THE LAW OF AIR WARFARE AND THE TREND TOWARDS TOTAL WAR

Until the First World War, it was probably possible to imagine that the overall trend in the evolution of the rules of warfare was characterised by a slow, but steady advance of the standard of civilisation, and that the field of the necessities of war was correspondingly shrinking. Since then, it has become painfully apparent that, in spite of some headway made in limited fields, far more powerful forces work in the opposite direction. Among these, technological advances in means of destruction stand out as the most potent inducement to disregard conflicting considerations. Scientific "progress" has transformed two-dimensional into three-dimensional war and tends to merge again this division into one of amorphous and total warfare.

I—THE "AUTONOMY" OF AIR WARFARE AND THE LAW OF AIR WARFARE

A comparison of the functions which are fulfilled by the three types of warfare may assist in putting into proper perspective the legal significance of the advent, and the already incipient decline, of air warfare as a separate form of warfare. So long as the object of war is not the elimination of the enemy State as a distinct subject of international law, that is to say, *debellatio*, the constant strategic object of war is the imposition of the victor's will on the government of the defeated enemy State. If everything else fails, this can be attained only by occupation of the enemy territory. Whether conducted by land, sea or air, operations of this kind must culminate in land warfare. Sea and air operations may be carried out in direct support of each other or of operations on land. They may also have as their immediate objective the command of the sea or air. Yet, both are but means to an end.

Command of the sea means control of the sea communications to one's own advantage and for the purpose of their denial to the enemy. Similarly, command of the air means immunity from attack by air of the territories under one's own control and capacity to destroy any chosen objects in enemy-controlled areas. Both sea and air warfare are eminently suited to weaken enemy resistance but, by themselves, they are not necessarily able to achieve the strategic objective of war. Applied to air warfare in particular, this implies that, from the point of view of the object of warfare, the distinction between strategic, or independent, and tactical, or dependent, air warfare is misleading.

In the light of the one and only object of warfare which, in the typical case, may be termed strategic, both independent and dependent air warfare are necessarily tactical. While the former is auxiliary in the first degree, the latter is auxiliary in the second degree. The advent

of long-range ballistic missiles appears to herald a further stage in this technological *crescendo* : shrinkage of the autonomy of any of these forms of warfare and growing relativity of the significance of the distinction between the various dimensions of warfare.

Still, at least for the time being, awareness of the functions fulfilled by the three forms of warfare assists in better comprehension of essential differences between the two traditional types of rules of warfare and a reasoned assessment of the value of analogies from either of these spheres to the third dimension. In the typical case, warfare on land takes place in the territories of the belligerent States, and neither in *territorium nullius* nor in the territories of neutral Powers. By way of contrast, the high seas, the primary orbit of sea warfare, are *res extra commercium* and the simultaneous object of peaceful and warlike uses. Thus, up to a point, it is true that, in shaping the rules which limit the necessities of maritime warfare, the interests of neutral Powers are a more important factor than in land warfare. From this angle, air warfare is more akin to land warfare.

II—THE GOVERNING RULES

The legal rules, if any, governing air warfare must belong to one of three categories. They may be rules which either are applicable to all forms of warfare, or they may have been extended by analogy from land or sea warfare to air warfare or they are germane to air warfare. To group such rules as may exist under these headings would have the merit of establishing their exact degree of autonomy. This presentation of the material would, however, obscure the main issue in a realistic exposition of the rules of warfare: the balance attained in each of the spheres of warfare between the competing demands of the standard of civilisation and the necessities of war. For this purpose, it may be helpful to pray in aid the typology of the rules of warfare sketched at least in outline elsewhere.[1]

In the case of the first type of rule, the standard of civilisation holds undisputed sway for the very reason that it does not clash with any necessities of war. If these are defined in the broadest sense as the strategic objects of war, no need exists to single out any particular form of warfare, for all of these serve this overriding purpose. Still, the rules under this head are rules which govern air warfare, although not air warfare alone. The rule by which civilian hospitals used for their appointed purposes are immune from being singled out intentionally for purposes of attack serves to illustrate this type of rule.[2]

1. See the writer's *Legality of Nuclear Weapons* (1958), p. 30.
2. Articles 18 and 19 of Geneva Convention IV of 1949.

The second type of rule, in which requirements of the standard of civilisation override conflicting necessities of war, exists in the law of air warfare in the forms of both general and specialised rules. The rules by which the use of certain means of warfare, such as poison, poisoned weapons, gas and bacteriological warfare is prohibited, apply as much to air warfare as to any other type of warfare. The origin and scope of the rules on the prohibition of poison and poisoned weapons in warfare, as well as the language employed in a number of post-1919 treaties dealing with chemical and biological warfare, suggest that the treaty provisions on these topics are merely declaratory of international customary law.[3]

A relevant specialised provision is contained in a Declaration adopted at the Hague Peace Conference of 1907 and prohibiting "for a period extending to the close of the Third Peace Conference, the discharge of projectiles and explosives from balloons or by other new methods of a similar nature."[4] The Declaration was signed and ratified by fifteen Powers, among them China, Great Britain, and the United States of America. Four further States adhered to it, and twelve further Powers signed but failed to ratify the Protocol.

The Declaration is intended to apply to air warfare in all its forms. The all-participation clause in it has made it inapplicable in the First and Second World Wars. Moreover, at the time when its duration was limited to the close of the Third Hague Peace Conference, this Conference was generally expected to be convened in 1914.[5] As a matter of fact, this Peace Conference never took place. The efforts made in 1922 and 1923 by the International Commission for the Revision of the Rules of Warfare which, in this field could be regarded as an equivalent, were abortive. [6] Thus, it would not be unreasonable to consider that, in accordance with the *clausula rebus sic stantibus,* the Declaration of 1907 ceased to be in force and, in so far as bombardment from the air is concerned, all parties regained the freedom of action which they could otherwise claim.

A number of relevant rules illustrate the third type of rule by which it is attempted to establish a genuine compromise between the demands of the standard of civilisation and those of the necessities of war. The St. Petersburg Declaration of 1868 is directly relevant.[7] It is arguable that, at the time when this Declaration was made, the prohibition of

3. See further *l.c.* note 1 above, p. 26 *et seq.*
4. Scott, *The Hague Conventions and Declarations of 1899 and 1907* (1915), p. 220.
5. Point 5 of the Declaration embodied in the Final Act of the Hague Peace Conference of 1907, *ibid.*, pp. 29-30.
6. For the Hague draft Rules on Air Warfare of 1923, see Cmd. 2201 (1924), and below, p. 131.
7. Martens, I (18) N.R.G., p. 474.

small projectiles which are explosive or charged with inflammable substances could not possibly have been intended to apply to air warfare. Moreover, the intention of the Contracting Parties is clearly described as fixing the "technical limits at which the necessities of war ought to yield to the requirement of humanity" [8] in such a manner as to exclude merely disproportionate inhumanity.[9] If the use of these weapons is likely to lead to the disablement or destruction of an aeroplane, it is a tenable proposition to hold that such disproportion no longer exists. Finally, the Declaration applies only between Contracting Parties and contains the all-participation clause. With the exception of Great Britain and Russia, the seventeen parties to the Declaration are all exclusively European Powers. Thus, the consistent non-application of the Declaration since the First World War, after some initial inhibitions,[10] is fully explicable on any of these grounds. No need exists to pray in aid either desuetude or reprisal, the maid of all trades.

Relevant clauses of minor significance apart,[11] the only clearly prohibitive rules in the Hague Regulations on Land Warfare of 1907 which require consideration in relation to air warfare, are Articles 25 and 26.[12] By Article 25, the attack or bombardment "by whatever means" of towns, villages, dwellings, or buildings which are "undefended" is prohibited. In accordance with Article 26, the officer in command of an attacking force must, before commencing a bombardment, except in cases of assault, do "all in his power" to warn the local authorities.

Article 26 formed the basis of two still controversial decisions of the Greco-German Mixed Arbitral Tribunal under the Peace Treaty of Versailles of 1919. These are the only international judicial pronouncements on the law of air warfare. In *Coenca Brothers v. Germany* (1927) the Tribunal had to deal with a claim for damages for the destruction of a quantity of coffee as a result of a German air-raid on Salonica in January, 1916. The fact that in the Tribunal's view Germany was

8. Preamble to the St. Petersburg Declaration *(l.c.* note 7 above).

9. This consideration would probably also exclude Article 23 (e) of the Hague Regulations on Land Warfare of 1907 in all instances of air warfare in which, in relation to the strategic or tactical objectives in question, inhumanity could not be considered disproportionate.

10. Cf. Spaight, *Air Power and War Rights* (1947), p. 198 *et seq.*

11. By Paragraph 2 of Article 29, persons "sent in balloons for the purpose of carrying despatches and, generally, of maintaining communications between the different parts of an army or a territory" are excluded from the definition of spies (Scott, *The Hague Conventions*, p. 119) and, under Article 53 *(ibid.*, p. 126) appliances in the air, adapted for the transmission of news, or for the transport of persons or things" may be *seized* by the enemy for the duration of the war, but only subject to compensation when peace is made.

12. Scott, *The Hague Conventions*, p. 117. On Article 27, see below, p. 132.

entitled to defend herself against the occupation of Salonica by the Allied Powers — Greece then still being a neutral State — did not exonerate her from the obligation to observe the rules established by international law. [13] As appeared from the evidence submitted, the bombardment took place without previous warning by the German authorities, the attack was made at night and the zeppelin dropped the bombs from a height of about 10,000 feet.

The Tribunal recalled that "it is one of the principles generally recognised by international law that the belligerents must respect, as far as possible, the civilian population and their property," and fortified itself by Article 26 of the Hague Regulations on Land Warfare of 1907. While, in Article 25, the words "by whatever means" were expressly inserted to include air attacks on undefended towns, the Tribunal held that Article 26 envisaged only measures of land warfare. The *ratio legis*, however, was that the previous warning would afford the authorities of the menaced town the opportunity either of avoiding the bombardment by the surrender of the town or of evacuating the civilian population. As the Article "must be considered as expressing *communis opinio* on the subject-matter," and as "there is no reason why the rules adopted for bombardment in war on land should not equally apply to aerial attacks," the Tribunal arrived at the conclusion that "the bombardment must be considered as contrary to international law."

The Tribunal dealt curtly with the argument that the peculiarities of bombardment from the air, and its different purpose — destruction as contrasted with occupation — excluded announcement in advance, necessarily required the element of surprise, and, therefore, made Article 26 inapplicable: "Even if this allegation of the defendant were true from a military point of view, it would not follow that aerial bombardment without warning is lawful, but, on the contrary, it would lead to the conclusion that these bombardments are generally inadmissible;" for "the darkness of the night, the height of 3,000 metres, and the fact that, during the occupation, Salonica did not keep her lights on, made it impossible to direct the bombs with the accuracy required to spare the private dwelling-houses and the commercial establishments." [14] Thus, applying by way of analogy Article 26 of the Hague Regulations on Land Warfare of 1907, and in accordance with Section 4 of the Annex to Articles 297 and 298 of the Peace Treaty of Versailles of 1919, the Tribunal held Germany responsible for the bombardment and liable to pay an indemnity to the claimants.[15]

In the other case before the Tribunal, *Kiriadolou* v. *Germany* (1930), the claimant's husband was killed by the explosion of a bomb during an air attack in 1916 by German aeroplanes on Bucharest. The Tribunal

13. 7 M.A.T., p. 683, at p. 687.
14. *Ibid*., pp. 687-688.
15. *Ibid*., p. 688.

not only referred to Article 26 of the Hague Regulations on Land Warfare, but also to Article 6 of Hague Convention IX of 1907 regarding Bombardments by Naval Forces in Time of War. This Article provides that "if the military situation permits, the commander of the attacking naval force, before commencing the bombardment, must do his utmost to warn the authorities."[16] The Tribunal attempted further to strengthen its reasoning by an argument drawn from the fields of chemical and bacteriological warfare: "The dispensation from previous notifications would enable aeroplanes and dirigibles to poison the civil population of an enemy town by allowing them to drop at night and without warning bombs filled with asphyxiating gas, spreading death or causing incurable diseases." Finally, it rejected as irrelevant in law the distinction between aerial bombardment for purposes of destruction and occupation or, in other words, between air warfare as auxiliary warfare in the first and second degrees. [17]

In any critical assessment of these decisions, it is probably advisable to jettison from the start two of the reasonings offered by the Tribunal in *Kiriadolou* v. *Germany.* The reference to Article 6 of Hague Convention IX can only weaken the Tribunal's reasoning. The reservation of "military situation permitting" reduces this Article to one of the admonitory rules of Type Four of the rules of warfare.[18] Similarly, the reference to chemical and bacteriological warfare is somewhat pointless. The use of these weapons is either legal or illegal, but does not depend on either notice or the manner of their delivery. It may also be that this passage was influenced by the view, mistaken though it is believed to be, on the clandestine use of poison as the *ratio legis* of the rules on the prohibition of the use of poison and poisoned weapons.[19]

The widespread resort to aerial bombardment without regard for the criteria laid down in Articles 25 and 26 of the Hague Regulations during the First and, even more so, the Second World War[20] has encouraged a critical attitude towards these decisions.[21] Both Articles are liable to be attacked on a number of grounds of varying persuasiveness.

The comprehensive formulation in Article 25 of the attack or bombardment of undefended places "by whatever means" makes it difficult to argue that this prohibition does not extend to air warfare. Actually, the preparatory material offers conclusive evidence to the opposite

16. Scott, *The Hague Conventions,* p. 159.
17. 10 M.A.T., p. 100. See also above, p. 120.
18. See further *l.c.* note 1 above.
19. See further *ibid.*, p. 26 *et seq.*
20. Cf. Garner, *International Law and the World War*, Vol. I (1920), p. 458 *et seq.*, and Spaight, *Air Power and War Rights* (1947), p. 220 *et seq.*
21. For a survey of views expressed by individual writers, cf. Spaight, *l.c.* above, note 37, p. 220 *et seq.*, and Spetzler, *Luftkrieg und Menschlichkeit* (1956), p. 33 *et seq.*

effect.[22] The attempt to admit the relevance of Article 25 for purposes of dependent air warfare, but to exclude it for those of independent air warfare, is hardly convincing. The distinction is metalegal and, moreover, merely between two forms of one and the same type of auxiliary warfare.

If the *ratio legis* is invoked, it is always debatable what it is. It is little in doubt that the *ratio legis of* the prohibition in international customary law of the attack or bombardment of *open* places is that the necessities of war do not call for such operations. It can be occupied by the enemy without attack or bombardment. It may well have been the intention of the parties to the Hague Regulations of 1899 to interpret the corresponding Article in this sense.[23] When, however, in 1907 the crucial words "by whatever means" were inserted in Article 25, it was already apparent that attack and bombardment from the air might extend to places which were undefended because they were in no need of defence, but which, in any case, were not open in the traditional sense of the term.

If, as appears established, this was the intention of the parties, a different and more commensurate *ratio legis* has to be found. It is the assertion, however ineffective, of the overriding needs of the standard of civilisation. Which of the possible functional interpretations of this Article is preferable can be decided by a test which has the authority of international judicial practice behind it. The *ratio legis* selected must not lead to a construction which is incompatible with the declared intention of the parties.[24] This is the protection of any undefended place against attack or bombardment of any kind.

The only argument that remains against the application of Article 25 to aerial attack or bombardment is to throw doubt on the meaning of the word "undefended." It is submitted that it suffices if a word is definable in good faith, and that this is possible in this case. A place is defended if it is capable of opposing an enemy attack. It appears immaterial against which type of warfare existing means of the defence of a place are directed. Admittedly, an enemy may find it difficult or impossible to ascertain the defended or undefended character of a place. This may be a shortcoming of the criterion selected by the parties to the Hague Regulations of 1899 and 1907. It means that, in attacking or bombarding a place which, in fact, is undefended, a belligerent State acts at its own risk.

In the cases before the Greco-German Mixed Arbitral Tribunal, the Tribunal accepted the submission that when Salonica and Bucharest were subjected to bombardment from the air, both these towns were defended

22. *Deuxieme Conference de la Haye. Actes et Documents,* Vol. III, p. 16.
23. Article 25 (Scott, *The Hague Conventions,* p. 117).
24. See further the writer's *International Law*, Vol. I (3rd ed.), p. 520 *et seq.*

towns and, thus, liable to bombardment from the air. The Tribunal held, however, Article 26 of the Hague Regulations applicable by way of analogy. It is doubtful whether the Article could not have been applied directly. Article 26 is in immediate proximity to the Article which provides absolute immunity to undefended places. It lays down the condition in which defended places may be bombarded. Thus, the need to repeat expressly the intention of applying this Article also to aerial bombardment is not self-evident.[25]

At the time when the Article was drafted, the *exception* permitting bombardment without notice in the case of assault applied only to land warfare. This does not, however, exclude the construction that the *rule* applied even then both to land and aerial bombardment.[26] Moreover, since then, assault from the air by means of parachute units has become an established technique. In any case, to liken aerial bombardment as such to assault rather than bombardment is hardly giving to words what the World Court likes to call their ordinary and natural meaning.[27]

Other arguments which tend to reduce Article 26 to an admonitory rule of optional character are hardly more conclusive. It has been attempted to equate the duty of the commanding officer of an attacking force to do "all in his power" to warn the enemy authorities of the impending bombardment with the much laxer formulation of the corresponding Article in Convention IX. It would then, however, require explanation why so different a wording should have been used in Article 26 of the Hague Regulations. A literal interpretation which would give to these words their fullest meaning could rely with better reason on an argument *a contrario* from Article 6 of Hague Convention IX.

The proposition that Article 26 does not stipulate how much time must elapse between notification and bombardment is even less attractive. Like other treaty clauses, this Article must be interpreted reasonably and in good faith.[28] It may be that, in this respect, the German-Greek Mixed Arbitral Tribunal went too far. Even in land warfare, the alternative to the surrender of a defended place is not evacuation of the civilian population, for, in strict law, the attacking force is under no legal duty to ease in this way the task of the defenders. If, however, the *ratio* of this group of Articles is the protection of the standard of civilisation, reason and good faith appear to suggest at least a relatively short interval which enables non-combatants to seek such refuge as they can.

25. So, rightly, Castren, *The Present Law of War and Neutrality* (1954), p. 406.
26. Although the parties to the various Hague Conventions were not necessarily identical, and a party to Hague Convention IV and its appended Regulations could well argue that "by whatever means" in Article 25 applied also to the naval bombardment of land targets, the opposite view could rely with some justice on the existence of a particular Convention (IX) of the same date on this very topic.
27. See further *l.c.* note 24 above, p. 498 *et seq.*
28. See further *ibid.*, p. 488 *et seq.*

The attempt to wave aside the obligations under Article 26 *ab inconvenienti* because of the inherent risks for the attacking air force which compliance with these legal duties would involve can be accepted as little in the law of air warfare as elsewhere. On this point, the International Military Tribunal of Nuremberg has been explicit, and the validity of this reasoning is not restricted to submarine warfare.[29]

It appears that, as in most cases of controversial treaty clauses, preference for one or the other argument does not rest on the professed legal grounds. These rather hide the unstated major premises.[30] Thus, it is only fair to explain the particular attractions which, to this writer, the two decisions of the Greco-German Mixed Arbitral Tribunal hold out.

The Tribunal has done its best to give effect to the declared intentions of the parties to the Regulations, attached to Hague Convention IV of 1907. It has not succumbed to the temptation to whittle down its conclusions in deference to ever growing demands for a free hand from powerful armed services departments in most of the Leviathans. This meant resisting the lures of a type of armchair realism which commends civilians to the ministerial guardians of wartime sovereignty. Finally, the Tribunal ventured to ignore the facile counsels of those who always capitulate before so-called facts. Instead it preferred to state the law as it saw it rather than to run away from this judicial duty because this law might remain ineffective. Thus, these decisions command respect as lonely attempts to uphold the standard of civilisation against wartime sovereignty at its most virulent and destructive. If, in the nuclear age, this display of moral courage and integrity has its quixotic aspects, this is not necessarily a reflection on the members of this Mixed Arbitral Tribunal who were responsible for these decisions.

However this may be, one thing is certain. These decisions are not dated. If anything is in danger of becoming old-fashioned in the age of long-distance rockets with nuclear warheads, it is the distinction between independent and dependent forms of air warfare, and the concept of three-dimensional war.

III — THE TREND TOWARDS TOTAL WAR

Total war means war conducted in such a manner that the necessities of war form the overriding test of belligerent action. If legal rules of warfare exist which set limits to the necessities of war, the doctrine and practice of total war cannot help coming into conflict with international law.

29. Cmd. 6964 (1946), p. 109.

30. See further *l.c.* note 24 above, p. 488 *et seq.*

In the view of the International Military Tribunal of Nuremberg, the concept of total war explained much, if not the whole, of the incredible story of war crimes which was unfolded during the Nuremberg Trials: "The truth remains that war crimes were committed on a vast scale, never before seen in the history of war. They were perpetrated in all the countries occupied by Germany, and on the high seas, and were attended by every conceivable circumstance of cruelty and horror. There can be no doubt that the majority of them arose from the Nazi conception of 'total war', with which the aggressive wars were waged. For in this conception of 'total war', the moral ideas underlying the conventions which seek to make war more humane are no longer regarded as having force or validity. Everything is made subordinate to the overmastering dictates of war. Rules, regulations, assurances and treaties all alike are of no moment; and so, freed from the restraining influence of international law, the aggressive war is conducted by the Nazi leaders in the most barbaric way. Accordingly, war crimes were committed when and wherever the Fuehrer and his close associates thought them to be advantageous. They were for the most part the result of cold and criminal calculation."[31]

If the war crimes indicted and found proven at Nuremberg are analysed in the light of their necessity in terms of total warfare, it emerges that only a relatively small proportion of these acts is attributable to "overmastering dictates" of total warfare in the actual conduct of hostilities. Most of these crimes relate to the breach of legal obligations for the protection of prisoners of war and the populations of occupied territories. Others were committed in the pursuit of long-term policies, which were directed at the permanent subjection, if not elimination, of "inferior" ethnic groups, or were of an outright pathological character.

The only major groups of war crimes which can be linked with any rational conception of total war and have received express attention in the Judgment, are the unrestrained exploitation of enemy man-power and property in the interest of the German war effort. Yet, both the Indictment and the Judgment of Nuremberg remain eloquently silent on the most striking trend towards total warfare in the actual conduct of hostilities during the Second World War: ever-growing reliance on unrestricted bombardment from the air. In view of the publicity which the German air attacks on Warsaw, Rotterdam and Belgrade attained during the War as the prototypes of indiscriminate aerial bombardments, this is especially surprising.

It is a moot point whether these acts are covered by the Tribunal's general finding on the wanton destruction without military necessity of

31. *Nuremberg Judgment* (1946), Cmd. 6964 (1946) p. 44.

cities, towns and villages. [32] In the course of the examination and cross-examination of the accused and other witnesses, the German air attacks on each of these three towns had been expressly mentioned.[33] Reference had also been made to the use of V-weapons by Germany against the United Kingdom in the concluding phase of the Second World War.[34] At the same time, witnesses for the Defence did not fail to respond with *tu quoque* illustrations from the period of Allied supremacy in the air.[35]

The Tribunal's refusal to concern itself with total warfare in this most extreme form is necessarily ambivalent. It is, however, significant that the Tribunal avoided any of the more obvious courses which were open to it. It did not evaluate the available evidence or ask for submission of further evidence on the character of any particular town as an undefended place. It also did not, as it had done in the case of unrestricted German submarine warfare, refuse to assess sentence for breaches of rules of air warfare because it accepted the validity in equity, if not in law, of *tu quoque* defences raised by the Defence. Thus, it appears that the Tribunal went to considerable pains to take evasive action. While it avoided any positive statement on the legality of "independent" air warfare, it certainly did not stamp it illegal.

It even requires consideration whether, by an indirect reference, the Nuremberg Tribunal asserted, at least indirectly, the legality of "strategic" bombing. It dealt with the incitement of the German civilian population to lynching attacks against baled out Allied airmen. In the individual Judgment against the accused Kaltenbrunner, the Tribunal enumerated among his war crimes and crimes against humanity the order which he had issued to the police not to interfere with such attacks. [36] This does not, however, imply that, in the Tribunal's view, Allied saturation bombing was necessarily legal. Assuming that the airmen were prepared to surrender as prisoners of war, they were entitled to protection even if the aerial bombardments in which they took part were illegal;

32. *Ibid*., p. 45. See also pp. 26-7 and 31 and, for a merely factual recital of the bombing of Belgrade by the *Luftwaffe*, *ibid*., p. 33.

    The formulation of the corresponding passage in the Indictment, *Proceedings* (London ed.), Part I, p. 19, appears to strengthen doubts on this point. The preparatory material (United States, Department of State, *International Conference on Military Trials*, *London*, *1945*, 1949) does little to elucidate the subject any further.

    Cf., however, the statements by General Nikitchenko (U.S.S.R.) at the Conference Session of July 4, 1945 *(ibid*., p. 156) and by Mr. Justice Jackson (U.S.A.) at the Session of July 25, 1945, *(ibid*., p. 378) as well as the successive changes in the drafts of the clause which, in the end, became Article 6(b) of the Tribunal's Charter.

33. See, for instance, *Proceedings* (London ed.), Vol. 9, pp. 49 and 52, and Vol. 15, p. 401.

34. *Ibid*., Vol. 17, p. 55.

35. *Ibid*., Vol. 8, p. 264, and Vol. 15, p. 401.

36. Cmd. 6964 (1946), p. 93.

for even an alleged war criminal is entitled to a summary military trial. [37] Thus, the Tribunal's treatment of the illegality of attacks on airmen who had baled out does not provide evidence for, or against, the legality of "independent" or "strategic" air warfare. It is as inconclusive as the Tribunal's silence on the main issue. In order to appreciate more fully the meaning of the self-denying ordinances which the Prosecution and the Tribunals of Nuremberg and Tokyo imposed on themselves, it is necessary to put these Judgments in the context of earlier and subsequent attempts at coping with the problem of aerial bombardment.

The Hague draft rules on aerial warfare of 1923 are the most significant of a number of fruitless efforts during the inter-war period between 1919 and 1939.[38] These Rules aimed at a compromise between the necessities of war, in the enlarged sense in which these could be conceived in an age of air warfare, and the requirements of the standard of civilisation. The Commission realised that, so long as war was still likely to occur, belligerent States would not be content to visualise the necessities of war in terms of a bygone phase of warfare in which the area beyond the immediate combat zones had been immune from attack because it was inaccessible. They did not equate impossibility with humanity, but attempted to forestall indiscriminate aerial bombardment of non-combatants. [39]

The Commission's proposals centred on the concept of the military objective. This was defined as an "object of which the destruction or injury would constitute a distinct military advantage to the belligerent." [40] In two different ways, the experts tried even further to circumscribe lawful aerial bombardment. They attempted to enumerate exhaustively the different types of military objectives : military forces, military works, military establishments or depots, factories constituting important and well known centres engaged in the manufacture of arms, ammunition or distinctively military supplies, and lines of communication or transportation used for military purposes.[41] Moreover, if such targets are so situated that they could not be bombarded "without the indiscriminate bombardment of the civilian population" of places which were in the immediate neighbourhood of the operations of land forces, the bombardment was to be illegal. [42]

37. On the doubts surrounding the indirectly relevant Article 5 of Geneva Convention IV of 1949, cf. Pictet's *Commentaire*, Vol. IV (1956), p. 58 *et seq.*
38. For other and equally Platonic attempts to cope with the problem by way of non-binding resolutions, see Spaight, *Air Power and War Rights* (1947), p. 244 *et seq*., and Stone, *Legal Controls of International Conflict* (1954), pp. 624-625.
39. Article 22 (Cmd. 2201 - 1924, p. 26).
40. Article 24(1), *ibid*., p. 27.
41. *Ibid*., Article 24(2).
42. *Ibid*., Article 24(3).

Thes e draft Regulations were in the tradition of the Hague Conferences. In the Hague Conventions of 1899 and 1907 on Land Warfare[43] and in the Convention of 1907 on Naval Bombardment,[44] the criterion of military usefulness of buildings and installations had received some recognition. It was, however, subordinated to the distinction between defended and undefended places[45] and, in the case of undefended places, admitted only by way of an exception to the prohibition of their naval bombardment. At the same time, the Commission attempted to strike a realistic balance between combatants and non-combatants. This necessarily involved an increased assimilation of war workers to combatants.

Contrary to the 1899 and 1907 prototypes of the rule covering military objectives, which belonged to Type Four of the Rules of Warfare — because their "as far as possible" clauses were legally unverifiable — the Commission of Experts meant to attain a true compromise between the necessities of war and the postulates of the standard of civilisation. In case of doubt, they even gave preference to the latter. This sufficed to condemn these draft rules permanently to the limbo of *lex ferenda.* While the Powers were prepared to pass pious resolutions on this topic at sessions of the Assembly of the League of Nations and disarmament conferences,[46] they were not willing to exchange the state of uncertainty of the law as it stood for one of more definite commitments, however realistic.

If this is the prevailing mood on the international scene, the choice of available legal patterns is somewhat limited. It is only between frank avowal of unwillingness to limit belligerent discretion and purely admonitory rules. Whenever the Third Dimension is involved, this attitude appears to pervade even codifications which, in other respects, clearly serve the ends of the standard of civilisation. In the post-1945 era, the Geneva Conventions of 1949 illustrate this point.

The Article dealing with medical aircraft in the Geneva Convention of 1929 on Wounded and Sick in Armies in the Field has been widely and deservedly praised as the most important innovation made in this Convention. [47] In order to achieve immunity from enemy attack, medical aircraft must comply with three conditions. They must be distinctively marked, used exclusively for the evacuation of wounded and sick and the transport of medical personnel and material and, in the absence of special and express permission, they must not fly over the firing line, enemy territory or territory occupied by the enemy.

43. Article 27 (Scott, *Hague Conventions*, p. 118).
44. Articles 2 and 5, *ibid.*, pp. 157-9.
45. See above, p. 126 *et seq.*
46. See *l.c.* note 39 above.
47. Article 18, (Cmd. 3940 (1931), p. 36).

In the corresponding Article of Geneva Convention I of 1949, the rule on the immunity of medical aircraft is qualified by the proviso that this applies only to aircraft "flying at heights, times and on routes specifically agreed upon between the belligerents concerned."[48] While, in the Convention of 1929, the necessity for permission was a locally defined exception to a wide rule, in the Convention of 1949, the rule as such has been removed from Category Three to Category Four of the rules of warfare or, in other words, from the sphere of law to that of sovereign discretion.

Similarly, the hospital and safety zones provided in Convention IV of 1949 need not be respected by the enemy unless, in time of peace, the High Contracting Parties or, upon the outbreak and during the course of hostilities, the parties concerned have concluded "agreements on mutual recognition of the zones and localities they have created."[49] The same applies to neutralised zones in operational areas.[50] Thus, in fact, these provisions merely state the obvious. Belligerent States are as free as they always have been to exempt by agreement areas under their control from the regions of war. The only immediate value of these provisions is that the rules laid down in the appended draft agreement on hospital and safety zones anticipate some of the typical problems which, in the contingencies contemplated, may arise. They constitute apposite, but merely optional patterns of conduct.

The significance of this draft agreement, the Geneva Conventions of 1949 in general and subsequent efforts on similar lines as, for instance, the Hague Convention of 1954 on the Protection of Cultural Property in the Event of Armed Conflict[51] lies in a different direction. Together, these works of codification offer strong, though indirect, evidence of the maximum of concessions that, in the nuclear age, service departments are still likely to make to the requirements of the standard of civilisation.

Seen from this angle, the volume of these conventions stands in inverse ratio to their significance. Binding commitments are essentially limited to Type One of the rules of warfare.[52] As, in this type of rule, clashes between the necessities of war and the demands of the standard of civilisation hardly arise, behaviour covered by these rules is responsive to legal regulation. Conversely, in spheres in which any actual or potential conflict between these antagonistic considerations does arise, wartime sovereignty either asserts itself uncompromisingly or permits itself to be but apparently restrained. In such a situation, rules of Type

48. Article 36 of Convention I (Cmnd. 550 (1958), p. 24). See also Article 39 of Convention II *(ibid.*, p. 70) and Article 22 of Convention IV *(ibid.*, p. 228).
49. Article 14 *(ibid.*, p. 224).
50. Article 15 *(ibid.*, p. 224). See also Article 19 on the discontinuance of the protection of hospitals *(ibid.*, p. 226).
51. Cmd. 9837 (1956).
52. See above, p. 121.

Two, which give priority to the standard of civilisation,[53] and of Type Three, which provide a true compromise between the two antagonistic principles,[54] acquire a certain scarcity value.

Everything depends on how widely the necessities of war are conceived. On the surface, it looks as if Articles 31 and 33 of Geneva Convention TV had imposed severe curbs on the necessities of war. According to Article 31 "no physical or moral coercion shall be exercised against protected persons, in particular to obtain information from them or from third parties." Moreover, by Article 33, "collective penalties and likewise all measures of intimidation or of terrorism are prohibited." Contrary to the much more narrowly formulated Articles 44 and 50 of the Hague Regulations on Land Warfare of 1899 and 1907,[55] these Articles apply both to the territories of the parties to a conflict and to occupied territories. These wide formulations are, however, as deceptive as is the title of Convention IV. These Articles belong to Part Three of Convention IV. But, for purposes other than those of Part II, protected persons do not include members of the civilian population who happen to be nationals of the party in whose territory they find themselves. Thus, these Articles offer no protection in the case of acts of terrorism against the civilian population of the type which the Tokyo Tribunal had considered, that is to say, in the case of acts which serve the purpose of making the civilian population induce its own government to submit to the enemy.[56] These Articles are not concerned with the issue of total war against the enemy civilian population.

The extent to which the civilian population may still expect immunity from warfare can be gauged perhaps indirectly from a comparative analysis of the Geneva Conventions of 1949 and the Hague Convention of 1954. These Conventions provide some indication of the hesitation of the parties to subscribe without qualifications to the doctrine of total war. It is implied in these codifications that, in the conditions of present-day warfare, the scope of persons and places exposed to the hazards of warfare must be considerably enlarged. At the same time, an attempt is still made to draw some, however elastic and subjective, distinctions between legitimate and illegitimate objects of warfare.

The classical rationalisation of this distinction into one between combatants and non-combatants had already become blurred during, and after, the First World War. Apparently, the most that can still be expected is a definition in negative terms of persons and places which are immune from war.

53. See above, p. 122. Contrast Article 34 of Geneva Convention I of 1949 (Cmnd. 550 (1958), p. 68) with Article 11(2) of the Hague Convention of 1954 concerning Cultural Property (Cmd. 9837 (1956), p. 14).
54. See above, p. 122.
55. Scott, *The Hague Conventions*, pp. 123-4.
56. *Tokyo Judgment* (1948), Part B, Chapter VIII, p. 396.

Persons who are directly connected with military operations or the production of war material are not eligible for protection under the draft agreement attached to Geneva Convention IV.[57] They are treated as legitimate objects of warfare. Similarly, a considerable number of localities and, by necessary implication, persons of any description in these localities fall into the same category. What these are becomes apparent from the definition of safety zones in the draft agreement.

Safety zones must comply with four conditions. They must constitute only a small part of the territory of the Power establishing the zones. They must be thinly populated in relation to the possibilities of accommodation. They must be "far removed" and free from all military objectives or large industrial or administrative establishments. Finally, they must not be situated in areas likely to become important for the conduct of war.[58] The last two of these requirements appear to be of more general significance. They include five, and partly overlapping, criteria of targets which are considered legitimate objects of attack — places in proximity to (1) military objectives, (2) large industrial or (3) administrative establishments and (4) actual or (5) likely theatres of war.

The conditions under which refuges for cultural property are eligible for registration under the Regulations for the Execution of the Hague Convention of 1954 are slightly less exacting. It suffices that they are not used for military purposes and are situated at an "adequate" distance from any "important military objective constituting a vulnerable point." In an enumeration which is not meant to be exhaustive, this type of military objective is illustrated by aerodromes, broadcasting stations, establishments engaged upon work of national defence, ports or railway stations of relative importance and main lines of communication.[59]

In the light of these sombre realities, the traditional distinction between combatants and non-combatants appears somewhat dated and even the addition of a category of quasi-combatants unduly euphemistic. The retreat of the standard of civilisation before the onslaught of the necessities of war is perhaps more adequately expressed in a threefold distinction between the following classes of persons:

(1) Persons connected with military operations or the production of war materials. Whether members of the armed forces or civilians, these have become legitimate objects of warfare.

57. Article 2 (Cmnd. 550 (1958), p. 308).
58. Article 4, *(ibid*., p. 308). In Article 19 of Convention I *(ibid*., p. 16) and Article 18 of Convention IV *(ibid*., p. 226), the term "military objective" is also used without further elucidation of its meaning.
59. Article 8(1) (Cmd. 9837 (1956), p. 13). See also *ibid*, under (3).

(2) Persons in target areas which consist of actual or likely theatres of war and objectives of the types illustrated in the Convention of 1949 and 1954. Irrespective of military or civilian status or occupation, persons in these areas are exposed to any hazards which, on grounds of necessities of war, befall these localities.

(3) Persons who do not fall into Category (1) and are sufficiently remote from areas in Category (2). They are the only persons who may still expect immunity from acts of warfare.

What is the significance of this threefold distinction? Technological developments of unparalleled destructive potentiality have brought about a situation in which almost any place in territories controlled by belligerent States can be transferred into an operational area. At the same time, the increasingly impersonal character of mechanised warfare tends to reduce to vanishing point inhibitions on the part of combatants against the use of weapons which, by their nature, are largely indiscriminate.

When such a situation has been created, the standard of civilisation must necessarily fight a losing battle against the necessities of war on the level of the rules of warfare. If it is to reassert itself, this is possible only on another level. In the conditions of mid-twentieth century warfare, the conduct of major wars increasingly jeopardises the survival of civilisation. The confident assertion in the Judgment of *Nuremberg* (1946) that the law of war is "not static, but by continual adaptation follows the needs of a changing world" [60] must not be read as a complacent affirmation of an automatic, and always commensurate, process of self-adjustment of the laws of war to the needs of international society. It can be accepted only as a challenge to stem the growing trend towards total war before the sands are running out.

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60. Cmd. 6964 (1946), p. 40.

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