VI

Some Major Inadequacies in the Existing Law Relating to the Protection of Individuals During Armed Conflict

When Battle Rages, How Can Law Protect? 7
14th Hammarskjold Forum, John Carey ed., 1971

In a book published in 1954 the author said: “By 1907 the proportion of the laws of war embodied in general convention(s) far exceeded, and still exceeds to this day, that of the law of peace.”¹ What he failed to mention was that, apart from the 1925 Geneva Protocol concerning gas and bacteriological warfare,² the conventional law of war relating to the conduct of hostilities dated (and still dates) from 1907;³ and that there was not (and is not) a single piece of international legislation dealing specifically with what might well be considered a fairly important aspect of modern warfare—war in and from the air⁴

Shortly after the end of World War I an anonymous article appeared in the prestigious British Yearbook of International Law the thesis of which was that, the League of Nations having been established, it would be a “disastrous mistake” for the governments of member nations to use this new machinery to codify (or expand?) the law of war; and that the past failure of international law to provide viable solutions to the problems of peace was, at least in part, due to the preoccupation of writers and statesmen with the law of war and their consequent neglect of the law of peace.⁵ Two arguments were advanced: first, that inasmuch as war had been abolished, there was no longer anything for the law of war to regulate;⁶ and second, that in any event there was no point in wasting time and energy on rules of war because such rules would only be broken.⁷ These arguments did not go unchallenged;⁸ but that they prevailed with the majority of statesmen and international lawyers of the day is evident from the fact that the Third Hague Peace Conference, which had not been convened because of the advent of World War I, was never called into session and, despite the tremendous technological advances demonstrated during that war, the Regulations attached to the Fourth Hague Convention of 1907⁹ continued to be the latest expression of States with respect to the conduct of hostilities.¹⁰ Thus it was these Regulations, drafted in 1907, prior to the advent of such weapons as the tank and the airplane, weapons which had completely

¹ The opinions shared in this paper are those of the author and do not necessarily reflect the views and opinions of the U.S. Naval War College, the Dept. of the Navy, or Dept. of Defense.
revolutionized warfare, which constituted the basic rules governing hostilities during World War II.

It could easily be assumed that the events of World War II would have caused a less antagonistic attitude towards efforts to modernize the law of war. However, such was not the case. In a statement which could have been written by our anonymous post-World War I author and his adherents, the International Law Commission made the following decision at its 1949 organizational meeting:

"18. The Commission considered whether the laws of war should be selected as a topic for codification. It was suggested that, war having been outlawed, the regulation of its conduct had ceased to be relevant. On the other hand, the opinion was expressed that, although the term 'laws of war' ought to be discarded, a study of the rules governing the use of armed force—legitimate or illegitimate—might be useful... The majority of the Commission declared itself opposed to the study of the problem at the present stage. It was considered that if the Commission, at the very beginning of its work, were to undertake this study, public opinion might interpret its action as showing lack of confidence in the efficiency of the means at the disposal of the United Nations for maintaining peace." (Emphasis added.)

As a result of that decision, and despite strong arguments in support of the need to modernize the law of war advanced by many of the leading international lawyers, the Commission has, more than twenty years later, never of its own volition considered any aspect of the law of war. At the present time, then, we are compelled to apply to wars being fought in the eighth decade of the 20th century rules governing the conduct of hostilities which were drafted in the first decade of that century. Just imagine the chaos if we were using the traffic regulations of that earlier horse-and-buggy decade to regulate today's traffic! Imagine Broadway and Forty-second Street with no traffic lights, no traffic policemen, no stop signs, and a five-mile per hour speed limit! But such are the rules under which the world community of nations, by its ostrich-like attitude, has permitted and continues to permit wars to be fought.

Like the anonymous writer after World War I and like the International Law Commission after World War II, the United Nations itself has long been extremely reluctant to exert any effort toward modernizing the law of war for fear that public opinion might interpret such action as lack of confidence in that organization's ability to maintain the peace. But more recently there is evidence that the General Assembly is becoming increasingly realistic in its approach to this problem and that humanitarian considerations are, at long last, having an effect. The International Conference on Human Rights, meeting in Teheran in May 1968, adopted a resolution which requested the General Assembly to invite the Secretary-General to study
"the need for additional humanitarian international conventions or for possible revision of existing Conventions to ensure the better protection of civilians, prisoners and combatants in all armed conflicts and the prohibition and limitation of the use of certain methods and means of warfare."\textsuperscript{17}

This Resolution, in turn, resulted in the adoption by the General Assembly of Resolution 2444 (XXIII);\textsuperscript{18} the preparation of the study \textit{Respect for Human Rights in Armed Conflict} by the Secretary-General;\textsuperscript{19} and the adoption by the General Assembly on December 16, 1969, of Resolution 2597 (XXIV), the pertinent operative portions of which read as follows:

1. \textit{Requests} the Secretary-General to continue the study initiated by resolution 2444 (XXIII), giving special attention to the need for protection of the rights of civilians and combatants in conflicts which arise from the struggles of peoples under colonial and foreign rule for liberation and self-determination and to the better application of existing humanitarian international conventions and rules to such conflicts;

2. \textit{Requests} the Secretary-General to consult and cooperate closely with the International Committee of the Red Cross in regard to the studies being undertaken by that body on this question;

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5. \textit{Decides} to give the highest priority to this question at the twenty-fifth session of the General Assembly;

6. \textit{Invites} the Secretary-General to present a further report on this subject to the General Assembly at its twenty-fifth session.\textsuperscript{20}

As it will have been noted from the foregoing, there is another powerful force at work in this area—the International Committee of the Red Cross (ICRC)\textsuperscript{21} Even during the arid period in the codification of the so-called "Hague" law of war\textsuperscript{22} after World War I, the ICRC was successful in obtaining the convening of a diplomatic conference in Geneva in 1929 which not only redrafted the 1906 Geneva Convention,\textsuperscript{23} but also drafted the first convention dealing exclusively with the subject of prisoners of war.\textsuperscript{24} And in 1949, just shortly after the International Law Commission had reached its decision not to include the law of war on its agenda, another diplomatic conference was convened at Geneva at the instance of the ICRC and, based on many years of preparatory work by the ICRC, it drafted and adopted four humanitarian conventions,\textsuperscript{25} including the first ever to deal exclusively with the protection of civilians.\textsuperscript{26} Moreover, when Resolution 2444 (XXIII) was adopted by the General Assembly, its basis
was a resolution which had been adopted at the XXth International Conference of the Red Cross at Vienna in 1965;\textsuperscript{27} and at the XXIst International Conference of the Red Cross, held in Istanbul in September 1969, a number of relevant resolutions were adopted.\textsuperscript{28} Assuredly, with the General Assembly and the ICRC acting together in a concerted effort to reach the identical goal, the prospect for the revision and modernization of the law of war may now be viewed with some minimum degree of optimism. Of course, there is a long international road to travel from proposals, to draft convention, to diplomatic conference, to signed convention, to ratification by a sufficiently large number of States, including the great powers, to make any such revision and modernization meaningful;\textsuperscript{29} but the very willingness of the General Assembly to acknowledge that the problem exists is “a giant step forward for all mankind.”

It is perhaps appropriate to mention at this point a suggestion which has been offered in order to make work in this area more palatable to those who have heretofore opposed it. This suggestion is that the term “armed conflict” be used as a substitute for the word “war” in the context of rules governing hostilities. It will be recalled that in the 1949 decision of the International Law Commission not to enter this field, those who opposed that decision suggested that the term “laws of war” be discarded.\textsuperscript{30} The same suggestion is to be found in the ICRC’s proposals and practice and is stated to be based upon the need “to take account of the deep aspiration of the peoples to see peace installed.”\textsuperscript{31} And the Report, A/7720, makes the same suggestion, but apparently for the perhaps more logical reason that “armed conflict” is a considerably more all-inclusive term, and therefore less subject to dispute, than is “war.”\textsuperscript{32} Whatever the motivation, such a change appears to be essentially one of semantics, and there does not appear to be any substantive objection to it. Moreover, if it will reduce opposition to the project for the revision and modernization of the applicable law, it will have served a useful and beneficial purpose.\textsuperscript{33} Accordingly, the balance of this paper will use the terms “armed conflict,” “rules of armed conflict,” and “law of armed conflict,” and, except where speaking historically, will pointedly refrain from the use of such antiquated terms as “war,” “rules of war,” and “law of war”!

Assuming then that the time is approaching when affirmative steps will be taken to revise and modernize the law of armed conflict, the question is presented as to the specific areas in which such revision and modernization is needed. Any attempt to answer that question completely would probably necessitate a listing which would cover many pages and explanatory matter which would fill many tomes. This paper, as its title indicates, will be limited to several matters considered to be the major inadequacies relating to the protection of individuals during armed conflict which presently exist and require correction. They are:
1. The non-existence of and the need for a method for the automatic determination that a particular inter-State relationship requires the application of the law of armed conflict;\textsuperscript{34}

2. The non-existence of and the need for a method which will ensure the presence in the territory of each party to an armed conflict of a Protecting Power or an international body with adequate authority to police compliance with the law of armed conflict;

3. The non-existence of and the need for a complete and total prohibition of the use in armed conflict of any and all categories of chemical and biological agents; and

4. The non-existence of and the need for a complete code governing the use of air power in armed conflict with emphasis on the outright prohibition of any type of bombing which has as its basic target the civilian population.

In the discussion of each of these inadequacies in the present law governing armed conflict, an effort will be made to show the nature of the particular inadequacy and why it exists and to suggest possible remedies, with the caveat that the suggested remedies are not intended to exclude other, possibly more practical and practicable, solutions. In view of the very nature of the inadequacies discussed, there would appear to be little need to advance arguments as to why each is deemed of sufficient import to be considered a major inadequacy requiring a remedy.

1. The non-existence of and the need for a method for the automatic determination that a particular inter-State relationship requires the application of the law of armed conflict.

One of the major inadequacies of the present law of armed conflict is that there is in existence no method for the automatic issuance of an authoritative and effective determination that the relationship between two or more States has reached a point where that law should be applied.

Under Article 1 of the Third Hague Convention of 1907 hostilities were instituted by a “reasoned declaration of war or ... an ultimatum with conditional declaration of war”; and under Article 2 of that Convention the belligerents had the duty to notify neutrals of the existence of a state of war.\textsuperscript{35} Of course, were these provisions uniformly complied with by States, the problem under discussion would not exist. Unfortunately, more often than not they have been honored in the breach. In 1914, just seven years after they had become a part of international legislation, Germany attacked Belgium without a declaration of war and started a policy which has been followed all too frequently since then.\textsuperscript{36}
Moreover, a number of nations have denied the applicability of the law of war by the use of subterfuge or perversion of the facts. Thus, the Sino-Japanese conflict of the late 1930s was designated by Japan as a "police action" which, it was claimed, did not bring the law of war into effect; and in numerous other cases the applicability of the provisions of the 1907 Hague and of the 1929 Geneva Conventions was rejected on the mere basis of a denial of the existence of a state of war—despite clear and undeniable evidence to the contrary.

Concerning this situation the ICRC later said:

"... Since 1907 experience has shown that many armed conflicts, displaying all the characteristics of a war, may arise without being preceded by any of the formalities laid down in the Hague Convention. Furthermore, there have been many cases where Parties to a conflict have contested the legitimacy of the enemy Government and therefore refused to recognize the existence of a state of war. In the same way, the temporary disappearance of sovereign States as a result of annexation or capitulation has been put forward as a pretext for not observing one or other of the humanitarian Conventions. It was necessary to find a remedy to this state of affairs . . . ."

As the problem had thus long been recognized, in preparing the so-called Stockholm draft conventions (the working papers for the 1949 Diplomatic Conference which drafted the four 1949 Geneva Conventions) the ICRC attempted to solve it by proposing the employment of a phrase making each Convention applicable "to all cases of declared war or any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them." This proposal was adopted by the Diplomatic Conference without change and without debate.

A great feeling of accomplishment was engendered by the acceptance of this supposedly all-inclusive phrase by the Diplomatic Conference. The same ICRC study quoted above said of it:

"By its general character, this paragraph deprives belligerents, in advance, of the pretexts they might in theory put forward for evading their obligations. There is no need for a formal declaration of war, or for the recognition of a state of war, as preliminaries to the application of the Convention . . . The occurrence of de facto hostilities is sufficient . . . Any difference arising between two States and leading to the intervention of members of the armed forces is an armed conflict within the meaning of Article 2, even if one of the Parties denies the existence of a state of war . . . ."

Unfortunately, it has not uniformly worked out this way in practice. Thus, for example, in Vietnam, where thousands of planes have been shot down, tens of thousands of human beings have been killed, and millions of rounds of
ammunition have been expended, the position has been taken by North Vietnam that the humanitarian conventions governing armed conflict, to which she long ago acceded, do not apply. 40

Thus, after World War II it was considered necessary to evolve a method which would make it impossible for States to engage in armed conflict and attempt to justify non-compliance with the then law of war by denying the existence of a state of war through some subterfuge such as labelling it a "police action," alleging the lack of a declaration of war, etc. Now, once again, it is necessary to seek a method which will make it impossible for States to engage in armed conflict and attempt to justify non-compliance with the present (or future) law of armed conflict by advancing the same or new subterfuges, such as labelling the armed conflict as "legitimate self-defense," or as "assistance to an ally in an internal conflict," or as "assistance to peoples engaged in a national liberation movement aimed at throwing off the yoke of imperialism," etc. 41 And contriving new phrases of limitation will probably be no more successful in solving the problem than they have in the past as they would merely serve as a basis for future evasions of a different type.

It is suggested that a true and effective solution could be attained by assigning the power to make a determination as to the existence of a state of armed conflict to a pre-selected international body; by making the decision reached by that body as to the existence of a state of armed conflict binding on the States directly involved, as well as on all other Parties to the Convention; and by providing for the automatic imposition of total sanctions whenever this body determines that its decision is not being respected by a State party to the armed conflict in that such State has, despite such decision, continued to deny the applicability of the law of armed conflict, or any part of it, or is, in fact, violating such law. 42

At the 1949 Diplomatic Conference two proposals were made which can be related to this problem. The Greek representative suggested that the existence of a state of belligerency should be decided by the Security Council of the United Nations. He later amplified this proposal by explaining that he had meant that such recognition of belligerency should be given by a majority of the countries represented on the Security Council. 43 A French proposal, which was actually concerned with the problem of a substitute for the Protecting Power, would have established on a permanent basis, immediately upon the Conventions becoming effective, a "High International Committee for the Protection of Humanity," consisting of thirty members elected by the Parties to the Convention from nominations made by the Parties, by the Hague "International [Permanent] Court of Arbitration," and by the "International Red Cross Standing Committee." Nominations were to be made from
"amongst persons of high standing, without distinction of nationality, known for
their moral authority, their spiritual and intellectual independence and the services
they have rendered to humanity—"

"In particular, they may be selected from amongst persons distinguished in the
political, religious, scientific and legal domains, and amongst winners of the Nobel
Peace Prize—"  

While this proposal was not incorporated into the Conventions, it was the
subject of a resolution adopted by the Diplomatic Conference which
recommended that consideration be given as soon as possible to the advisability
of setting up an international body to perform the functions of a Protecting
Power in the absence of such a Power.  

These two proposals are mentioned here because they suggest alternative
methods of attempting to solve our problem: one by the use of an established
political body; the other by the use of a new body created specifically for the
purpose and which is made as neutral and apolitical as it is possible to do in these
days of hypernationalism.  

The suggested use of the Security Council (or, indeed, of any political body)
is not considered to be a feasible solution. That body is composed of the
representatives of States, voting on the basis of decisions reached in Foreign
Offices, decisions which are made on the basis of self-interest and political
expediency, and which are not necessarily consonant with the facts. It is
inconceivable, for example, that the Security Council would ever reach a
decision, over the opposition of North Vietnam (and, more important, of the
Soviet Union), that the situation in Vietnam demands the application of the
humanitarian conventions which govern the law of armed conflict.  

On the other hand, a specially constituted body of perhaps twenty-five
individuals, each of whom is of sufficient personal international stature to be
above politics and would act as an individual and as his or her moral and ethical
principles dictated, detached and unaffected by instructions, could well
constitute an acceptable and effective international body. The provisions for the
selection of the members of this body (the "International Commission for the
Enforcement of Humanitarian Rights during Armed Conflict"—ICEHRAC)
would be sufficiently restrictive to ensure the choice of the type of individual
described, without regard to nationality, race, religion, color, or geographical
distribution. The ICEHRAC would be selected as soon as the constitutive
convention had become effective and would be a permanent body, perhaps
self-perpetuating.  Any Party to the convention, whether or not itself involved,
could, at any time, request a determination by ICEHRAC as to whether the
relationship between two or more States was such as to call into effect the
application of the law of armed conflict; the States involved would be invited
to present any facts or arguments they desired but would not otherwise participate in the decision-making process; an affirmative decision would immediately be binding not only upon the States involved, but on all of the other Parties to the Convention; and a subsequent finding by ICEHRAC that its decision was not being complied with would automatically, and without further action of any kind, require the application of complete economic and communications sanctions against the violating State by all of the other Parties to the Convention.

To many this proposal will undoubtedly appear Utopian, idealistic, and impractical. However, upon reflection this reaction may appear somewhat less valid. There are today more than one hundred States which are not presently involved in the type of armed conflict under discussion. Each and every one of them considers that should it become involved in such activities in the future, it would be on the side of the angels—so the provisions of any such convention would naturally apply in its favor and against the opponent. Moreover, to what will it have agreed? Merely that a neutral, internationally-created body, which it helped create, may determine that a situation in which that State unexpectedly finds itself calls for the application of the humanitarian law of armed conflict. What would that mean to it? Only that it could not kill, or otherwise maltreat, protected persons such as the sick and wounded, prisoners of war, and civilian noncombatants, and that it could not have recourse to certain prohibited methods of conducting hostilities. Can any State advance the argument that it refuses to ratify such a convention because it does not wish its sovereign power of action limited in these respects, it wishes to retain the unfettered ability to kill and maltreat these people at will and that it wishes, for example, to retain the possibility of using weapons which have been banned? Moreover, once such a convention is drafted and presented for signature and ratification, the moral and humanitarian pressure to bring about ratifications would be tremendous and there would be an excellent possibility of its general acceptance. While certain States which have adopted obsolete attitudes magnifying national sovereignty might well oppose such a proposal from beginning to end, it is predictable that they would participate, albeit reluctantly, in the diplomatic conference which was convened to draft such a convention and would eventually, rather than risk international opprobrium, become Parties to it.

This, then, is the suggested remedy to the problem of establishing a method for the automatic determination that an existing situation necessitates the application of the law of armed conflict. While it would, it is true, entail a somewhat broader delegation of authority than States have heretofore been willing to make, it is believed that the time is past when States may argue “national sovereignty” as an excuse for refusing to participate in the creation of
an international institution the sole function of which will be to limit the illegal and nonhumanitarian conduct of hostilities in armed conflict.

2. The non-existence of and the need for a method which will ensure the presence in the territory of each State party to an armed conflict of a Protecting Power or an international body with adequate authority to police compliance with that law.

Another major inadequacy in the old law of war and in the present law of armed conflict is that there has never been an “umpire” with sufficient authority to oversee the application of the law, to investigate alleged or possible violations, to determine the facts with respect thereto, and to take the necessary action to ensure the correction of the default.

For many centuries there has existed in customary international law an institution known as the Protecting Power. By the time of the Spanish-American War (1898), the traditional functions of that Protecting Power had come to include some aspects of the protection of prisoners of war. During World War I a number of formal agreements were entered into confirming the existence of the Protecting Power and its activities with respect to prisoners of war, which had until then rested entirely on custom, and specifying a number of functions. Subsequently, in Article 86 of the 1929 Geneva Prisoner-of-War Convention, this institution received formal recognition in a general multilateral treaty concerned with ensuring humanitarian treatment for one class of victims of war.

The four 1949 Geneva Conventions reaffirm the Protecting Power as an international humanitarian institution. There is now, therefore, binding international legislation establishing the Protecting Power as an international institution during time of armed conflict and specifying a number of its duties and powers with respect to the protection of wounded and sick, prisoners of war, and civilian noncombatants. Unfortunately, the provision concerning the original designation of Protecting Powers by belligerents is less than clear, apparently relying on customary international law in this respect, although a great deal of time, effort, and controversy were expended at the 1949 Diplomatic Conference with respect to the designation of replacements and substitutes for an original Protecting Power. In any event, although there have probably been close to one hundred armed conflicts of various sorts and sizes since the end of World War II, the institution of the Protecting Power has not once during that period been called into being. While the Report advances a number of possible reasons for this failure, it is believed that many of them are completely irrelevant and that, for the most part, the failure to secure the designation of such a Power has resulted from the fact that the States involved did not wish to have on their territory a neutral presence concerned with the problem of the
extent to which there was compliance with the provisions of the specifically humanitarian conventions governing the law of armed conflict. The failure of the Protecting Power as an institution and the need for some effective system of supervision appears to be very generally admitted. Thus in answer to the Secretary General’s inquiry concerning the preparation of his Report, India stated that it believed that the solution to the problem “would perhaps be found more through the complete implementation of the existing conventions than through the search for new legal instruments.” And the response of the United States acknowledged “a strongly held conviction that steps are urgently needed to secure better application of existing humanitarian international conventions to armed conflicts.” Similarly, the Report states that

“there would be pressing need for measures to improve and strengthen the present system of international supervision and assistance to parties to armed conflicts in their observance of humanitarian norms of international law.

And another organization concerned with preserving humanitarian rights said, with respect to the Protecting Power:

“Certainly it is time that this valuable international custom was revived in the modern context of armed conflicts. An initiative of this kind by the United Nations would set a precedent as a means of lessening the brutality of conflicts, and would accord with the aim expressed in the Charter.

And, finally, Resolution XI of the XXIst International Conference of the Red Cross “calls upon all parties to allow the Protecting Power or the International Committee of the Red Cross free access to prisoners of war and to all places of their detention.” Further, it should be borne in mind that nowhere in either customary or conventional international law is there any rule which would authorize the Protecting Power, even if it were designated and functioning, to supervise the compliance of a belligerent with that area of the law of armed conflict governing the conduct of hostilities.

Although, as has been stated, no Protecting Power has been designated in any armed conflict which has occurred since World War II, on a number of occasions the ICRC has been permitted to perform its humanitarian functions. Perhaps because of this, the Report calls it the most effective private organization concerned with respect for human rights in armed conflict, ascribes this to “its history, past experience, and its established and well deserved reputation of impartiality,” and recommends its strengthening. But not even the ICRC has been uniformly successful in having its services accepted. Thus, while it was permitted to perform humanitarian functions in the prisoner-of-war camps maintained in South Korea during the period of hostilities in that country
It was never permitted in North Korea where, as a result, there was no "guardian" of the Conventions; similarly, while it has functioned in South Vietnam over a considerable period of time, it has never been permitted in North Vietnam; and its trials and tribulations in Biafra and Nigeria are too recent to require elaboration.

There is, then, a double need in this area: (1) a need to devise a method which will ensure the existence of a "third" presence, either a Protecting Power or some substitute therefor, on the territory of each State party to an armed conflict; and (2) a need to grant to that Protecting Power, or the substitute therefor, adequate authority to ensure compliance with all of the law of armed conflict, including that relating to the conduct of hostilities. The provisions of the 1949 Geneva Conventions for the designation of Protecting Powers have not been at all effective and those relating to substitutes for Protecting Powers have been only partially successful. It is apparent, then, that the only real solution would be, once again, to have a provision in a convention which would, in appropriate cases, automatically trigger action by ICEHRAC. Thus the convention creating that institution could provide that, when the existence of a state of armed conflict is acknowledged by the States involved, or when a decision to that effect has been reached by ICEHRAC in accordance with the other provisions of the convention, and no Protecting Powers have been designated in accordance with customary international law within one week thereafter, ICEHRAC would automatically begin to function in the capacity of a substitute for the Protecting Power, with all the rights and duties which have been, or which may be, granted to such Powers. And such rights and duties should include the supervision of the application of all of the law of armed conflict and should not be restricted to the protections afforded under the 1949 Geneva Conventions. After all, a human being, combatant or noncombatant, suffers just as much, or is just as dead, be his improper treatment due to a violation of those conventions or to the use of dum-dum bullets (in violation of the 1899 Hague Declaration), or the use of poison (in violation of the 1907 Hague Regulations), or the use of gas (in violation of the 1925 Geneva Protocol), etc.

In many respects the foregoing proposal parallels suggestions contained in the Report. Nor is it believed that the U.S.S.R. and the other Communist countries would necessarily oppose such a solution merely because they made reservations to Article 10/10/10/11, and because the Soviet Union made a statement indicating that it did not consider Resolution 2 of the 1949 Diplomatic Conference necessary. Events subsequent to 1949 have demonstrated the need for an institution capable of performing the functions of the Protecting Power and competent to take such functions upon itself immediately when the need therefor becomes apparent. It is believed that only in this fashion will the world community of nations provide a satisfactory and effective method of ensuring
in every case of armed conflict the presence of an impartial agency with the
function of making certain that the law of armed conflict is fully and properly
applied.82

3. The non-existence of and the need for a complete and total prohibition of the use
in armed conflict of any and all categories of chemical and biological agents.

A third major inadequacy in the existing law relating to the protection of
individuals during armed conflict is the lack of a comprehensive and generally
accepted ban on the use as weapons of all types and categories of both chemical
and biological agents.

While there is probably no real equal to the disaster that would descend upon
this earth should an all-out nuclear war occur, potentially the use of other
uncontrollable methods of mass destruction could be almost equally disastrous
for mankind.83 Dozens of chemical agents, and numerous biological agents, all
with varying degrees of lethality, that have been determined to be the most
“useful” are now included in the arsenals of a number of nations for possible use
in the event of armed conflict.84 Hundreds of books and articles have been
written86 and millions of words have been spoken87 on the subject. For the
most part they have been concerned with the questions of whether there is today
any customary rule of international law which prohibits the use of chemical
agents in armed conflict and whether biological agents fall within the
well-established prohibitions against the use of “poisons” and against the use of
weapons which cause “unnecessary suffering”; but also, in more recent days,
with the inhumanity of these weapons and the highlighting of the moral and
ethical basis for the universal acceptance by nations of a strict and all-inclusive
ban on the use in armed conflict of any and all types of both chemical and
biological agents.88

A very brief history of the attempts to ban the use of chemical (and
bacteriological) agents as weapons will probably serve to clarify the current
problem as well as the suggestion for solving it. Chemical warfare of differing
varieties has existed for centuries.89 Although the 1868 Declaration of St.
Petersburg90 actually dealt with explosive bullets, it is often cited as the beginning
of the attempt to ban the use of chemical agents in armed conflict because of a
preambular clause which deplored “the employment of arms which uselessly
aggravate the suffering of disabled men, or render their death inevitable.”
Chemical agents, it is contended, fall within this classification.

The 1899 Hague Peace Conference adopted a number of provisions which
are said to have indirectly, or which did directly, ban the use of chemical agents.
Thus the Regulations attached to the Second Hague Convention91 drafted by
that Conference stated that the right of belligerents to adopt means of injuring
the enemy was not unlimited (Art. 22) and they especially prohibited the employment of poison or poisoned weapons (Art. 23a) and of arms, projectiles, or material of a nature to cause unnecessary suffering (Art. 23e). In addition, a Declaration concerning the Prohibition of Using Projectiles the Sole Object of which is the Diffusion of Asphyxiating or Deleterious Gases was drafted. While this Declaration was not repeated at the 1907 Hague Peace Conference, the provisions of the Regulations attached to the Fourth Hague Convention of 1907 were identical with those cited from its 1899 predecessor.

World War I saw the use of gas introduced by Germany, followed thereafter by its use by the Allies. The Treaty of Versailles contained an article which stated that the “use of asphyxiating, poisonous or other gases and all analogous liquids, materials or devices being prohibited, their manufacture and importation are strictly forbidden in Germany.” Nevertheless, it would be an exaggeration to say that when the Treaty of Versailles was signed in 1919 there was in existence any generally accepted rule of international law prohibiting the use of chemical agents in armed conflict. In 1922 the five great maritime nations of that time (France, Italy, Japan, the United Kingdom, and the United States) drafted and signed the Treaty of Washington relating to the use of submarines and noxious gases which contained a provision that, the use of “asphyxiating, poisonous or other gases, and all analogous liquids, materials or devices, having been justly condemned by the general opinion of the civilized world and a prohibition of such use having been declared in treaties to which a majority of the civilized Powers are parties,” the signatories “declare their assent to such prohibition.”

While this treaty never became effective (France failed to ratify it because of the provisions relating to submarines), it constituted an important landmark in the law of armed conflict. And three years later, at the Conference which met in Geneva to establish controls on international trade in munitions, a Protocol was drafted which contained wording lifted bodily from the Treaty of Washington and, in addition, contained an agreement “to extend this prohibition to the use of bacteriological methods of warfare.” As of October 30, 1969, there were 68 States parties to this 1925 Geneva Protocol. The great majority, however, have ratified it with reservations which make it applicable only as regards other States which are also Parties to it; and which make it inapplicable in the event it is violated by the enemy.

Gas was subsequently used by Italy against Ethiopia in the 1935–36 war. Italy admitted this use in the League of Nations and unsuccessfully attempted to justify it as a reprisal for other alleged violations of international law by Ethiopia. Japan used gas against China in their hostilities of the late 1930s; and the Soviet Union contended that Japan used bacteriological agents against China in the 1930s. This was never established by acceptable evidence and, so far as appears, there was no use in armed conflict of either chemical or bacteriological weapons
by any belligerent during World War II.\textsuperscript{101} During the Korean hostilities the
Soviet Union, Communist China, and North Korea all contended that the
United States forces in the United Nations Command had used bacteriological
weapons.\textsuperscript{102} The United States denied this and demanded an investigation
which was refused. It is interesting to note that in an official book published in
Moscow in 1967 no mention is made of these allegations, although the charge
against the Japanese is reiterated and the use of defoliants in Vietnam is strongly
criticized.\textsuperscript{103} The charge was also made, and apparently verified by the ICRC,
that Egypt used a chemical agent against the Royalists in the Yemen.\textsuperscript{104} Egypt
denied the charge and invited an investigation. As in the case of the similar
demand made by the United States in Korea, no such investigation ever took
place.

The ICRC Draft Rules contain a blunt and broad prohibition against the use
of “incendiary, chemical, bacteriological, radioactive or other agents”;\textsuperscript{105} on a
number of occasions the General Assembly has adopted resolutions calling for
strict observance of the “principles and objectives” of the 1925 Geneva Protocol
and inviting non-Parties to accede to it;\textsuperscript{106} and on at least one occasion it has
declared the use of chemical and biological agents of warfare “as contrary to the
generally recognized rules of international law, as embodied in the Protocol.”\textsuperscript{107}
Some writers also urge that the use of these weapons is prohibited by customary
international law.\textsuperscript{108} It appears however that, particularly in the light of recent
developments, this is a sterile approach to the problem.

When the 1925 Geneva Protocol was sent to the United States Senate for its
advice and consent to ratification, this was refused; and accordingly, the United
States is not presently a Party to the Protocol.\textsuperscript{109} As a result, the United States
has long taken the position that, while it will not be the first user of the weapons
prohibited by that international agreement, it “is not a party to any treaty, now
in force, that prohibits or restricts the use in warfare of toxic or nontoxic gases,
of smoke or incendiary materials, or of bacteriological warfare.”\textsuperscript{110} Although
the United States has not used any toxic chemical, or any bacteriological agent,
since the Protocol became effective as between the Parties to it, the fact that it
refused to ratify the Protocol has not only caused it to have problems in the
diplomatic field,\textsuperscript{111} but has also undoubtedly deterred a number of other States
from becoming Parties to it.

On November 25, 1969, President Nixon made an announcement of major
importance concerning this subject.\textsuperscript{112} This announcement included:

1. A reaffirmation of the renunciation by the United States of the first use of
   lethal chemical weapons;

2. An extension of this renunciation to the first use of incapacitating chemicals;
3. An intention to resubmit the 1925 Geneva Protocol to the Senate for its advice and consent to ratification;

4. Renunciation by the United States of the use of lethal biological agents and weapons;

5. Confining biological research to defense measures;

6. Disposing of all stocks of bacteriological weapons; and

7. Associating the United States with the principles and objectives of the United Kingdom Draft Convention on biological weapons. 113

It is assumed that this action by the United States, its prospective ratification of the 1925 Geneva Protocol, and its expressed willingness to become a party to a convention banning biologicals will lead the way to the goal which the United Nations General Assembly has long sought to reach—universal acceptance of prohibitions on chemical and biological agents and weapons. 114 Unfortunately, it appears that there is still one major problem which requires solution—the status of the use of certain types of chemical agents. For while diplomats, scientists, and international lawyers are, for the most part, in general agreement that lethal gases and all biologicals either are, or should be, prohibited by the law of armed conflict, there is no such concordance with respect to: the so-called non-lethal gases, such as tear gas (CS); incendiaries, such as napalm; and defoliants. Moreover, the use of all of these weapons by the United States in Vietnam has considerably exacerbated this problem.

The difference of opinion with respect to both the legal and the moral aspects of the problem of the use of non-lethal or incapacitating chemicals such as tear gas (lachrymatories) is evidenced by the division among the group of experts convened by the ICRC:

"... Some [experts] ... wondered whether the employment against the enemy of chemical agents involving no serious danger for health might not in the final issue be of a more humanitarian character than many other means of warfare. The employment of means such as police gases (lachrymatory and others) is admitted on the national level: why could they not a fortiori be admitted against the enemy?"

"Other experts, on the contrary, considered that the prohibition in the 1925 Geneva Protocol should be taken as covering all gases, including those not directly poisonous, in virtue of the deliberately broad terms of this prohibition in the Protocol . . . ."115
In 1930 the United Kingdom took the position that the use of smoke did not violate the Protocol but that the use of tear gas did; but recently a spokesman for that country stated that today’s tear gas is less harmful to man than was the 1930 smoke; that it is used widely for domestic purposes for riot control; and that its use is not prohibited by any international convention.  

Apart from the fact that even a non-lethal, incapacitating gas will occasionally cause a fatality, there are two major objections voiced against their use in armed conflict: first, that as a practical matter the legality of their use becomes extremely debatable when its purpose is “to enhance the effectiveness of conventional weapons,” 117 “to force persons from protective covering to face attack by fragmentation bombs.” 118 and second, and more important, that the use of any chemical, albeit non-lethal, results inevitably in escalation: “except perhaps when they are first used, non-lethal chemical weapons are unlikely to have much effect except to set the stage for more deadly CBW operations.” 119

The second chemical weapon in the controversial area is napalm—an extremely effective weapon and hence one which is much feared, 120 and much denounced. 121 Once again there is no general agreement as to whether this chemical weapon is prohibited by the Protocol. 122 And because the answer to this question is even more difficult to ascertain than is that with respect to lachrymatories, the position has been taken that it may be used, but only in a discriminating manner. 123 The suggestion is made in A/7720 that in measures of control and disarmament incendiary weapons such as napalm should be considered separately from chemical and biological weapons and that a new convention is needed to clarify the situation; 124 a suggestion which is probably an admission that this is presently a gray area of the law.

Prior to Vietnam defoliants had never been used in warfare. As a result, there is no real experience upon which scientists can base their opinions as to the ecological effects of their use. 125 Here, as in the case of napalm, the suggestion has been made that the legality of their use depends upon the purpose or target: while it might be permissible to use them on a forest area used by combat troops, it would not be permissible to use them on farm lands raising crops to feed the civilian population. Apart from the fact that it would frequently be all but impossible to make the correct determinations, if the use of defoliants does change the ecology, then it would appear that the purpose or target should not be the determining factor in reaching a decision on their use. 126

Because the use of non-lethal, or incapacitating, chemical agents will inevitably lead to the use of other, more lethal, chemical agents; because napalm can cause both asphyxiation and unnecessary suffering; because defoliants may well change the entire ecology of an area and could lead to the starvation of the civilian population; because of these and many other reasons, it is believed that to be successful any prohibition on the use of chemical weapons in armed
conflict must comprise all types of chemical agents, including those just mentioned. It is on this basis that it is urged that there is a vital humanitarian need for a universally accepted understanding that the prohibition of the use in armed conflict of chemical agents includes any and all categories of such agents, not excluding incapacitating gases, incendiaries, and defoliants.127

There is comparatively little dispute on the need for a far-reaching prohibition on the use of biologicals in armed conflict. As has been noted, there is general agreement that, like a nuclear war, a biological war would constitute a disaster to all mankind, belligerent and neutral, combatant and noncombatant.128 One grave problem in this area is that even a small, comparatively undeveloped nation could conceivably mass the necessary resources to enter this field—and there is considerable dispute as to whether an inspection system, even if adopted, could function effectively.129 The United Kingdom Draft Convention on the subject of biological weapons does not provide for inspections except in the context of a specific complaint. 130 But, while every effort should most certainly be made to devise means of ensuring against the illegal production and storage of biological agents of military relevance by any nation, large or small, industrial or undeveloped, this should not be permitted to unduly delay agreement on a treaty completely outlawing the use in armed conflict of any and all biological agents.

4. The non-existence of and the need for a complete code governing the use of air power in armed conflict with emphasis on the outright prohibition of any type of bombing which has as its basic target the civilian population.

The airplane was first successfully flown in 1903, just shortly prior to the Second Hague Conference of 1907; it developed into a military weapon of sizable proportions during World War I; during the between-wars period it became obvious that it was a major military weapon; during and since World War II technological advances in this field have been such that its importance in the military arsenal is now unequalled (except for the nuclear ballistic missile); and yet its use in armed conflict remains essentially unregulated!

In 1917, while the airplane was still in swaddling clothes, exponents of the use of air power had already evolved the theory that

"the day may not be far off when aerial operations with their devastation of enemy lands and destruction of industrial and populous centres on a vast scale may become the principal operations of war."131

While strategic bombing was probably not the "principal operation" of World War II, it certainly played a most important role in that war and will do so again
Major Inadequacies

in any future non-nuclear armed conflict—and perhaps even in one involving the use of nuclear weapons. As in the case of the discussion of chemical and biological weapons, while it is unproductive to argue about whether or not the strategic bombing of World War II violated international law, a brief survey of what has transpired in the past will prove helpful in approaching the problem from the point of view of the future. When the Second Hague Peace Conference met in 1907 the balloon was more than a century old and had already been used for military purposes, while the airplane had been successfully flown for the first time only four years before. The Conference adopted a Declaration prohibiting bombing “from balloons or by other new methods of a similar nature” and Conventions which included restrictions on land bombardment and naval bombardment. Article 25 of the Regulations on the Laws and Customs of War provided:

“The attack or bombardment by whatever means, of towns, villages, dwellings, or buildings which are undefended is prohibited.” (Emphasis added.)

The records of the Conference indicate that the words “by whatever means” were included in the article in order to cover air bombardment. And Article 2 of the Convention on Naval Bombardment excluded from the prohibition against the bombing of undefended places “military works, military or naval establishments, depots of arms or war materiel, workshops or plants which could be utilized for the needs of the hostile fleet or army.” The argument has been advanced, not without justification, that this provision provides a basis for the air bombardment in the “hinterland” of objectives such as those enumerated.

This was the extent of the efforts which had been made to control the use of air power when World War I began; and during its course the airplane became a full-fledged weapon. However, apart from a few incidents its use was restricted to the battlefield and, usually, to air-to-air duels. In view of the technological progress made and foreseen, it is indeed strange that although a number of efforts were made in the between-wars period to obtain an international agreement on such matters as air bombardment none was successful. The most authoritative of these failures was the drafting of the 1923 Hague Rules of Air Warfare. Two articles of those Rules are particularly relevant: Article 22, which would have prohibited aerial bombardment which was “for the purpose of terrorizing the civilian population . . . or of injuring noncombatants”; and Article 24, which would have limited it to specified military objectives in the vicinity of the zone of land operations and then only if it would result in a distinct military advantage and if it could be accomplished without “indiscriminate” bombing of the civilian population. These two articles were intended: (1) to preserve the traditional distinction between combatant and noncombatant; and (2) to limit the allowable
military objectives to those in the area of the combat zone—the so-called "occupation bombardment" because it is normally preliminary to physical occupation.

In a discussion of air bombardment in the House of Commons on June 21, 1938, Prime Minister Chamberlain made the following statement:

"I think we may say that there are, at any rate, three rules of international law or three principles of international law which are as applicable to warfare from the air as they are to war at sea or on land. In the first place, it is against international law to bomb civilians as such and to make deliberate attacks upon civilian populations. That is undoubtedly a violation of international law. In the second place, targets which are aimed at from the air must be legitimate military objectives and must be capable of identification. In the third place, reasonable care must be taken in attacking these military objectives so that by carelessness a civilian population in the neighborhood is not bombed."141

When World War II erupted in September 1939, President Roosevelt immediately sent the belligerents a plea against the bombing of civilian populations. The British, French, and Germans all replied that their planes were instructed to attack military objectives only.142 In March 1940 the ICRC made an appeal to the belligerents "to confirm general immunity for peaceful populations, to define their military objectives, and to refrain from indiscriminate bombardments and reprisals." Once again the belligerents responded affirmatively—but continued to act as they felt necessary.143 The estimate has been made that while World War I caused 10 million deaths, of which 500,000 were civilians, World War II caused 50 million, of which 24 million were civilians; and that half of the civilian deaths (12 million) were caused by air raids.144 It is worthy of note, too, that such air attacks were not specifically included in the definition of war crimes in the Charter of the International Military Tribunal and that there were no post-war trials based on a charge of indiscriminate bombardment of the civilian population.145 Nevertheless, Spaight takes the position that "nothing that has happened in the second world war has shaken the legal objection to indiscriminate bombing."146

It is apparent from the foregoing that the attempt to control aerial bombardment juridically has been based on analogy to two classical principles of land and sea warfare: (1) the distinction between combatant and noncombatant; and (2) the restricting of lawful targets to military objectives.147

Much of the humanitarian law regulating armed conflict which has been accepted during the past century has been based upon the distinction between combatant and noncombatant. The airman who has crashed and been hospitalized, the sailor who has been rescued from the sea by the enemy after his ship has been sunk, the soldier who has been captured on the field of
battle—all of these have been removed from combatant status and are therefore entitled to the humanitarian protection afforded by international law. But they are but a comparatively small percentage of the overall group of noncombatants, the vast majority of whom are simply civilians, persons who are not a part of the armed forces of a belligerent. It is with these latter that we are presently concerned. The distinction between combatant and civilian has been termed, and properly so, “the fundamental principle of the law of war.” But air warfare in general, and strategic bombing in particular, has tended to blur that distinction and its validity has been questioned.

Let us take three examples. First, a city of 500,000 population located in the “hinterland” (deep inside the country and far from the scene of actual land combat) has no factories making any product in support of the country’s war effort. Is the city a proper target for air bombardment? Second, suppose that this same city has in its midst a factory employing 1000 workers making a very important instrument of war. Is the factory, or the city, a proper target for air bombardment? And third, suppose that the same city has within its area a number of factories making important instruments of war, and employing the entire work force of the city. Are the factories, or is the city, a proper target for air bombardment?

Under the classical rules discussed and enumerated above, to bomb the city with no war production factories would be terror bombing, pure and simple, and would be a violation of the law of armed conflict. It would be an attack on a non-military objective which could be of no military advantage to the attacker except the possible demoralization of the enemy civilian population. With respect to this type of activity Lauterpacht has said:

“... it is in that prohibition, which is a clear rule of law, of intentional terrorization—or destruction—of the civilian population as an avowed or obvious object of attack that lies the last vestige of the claim that war can be legally regulated at all. Without that irreducible principle of restraint there is no limit to the license and depravity of force. . . .”

Even the proponents of more “liberal” rules of air bombardment do not assert the legality of bombing of this type.

What of the large city with only one small factory in which is made a product of value to its country’s war-effort? Certainly the bombing and destruction of such a factory would meet the test of resulting in a distinct military advantage to the attacker. It would not meet the test of being located in the zone of operations—but is that test, originally established when only cities in the zone of land operations could be reached by artillery bombardment, a valid test to be applied to air bombardment which can reach anywhere in the world? Moreover, it would meet the test of the requirements for naval bombardment. It would
probably not meet the test of being located where the bombing can take place without danger to the civilian population. However, it appears that practice during and since World War II would permit the factory to be subjected to air attack. As the Report points out, in recent armed conflicts belligerents have frequently made accusations of attacks upon non-military objectives and the enemy belligerent has denied the fact without either side questioning the propriety of the distinction as to types of objectives.  

Finally, what of the large city with many factories and most of the work force engaged in the war effort? Let us assume that in time of armed conflict 40% of the population constitute the work force—but that still means that 60% of the civilian population, 300,000 people of this city, is made up of women, children, aged, sick, etc. Must the attacker pick out individual targets, the real military objectives? Or may he blanket the entire city with bombs, thus ensuring that all of the plants are destroyed—but also ensuring that a large part of the population, worker and nonworker, is likewise destroyed? Spaight would answer this latter question in the affirmative. He says:

"... There are in any given enemy city thousands of civilians, of 'noncombatants' in the old sense, but there are also thousands who cannot be called 'noncombatants' in any true meaning of the term. The former suffer inevitably because the latter have, quite properly, to be prevented from pursuing their lethal activities. It is a tragedy of juxtaposition which is not entirely without precedent. Noncombatants have often suffered in bombardments by land and naval forces, but their suffering has never been held to make the bombardment illegal...."  

And he repeatedly asserts that so-called "target-area bombing" is an "established usage" and that it "cannot be considered to offend against the principles of the international law of war." The problem which then confronts us is that we have returned to the doctrine of "total war," war as fought centuries ago: when the besieged city fell, all of its inhabitants were slaughtered and the city itself was put to the torch.  

The Report makes the suggestion with respect to strategic bombing conducted on a target-area basis that "(it) would seem that measures to examine the effects of this kind of military operations within their legal context may now be desirable, and the question of defining limits might be usefully studied." With this modest proposal there can be no possible dispute. The question which then presents itself is, what are possible solutions to the problem? And, which of these possible solutions offers the greatest amount of protection to the civilian population?  

Air bombardment could, of course, be limited to areas where combat is actually taking place—the old concept of the "zone of operations." This, in effect, means tactical bombing, and would preclude strategic bombing.
this would, in large part, solve the problem, it is extremely doubtful that it would be possible to secure the agreement of Governments to such a stringent rule. Moreover, even if the agreement of Governments were obtained, it is doubtful that there would be compliance with such a rule in practice.

The Report proposes the establishment of safety zones, \textsuperscript{159} apparently similar to, but much larger than, the hospital zones referred to in Annex I to the First and Fourth Geneva Conventions of 1949.\textsuperscript{160} Presumably there would be no bombing whatsoever permitted within the safety zones and no restrictions on bombing elsewhere. While this might work for small groups and in small areas, it appears to be totally impractical for the protection of tens or hundreds of millions of civilians. The logistic problem alone would be insurmountable; and with thousands of square miles within a safety zone, the unlawful use of such areas for the protection of important military matters would probably be inevitable.

The Draft Rules prepared by the ICRC and submitted to the XIXth International Conference of the Red Cross at New Delhi in 1957\textsuperscript{161} contain a number of provisions intended to provide maximum protection for the civilian population. An examination of the various provisions of these Draft Rules makes it clear why they were received by the Governments with a "crushing silence." While they are, as would be expected, as humanitarian as it would be possible to draft such rules, they are also impractical to the point where it is extremely doubtful that any armed force would be able to comply with them in time of armed conflict. While this, as we shall see, is not true of all of these Draft Rules, a much more practical set of general principles was drafted by the ICRC for consideration by its group of experts in 1968. These principles would limit air bombardment to identified military objectives; would place upon the attacker the duty to use care in attacking the identified military objective; and would apply the principle of proportionality as between the identified military objective and any possible harm to the civilian population.\textsuperscript{162} These principles would clearly prohibit target-area bombing; but there does not appear to be any reason why such an important rule should not be specifically set out.

It is clear now, as it has been in the past, that no rule has as yet been conceived which will give full protection to the civilian population and yet will be acceptable to Governments. However, if man can devise instruments to send a spaceship to the moon and have it land within a matter of yards from its target, man can certainly devise, if he has not already done so, instruments which will put a bomb exactly on target. On the basis of this premise, the following rules on aerial bombardment are suggested:

1. \textit{Terror Bombing Prohibited}. Attacks directed against the civilian population, as such, whether with the object of terrorizing it, or for any other reason, are prohibited.\textsuperscript{163}
2. Target-Area Bombing Prohibited. It is forbidden to attack, as a single objective, an area including several military objectives at a distance from one another where members of the civilian population are located between such military objectives. 164

   (a) Before bombing a military objective, the attacking force must have sufficiently identified it as such. 165
   (b) In bombardments against military objectives, the attacking force must take every possible precaution in order to avoid inflicting damage on the civilian population. 166
   (c) To constitute a military objective a target must fall within one of the categories listed in the annex hereto. 167

It is believed that these rules will, under present and foreseeable technological standards, provide a maximum of protection to the civilian population, while placing acceptable limitations on the scope of strategic bombing.

Conclusion

Armed conflict is, by its very nature, unhumanitarian. However, humanitarian rules, properly applied, can do much to mitigate this situation. It is believed that were the proposals made herein to be adopted as part of the law of armed conflict, they would go far to provide additional needed protection for both combatant and civilian noncombatant.

As has been stated, this paper represents an attempt to deal with only some of the present major inadequacies of the law of armed conflict; and their selection and priority must be ascribed to the personal predilections of the author. There are a number of other areas which might well have been included and which may well be considered by some to have equal, or even greater, importance. These might include: enforcement of the law of armed conflict; combat at sea, particularly submarine warfare; the status of guerrillas and partisans; the use of starvation as a weapon; etc. The selection made of the subjects to be discussed should certainly not be considered as in any way denigrating the importance to the cause of humanitarianism in armed conflict of many other such subjects.
APPENDIX 1

RESOLUTION ADOPTED BY THE GENERAL ASSEMBLY

[on the report of the Third Committee (A/7433)]

2444 (XXIII). Respect for human rights in armed conflicts

The General Assembly,
Recognizing the necessity of applying basic humanitarian principles in all armed conflicts,
Taking note of resolution XXIII on human rights in armed conflicts, adopted on 12 May 1968 by the International Conference on Human Rights,1
Affirming that the provisions of that resolution need to be implemented as soon as possible,

1. Affirms resolution XXVII of the XXth International Conference of the Red Cross held at Vienna in 1965, which laid down, inter alia, the following principles for observance by all governmental and other authorities responsible for action in armed conflicts:
   (a) That the right of the parties to a conflict to adopt means of injuring the enemy is not unlimited;
   (b) That it is prohibited to launch attacks against the civilian population as such;
   (c) That distinction must be made at all times between persons taking part in the hostilities and members of the civilian population to the effect that the latter be spared as much as possible;

2. Invites the Secretary-General, in consultation with the International Committee of the Red Cross and other appropriate international organizations, to study:
   (a) Steps which could be taken to secure the better application of existing humanitarian international conventions and rules in all armed conflicts;
   (b) The need for additional humanitarian international conventions or for other appropriate legal instruments to ensure the better protection of civilians, prisoners and combatants in all armed conflicts and the prohibition and limitation of the use of certain methods and means of warfare;

3. Requests the Secretary-General to take all other necessary steps to give effect to the provisions of the present resolution and to report to the General Assembly at its twenty-fourth session on the steps he has taken;

4. Further requests Member States to extend all possible assistance to the Secretary-General in the preparation of the study requested in paragraph 2 above;

5. Calls upon all States which have not done so to become parties to the Hague Convention of 1899 and 1907,2 the Geneva Protocol of 19253 and the Geneva Conventions of 1949.4

FOOTNOTES

is a report submitted to the XXIst conventions such as those on the Law of the Sea, Diplomatic Immunities, Consular Relations, and Treaties. See note 84 infra. To a limited extent it might be considered that the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict (249 U.N.T.S. 215) also falls in this category; but, of course, it attempts to protect property, not people. 3. International Committee of the Red Cross, Reaffirmation and Development of the Laws and Customs Applicable in Armed Conflict 6 (1969) [hereinafter cited as ICRC, Reaffirmation]. This document is a report submitted to the XXIst International Conference of the Red Cross, held in Istanbul in September 1969.

4. It has at times been suggested that the condition for the termination of the 1907 Hague Declaration Prohibiting the Discharge of Projectiles and Explosives from Balloons (36 Stat. 2439, 2 Am. J. Int'l L. Supp. 216 (1908)) has never occurred and that, therefore, the Declaration is still in force. In view of the practice of nations prior to, during, and since World War II, there would appear to be little merit to such an argument. Moreover, the United States and the United Kingdom are the only major powers which ratified it. 5. "The League of Nations and the Laws of War," 1920-21 Brit. Ybk. Int'l L. 109, 114-15. 6. Ray, Commentaire du Pacte de la Société des Nations 528 (1930).


8. Writing in 1931 one author pointed out that neither the Pact of the League of Nations, nor the Kellogg-Briand Pact of 1928, could guarantee that there would be no future wars. Rasmussen, Code des Prisonniers de Guerre 72 (1931). And commenting on the 1934 Monaco Conference, de la Pradelle said: "... Doctors and lawyers denounced the conspiracy of silence which, lest public opinion be frightened, had been adopted in official circles and which consisted of not speaking about the laws of war." (Translation mine.)


10. It is true that occasional attempts to further codify some limited aspects of the law of war were made, despite the inhospitable atmosphere. Thus, naval conferences were held in Washington in 1922 and in London in 1930 and 1936. However, these conferences, which were not even always successful in producing an effective result, merely scratched the surface of the work which needed to be done.

11. It is essential to bear in mind that to a considerable extent the existing law of war was observed during World War II. True, there were many well publicized violations of that law, the so-called "conventional war crimes." But see Baxter, "The Role of Law in Modern War," 1953 Proc. Am. Soc. Int'l L. 90, 92 where the following appears:

"Those who are most scornful of the attempts which the law of war makes to mitigate human suffering in war inevitably point to the barbarities which were practiced in the second World War. These accusations overlook the extent to which states did comply with the law of war, the advantage of a fixed standard against which to measure the conduct of those who were the most flagrant in the violation of all international law, and the subsequent vindication of the validity of the norms of international law through the imposition of sanctions in the war crimes proceedings. . . ."


14. Actually, the 1907 Hague Regulations (note 9 supra) were in large part a comparatively minor revision of the Regulations attached to the 1899 Second Hague Convention, 32 Stat. 1803; 1 Am. J. Int'l L. Supp. 129 (1907).
15. The following very apt statement appears in Pictet, "The XXth International Conference of the Red Cross: Results in the Legal Field," 7 J. Int'l Comm'n., 3, 11 (1966): "... whereas the ruined cities [of World War II] have been rebuilt, the States have done nothing to restore the Hague Rules, which vanished under the same ruins ... While the techniques of offensive action have taken giant strides forward, the only rules which can be invoked date from 1907. Such a situation is flagrant in its absurdity."

The Secretary-General's Report on Respect for Human Rights in Armed Conflict, A/7720, para. 131, is to the same effect, stating that military-technical developments "have brought major changes which the authors of existing international instruments could not envisage." And that many governments share the belief that affirmative action is needed in this area is demonstrated by a number of the answers received by the Secretary-General in response to his inquiry regarding the preparation of A/7720. See the replies of Finland (at 76 of the original United Nations document); Hungary (at 77); Morocco (at 82); Norway (at 82); and Romania (at 85). This Report is, of course, the basis for this paper and for the Fourteenth Hammarskjold Forum of the Association of the Bar of the City of New York. It will be referred to simply as "the Report" or as A/7720, and will be cited as A/7720.

16. This reluctance on its part, and a similar reluctance on the part of the various subsidiary organs of the United Nations, is noted in A/7720, para. 19.

17. Resolution XXIII of the International Conference on Human Rights, Teheran, April-May 1968 (United Nations publication, Sales No.: E. 68. XIV 2), at 18.

18. See Appendix 1 hereto.

19. See note 15 supra.

20. It will be noted that operative paragraph 1 has now been given a somewhat different emphasis, an emphasis of a type which has tended to permeate all United Nations actions in recent years. It is to be hoped that this will not be to the detriment of a revision and modernization of the general law of war which, of course, is, or should be, largely applicable in both international and internal conflicts.

21. "Powerful" in the sense that it has strong support from people all over the world who are acquainted with and who welcome its methods and objectives. Apart from its dedication to humanitarian endeavors, the ICRC has found that "belligerents necessarily consider this law [of war] as a single whole, and the inadequacy of the rules relating to the conduct of hostilities has a negative impact on the observance of the Geneva Conventions." ICRC, Reaffirmation 8.

22. It has been the practice to refer to the rules governing the conduct of hostilities as "Hague" law and to the rules governing the treatment of people (wounded and sick, prisoners of war, civilians) as "Geneva" law. See, for example, Pictet, note 13 supra, at 23. There is no merit to such a distinction. The 1899 and the 1907 Hague Regulations dealt with, inter alia, prisoners of war and military occupation. Those subjects are now covered in whole or in part by the Third and Fourth 1949 Geneva Conventions, respectively (see note 25 infra). And the 1925 Geneva Gas Protocol (see note 84 infra) as well as the ICRC's Draft Rules (see note 26 infra) are both concerned with permissible weapons, methods of attacks, etc., subjects which are basic to the Hague Regulations. Were it not for the 1954 Hague Cultural Convention (see note 2 supra), it might well be that the world is no longer having the neutral status which it enjoyed prior to World War II, the nations of the world prefer to discuss subjects dealing with hostilities in still-neutral Switzerland. In any event, whether it is "Hague" law governing the conduct of hostilities or "Geneva" law governing the treatment of persons, its ultimate objective is humanitarian in nature.

23. This new version was the 1929 Geneva Convention for the Amelioration of the Conditions of the Wounded and Sick in Armies in the Field, 47 Stat. 2074; 118 L.N.T.S. 303; 27 Am. J. Int'l L. Supp. 43 (1933).


"The historians of the future will be puzzled by the conclusion of three [sic] new Geneva Conventions in 1949, and the failure of the powers who agreed to them to do anything to regulate those methods of war which, if continued, will make the humanitarian provisions of those Conventions read like hypocritical nonsense."

26. This is the Fourth Convention, note 25 supra. Of course, even the ICRC is not always immediately successful in its humanitarian efforts. In 1957 it presented to the XIXth International Conference of the Red Cross, meeting in New Delhi, its Draft Rules for the Limitation of the Dangers Incurred by the Civilian Population in Time of War. The Conference adopted a resolution requesting the ICRC to transmit the Draft Rules to the Governments. To quote the ICRC Director-General: "[T]heir replies took the form of a crushing silence, with the exception of a few well-disposed countries. The great powers, in particular, remained silent..."

Pictet, note 15 supra, at 12.

27. Operative subparagraphs 1 (a), (b), and (c) of A/RES/2444 (XXIII) were taken verbatim from the Red Cross resolution which is itself cited in the opening part of operative paragraph 1 of the United Nations resolution. The General Assembly omitted a fourth paragraph of the Red Cross resolution which stated "that the general principles of the Law of War apply to nuclear and similar weapons."

28. See Resolutions X, XI, XII, XIII, XIV, XVII, and XVIII, 9 Int'l Rev. Red Cross 613-19 (1969). Of particular relevance is the following extract from Resolution XIII, in which the Conference "requests the ICRC on the basis of its report [ICRC, Reaffirmation] to pursue actively its efforts in this regard with a view to:

1. proposing, as soon as possible, concrete rules which would supplement the existing humanitarian law,
2. inviting governmental, Red Cross and other experts representing the principal legal and social systems in the world to meet for consultations with the ICRC on these proposals,
3. submitting such proposals to Governments for their comments, and
4. if it is deemed advisable, recommending the appropriate authorities to convene one or more diplomatic conferences of States parties to the Geneva Conventions and other interested States, in order to elaborate international legal instruments incorporating those proposals."

29. As of October 15, 1969, just over 20 years from the date on which they were signed, the four 1949 Geneva Conventions had 125 ratifications and accessions. 9 Int'l Rev. Red Cross 646 (1969). (The data contained in note 49 of text in connection with note 12 supra. Ratifications and accessions to these "war" conventions far exceed those to any of the conventions drafted by the Commission, as important as these latter are.

30. See text in connection with note 12 supra.

31. ICRC, Reaffirmation 11

32. Para. 21.

33. As further evidence of the post-World War II antipathy to the use of the word "war," it might be noted that, apart from Article 107 referring to World War II, it is not used anywhere in the Charter of the United Nations; instead we find such terms as "international disputes," "breaches of peace," "acts of aggression," etc. Universal adoption of the term "armed conflict," a term already familiar to those acquainted with the four 1949 Geneva Conventions and the 1954 Hague Cultural Convention, will certainly result in uniformity of language—even if some who are less able to accept new ideas will, for a time, have to think twice and then say "Oh, you mean the law of war!"

34. This problem is, of course, also of major importance with respect to internal conflict (civil war) and the question of the application of one of the so-called "common" articles (Article 3) of the 1949 Geneva Conventions.


36. "... Thus the wars of Italy with Abyssinia in 1935, of Japan with China in 1937, of Germany with Poland in 1939, of Russia with Finland in the same year, and of Japan with the United States in 1941, opened without a formal declaration of war."

37. 2 Lauterpacht-Oppenheim, International Law 292-93 (7th ed., 1952). But there were a number of cases of compliance during both World War I (ibid., at 294, footnote 2) and World War II (ibid., at 295, footnote 3).

38. I Final Record of the Diplomatic Conference of Geneva of 1949, at 47 [hereinafter cited as Final Record]. This is the first paragraph of common Article 2 and is, therefore, identical in Article 2 of each of the four 1949 Geneva Conventions. It is also employed in Article 18 (h) of the 1954 Hague Cultural Convention, supra note 2.


41. ICRC, Reaffirmation 94.
42. It is obvious that this proposal jumps squarely into the problem of the enforcement of the law of armed conflict which is, without question, another area requiring major action.
43. IIIB Final Record 11 and 16. Further amplification of the proposal, which was clearly required, was not forthcoming and its adoption was not pressed.
44. Annex 21, III Final Record 30.
45. Resolution 2, I Final Record 361. So far as is known, this resolution has never been implemented.
46. In addition, it might be noted that the Security Council undoubtedly already has the power to make such a decision; that it has heretofore, in effect, made such a decision, but always in the context of a call for a cessation of the armed conflict so found to exist (e.g., S/RES/233 (1967), adopted June 6, 1967, in which the Security Council states its concern “at the outbreak of fighting” in the Middle East and calls for “cessation of all military activities in the area”); and that it has not, and probably will not, ever exercise such power in the context of the proposal under discussion as to do so would be an admission of its inability to eliminate completely the breach of the peace involved.
47. To gain support at the outset and to ensure complete impartiality, it might be denied jurisdiction over fact situations existing at the time of its creation.
48. The General Assembly has, on a number of occasions, called upon its Members “to make effective use of existing facilities for fact-finding” (e.g., A/RES/2330 (XXIII)). The present proposal would, in effect, merely create a new specialized fact-finding body and provide for certain results to flow automatically if specified facts are found. It is a variation and expansion of the Commission of Inquiry originally created by the First Hague Convention of 1899 (32 Stat. 1779; 1 Am. J. Int’l L. Supp. 107 (1907) and applied for the first time in the Dogger Bank Incident (Scott, Hague Court Reports 403 (1916)).
49. Of course, many additional details of creation and operation would necessarily be included in any convention establishing such a body; but these appear to be unnecessary for the purposes of this paper. However, it should be mentioned that, as in the case of the Protecting Power in the 1949 Geneva Conventions, provision would have to be made for the ICEHRAC to use, when needed, an operational staff.
50. While it is true that the provision for automatic economic and communications sanctions goes even somewhat beyond the comparable provisions of the Charter of the United Nations, it is suggested that the majority of law-abiding States have come to realize that there will always be a few delinquents among them and that only the absolute knowledge of automatic, effective, and universal sanctions will tend to keep the delinquent States in line. (The sanctions against Rhodesia can scarcely be described with those adjectives)
51. Certainly, the 125 ratifications of and accessions to the 1949 Geneva Conventions, which were drafted before many of the acceding States were even in existence as members of the international community, were not obtained merely because of an overwhelming urge on the part of nations to be Parties to it; they were obtained because of moral and humanitarian pressures and because few nations were willing to be pointed at as not having accepted these great humanitarian expressions.
52. Can there be any great doubt that President Nixon’s announcement concerning his intended actions with respect to chemical and biological warfare (see section 3 infra) was motivated not only by humanitarian considerations but also by the increasing feeling of isolation which the United States was being compelled to endure in this respect, as well as diplomatic pressure from friends, resolutions of the General Assembly, resolutions of the ICRC, etc.?  
54. Ibid., 377-78.
55. See note 24 supra.
56. The basic article relating to the Protecting Power is one of the common articles, Article 8/8/8/9. References to this institution appear throughout the Conventions. See Levie, note 53 supra, at 380-81, where there is a list of 36 articles in the Prisoner-of-War Convention containing references to the Protecting Power.
57. Common Article 10/10/10/11 covers this latter subject. The U.S.S.R. and the other Communist countries all reserved to these articles.
58. A/7720, para. 213.
59. Ibid.
60. It is probable that the United States has not even attempted to secure the designation of a Protecting Power in Vietnam because such action would appear to constitute a legal recognition not only of North Vietnam as a State, but also, and perhaps more important of the existence of a state of war.
62. Ibid., at 91.
63. Ibid., para. 215. See also para. 203.
65. See note 28 supra. In view of the fact that the 1949 Geneva Conventions clearly indicate that the activities of the Protecting Power and of the ICRC are complementary and not alternative (see Levie, note 53 supra, at 394-96), it is difficult to understand why the resolution was phrased in the disjunctive.

66. ICRC, Reaffirmation, at 7, where the following appears:

"... Thus the wars of Italy with Abyssinia in 1935, of Japan with China in 1937, of Germany with Poland in 1939, of Russia with Finland in the same year, and of Japan with the United States in 1941, opened without a formal declaration of war."

To the same effect see ibid., at 79-88.

67. Common Article 9/9/10 is the basic provision of the four 1949 Geneva Conventions relating to the activities of the ICRC. Paragraph 3 of common Article 10/10/11, concerning replacements and substitutes for Protecting Powers, permits the ICRC to offer its services to perform the humanitarian functions of the Protecting Power when there is no Protecting Power. This is probably the basis upon which the ICRC has acted in the post-1949 Geneva Conventions era. One of its more successful recent efforts was in connection with the Honduras-Salvador conflict. 9 Int'l Rev. Red Cross 493-96 (1969), 10 ibid., 95-105 (1970).

68. A/7720, para. 226. Italy suggested considering the possibility of "delegating" authority to the International Red Cross, so that that body may, in the case of armed conflict, ensure that its own representatives are continually present in the belligerent countries throughout the duration of the conflict." Ibid., at 79 of the original United Nations document. A somewhat similar suggestion was made by the group of experts convened by the ICRC. ICRC, Reaffirmation 107.


71. Surprisingly enough, it has apparently been permitted to function with virtually no restrictions in Israel for the protection of both prisoners of war and of civilians in the occupied territory. See, for example, 8 Int'l Rev. Red Cross 18-19 (1968); 9 ibid., 173-76, 417-19, 438, and 540. On the other hand, the United Nations has encountered some difficulty in making an investigation of the treatment of civilians in the occupied territory because of the Israeli position that the resolution calling for it was biased and one-sided. However, even the International Conference of the Red Cross found it necessary to express concern about the plight of these people. 9 Int'l Rev. Red Cross 613 (1969).

72. The Report also makes a suggestion to this latter effect. A/7720, para. 217. It is entirely possible, however, that some States, notably Switzerland and Sweden, which did yeoman work as Protecting Powers during both World Wars, would not wish to shoulder these additional, and potentially controversial, problems. This would make the solution herein suggested all the more necessary. It might be appropriate to cover this eventuality by providing for a possible division of functions, where desired, the Protecting Power, if there be one, performing the traditional functions with respect to wounded and sick, prisoners of war, and civilians, and the substitute performing the function with respect to the conduct of hostilities.

73. In ICRC, Reaffirmation 89-90, it is ascribed to the fact that many of the conflicts since 1949 have been of an internal nature; but what of Korea, the Yemen, Vietnam, the Middle East, etc.? In none of these conflicts has there been a Protecting Power.

74. In A/7720, para. 216, it is suggested that a new organ be created which could "offer its services in case the Parties do not exercise their choice." For the reasons already advanced, it is not believed that any system other than one which operates automatically will constitute a solution to the problem.

75. This calls for selection by one State, acceptance by the State so selected, and approval by the State on whose territory the Protecting Power is to operate. See Levie, note 53 supra, at 383.

76. The Report (A/7720, para. 218) makes two suggestions with respect to the legal effect of the designation of a Protecting Power or of an international organ as a substitute therefor: (1) that the Protecting Power, or the substitute, should be considered as an agent of the international community and not merely of one belligerent State; and (2) that the designation, being solely humanitarian in purpose, should have no legal consequences. The first comment is already true under the 1949 Geneva Conventions, although the term "Parties to the Convention" is deemed appropriate rather than "international community" (see Levie, note 53 supra, at 362-63); and the second comment might well be accomplished by the use of a provision such as that appearing in the last paragraph of common Article 3 of the 1949 Conventions: "The application of the preceding provisions shall not affect the legal status of the Parties to the conflict." This provision was eventually applied during the French-Algerian conflict of the late 1950s and early 1960s.

77. The ICRC experts were also of this opinion. ICRC, Reaffirmation 89 and 91. Had such an international body heretofore existed with such powers and duties, there could have been immediate investigations of allegations of such charges as the use of gas in the Yemen by the United Arab Republic, of bacteriological agents in Korea by the United Nations Command, etc. In this regard, see Joyce, Red Cross
International 201 (1959). In fact, it is probably safe to say that under these circumstances many such allegations would never be made in the first place.

78. The subject is there discussed at length. A/7720, paras. 216-225. Despite the cautious defense of the use of a political organization as a Protecting Power, made in the last paragraph cited, it would appear that, for the reasons hereinafter stated (see text in connection with note 46 supra), the creation of a new, non-political body is basically the position taken by the Report.

79. See note 57 supra. The reservations were justified. The article, in effect, authorizes the Detaining Power to unilaterally select a substitute for the Protecting Power. The reservations would merely require agreement on the part of the Power of Origin, as in the case of the selection of the Protecting Power itself. See note 75 supra. Of course, were it a Party to the new convention which we are discussing, it would have agreed in advance to the filling of the void by the ICEHRAC.

80. I Final Record 201. Concerning this resolution, see the text in connection with note 45 supra.

81. Once again, of course, the ICEHRAC would need a fairly large operational staff, including many specialists, to serve as its eyes and ears to collect and sift evidence. But this is no more than an administrative problem which should present no insurmountable difficulty.

82. There is no reason whatsoever why, under appropriate legal safeguards (see note 76 supra), these provisions could not be applied to internal conflicts, and to conflicts of "national liberation," and are frequently much more sanguinary than are international conflicts. "Nigeria/Biafra: Armed Conflict with a Vengeance," loc. cit., note 64 supra.

83. The question will undoubtedly be asked immediately why the present discussion concerning the elimination of chemical and biological weapons does not include nuclear weapons. That matter has been, and continues to be, one of the major subjects of discussion at the meetings of the nuclear powers themselves and at the meetings of the Conference of the Committee on Disarmament (formally the Eighteen-Nation Committee on Disarmament). The status of these various discussions and the reason for the stalemate which has now existed for more than a decade is well known. It could not conceivably serve any useful purpose for this paper to make a proposal for the banning of nuclear weapons, with or without inspection. Probably only some scientific breakthrough will solve that problem. In the meantime we have what some call "the equilibrium of dissuasion." I.C.R.C., Reaffirmation 50.

84. The Geneva Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases and of Bacteriological Methods of Warfare, signed at Geneva on June 17, 1925 (94 L.N.T.S. 65; 25 Am. J. Int'l L. Supp. 94 (1931)), uses the term "bacteriological." Because scientific developments since 1925 have indicated the possible use in armed conflict of various living organisms (e.g. rickettsiae, viruses, and fungi), as well as bacteria, the more inclusive "biological" is now very generally used. In this regard see the Report of the Secretary-General based on the Report of the Group of Consultant Experts, United Nations Document A/7575/Rev. 1, Chemical and Bacteriological (Biological) Weapons and the Effect of Their Possible Use (United Nations publication, Sales No.: E. 69, I. 24), paras. 17-18 (hereinafter cited as UN, CB Weapons), and Article I of the British Draft Convention, note 130 infra, which refers to "microbial and other biological agents."

85. In the Foreword to the Report of the Secretary-General (see UN, CB Weapons, note 84 supra, at viii), U Thant quoted as follows from his 1968 Annual Report:

"...The question of chemical and biological weapons has been overshadowed by the question of nuclear weapons, which have a destructive power several orders of magnitude greater than that of chemical and biological weapons. Nevertheless, these too are weapons of mass destruction regarded with universal horror. In some respects, they may be even more dangerous than nuclear weapons because they do not require the enormous expenditure of financial and scientific resources that are required for nuclear weapons. Almost all countries, including small ones and developing ones, may have access to these weapons, which can be manufactured quite cheaply, quickly and secretly in small laboratories or factories . . . ."

86. A comparatively short list of some of the works in this area will be found in UN, CB Weapons, note 84 supra, at 99. To that list should certainly be added McCarthy, The Ultimate Folly: War by Pestilence, Asphyxiation, and Defoliation (1969).

87. Mention need be made of only two authoritative forums where numerous discussions of this subject have taken place: the United Nations, where it has been discussed at length both in the First Committee and in the General Assembly; and the United States Congress where Representative Richard D. McCarthy and others similarly concerned have not allowed the matter to pass unnoticed. See, for example, N.Y. Times, Nov. 19, 1969, p. 9, col 1.

88. One author makes the rather pessimistic evaluation that this recent concern "is perhaps an index of the growing role of such weapons in military preparations." Brownlie, "Legal Aspects of CBW" in Rose (ed.), CBW: Chemical and Biological Warfare 141, 150-51 (1968). [This collection hereinafter cited as Rose, CBW].
89. For a short but comprehensive history of the use or alleged use of chemicals in warfare, from the Peloponnesian Wars to Korea, see Kelly, "Gas Warfare in International Law," 9 Mil. L. Rev. 3-14 and passim (1969).

90. Declaration of St. Petersburg of 1868 Renouncing the Use, in Time of War, of Explosive Projectiles, 1 Am. J. Int'l L. Supp. 95 (1907).

91. See note 14 supra.

92. 1 Am. J. Int'l L. Supp. 157 (1907). The United States did not sign or ratify this Declaration.

93. See note 9 supra.


95. 3 Malloy (Redmond) Treaties 3116; 16 Am. J. Int'l L. Supp. 57 (1922).

96. A/7720, para. 53.

97. See note 84 supra.

98. A/7720, note 31 and Annex II, Tables I and II.

99. This latter reservation preserves the right to use chemical and bacteriological agents as a reprisal for their first use by the enemy. Some writers would not even permit this use; and there is no doubt that an alleged reprisal can be the excuse for a first strike.


102. As the former Assistant Secretary of Defense, Carter Burgess, later said: "It has been reported that following the Korean conflict there were no flies in China. Allegedly, the 'germ warfare' propaganda of the Red Chinese was so effective that it incited a universal attack on these insects by the Chinese people."


105. See note 26 supra.

106. See, for example, A/RES/2162B (XXI), 5 December 1966; A/RES/2454A (XXIII), 20 December 1968; and A/RES/2603B (XXIV), 16 December 1969.


108. See, for example, Brownlie, note 88 supra, at 143-44, and O'Brien, "Biological/Chemical Warfare and the International Law of War," 51 Geo. L.J. 1, 36 (1962).

109. There are 68 Parties to the 1925 Geneva Protocol after 45 years, compared to 125 Parties to the 1949 Geneva Conventions after 20 years.


111. See note 52 supra.


113. On February 14, 1970, President Nixon ordered the destruction of all toxins which had been produced for weapons purposes. St. Louis Post-Dispatch, Feb. 15, 1970, p. 1, col. 1. These apparently had been overlooked in the original announcement.

114. It would almost seem as though, after years of exploiting the fact that the United States had not ratified the Protocol, the Soviet Union is now determined to place roadblocks in the announced intention of the United States to accept a prohibition on the use of biological weapons. In addition to its usual adamant objection to any treaty calling for verification procedures, it is now apparently insisting on a new agreement which would replace the 1925 Protocol and simultaneously ban both chemical and biological weapons, rather than retaining the old agreement and supplementing it with a new treaty prohibiting biological weapons as proposed by the British and accepted by the United States. St. Louis Post-Dispatch, Feb. 17, 1970, p. 2A, col. 1. This latter dispute appears to be one of procedure, rather than substance, and the Soviet approach might well afford the opportunity for the necessary clarifications discussed immediately below.

115. ICRC, Reaffirmation 58. See also A/7720, para. 201.


117. UN, CB Weapons, para. 20.


119. Ibid. See also UN, CB Weapons, para. 374.

120. Sidel, "Napalm," in Rose, CBW 44, 46.
121. Ramundo, Peaceful Coexistence 138-39 (1967). It was recently reported that a suit had been filed against the Dow Chemical Co., formerly the chief manufacturer of napalm for the United States armed forces, alleging that Dow had supplied the United States with "various types of chemical, biological, bacteriological, incendiary and asphyxiatory weapons" and asking that it be designated a "war criminal." St. Louis Post-Dispatch, Feb. 3, 1970, p. 2A, col. 4. There is a certain resemblance to The Zyklon B Case, 1 L. Rep. Tr. War Crim. 93.


123. ICRC, Reaffirmation 62-63; Brownlie, note 88 supra, at 150. The U.S. Army Field Manual 27-10, The Law of Land Warfare (1956) states (at para. 18) that while its use is not violative of international law, it should not be employed in such a way as to cause unnecessary suffering.

124. A/7720, para. 200. See also Sidell, note 120 supra.

125. Galston, "Defoliants," in Rose, CBW 62; UN, CB Weapons, para. 311. The scientific problem is not far removed from the current problem in the United States arising out of the use of DDT and other pesticides.

126. Nor has it been satisfactorily established that defoliants will not in time adversely affect human health.

127. "... The tremendous capabilities of modern weapons of mass destruction, however, make the objective of their effectively sanctioned abolition much more urgent than was weapons abolition at the time of the Hague Conference."


128. UN, CB Weapons, para. 375; ICRC, Reaffirmation 57; Mezelson, note 101 supra, at 169. See also the U Thant statement, note 88 supra; and Mallison, note 127 supra at 324.

129. Malek, "Biological Weapons," in Rose, CBW 48, 56; Humphrey, "Ethical Problems: Preventing CBW," ibid., at 157, 159. The Stockholm International Peace Research Institute is currently engaged in a project to determine "whether it is technically possible to discover production of biological agents on a scale of military relevance."


132. The possible use of nuclear weapons, whether delivered by ballistic missiles or by bombers, merely emphasizes the gravity of the problem under discussion.

133. Lauterpacht, note 13 supra, at 365-66.

134. See note 4 supra.

135. Regulations attached to the Fourth Hague Convention of 1907, note 9 supra.

136. Stone, note 1 supra, at 621, footnote 91.


138. Tracer bullets were used, apparently without objection from either side, despite the 1868 Declaration of St. Petersburg (note 90 supra) which outlawed explosive and incendiary projectiles. Apparently it is generally accepted that this prohibition does not apply to aircraft. See Article 18 of the Hague Air Rules, note 140 infra.

139. Spaight, note 100 supra, at 41-42 and 244-50. The disillusioned will say that successful weapons are now outlawed and seldom restricted in their use.


141. Quoted in Spaight, note 100 supra, at 257. These limitations on air bombardment were included in a resolution adopted by the Assembly of the League of Nations on September 28, 1938. Ibid., at 258.

142. Actually, the Germans had already bombed Warsaw, obliterating much of it.

143. Pictet, note 13 supra, at 30. After the Germans had disregarded the principles of the military objective and of the protection of the civilian population in Norway, the Netherlands, and Belgium in April-May 1940, the British announced that they reserved to themselves "the right to take any action which they consider appropriate in the event of the bombing by the enemy of civilian populations." Spaight, note 100 supra, at 264-266.

144. Pictet, note 13 supra at 30.

145. Lauterpacht, note 13 supra, at 366, footnote 1. Of course, in a somewhat parallel situation, where both sides had followed substantially the same course of conduct, unrestricted submarine warfare, the International Military Tribunal refused to assess any punishment on this score against German Admiral Doenitz.

146. Spaight, note 100 supra, at 277. And he does not stand alone. Pictet, note 13 supra, at 39.
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147. The former use of the term "undefended" as a basis for determining that an area is not subject to attack appears to have lost significance—and properly so.

148. Lauterpacht, note 13 supra, at 364.

149. A/7720, para. 131.

150. ICRC, Reaffirmation 39; Spaight, note 100 supra, at 43-44 and 47.

151. Lauterpacht, note 13 supra, at 369. See also Pictet, note 13 supra, at 38; and "Nigeria/Biafra: Armed Conflict with a Vengeance," note 64 supra, at 10-11. The Report, A/7720, para. 144, points out that terror bombing "is more frequently than not counterproductive."

152. See Spaight, note 100 supra, at 43.

153. A/7720, paras. 140-141. Of course, for propaganda purposes, even if every bomb dropped by an attacking airplane landed in the middle of a tank park, the enemy will mention only the deaths of a woman and her two children—who had had the misfortune to pick that time to hawk bottled pop to the tank crews.

154. Spaight, note 100 supra, at 47. Other apt quotations from this authoritative, but frequently controversial, work are (at 43):

"The position was that, for the first time, belligerents had at their disposal an instrument enabling them to strike not only at the user of armaments but at the makers of armaments. The possession of such an instrument had the effect of calling in question the hitherto accepted distinction between armed forces and civilians, between combatants and noncombatants..."

"It was a praiseworthy principle in the circumstances of the pre-air age of war, but it was not one which could survive the arrival of the bombing aircraft. For, objectively considered, it was not a logical principle..."

155. Ibid. 254, 270, 271.


158. Unfortunately, as stated by one author, "(i)t is far easier to moralize about air attacks on civilians, and to offer soothing verbal solutions, and to dismiss target area bombing as probably unlawful, than to frame rules for mitigation of human suffering with some hope of belligerent observance amid the realities of war."

Stone, note 1 supra, at 627.

159. A/7720, paras. 145-150.

160. Note 25 supra.

161. Note 26 supra.

162. ICRC, Reaffirmation 73.


164. Based on Article 10 of the ICRC Draft Rules.

165. Based on one of the ICRC principles.

166. Based on one of the ICRC principles.


Some Major Inadequacies in the Existing Law Relating to the Protection of Individuals During Armed Conflict

Addendum

This Working Paper for the 14th Hammarskjold Forum conducted by the Association of the Bar of the City of New York was written in 1970. Since that time there has been no change in the status of the first problem mentioned, the absence of "a method for the automatic determination that a particular State relationship requires the application of the law of armed conflict." Article 1 of the 1907 Convention (II) Relative to the Opening of Hostilities requires a "previous and explicit warning, in the form either of a declaration of war, giving reasons,
or an ultimatum with conditional declaration of war.” This provision has become a nullity. Article 2 of the four 1949 Geneva Conventions for the Protection of War Victims provides that these Conventions become applicable “in all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them.” The lack of value of this provision was demonstrated during the hostilities in Vietnam where the North Vietnamese disregarded it by merely asserting that all captured American personnel were war criminals captured in flagrante delicto. There have been innumerable international armed conflicts since 1970 but in not one instance has there been a formal declaration of war or any other affirmative action indicating that the international law of war was deemed applicable. The last known compliance with the cited provision was when the Soviet Union declared war on Japan on 8 August 1945 during World War II.

The second item discussed was “the need for a method which will ensure the presence in the territory of each State party to an armed conflict of a Protecting Power or an international body with adequate authority to police compliance with that law.” The international community had an opportunity to correct this defect but failed miserably, The Diplomatic Conference which met in Geneva from 1974 to 1977 before completing the 1977 Protocol Additional to the Geneva Conventions of 8 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I) drafted provisions (Article 5 thereof) which once again mean that there will usually be no Protecting Power and no substitute for a Protecting Power. (The United States has not as yet ratified that Protocol.) In the conflict in Korea there were no Protecting Powers. The International Committee of the Red Cross (ICRC) offered its services to both sides. The United Nations Command (UNC) accepted the offer and the ICRC made over 100 inspections of UNC prisoner of war facilities. The North Koreans and the Chinese Communists never even deigned to answer the ICRC’s offers. There is nothing in the 1977 Protocol I which will change that situation as every action is dependent upon the willingness of the Party to the conflict. Thus, if the system for designating a Protecting Power fails, as it probably will, a sort of lottery system may be instituted, but its value is dubious; and the ICRC may offer its services as a substitute, but the functioning of the ICRC as such a substitute “is subject to the consent of the Parties to the conflict”—a consent which countries like North Korea and the People’s Republic of China, and a number of other nations, will not give.

The third item discussed was “the need for a complete and total prohibition of the use in armed conflict of any and all categories of chemical and biological weapons.” An addendum to the article entitled Nuclear, Chemical and Biological Weapons in this collection updates the subject.
The final item discussed in that paper was “the need for a complete code governing the use of air power in armed conflict with emphasis on the outright prohibition of any type of bombing which has as its basic target the civilian population.” Some progress has been made in this area. Article 51(2) of the 1977 Additional Protocol I prohibits making the civilian population the object of attack, Articles 54(2) and 56 thereof contain provisions aimed at protecting the civilian population from attack. Article 2(1) of the Protocol on Prohibitions or Restrictions on the Use of Incendiary Weapons (Protocol III to the 1980 Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons which may be Deemed to be Excessively Injurious or to have Indiscriminate Effects) specifically prohibits attacks on the civilian population by incendiary weapons; and Article 2(2) thereof prohibits attacks on a military objective located within a concentration of civilians by air delivered incendiary weapons. (The United States has not as yet ratified this Protocol, although it has ratified the convention and Protocols I and II thereof.)