 13, 1971.

³⁰Articles of the International Military Tribunal, Established by the London Agreement Article 6. A similar Tribunal was Established in the Far East.

³¹The Einsatz-Gruppen case, 15 Law Reports of the Minor War Crimes Tribunals 114, 115 (1947).

³²Trial of the Major War Criminal Tribunals, 337 (1947).

³³Report of the ICRC Experts, note 6, *supra*, at 44.

They do not consider strategic area bombing a premissible form of combat. They cite the proposition that to "attack without distinction, as a single objective, an area including several military objectives at a distance from one another is forbidden whenever elements of the civilian population or dwellings, are situated in between." In a similar vein, the Secretary General's supplemental report on respect for human rights in armed conflicts provides that "consideration might be given to the specific prohibition of the use of 'saturation' bombing as a means of intimidating, demoralizing and terrorizing civilians by inflicting indiscriminate destruction upon densely populated areas."³⁴

While neither the Red Cross nor the Secretary General condones area bombing, belligerents are not likely to forego a valuable strategic option for air attacks which has proved so helpful in securing a more favorable and quicker termination of the conflict. Like the philosophy of defining the military objective exclusively, formulations which leave the military incapable of accomplishing its assignments are certain to be ignored. Hence, the wide divergence between the expression of hopes of experts and the actual practices of belligerents.

A more realistic and forceful distinction is made by Professor Telford Taylor in his recent book, *Nuremberg and Vietnam: An American Tragedy*. It is one thing, writes Professor Taylor, for the U.S. pilot to have bombed large industrialized areas in World War II to cripple the enemy's war-making capability. Although it was inevitable the civilian population would be harmed, the high-flying pilot could not distinguish within the industrialized centres between the war-making facilities and the civilian population therein. Quite another circumstance, writes the Professor, for the demarcation of large free strike (air) zones suspected of guerilla activity, where after the zone is cleared of friendly troops and civilians, tactical air strikes and "squirrel hunting" by small planes and helicopters is instituted. "This is using the aircraft for the same purpose that the infantryman uses his gun, and the pilot ought to be held to the same standards of distinguishing combatants from noncombatants."³⁵ It remains to be seen, however, whether even this logical delineation between the strategic and the tactical use of air power will stand up to the military necessities demanded by a belligerent whose air power constitutes her most effective deterrent to the infiltrations and jungle tactics of a powerful foe.

The Hague Convention for the Protection of Cultural Property does

³⁴Para. 42, Report of the Secretary General A/8052, 18 September 1970.

³⁵Taylor, *Nuremberg and Vietnam: An American Tragedy* (1970), p. 142 *et seq.*

provide a useful and *realistic* middle ground.³⁶ This convention is the product of an intergovernmental conference convened at the Hague in 1954. Whereas the Geneva Conventions of 1949 are for the protection of persons, the 1954 Hague Convention preserves cultural property. It is of special significance to airmen for several reasons. First, it equates "large industrial centers" to "military objectives," by providing that places of refuge for movable cultural property must be placed at an adequate distance from either. Second, it broadens the concept of the military objective by providing that this term includes, *by way of example*, airports, broadcasting stations, establishments engaged in work of national defense, ports, railway stations of relative importance, and main lines of communication. Third, it recognizes that the principle of imperative military necessity deprives cultural property of its protection. Finally, it stipulates that in no event shall property be the subject of reprisal raids.

All of these are important realistic principles fully applicable to air combat. The use of places of refuge, clearly marked and identified for the protection of cultural property, could be the beginning of a wedge to increase the number of objects and buildings to be immunized; just as the extension of hospital, safety or neutralized zones is the opening to increase the areas for the protection of civilians. Certainly the establishment of safety zones for property and people is compatible with area as well as precision bombing techniques. Neither concept requires the destruction of identified protected areas placed at an adequate distance from large industrial centers, places of military encampment and dangerous militarized areas as armed villages supporting the enemy.

The second dilemma inhibiting the development of the laws of air warfare centers around the choice of weapons which may be employed. The historic St. Petersburg Declaration of 1868 which prohibited the use of explosive, fulminating, or inflammable substances in bullets has no application to air warfare. The use of such bullets in air war is for the purpose³⁷ of destroying aircraft and the enemy's resources on the ground and in the air, not primarily for the purpose of injuring enemy personnel. For the same reason, the old Hague Declaration of 1899 prohibiting the use of expanding bullets has not been extended to air operations. There are, however, three general areas where the type of weapon employed has evoked particular controversy with respect to aircraft.

³⁶*Convention of The Hague of The Protection of Cultural Property in Event of Armed Conflicts* (14 May 1954), reported in the ICRC Expert Report in Annex 5, at N16. At the time of this writing the United States is not a party, but it is expected that it will be.

³⁷*But see* Spaight, *Air Power and War Rights* 198 (1947). The Declaration of St. Petersburg is reproduced in the ICRC Expert Report as Annex 1.

First, is the use of atomic weapons. There is substantial legal opinion that such weapons are unlawful. This view has been reflected by U.N. Resolution 1653 (XVI) which specifically provides that "Any state using nuclear and thermonuclear weapons is to be considered as violating the Charter of the United Nations, acting contrary to the laws of humanity and as committing a crime against mankind and civilization." The Secretary General notes, however, that the legal effect of this resolution is subject to question because of the divided vote, 55 for, 20 against, and 26 abstentions. The ICRC experts were divided on how best to handle the question of nuclear use.

They were unanimous that such weapons were incompatible with the expressed aim of the Hague Conventions to reduce unnecessary suffering. The present U.S. view as expressed in the *U.S. Army Field Manual* on the laws of war is clear. The use of "Explosive 'atomic weapons' whether by air, land, or sea" does not violate international law in the absence of any customary rule or international convention.³⁸ The Red Cross also gave tacit recognition to this viewpoint at Vienna in 1965, by providing that the "General principles of the laws of war apply to nuclear and similar weapons."³⁹

It must not be forgotten, however, that there is strong legal authority denying the lawfulness of the atomic bomb. "While target-area bombing comes close to the border line of permissibility," wrote Spaight shortly after World War II, "atom bombing definitely oversteps it."⁴⁰ And in the only published case discussing its legality, that concerning the claim of five Japanese for injuries sustained at Hiroshima and Nagasaki, a Japanese District Court was of the view that such bombing violated both customary law, in that it was necessarily indiscriminate, and treaty law, in that its blast and radioactive effect violated the Hague Regulations of 1907 against the use of poisons and poisoned arms as well as the Geneva Protocol of 1925.⁴¹

The second general area arousing controversy relates to the use of fire weapons and specifically napalm. Again, the official U.S. position, as reflected in our *Army Field Manual*, is that their employment against targets requiring their use is not in violation of international law, with the

³⁸*U.S. Army Field Manual* (FM 27-10) at 18.

³⁹ICRC Resolution XXVIII, Vienna 1965, XXth Conference of ICRC.

⁴⁰Spaight, *Air Power and War Rights* (3 ed., 1947) 276; see also Greenspan, *The Modern Law of Land Warfare* (1959) 368, and Stone, *Legal Controls of International Conflict* (1959) 342.

⁴¹The Shimoda Case, digested 58 AJIL 1016 and commented on 59 AJIL 759; cf. O'Brien, *Limited Nuclear Warfare*, 8 *Military Law Review* 162; Singh, *Nuclear Weapons and International Law* (1959).

caveat that they are not to be used in a way to cause unnecessary suffering to individuals.⁴² This view is in opposition to the Teheran resolution of May, 1968 which expressly condemned napalm bombing. Some ICRC experts viewed the use of incendiaries as prohibited by the Geneva Protocol of 1925 because of its asphyxiating effects, while others considered it was the use to which incendiaries were put which determined its lawfulness.⁴³ U.N. Resolution 2444 does not specifically condemn the use of incendiaries, including napalm, but the Secretary General states that regulation of its use clearly needs an agreement. Certainly, the extensive resort to incendiaries in World War II, Korea and Vietnam has demonstrated the military efficacy of this weapon. It is reasonable to conclude that only by special international agreement will its use ever be regulated.

The third area of general uncertainty relates to the use of weapons calculated to affect the enemy through his senses (including his skin), the use of chemical and bacteriological weapons. Included in this category are the use of noninjurious agents such as tear gas and also the use of herbicides and defoliants. All of these possible means of warfare center around the Geneva Gas Protocol of 1925 and its precise compass. The Protocol prohibits the use in war of asphyxiating, poisonous or other gases and all analogous liquids, materials, or devices and, further, the use of bacteriological methods of warfare. More than 65 States are formally bound by this agreement.

In 1966 the U.N. General Assembly passed a resolution by 91 in favor, none against, and four abstentions, that called for the strict observance of the Protocol by all States and asked those members who had not done so to ratify it.⁴⁴ No one is against this Protocol, but its correct interpretation finds nations in disagreement. Some believe the use of incendiaries and napalm are prohibited under the Protocol, many believe that riot-control agents, such as tear gas, may not be employed, and there is a strong view that even herbicides fall within its purview. The U.S. position on these various views was stated by the President and the Secretary of State earlier last year. On 19 August the President, in submitting the Protocol to the U.S. Senate, stated that "The U.S. has renounced the first use of lethal and incapacitating chemical weapons and renounced any use of biological or toxic weapons."⁴⁵ The Secretary of State noted that the Protocol had been

⁴²U.S. Army Field Manual (FM 27-10) at 18.

⁴³Geneva Protocol of June 17, 1925 for the Prohibition of the Use in War of Asphyxiating, Poisonous or other Gases and of Bacteriological Methods of Warfare, reprinted in the ICRC Expert Report as Annex 3.

⁴⁴United Nations General Assembly Resolution 2163 (XXI), 5 Dec. 1966.

⁴⁵President Nixon's Message in LXIII Dep't State Bull. 273, September, 1970.

observed in almost all armed conflicts since 1925, and that the United States' understanding was that the Protocol did not prohibit the use in war of riot-control agents and chemical herbicides; and further, that smoke, flame, and napalm are not covered by the Protocol's general prohibition.⁴⁶ The Senate Foreign Relations Committee is showing considerable reluctance to recommend ratification of the Pact with this interpretation. Senator Fulbright and others have stated that by insisting that herbicides and riot-control agents are not banned by the Protocol and would still be used in Vietnam, all the advantage of ratifying the Treaty would be lost. (*Washington Post*, March 23.) Unless the executive branch revises its understanding of the Geneva Protocol of 1925, to include herbicides and tear gas, it is doubtful the Senate will give advice and consent to the Protocol's ratification.

The third dilemma concerns the status of the aircrewman. Here is a problem of the enforcement of clearly defined rules rather than the development of new ones. The fallen airman poses problems of growing concern as he seems to be singled out for mistreatment or unauthorized public display with increasing frequency. Both the Hague Conventions of 1899 and 1907 respecting land warfare contained provisions that members of the armed forces were entitled to be treated as prisoners of war. Of course, this included all members, whether combatants on land, sea, or in the airspace.

Early in World War I there was some question as to the enemy airman's status, but no case appeared in which they were denied prisoner-of-war status. In World War II, however, the concept began to be advanced by some that airmen, unlike their brothers in arms on land and at sea, were not necessarily entitled to be treated humanely. In 1943, Himmler ordered all senior SS and police officers not to interfere between German civilians and English and United States flyers who bailed out of their aircraft. In 1944 Hitler ordered allied aircrews shot without trial whenever such aircrews had attacked German pilots of aircrews in distress, attacked railway trains or strafed individual civilians or vehicles. Goebbels referred to Allied airmen as murderers and stated that it was "hardly possible and tolerable to use German police and soldiers against the German people when the people treat murderers of children as they deserve."⁴⁷

Although captured Allied airmen were largely accorded prisoners-of-war status by German authorities, there is enough evidence of mistreatment in the reports of the trials of the major and minor war criminals in Europe to

⁴⁶*Id.*

⁴⁷For the Views of the Axis Leaders on the status of downed Allied Airmen, see 26 Reports of the Trial of Major War Criminals 275; 27 *id.* at 246; and 38 *id.* at 314 (1949).

reflect the beginnings of what could be a disturbing precedent. In the Far East, Allied airmen also suffered from deprivation of their prisoner-of-war status.

Two of the U.S. aircrews which participated in the famous Doolittle air raids on Tokyo and Nagoya from the U.S. naval carrier *Hornet* were captured by Japanese troops when they made forced landings in mainland China. At the time of their capture, there was no Japanese law under which they could be punished. This was remedied four months after their capture by the passage of the Enemy Airmen's Act of Japan. This act made it a war crime to participate in an air attack upon civilians or private property, or conduct air operations in violation of the laws of war. The law was made retroactive to cover those U.S. airmen already in their hands. In October, 1942, two months after the passage of the Enemy Airmen's Act, three of the Doolittle raiders were sentenced and executed. The Judgment of the International Tribunal for the Far East reflects many instances thereafter in which captured Allied airmen were tortured, decapitated and even deliberately burned to death.⁴⁸

The Charters of the Nuremberg and Tokyo International Military Tribunals expressly make it a war crime to murder or ill-treat prisoners-of-war. Both General Keitel of the German Army General Staff and Kaltenbrunner of the Gestapo were charged with, and convicted of mistreating POWs, in part, it appears, for their role in the mistreatment of captured Allied airmen.⁴⁹

However, in the trial of Japanese judges, Japanese judicial and prison officials were convicted on a different basis. The thrust of the holdings of the War Crimes Commissions in these cases was that the U.S. airmen were deprived of a fair trial and not that U.S. airmen, as lawful combatants, were entitled to POW status. The 1949 Geneva Convention on POWs confirmed the entitlement of aircrew members to the benefits of that Convention including "civilian members of military-aircrews" and "crews of civil aircraft." Article 85 provides that prisoners-of-war prosecuted under the laws of the detaining power for acts committed prior to capture shall retain, even if convicted, the benefits of that Convention. Compliance with these provisions would prevent the denial of POW status to airmen, even those convicted during hostilities under such laws as the Japanese Enemy Airman Act.

Unfortunately, most of the Communist-bloc countries have entered

⁴⁸See *Judgment of the International Military Tribunal for the Far East*, Chapter VIII, at 1025 (1948).

⁴⁹Trial of the Major War Criminals 289-92.

reservations to article 85. The reservation of the North Korean Government is typical. They refused to be bound to provide POW status to individuals convicted under local law of war crimes based on the principles of Nuremberg and the Tokyo Far East International Military Tribunal. The Government of China and the North Vietnamese reservations are similar. There are many cases of mistreatment of U.S. airmen in the Korean conflict, and the extortion from U.S. airmen of false germ warfare confessions for propaganda purposes, and publicly parading them through the streets under humiliating circumstances, is well known. Although all captured U.N. Forces suffered to some extent under the fairly primitive conditions of confinement which existed, it was the airman who was singled out especially for public degradation, exposure to the press, and the forcing of confessions of illegal conduct.

The fate of all prisoners of war held by the North Vietnamese is of present great concern because of the refusal of that Government to consider the 1949 Geneva Convention applicable to that conflict. Of interest to this discussion, however, is the particular light in which they consider captured U.S. airmen. A Hanoi press release with a date line of 10 July 1966 could well be expected to reflect their official attitude on this issue. A North Vietnamese lawyer writes that U.S. pilots are not prisoners-of-war but criminals, that air raids on densely populated areas in South Vietnam and on pagodas and hospitals in both the South and the North were conducted by B-52 bombers, and are concrete war crimes under paragraph 6(b) of the Nuremberg War Crimes Charter. He also cites the bombing and strafing of the dike system and other irrigation works and densely populated cities such as Hanoi and Haiphong as war crimes. (There is a striking parallel between this reference to the dike systems and irrigation works and Article 17 of the ICRC Rules for the Protection of Civilians. Article 17 invites the States concerned to agree on the immunity from destruction "of engineering works or installations—such as hydroelectric dams, nuclear power stations or dikes" which might, if attacked, endanger the civilian population "through the releasing of natural or artificial forces."⁵⁰ This view apparently shared by the North Vietnamese lawyer and the drafters of the ICRC Rules is a substantial departure from practices in World War II where dikes and dams as well as bridges were attacked from the air.)

The North Vietnamese lawyer specifically refers to article 8 of the Nuremberg Charter and states that even though accused airmen have acted strictly on orders given by their government or superiors, they remain

⁵⁰See Report of the XX1st Conference of the Red Cross, Reaffirmation of the Laws and Customs of Armed Conflict, Annex 1, p. 040.

individually responsible for the air attacks. The lawyer writes that the North Vietnamese Government "deliberately and clearsightedly ruled out (protection for) those prosecuted and accused of war crimes and crimes against mankind" in adhering to the Geneva Prisoner-of-War Convention. This is why, he concludes, U.S. pilots, whom he labels as pirates, saboteurs and criminals, can be tried, and presumably punished, under the North Vietnamese law of 20 January 1953, which he states relates to crimes against the security of North Vietnam.

It was the unanimous opinion of the Secretary General and the ICRC experts that even when airmen had committed acts justifying their treatment as war criminals, they should be treated as prisoners-of-war.⁵¹ Both believed that an airman behind enemy lines, in distress, and not employing any weapon should be protected from the civilian population.⁵² Neither, however, gave any significant attention to the relation of war crimes as defined at Nuremberg and Tokyo to the conduct of air operations. In view of the non-prosecution of any Axis airman or official for his part in air activities, strategic bombing which by its nature is bound to cause a great deal of suffering and devastation, must be judged on different grounds. Certainly the impermissibility of the defense of superior orders has very questionable application to air combat. The experts and the Secretary both raised this issue in their report by stating that when the attack of the military objective will cause serious loss to the civilian population, and is disproportionate to the military advantage, they must refrain from the attack. In recommending that the principles in U.N. Resolution 2444 be introduced into army military instruction, especially for air forces, the experts also state that this is "to remind all the members of the armed forces that it is sometimes their duty to give priority to the requirements of humanity, placing these before any contrary orders they might receive."

The airmen might properly ask how is he to know, flying off the wing of his flight leader at 30,000 feet, at night, or over a solid covering of clouds, whether the damage his bombs inflict will meet the test of proportionality or his bombing will be indiscriminate. Or if he does exercise his individual judgment on a particular raid, and refrains from the attack by leaving the formation, what proof can he give when a charge is brought by his own authorities for misbehavior before the enemy. It would seem that the prosecutors and judges who presided at the War Crimes Trials in World War II had such thoughts when they chose to refrain from the prosecution of Axis airmen or officials for their participation in the conduct of air campaigns.

⁵¹See Report of the ICRC Experts at 77.

⁵²*Id.* at 78.

Admittedly, the pilot of a tactical fighter plane or a helicopter who performs his mission at low level and can identify clearly his individual target, is more akin to the infantry rifleman. Professor Taylor has written that the crews of helicopters and small reconnaissance planes who go "squirrel hunting" for individuals, using machine guns and "sniping with bombs," are "using the aircraft for the same purposes the infantryman uses his gun" and ought to be judged by the same standards.⁵³ Certainly, evidence that an airman deliberately singled out harmless non-combatants or individual dwellings (not concealing military targets) could constitute a war crime and result in a murder charge. Eight crewmen from two U.S. Army helicopter gunships were charged late last year, either as principals or accessories, to the deliberate killing or wounding of a number of Vietnamese civilians by firing grenades from their craft along a rice field where the Vietnamese were located.⁵⁴ Clearly, such conduct, if proved, falls squarely within the parameters of Professor Taylor's remarks.⁵⁵ However, the fundamental difference between the airman who is not charged with such conduct and does not purposely single out and attack individual civilians or defenseless homes, and the infantryman is clearly set forth in the only War Crimes Trial to rule precisely on the subject of aerial bombardment:

A city is bombed for tactical purposes; communications are to be destroyed, railroads wrecked, factories razed, all for the purpose of impeding the military. It inevitably happens that nonmilitary persons are killed. This is an incident, a grave incident to be sure, but an unavoidable corollary of battle action. *The civilians are not individualized.* The pilots take their aim at the railroad yards, houses along the tracks are hit and many of the occupants are killed, but this is entirely different in law and in fact from an armed force marching up to these same railroad tracks, entering those houses abutting thereon, dragging out the men, women, and children, and shooting them.⁵⁶

These then are the three central dilemmas that impede the development of the laws of air warfare. All past effort to define, by all-inclusive enumeration, those objectives which are proper military targets have failed. Either they have been too restrictive or too indefinite to have been accorded much respect in actual practice. General exhortations to refrain from terror bombing, indiscriminate bombing and morale bombing equally have a nebulous ring. There is no adequate standard to judge what constitutes this type of warfare, and no nation has considered that their

⁵³Taylor, *Nuremberg and Vietnam: An American Tragedy* 147.

⁵⁴Washington Post, May 3, 1971, p. 5.

⁵⁵Cf. with report that in the Korean Conflict, UN Commanders authorized attack upon civilians who were used as grenade and ammo carriers for the North Koreans. 6 Karig, *Battle Report (The War in Korea)* (1952) p. 107.

⁵⁶Einsatz-Gruppen Case 4 Tr. War Crim. Cases 446-467.

combatant air forces have ever resorted to the use of terror or indiscriminate attacks.

The 1954 Hague Convention for the protection of cultural property signals a milestone, by providing agreement for the refuge of certain types of objects and buildings. Perhaps this concept can be enlarged to immunize other clearly defined resources and facilities of a belligerent nation. Common consent for the extension of hospital and safety zones to cover larger segments of the civilian population, removed from vital target areas, also is a growing possibility.

The dilemma of the choice of weapon is created by the uncertain status of the use of nuclear force, the use of incendiaries, including napalm, in air operations, and the use of modern agents designed to control the movement of people without producing significant harm, and to destroy plants, trees and food resources by chemical means. The applicability of the Hague Regulations and the Geneva Gas Protocol to those forms of waging war is far from settled, and in the eyes of some taints the aircrewman who is detailed to employ them.

Finally, the status of the aircrewman, who all too frequently serves as the focal point of the opposing belligerent's indignation and charges that the laws of war have been violated, must be restated. It is the airman who is especially vulnerable to mistreatment and denial of his rights under the Geneva Convention of 1949, because of the tremendous destructive capacity within his control, and because he brings the misfortune of war to the enemy hinterland. Clarification of the Nuremberg principles as they apply to him, the airman, and withdrawal of reservations making possible his treatment as a war criminal are badly needed. His legitimate combatant status must be reaffirmed. That neither the weapons prescribed for his use, nor the targets pre-selected for his particular mission, operate to remove him from the ranks of lawful combatants must be recognized uniformly.

As difficult as these three central dilemmas make it to codify or formulate air law rules for armed conflict, the continued use of air power in armed conflicts in the Middle East and in Southeast Asia make imperative the issuance of concrete guidance for airmen of all armed forces. This writer recently queried a responsible, knowledgeable Air Force lawyer as to whether the time was not at last propitious to update and promulgate the Air Force rules of 1956-1960 which never left the drafting stage. His reply is worth quoting as a thoughtful argument against an Air Force sponsored publication:

One of the real difficult problems in dealing with the laws of war is to take an objective, legalistic analysis of what the law is and apply it to circumstances of today's conflict, bearing in mind that to a large extent International

Law in this area is made by customary practices. Since the United States is the one that is principally involved in the use of a wide variety of sophisticated weapons, to assert restraint on the use of weapons not required by the current status of the law, yet demanded by certain segments of the international community, is painful indeed. Such self-imposed restraint designed to accommodate moral sensitivities, develop a customary rule of law and yet win a war is an almost impossible task. I am almost of the view that for the United States to participate in or to play an active role in the development of the laws of war with respect to legality of weapons or tactics is an almost impossibility while we are presently engaged in armed conflict.⁵⁷

Certainly, there is much merit in this viewpoint. The lack of any real, distinctive guidance for the airman in the British and Swiss Manuals on the laws of air warfare seems to support a view that codification of this subject is premature, absent greater development of customary law. On the other hand, neither the Secretariat of the United Nations, the General Assembly, nor the International Committee of the Red Cross have thus far been capable of working out a practical useful accommodation between operational (or military) necessity and the need for respect for human rights in armed conflict.

Understandably, the efforts of the UN and the ICRC are directed toward sparing the civilian population from the ravages of war. Humanitarian admonitions by these agencies to refrain from terror bombing, indiscriminate bombing, and the use of weapons which cause unnecessary suffering or mass destruction carry great optative value. However, the Air Force planner, the Wing Commander, his operations officer, and the crewmen themselves relate much more strongly to Air Force doctrine in the form of specific rules and regulations. Such rules and regulations become part of the overall functioning of the military effort, in war as well as in peace, and must be taken into account in mission counseling, briefing and general Air Force instruction to aircrews and ground support members alike. In contrast, it has to be admitted that such well intended efforts as the ICRC rules of 1956 for the Limitation of the Dangers to the civilian population can be of only peripheral significance to the airman and his superiors until they are translated into concrete and detailed instructions by Air Force or Defense publication.

In addition, the efforts of the ICRC and the UN Secretariat have a utopian ring when they seek to eliminate area bombing, require the airman to return with his bombs (presumably even in high level, all-weather bombardment) if the target cannot be "duly identified"; and to make a selective in-the-air choice as to the targets he will attack, based on the doctrine of

⁵⁷Letter to the writer from an Air Force officer dated 13 April 1971.

proportionality. Far better would it be for the Air Force to set forth its position on these matters in specified, practical instructions in an Air Force manual, pamphlet or regulation.

While the UN and the ICRC are naturally and primarily occupied with the protection of the civilian population, the airman must be concerned with many, many other limitations on the use of his aircraft and accompanying weapons in armed conflict. Does the Hague Rule requiring that quarter be given to defenceless ground combatants, prohibit attacks on disabled enemy aircraft? Does the Hague Rule requiring combatants to wear "fixed distinctive emblem recognizable at a distance" and to "carry arms openly," have any applicability to the flying crewman? Is the descending enemy crewman subject to attack? Is the crewman who carries saboteurs and spies for air drop behind enemy lines tainted by this conduct if captured? What is his status if he falls into enemy hands while on a propaganda mission which has for its purpose the incitement of the enemy to desert? May he attack non-military public aircraft of the enemy, or civil enemy aircraft, and must his own aircraft bear national, belligerent markings, or may he adorn it with the markings of the enemy?

It is doubtful, indeed, that this and many other such important questions will have been considered by the conference of Government experts which is to convene at Geneva 24 May thru 12 June 1971, for the purpose of reaffirming and developing the international humanitarian laws applicable to armed conflicts. State and Defense representatives will have attended this conference for the U.S., but if the past efforts of the ICRC are a prelude to the future, this ICRC conference may not have solved the three basic dilemmas confronting the Air Force in today's conflict, nor will they have had the time needed to consider the many detailed, ancillary rules of air warfare which so urgently need articulation today.