

THE LAWS OF AIR WARFARE: ARE THERE ANY?

Hamilton DeSaussure

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

as much as possible."¹ The U.N. General Assembly Resolution then invited the Secretary General, in consultation with the International Committee of the Red Cross, (ICRC) to study how to better apply the existing laws of war for "the better protection of civilians, prisoners and combatants and for the further limitation on certain methods and means of warfare." All states were asked to ratify the Hague Laws of War Conventions of 1899 and 1907, the Geneva Gas Protocol of 1925, and the Geneva Conventions of 1949. Pursuant to that resolution, the Secretary General circulated for comment, among member states and international organizations, a report entitled "Respect for Human Rights in Armed Conflicts."² His report contains a historical survey of the existing international agreements pertaining to the laws of war, urging those states

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

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

This resolution was the result of a UNESCO-convened Conference on Human Rights in Teheran in April of 1968.³ There, Resolution XXIII was adopted by the Conference with only one abstention and no votes against it. (Referred to below as the Teheran Declaration.) It was couched in stronger terms than later used in U.N. Resolution 2444, referring to the widespread violence and brutality of our times, including "massacres, summary executions, tortures, inhuman treatment of prisoners, killing of civilians in armed conflicts and the use of chemical and biological means of warfare including napalm bombing."

With the background of U.N. Resolution 2444 and the Teheran Declaration, the ICRC decided to expand its scope of

studies to include consideration of the laws of war as they apply to the regulation of the conduct of hostilities. A committee of experts of the ICRC convened in February 1969 and formulated a report entitled "Reaffirmation and Development of the Laws and Customs Applicable in Armed Conflicts."⁴ It was the culmination of their observations made during the last 20 years of perennial armed conflicts, especially in Korea, the Middle East, and Vietnam and the Yemen. As a result of this, the Red Cross believed it necessary to consider the means of combat and the relation between combatants themselves.

The increased emphasis given to the regulation of armed conflict by the ICRC and the U.N. General Assembly makes it all the more necessary for air planners and flyers to know their rights and duties under the laws of war.

There is no dearth of opinion that in the matter of air warfare there are, in fact, no positive rules. Air Marshal Harris, the famous chief of the British Bomber Command in World War II, wrote shortly after its conclusion that "In the matter of the use of aircraft in war, there is, it so happens, no international law at all."⁵ This view has been echoed in more recent times by well-known international lawyers who have specialized in studies on the laws of war. "In no sense but a rhetorical one," wrote Professor Stone in 1955, "can there still be said to have emerged a body of intelligible rules of air warfare comparable to the traditional rules of land and sea warfare."⁶ Professor Levie labeled the nonexistence of a code governing the use of airpower in armed conflict one of the major inadequacies in the existing laws of war.⁷ While the view of Air Marshal Harris reflects a certain hopeless attitude toward any attempt to regulate this important form of warfare, the views of Professors Stone and Levie contain pleas to focus effort on its regulation and clarification.

There are only two provisions of existing international legislation which were drafted with the regulation of air warfare specifically in mind. One was the 1907 Hague Declaration prohibiting the discharge of projectiles and explosives from balloons "or by other new methods of a similar nature." It was never ratified by major powers. With the introduction of the aircraft into World War I, with its capacity for guided flight, the declaration became an open nullity.

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

One official and ambitious attempt was made to completely codify the laws of air warfare after World War I. At the Washington Conference on the Limitation of Armaments in 1921, a resolution was unanimously approved by the United States, the United Kingdom, France, Italy, and Japan which called

for a commission of jurists to convene at The Hague to study the subject. Legal experts from those countries and the Netherlands met there from December 1922 to February 1923 and framed an all-embracing codification of the subject intended to be a compromise between the necessities of war and the requirements of the standards of civilization.⁸ Their rules were never ratified, even by the parties to the Conference, but do reflect the only authoritative attempt to set down completely the air warfare rules. Prior to World War II, certain nations did indicate their intent to adhere to these rules, notably Japan in 1938 in their China campaign, but they had little influence in World War II.

This paucity of conventional rules has left airmen stranded for authoritative and practical guidance. It is true the airman is subject to the general laws of war to the same general extent as the sailor and the soldier, but where does he look for special rules governing his air activity? The British *Manual of Air Force Law* dispensed with any effort to formulate air warfare rules by stating in a footnote that, in the absence of general agreement, it was impossible to include in that manual a chapter on air warfare.⁹ The authoritative *U.S. Army Field Manual (FM 27-10)* on *The Law of Land Warfare*, apart from references contained in the Geneva Conventions of 1949 respecting the status of aircrews as prisoners of war and medical aircraft, only refers to air activities in time of armed conflict in four instances. What a skimpy source of guidance for the inquiring airman when one notes the extensive scope of intended guidance of the draft Hague Rules of 1923 where such subjects as the marking of aircraft, aerial bombardment, the use of incendiary and explosive bullets were covered. Today's U.S. Air Force crewman about to enter a combat theater is still referred officially to the *Army Field Manual* for official instruction.

The U.S. Air Force did undertake the

task of drafting guidance on the subject of air warfare in 1956. After 4 years of research, a draft manual on the subject was finalized. However, the decision to release it for publication has never been made. The draft Air Force manual has been made available to the students of the Air Force Academy and the Air War College for research and discussion purposes. Because of its unofficial nature, however, it has not been available to aircrews and air planners. Its influence even within the U.S. Air Force is relatively slight.

Three dilemmas confront the regulation of air hostilities. The Air Force draft, no more than the Hague Rules of 1923, can not fully lay down the existing rules of air combat without a certain concordance among the major air powers and among belligerents as to how these dilemmas should be resolved. The first of these dilemmas is the permissible scope of the military objective. Inherent in this problem is whether in air warfare there is any realistic distinction to be made between combatants and noncombatants. Also, is there a middle category, the so-called quasi-combatant (the industrial work force of the enemy) within the military objective? U.N. Resolution 2444 stated the civilian population should not be the object of attack *as such*. Are civilians the direct object of attack when vital industrial and strategic targets are in the immediate vicinity, and how much bombing transfers civilians from the indirect-object category to a direct-object one? The late Professor Cooper, in a lecture to the Naval War College in 1948, termed the definition of the military objective and the bombing of the civilian population the most crucial issue confronting any attempt to regulate this subject. The Secretary General does recommend an alternative to arriving at an acceptable and agreed-upon definition of the military objective.¹⁰ This would be an enlargement of the concept of safety or protected zones to

include specified areas where women, children, elderly, and sick could be located with immunity from air attack. Such areas would contain no objectives of military significance nor be used for any military purpose. They would have to be specially and clearly marked to be visible from the air. To be effective there would have to be an adequate system of control and verification of these zones. This verification would be carried out either by some independent agency, such as the ICRC, or by one or more nonbelligerent nations acting in the capacity of a protecting power. There is ample precedent for the creation of such protected areas in the 1949 Geneva Humanitarianism Conventions for the protection and treatment of prisoners of war, civilians, and the sick and wounded. The Sick and Wounded and the Civilian Conventions contain as annexes, draft agreements hopefully to be signed by potential belligerents before the outbreak of hostilities.¹¹ These agreements would provide for the establishment of hospital and safety zones. Such zones, under the Geneva Conventions, are to comprise only a small part of the belligerent's territory, be thinly populated, and be removed and free from all military objectives or large industrial or administrative establishments. They may not be defended by military means (which presumably includes the defense by anti-aircraft weapons, tactical fighter aircraft, or guided weapons). Such a concept of protected zones, but incorporating a broader category of the civilian population to be sheltered, is an alternative to the concept of the undefended town or the open city which has not found favor in actual practice. There are some who do not believe the establishment of safety zones for potentially large segments of the civilian population is practicable. To be effective it is thought these zones would require thousands of square miles which would create insurmountable logistics problems and inevitably cause

the areas to be used unlawfully for military advantages.¹²

Perhaps, however, the immunized areas need not be so broad. If one grants that the industrial work force, those actively engaged in work directly sustaining the war effort of the belligerent, really have no entitlement to immunity, the physical breadth of the protected areas could be reduced. Such zones are an alternative to the continually frustrating efforts to pin down the elusive scope of the military objective. The Hague Commission of Jurists' definition of the military objective is a case in point. Military forces; military works; military establishments or depots; factories engaged in the manufacture of arms, ammunition, or distinctively military supplies; lines of communication or transportation used for military purposes, only, could be bombed from the air.¹³ This was hardly broad enough to cover the enemy's marshaling yards, his industrial centers, his shipping facilities, and his means of communication. Moreover, cities, towns, and villages not in the immediate neighborhood of ground operation were prohibited under the Hague Rules. This proved too limited where cities and towns, far removed from the ground action, were known to be vital to the enemy's war effort.

The totality of World War II saw both the Allies and the Axis expand considerably on the military objective. The German Luftwaffe virtually destroyed Warsaw, Rotterdam, and Coventry by air very early after the opening of hostilities. The first thousand-bomber raid launched by the British on Cologne the night of 30 May 1942 destroyed 12 percent of the city's industrial and residential sections and caused 5,000 casualties. It set the tone for the whole British night-bomber offensive against the Third Reich; the concept that area bombing of important industrial centers was best suited to bring Germany to her knees.

U.S. forces, with their superior navi-

gational aids, did seek to confine their targets to individually selected and identified factories, oil refineries, industrial plants, and shipyards in Europe. However, in the Far East, Tokyo and Yokohama were saturated with explosive and fire bombs because of the so-called Japanese shadow industries; that is, the production of war parts in the individual home. The first night air raid by U.S. superfortresses in the Far East occurred on 9 March 1945 over Tokyo, and it is reported that 280 of these bombers destroyed several square miles of the center of the city.¹⁴ In the Korean conflict, precision bombing was again emphasized by the Air Forces (mostly U.S.) of the U.N. Command. The repair ships, dockyards, and military warehouses of North Korea were bombed without significant damage to surrounding cities. In the Vietnamese conflict, however, area of saturation bombing has been reintroduced, this time to penetrate the vast jungle canopy which serves as a protective layer for the network of Vietcong and North Vietnamese storage areas, communication and transportation complexes, and command posts.

The charters for the trial of major war criminals for Europe, and for the Far East, define the wanton destruction of cities, towns, or villages or devastation not justified by military necessity as a war crime. Inhumane acts committed against the civilian population are defined as a crime against humanity.¹⁵ Several high German Air Force officers were indicted for war crimes, notably Field Marshal Goring, and Generals Milch and Speidel. However, none were tried for their part in air operations. It has been argued indiscriminate air attacks were not charged against Axis leaders because both sides participated equally in such attacks. However, other authorities claimed that the evidence gathered did not substantiate a charge of wanton destruction in air attacks. In perhaps the only dis-

cussion of strategic air bombardment by a war crimes tribunal in Europe, a U.S. military tribunal stated "A city is bombed for tactical purposes; communications are to be destroyed, railroads wrecked, ammunition plants demolished, factories razed, all for the purpose of impeding the military. In these operations it inevitably happens that nonmilitary persons are killed."¹⁶ Ranking German officers such as Field Marshal Kesselring testified at Nuremberg that Warsaw, Rotterdam, and other cities bombed by the Luftwaffe in the early stages of the war all contained military objectives.

The ICRC has drawn a distinction between occupation or tactical bombardments and strategic ones. In the former category are those air raids closely allied to ground fighting. The experts suggested the institution of open localities for the protection of civilians. In strategic bombardments the experts believed the military objective must be sufficiently identified by the attacking force and that any loss to civilian life must be proportionate to the military advantage to be secured. Whenever the principle of proportionality might be violated, the combatant should refrain from the attack. The experts fail, however, to adequately define what constitutes a military objective just as did the Hague Commission of Jurists. It is manifest they do not endorse strategic area bombing. They cite the proposition that to "attack without distinction, as a single objective, an area including several military objectives at a distance from one another is forbidden whenever elements of the civilian population or dwellings, are situated in between."¹⁸ While neither the Red Cross nor the Secretary General condone area bombing, belligerents are not likely to forego a valuable strategic option for air attacks which has proved so helpful in securing a more favorable and quicker termination of the conflict. Like the philosophy of defining the

military objective exclusively, formulations which leave the military incapable of accomplishing its assignments are likely to be ignored, hence the dilemma between the expression of hopes of experts and the actual practices of belligerents.

There does seem to be ground for compromise. Conceding that thousands of square miles could not be enclosed within safety zones, an extension of the hospital zones formulated in the Geneva Humanitarian Conventions of 1949 seems both desirable and feasible. Moreover, the Hague Convention for the Protection of Cultural Property provides another logical extension.¹⁹ This convention is the product of an intergovernmental conference convened at The Hague in 1954. (The United States has not yet ratified, but 57 states have become parties.) Whereas the Geneva Conventions of 1949 are for the protection of persons, the 1954 Hague Convention preserves cultural property. It is of special significance to airmen for several reasons. First, it equates "large industrial centers" to "military objectives" by providing that places of refuge for movable cultural property must be placed at an adequate distance from either. Second, it broadens the concept of the military objectives by providing that this term include, *by way of example*, airports, broadcasting stations, establishments engaged upon work of national defense, ports, railway stations of relative importance, and main lines of communication. Third, it recognizes that the principle of imperative military necessity deprives cultural property of its protection, and finally, that in no event shall such cultural property be the subject of reprisal raids.

All of these are important realistic principles fully applicable to air combat. The use of places of refuge, clearly marked and identified, for the protection of cultural property could be the opening for enlarging the categories of objects and buildings to be immunized.

In the same way the extension of hospital zones is the start for increasing the areas for the protection of civilians. Certainly the enlargement of safety zones for property and people is compatible with area as well as precision bombing techniques. Neither concept requires the destruction of identified protected areas placed at an adequate distance from large industrial centers and essential military targets. This is not to suggest that all facilities and categories of the civilian population outside protected areas would be within the domain of legitimate air attack. They would not enjoy, however, the same absolute immunity conferred within the immunized zones. Although not subject to direct attack outside established sanctuaries, their proximity to assigned military targets would expose them to injury and suffering which could not thereby be ascribed as *indiscriminate* or *wanton*. The doctrine of proportionality would, of course, dictate in any event that the military advantage to be gained by the air attack must not be outweighed by the harm done to civilians and nonessential property. However, this doctrine itself seems to leave a wide margin for the discretion of the attacking force.

The second dilemma inhibiting the development of the laws of air warfare centers around the choice of weapons which may be employed. The historic St. Petersburg Declaration of 1868 which prohibited the use of explosive, fulminating, or inflammable substances in bullets has no application to air warfare.²⁰ Their use by aircraft is for the purpose of destroying the enemy's aircraft and resources and not primarily for the purpose of injuring enemy personnel. For the same reason, the old Hague Declaration of 1899, prohibiting the use of expanding bullets, has not been extended to air operations. There are, however, three general areas where the type of weapon employed has

evoked particular controversy with respect to aircraft.

First is the use of atomic weapons. There is substantial legal opinion that such weapons are unlawful. This view has been reflected by U.N. Resolution 1653 (XVI) which specifically provided that "Any state using nuclear and thermo nuclear weapons is to be considered as violating the Charter of the United Nations, acting contrary to the laws of humanity and as committing a crime against mankind and civilization." The Secretary General notes, however, that the legal effect of this resolution is subject to question because of the divided vote, 55 for, 20 against, and 26 abstentions. The ICRC experts were divided on how best to handle the question of nuclear use. They were unanimous that such weapons were incompatible with the expressed aim of the Hague Conventions to reduce unnecessary suffering. The present U.S. view as expressed in the *U.S. Army Field Manual* on the laws of war is clear. It provides that the use of such weapons does not violate international law in the absence of any customary rule or international convention.²¹ The Red Cross also gave tacit recognition to this viewpoint at Vienna in 1965 by providing that the "General principles of the laws of war apply to nuclear and similar weapons."²²

The second general area arousing controversy relates to the use of fire weapons and specifically napalm. Again the official U.S. position as reflected in the *U.S. Army Field Manual* is that their employment against targets requiring their use is not in violation of international law with the caveat that they are not to be used in a way to cause unnecessary suffering to individuals.²³ This view is in opposition to the Teheran Resolution of May 1968 which expressly condemned napalm bombing. Some ICRC experts viewed the use of incendiaries as prohibited by the Geneva

Protocol of 1925 because of its asphyxiating effects while others considered it was the *use* to which incendiaries were put which determined its lawfulness. U.N. Resolution 2444 does not specifically condemn the use of incendiaries, including napalm, but the Secretary General states the regulation of inflammable substances clearly needs an agreement. Certainly, the extensive resort to incendiaries in World War II, Korea, and in Vietnam has demonstrated the military efficacy of this weapon. It is reasonable to conclude that only by special international agreement will their use ever be restricted, controlled, or abolished.

The third area of general uncertainty relates to the use of weapons calculated to affect the enemy through his senses (including his skin), the use of chemical and bacteriological weapons. Included in this category are the use of non-injurious agents, such as tear gas, and also the use of herbicides and defoliants. All of these possible means of warfare center around the Geneva Gas Protocol of 1925 and its precise compass.²⁴ The Protocol prohibits in war the use of asphyxiating, poisonous, or other gases and all analogous liquids, materials, or devices and, further, the use of bacteriological methods of warfare. More than 65 states are formally bound by this agreement. In 1966 the U.N. General Assembly passed a resolution by 91 in favor, none against, and four abstentions that called for the strict observance of the Protocol by all states and asking those members who had not done so to ratify it.²⁵ No one is against this Protocol, but its correct interpretation finds nations in disagreement. Some believe the use of incendiaries and napalm are prohibited under the Protocol, many believe that riot control agents such as tear gas may not be employed, and there is a strong view that even herbicides fall within its purview.

The U.S. position on these various

views was stated by the President and the Secretary of State. On 19 August 1970 the President, in submitting the Protocol to the U.S. Senate, stated that "The U.S. has renounced the *first use* of lethal and incapacitating chemical weapons and renounced *any use* of biological or toxic weapons."²⁶ The Secretary of State noted the Protocol had been observed in almost all armed conflicts since 1925 and that the United States understanding was that the Protocol did not prohibit the use in war of riot control agents and chemical herbicides. Further, that smoke, flame, and napalm are not covered by the Protocol's general prohibition.²⁷ This view is not generally shared. In a resolution adopted by the General Assembly on 16 December 1969, the Assembly declared that any chemical agents of warfare (gaseous, liquid, or solid) employed because of their direct toxic effects on man, animal or plants—and any biological agents of warfare intended to cause death in man, animals or plants are contrary to the generally recognized rules of international law embodied in the Geneva Protocol of 17 June 1925.²⁸ This Resolution was overwhelmingly adopted 80 for, only three against (Australia, Portugal, and the United States), and 36 abstentions.

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

Early in World War I there was some question as to the enemy airman's status, but no case appeared in which

they were denied prisoner-of-war status. In World War II, however, the concept began to be advanced by some that airmen, unlike their brothers in arms on land and at sea, were not necessarily entitled to be humanely treated. In 1943 Himmler ordered all senior SS and police officers not to interfere between German civilians and English and United States flyers who baled out of their aircraft. In 1944 Hitler ordered Allied aircrews shot without trial whenever such aircrews had attacked German pilots or aircrews in distress, attacked railway trains, or strafed individual civilians or vehicles. Goebbels referred to Allied airmen as murderers and stated it was "hardly possible and tolerable to use German police and soldiers against the German people when the people treat murderers of children as they deserve."²⁹

Although captured Allied airmen were largely accorded prisoner-of-war status by German authorities, there is enough evidence of mistreatment in the reports of the major and minor war criminals in Europe to reflect the beginnings of what could be a disturbing precedent. In the Far East, Allied airmen also suffered from deprivation of their prisoner-of-war status. Two of the U.S. aircrews which participated in the famous Doolittle air raids on Tokyo and Nagoya from the U.S. naval carrier *Hornet* were captured by Japanese troops when they made forced landings in mainland China. At the time of their capture there was no Japanese law under which they could be punished. This was remedied 4 months after their capture by the passage of the Enemy Airmen's Act of Japan. This act made it a war crime to participate in an air attack upon civilians, private property, or conduct air operations in violation of the laws of war. The law was made retroactive to cover those U.S. airmen already in their hands. In October 1942, 2 months after the passage of the Enemy Airmen's Act, three of the Doo-

little raiders were sentenced and executed. The Judgment of the International Tribunal for the Far East reflects many instances thereafter where captured Allied airmen were tortured, decapitated, and even deliberately burned to death.³⁰

The Charters of the International Military Tribunal (Nuremberg) and Tokyo expressly make it a war crime to murder or ill treat prisoners of war. Both General Keitel of the German Army General Staff and Kaltenbrunner of the Gestapo were charged and convicted with mistreating POW's, in part, it appears, for their role in the mistreatment of captured Allied airmen.³¹

However, in the trial of Japanese judges, Japanese judicial and prison officials were convicted on a different basis. The thrust of the holdings of the War Crimes Commissions in these cases was that the U.S. airmen were deprived of a fair trial and not that U.S. airmen, as lawful combatants, were entitled to POW status. Article 4 of the 1949 Geneva Convention on POW's confirmed the entitlement of aircrew members to the benefits of that Convention as well as "civilian members of military aircrews" and "crews of civil aircraft." Article 85 provides that prisoners of war prosecuted under the laws of the detaining power for acts committed prior to capture shall retain, even if convicted, the benefits of that Convention. Compliance with these provisions would prevent the denial of the application of the Geneva POW Convention to airmen, even when convicted during hostilities of alleged war crimes. Unfortunately, most of the Communist bloc countries have entered reservations to article 85. The reservation of the North Korean Government is typical. They refused to be bound to provide POW status to individuals convicted under local law of war crimes under the principles of Nuremberg and the Tokyo Far East International Military Tribunal. The Government of China and the North

Vietnamese reservations are similar. There are many cases of mistreatment of U.S. airmen in the Korean conflict, including the extortion of false germ-warfare confessions for propaganda purposes and their public exposure to hostile crowds under humiliating circumstances. Although all captured U.N. Forces suffered to some extent under the fairly primitive conditions of confinement which existed, it was the airman who was singled out especially for public degradation, exposure to the press, and the forcing of confessions of illegal conduct.

The fate of all prisoners of war held by the North Vietnamese is of present great concern because of the refusal of that Government to consider the 1949 Geneva Convention applicable to that conflict. Of interest to this discussion, however, is the particular light in which they consider captured U.S. airmen. A Hanoi press release with a dateline of 10 July 1966 could well be expected to reflect their official attitude on this issue. A North Vietnamese lawyer writes that U.S. pilots are not prisoners of war but war criminals, that air raids on densely populated areas in South Vietnam and on pagodas and hospitals in both the South and the North were conducted by B-52 bombers and are concrete war crimes under paragraph 6(b) of the Nuremberg War Crimes Charter. He also cites the bombing and strafing of the dike system and other irrigation works and densely populated cities such as Hanoi and Haiphong as war crimes. The North Vietnamese lawyer specifically refers to article 8 of the Nuremberg Charter and states that even though accused airmen have acted strictly on orders given by their government or superiors, they remain individually responsible for the air attacks. The lawyer writes that the North Vietnamese Government "deliberately and clear-sightedly ruled out (protection for) those prosecuted and accused of war crimes and crimes against mankind" in

adhering to the Geneva Prisoner of War Convention. This is why, he concludes, U.S. pilots, who he labels as pirates, saboteurs, and criminals, can be tried, and presumably punished, under the North Vietnamese law of 20 January 1953, which he states relates to crimes against the security of North Vietnam.

It was the unanimous opinion of the Secretary General and the ICRC experts that even where airmen had committed acts which were alleged to be war crimes, they should be treated as prisoners of war.³² Moreover, that an airman behind enemy lines, in distress, and not employing any weapon should be protected from the civilian population. Neither, however, gave any significant attention to the relation of war crimes as defined at Nuremberg and Tokyo to the conduct of air operations. In view of the nonprosecution of any Axis airman or official for their part in air activities, strategic bombing, which by its nature is bound to cause a great deal of suffering and devastation, must be judged on different grounds. Certainly the impermissibility of the defense of superior orders has very questionable application to air combat. The experts and the Secretary both raised this issue in their report by stating that when the attack of the military objective will cause serious loss to the civilian population and is disproportionate to the military advantage, aircrews must refrain from the attack. In recommending that the principles in U.N. Resolution 2444 be introduced into army military instruction, especially for air forces, the experts also stated this is "to remind all the members of the armed forces that it is sometimes their duty to give priority to the requirements of humanity, placing these before any contrary orders they might receive."³³

The airman might properly ask how he is to know, flying off the wing of his flight leader at 30,000 feet at night or over a solid covering of clouds, whether the damage his bombs inflict will meet

the test of proportionality or his bombing will be indiscriminate. Or if he does exercise his individual judgment on a particular raid and refrains from the attack by leaving the formation, what proof can he give when a charge is brought by his own authorities for misbehavior before the enemy. It would seem the prosecutors and judges who presided at the war crimes trials in World War II took actual air practice into account when they chose to refrain from the prosecution of Axis airmen or officials for their participation in the conduct of air campaigns.

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

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

target areas, also is a growing possibility.

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

Finally, the status of the aircrewman, who all too frequently serves as the focal point of the opposing belligerent's indignation and charges that the laws of war have been violated, must be restated. It is the airman who is especially vulnerable to mistreatment and denial of his rights under the Geneva POW Convention of 1949, because of the inherent destructive capacity his mission may produce and because he brings the misfortune of war to the enemy hinterland. Clarification of the Nuremberg principles as they apply to him, the airman, and withdrawal of reservations making possible his treatment as a war criminal are badly needed. His legitimate combatant status must be reaffirmed. That neither the weapons prescribed for his use nor the targets selected for his particular mission operate to remove him from the ranks of lawful combatants must be uniformly recognized. With agreement on these issues, useful, practical instructions to aircrews on their duties and limitations and on their rights and expectations, under the laws of war, more practicably follow.

FOOTNOTES

1. United Nations, General Assembly, "Respect for Human Rights in Armed Conflicts," A/Res/2444 (New York: 19 December 1968).

2. "Respect for Human Rights in Armed Conflict," United Nations, Report of the Secretary General, A/7720 (New York: 20 November 1969).

3. Final Act of the International Conference on Human Rights Resolution XXIII, Teheran, April-May 1968.
4. "The 21st International Conference of the Red Cross," *International Review of the Red Cross*, November 1969, p. 600.
5. Arthur Harris, *Bomber Offensive* (New York: Macmillan, 1947), p. 177.
6. Julius Stone, *Legal Controls of International Conflicts* (New York: Rinehart, 1954), p. 609.
7. H. Levic, *Major Inadequacies in the Existing Law of Armed Conflict*, Report to the New York City Bar Association, 1970.
8. See Rapporteur's summary, John B. Moore, *International Law and Some Current Illusions* (New York: Macmillan, 1954), p. 182-288.
9. The Air Ministry, *Manual of Air Force Law* (London: H.M. Stationery Office, 1944), p. 2.
10. "Respect for Human Rights in Armed Conflict," A/7720, p. 49-50.
11. "Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field," (TIAS 3362), *U.S. Treaties, etc.* (Washington: U.S. Govt. Print. Off., 1956), v. VI, pt. 3, p. 3115-3216; "Geneva Convention Relative to the Protection of Civilian Persons in Time of War" (TIAS 3365), *U.S. Treaties, etc.* (Washington: U.S. Govt. Print. Off., 1956), v. VI, pt. 3, p. 3517-3695.
12. See Levic, p. 45.
13. Hague Rules of Air Warfare (1928), art. 24(2).
14. See *Air Force Magazine*, v. XXVIII (1945), p. 34.
15. *International Conference on Military Tribunals*, Report (Washington: U.S. Govt. Print. Off., 1949), p. 423. A similar tribunal was established in the Far East.
16. The *Einsatz-Gruppen* case, *Law Reports of the Minor War Crimes Tribunals*, v. XV (1947), p. 114-145.
17. *Trial of the Major War Crimes Tribunals*, v. IX (1947), p. 337.
18. "Report of the International Committee of the Red Cross Experts," p. 044.
19. Convention of The Hague for the Protection of Cultural Property in the Event of Armed Conflict (14 May 1954), Report in "Report of the International Committee of the Red Cross Experts," as annex V, p. 016.
20. But see J.M. Spaight, *Air Power and War Rights* (London: Longmans Green, 1947), p. 198. The Declaration of St. Petersburg is reproduced in "Report of the International Committee of the Red Cross Experts," as annex I.
21. U.S. Dept. of the Army, *The Law of Land Warfare*, FM 27-10 (Washington: U.S. Govt. Print. Off., 1956), p. 18.
22. International Committee of the Red Cross Resolution, Vienna 1965, 20th Conference of the International Committee of the Red Cross.
23. U.S. Dept. of the Army, p. 18.
24. Geneva Protocol of 17 June 1925 for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases and of Bacteriological Methods of Warfare, reprinted in the "Report of the International Committee of the Red Cross Experts," as annex III.
25. United Nations, General Assembly, "Question of General and Complete Disarmament," A/Res/2162 (New York: 5 December 1966).
26. "President Nixon's Message," *The Department of State Bulletin*, 7 September 1970, p. 273.
27. *Ibid.*
28. "Question of Chemical and Bacteriological (Biological) Weapons," Res. 2603, in United Nations, General Assembly. *Resolutions Adopted by the General Assembly during Its Twenty-Fourth Session*, A/7630 (New York: 1969), p. 16; see Report of First Committee, A/7890.
29. For the views of Axis leaders on the status of downed airmen, see *Reports of the Trial of the Major War Criminals before the International Military Tribunal, Nuremberg* (1949), v. XXVI, p. 275; v. XXVII, p. 346; and v. XXXVIII, p. 314.
30. See *Judgment of the International Military Tribunal for the Far East* (1948), ch. VIII, p. 1025.
31. *Trial of the Major War Criminals*, v. I, p. 289-292.
32. See "Report of the International Committee of the Red Cross Experts," p. 77.
33. *Ibid.*, p. 78.