COMITÉ INTERNATIONAL
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Commission of experts
for the legal protection of civilian populations and victims of
war from the dangers of aerial warfare and blind weapons

Commentary
on the
provisional agenda

Geneva
March 1954
COMMISSION OF EXPERTS
FOR THE LEGAL PROTECTION OF CIVILIAN POPULATIONS AND
VICTIMS OF WAR FROM THE DANGERS OF AERIAL WARFARE AND
BLIND WEAPONS

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The Explanatory Note sent to Experts suggests the following Agenda for the meeting:

1. General introductory discussion as to the desirability of enquiries with a view to defining or determining the rules relating to war from the air, with the object of increasing the protection of defenceless persons.

2. Enquiry, in the light of humanitarian requirements and having regard to the realities of war, into the rules which are, or should be, applicable to the conduct of bombing from the air (including bombing by blind weapons or engines guided from a distance);
   a. Study of the treaty provisions in force (in particular of the Hague Regulations of 1907),
   b. Study of the provisions with regard to war from the air embodied in draft Conventions not sanctioned by Governments (such as the "Hague Rules" of 1923), or in Resolutions of international organisations (such as the Resolution adopted by the 19th General Assembly of the League of Nations in 1938),
   c. Enquiry into other possible standards for the governance of bombing from the air or at any rate the guidance of Governments in the matter.

3. Study of the existing possibilities of taking proceedings to prevent or ascertain breaches of the rules resulting from paragraph 2, with a view to ensuring respect for the same.

4. Study, if necessary, of the form (declaration, Convention, etc.) to be given to the fundamental rules and proceedings elaborated by the Committee, with a view to facilitating as far as possible their recognition at a subsequent stage and practical application by Governments.
The International Committee of the Red Cross (ICRC) made it clear that this was only a provisional programme, given as a general guide; it will be for the Experts alone to decide on the final programme for their discussions.

The Committee feel that it may be helpful to send them the present commentary on the Provisional Agenda, also as a general guide. For each item, we have tried to enumerate, and comment briefly upon, certain questions which may arise and to which an answer should, as far as possible, be given.

The list of questions for consideration will be found overleaf. It cannot, of course, be regarded as exhaustive. Similarly, the remarks accompanying it cannot be taken as representing the ICRC's final standpoint. Nor need the Experts necessarily deal with the questions in the order in which they are given.

In the present Commentary we shall have occasion to refer from time to time to the Collection of constitutional Texts and Documents prepared for the Commission of Experts. In these pages we shall use the abbreviation "C. of T." when referring to it.
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1. - GENERAL DISCUSSION AS TO THE DESIRABILITY OF THE ENQUIRY

It would appear necessary for a meeting of this nature to open with a general discussion. This will give the Experts an opportunity of explaining their views on the subject as a whole, without, of course, entering into matters of detail, which will come up for discussion under subsequent Items on the Agenda.

The general discussion should deal in particular with a series of interlocutory questions. The fact that the ICRC convened this meeting of experts shows that it has very definite views on certain of these questions - views which it will have occasion to explain in part in the following pages. It would however be particularly glad to know the Experts' opinion on the subject. Without pretending to give a complete list of such questions, may we draw attention to the following:

Lack of adequate legal protection.

In initiating the present study, the ICRC started from the fact that the civilian population had been insufficiently respected during the Second World War, and that it was necessary to try to improve matters.

Was this state of affairs due, in particular, to a lack of precisely defined rules for their protection in the domain with which we are concerned? The Committee of legal experts convened by the ICRC in 1931 had already expressed the opinion that the international Conventions then in force failed to offer the civilian population a sufficient guarantee against the dangers of aerial warfare (C. of T., p.66). It is often said, moreover, that no definite rules exist in this field, and doubt is even sometimes thrown on the very principles underlying the laws of war.

Under these circumstances, is one not forced to conclude, as the ICRC has done, that this failure to respect the population can be explained, in part at least, by lack of adequate legal protection, and that the latter must therefore be reinforced and defined in more precise terms? The ICRC would be glad to know the opinion of the Experts on the above question, without, however, entering in detail into the actual idea of what the civilian population represents (as this will be dealt with under item 2 - see p.8 below).

Or must we, on the other hand, conclude that even given an increase in legal protection, any modern war must necessarily lead to the annihilation of a large part of the civilian population?
Absence of restrictive rules as an element favouring the maintenance of peace.

One sometimes hears it said that, in view of the great development of certain aerial weapons, the absence of any restrictive rules, or their inadequacy, is one of the only things which discourage States from engaging in a new war. It is suggested that fear of the horrors of a conflict in which air operations were not governed by any rules whatsoever would be a factor which would on the whole be favourable to the maintenance of peace. Viewing the matter from this angle, there is even a tendency in some quarters to regard any attempt to introduce such rules, or render them more explicit, as inopportune.

It is obvious that the ICRC cannot, by its very nature, accept any such argument. In its eyes, fear as a factor in the maintenance of peace is a mere hypothesis which may lead to dangerous inaction, whereas the duty of doing everything possible to diminish the evils engendered by war is for it an imperative and immediate necessity. It would however be glad to know the opinion of the Experts on the effect of this factor.

Is it possible to establish rules in view of technical developments in the design of arms?

The failure of the efforts made after the First World War to produce rules governing bombing from the air has often been explained as being mainly due to the necessarily premature character of a code applied to a form of warfare then in the first stage of its development.

It is believed by some writers that the methods used in aerial warfare have now acquired sufficient stability, in certain connections at any rate, to permit the establishment of a code of rules governing bombing. Others consider that the development of certain weapons reopens the whole question of the methods to be used, and consequently makes the success of any attempt to produce rules problematical from the outset. What is the opinion of the Commission of Experts?

Even if the technical developments of the means of waging war make any code of rules of doubtful practical value at the present time, is it not advisable for the most essential principles to be proclaimed and reaffirmed (as the ICRC considers they should be) independently of the progress made in the development of weapons?
Is it possible to prohibit completely all bombing from the air?

We sometimes hear it suggested that in view of the difficulty of establishing a restrictive set of rules, it would be better to aim at the complete prohibition of all bombing from the air. This idea was, for example, put forward at the Meeting of Experts convened by the ICRC in 1931 (C. of T., p.68). In proposing to consider at the present meeting whether it is possible to establish precise rules applicable to bombing from the air, the ICRC really started from the premise that a complete prohibition of all bombing — certainly the simplest solution — would, at the present juncture, meet with such resistance that it would appear preferable to make an effort in other directions. It would, however, be interesting to know the Experts' views on the possibility of arriving at such a solution at the present time.

The provisional answer given to this question naturally in no way prejudices the opinion which the Experts or the ICRC may form, at the close of the discussions, as to the necessity of such a prohibition or, at least, of the complete prohibition of given types of bombing (bombing with certain weapons, in certain zones, etc.).

Military value of indiscriminate bombing.

Several particularly authoritative writers and publicists affirm that the practically indiscriminate bombing which took place during the last world war had very little effect on the ultimate result of the war. Others, on the contrary, regard it as a more crucial factor.

The mere existence of some doubt on the subject is a matter of the gravest concern to the ICRC; for it implies that thousands of civilians, who should in any case have been spared, have perished although their loss was not even, perhaps, absolutely necessary to obtain the desired military result. But at the same time, the existence of this element of doubt gives us reason to hope that it will be possible to arrive at a set of rules which are acceptable to everyone.

The Experts will doubtless have occasion to consider this question in connection with several of the headings under Item 2 of the Agenda (in particular those concerned with military objectives), but it may, perhaps, be well to know their general views on the subject from the outset.
2. ENQUIRY INTO THE RULES APPLICABLE TO BOMBING FROM THE AIR

There are several ways in which this enquiry could be carried out - all of them leaving something to the discretion of those concerned. The method proposed here is aimed at making as complete a survey as possible of the fundamental rules relating to bombing from the air, taking them, so to speak, in their order of validity: first, the rules contained in international Conventions now in force (ignoring the clausula si omnes); then those which occur most frequently in the attempts at codification after 1918; and finally, a third section containing certain material which might form the subject of precisely defined rules. The discussions will doubtless, enable this third part of the survey to be expanded.

The method selected may have the drawback of presenting separately questions which are inter-related. It will be noted, in particular, that those bearing on the establishment and the prevention of infractions are reserved for Item 3 of the Agenda, in spite of their being sometimes linked very closely with the basic questions. But in studying all these problems the Experts will certainly find no difficulty in re-establishing the necessary relationship between them.

a) Treaty provisions in force.

It is mainly the Hague Regulations (some of whose provisions are generally recognized as applying to aerial warfare) and the Geneva Conventions, which call for consideration under this heading. On the other hand the Hague Declarations of 1899 and 1907 prohibiting the dropping of projectiles from balloons are no longer relevant and can be ignored.

The following questions arise in connection with these provisions:

Definition of "bombing from the air".

This is a matter of terminology. Article 25 of the Hague Regulations uses the words "bombadment, by whatever means ...", which admittedly apply also to bombing from aircraft. In the attempts at codification after the First World War mention is generally made of aerial bombardment.

Do the Experts consider that this latter term is wide enough to apply to bombardment with the guided or self-propelled
missiles which made their appearance at the end of the last world war, such missiles not being necessarily launched from the air, but in most cases from the ground? It would appear essential that the rules relating to bombing from the air, which are to be examined here, and possibly reaffirmed, should be considered as applying also to bombardment with missiles of the above nature.

The same question arises in regard to shelling with very long-range artillery, for strategic purposes, like the shelling of Paris during the First World War.

Prohibition of the bombardment of undefended localities.
(Article 25 of the Hague Regulations - C. of T., p.3).

Many authorities consider this rule as having now lapsed following the introduction of the notion of a military objective. Yet President Roosevelt referred to it in his appeal of 1 September 1939 (C. of T., p.37), and it was included once again in the International Law Association's draft text (C. of T., p.16). The idea of an "undefended" town or, more often, of an "open town", and of the immunity attaching to them, is moreover firmly rooted in the public mind.

The controversy aroused by the attacks in 1939 and 1940 on certain towns, regarded by some as being "defended" and by others as benefiting by the immunity provided for in Article 25, surely shows the desirability of precisely defining the notion of an "undefended" town in the light of modern war conditions and, in particular, in relation to the notion of a military objective. The rules contained in the Monaco draft, those drawn up by the International Law Association and the Regulations for safety localities in the new Geneva Conventions may perhaps furnish some guidance on the subject.

Consideration should also be given to the question of whether the civil defence measures taken in a locality may cause it to lose its character as an "undefended" town. And what is the effect in this respect, of armed measures of defence, where such measures are only intended to come into operation if the locality is unlawfully attacked from the air (just as medical personnel are authorized to use their weapons in self-defence)?

Prior warning to the Authorities before commencing a bombardment.
(Article 26 of the Hague Regulations, p.3).

Many writers claim that this rule is incompatible with the methods used in bombing attacks carried out in force.
Yet prior warning has been given in certain cases, though most often, it is true, to the civilian population of an occupied territory, and not direct to the Authorities. In August 1952 the Press mentioned a warning of this kind issued to a large number of localities during the Korean War.

However great the military difficulty of giving prior warning of an attack, it is surely desirable to examine the possibility of retaining this rule in one form or another, in view of the help such warnings give, and have given, in safeguarding the population.

Obligation to respect hospitals.

Under Article 27 of the Hague Regulations (C. of T., p.3) steps must be taken, during bombardments, to spare, as far as possible, hospitals and places where the sick are collected, in particular.

As we know, the Fourth Geneva Convention of 1949, which extends to civilian hospitals the respect due to military hospitals, now lays down this duty in absolute terms (the words "as far as possible" are omitted), stipulating in Article 18 (C. of T., p.34) that civilian hospitals "... may in no circumstances be the object of attack". These last words, which are also to be found in Article 19 (C. of T., p.2) of the Geneva Convention of 1949 dealing with wounded and sick members of the armed forces, were deliberately chosen to apply also to attacks from the air.

The obligation not to attack civilian hospitals, in its present wording, raises certain questions. Consideration might be given, first, to the consequences of this obligation on the methods of bombardment developed during the last world war.

On the other hand, one might examine the special rules, existing or to be created, designed to facilitate the absolute respecting of hospitals, particularly civilian hospitals - rules dealing, for instance, with their marking (which is not compulsory under the Geneva Conventions), their location, and, possibly, with the notification of their position to the adverse Party.

* * *

The words "spare as far as possible", in Article 27 of the Hague Regulations, are sometimes taken as meaning that every care must be taken, when attacking military objectives, not to hit inadvertently the buildings enumerated in the Article. This question, which concerns the precautions to be taken when bombing military objectives, will be considered further on under (b) (see below, page 12).
In connection with this problem, the Experts will also be able consider the extent to which they wish to take into account the buildings, other than hospitals, mentioned in Article 27 (buildings dedicated to religion, art, science or charitable purposes). They have not been referred here, since the main object of the present enquiry is, in accordance with Red Cross aims, the protection of human beings. As provision is shortly to be made for the protection of cultural property in a new international Convention under the auspices of UNESCO (see C. of T., p.46), it will be above all a question here of religious buildings - so intimately associated, it is true, with the life of so many people - and buildings used for charitable purposes.

Prohibition of the use of arms, projectiles or material calculated to cause unnecessary suffering.
(Article 23 (e) of the Hague Regulations - C. of T., p.2)

This rule is merely the expression in a particular field of the fundamental principle upon which the laws of war in modern times are based - namely, that belligerents may not inflict suffering on their adversary out of proportion to the military object to be attained.

The rule is usually considered in connection with hostilities between the combatant forces. But since an attack on certain objectives situated completely outside the zone of military operations, and in the midst of non-combatants, has come to be regarded as legitimate, how can we possibly avoid agreeing that this rule must also apply to such attacks in view of the unnecessary suffering which they must engender? This is a particularly important question, perhaps the most important of all, and the ICRC would be glad to know the Experts' opinion on the subject.

This is in any case the rules on which recognized authorities (1) have relied implicitly when speaking of the abusive use of rights by belligerents who use, for the destruction of a legitimate target, projectiles with an unduly wide radius of action which spread devastation and death among the civilian population living within that radius, giving them no possibility of protecting themselves.

This impossibility of protecting oneself, the impossibility even of the most essential humanitarian relief reaching

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(1) See, for example, the opinion of M. Sibert, on page 168 of the Recueil des Consultations published in 1930 by the ICRC.
the victims, is undoubtedly one of the most cruel aspects of certain bombing operations which, striking as they do at non-combatants, and preventing the bringing up of relief supplies, are, in the opinion of the ICRC, in flagrant contradiction to the principles proclaimed by the Geneva Conventions since 1864. This was, sometimes, the case when waves of high explosive bombs were succeeded by waves of incendiary bombs which, by setting the debris on fire, hindered rescue operations. (It should be noted in this connection that Article 6 of the draft text drawn up by the International Law Association prohibited the use of incendiary weapons - C. of T., p.17).

The use in certain cases of time bombs which, even after the objective aimed at has been destroyed, deal death among the very people who are coming to the aid of stricken civilians, is also one of these uselessly cruel aspects of the bombing, and entirely contrary to the spirit of the Geneva Conventions.

The Hague rule considered above might also be studied in connection with the question, raised further on (see p.12), of the precautions to be taken when bombing military objectives.

(b) - Provisions embodied in draft Conventions or in Resolutions of international organizations.

Three types of rules come under this heading, their common feature being that they have not been sanctioned by inter-state agreements. They consist of (i) Conventions prepared by Governments but not ratified by them, (ii) rules drawn up by private organizations, and (iii) principles proclaimed by the League of Nations, the legal standing of which is not very clear.

It is here, however, that the main elements for a restrictive code of rules on the subject under consideration are to be found, and tribute should be paid to these efforts by public and private bodies - efforts which are of such importance for the protection of the civilian population against the dangers of war. It would appear to be necessary, therefore, to study these different rules with care and consider whether they can be included, in part or in their entirety, in positive law, in so far as they are not already part of it.

Prohibition of any act of war aimed at the civilian population.

Article 1 of the Monaco draft (C. of T., p.10) and Article 1 of the draft text produced by the International Law Association (C. of T., p. 16) both prohibit acts of war against the civilian population, which must be "left out of any form of hostilities".
In actual fact this rule is not a new one; it has been part of customary international law for a very long time and forms part of what the Preamble to the Fourth Hague Convention calls "the principles of the law of nations as they result from the usages established among civilized peoples, from the laws of humanity, and the dictates of the public conscience".

The Geneva Conventions of 1949 have made considerable use of this rule in the special fields with which they are concerned. Article 3 in each of them, which applies to civil war and therefore a fortiori to international wars, lays down that persons taking no active part in the hostilities shall in all circumstances be treated humanely.

However, this rule of customary law has been so severely shaken, so far as aerial bombardments are concerned, that one sometimes doubts its validity or the feasibility of drawing attention to it once again and, perhaps, making it more explicit.

In the eyes of the ICRC a reaffirmation of such a principle in connection with the field we are considering is much to be desired, and would obviously have important practical consequences. It would, for instance, put an end to the machine-gunning of civilians - a method of waging war which was often practised during the Second World War and which consists in firing indiscriminately on anyone out in the open, whether a labourer tilling the fields or a soldier.

An affirmation of this nature would also be of the greatest importance to civilians working in war industries. For surely it should state quite clearly that after leaving their place of work such persons - in so many cases women and children - can in no way be regarded as semi-combatants or pseudo-combatants, as some people have tried to make out they should be, and that the houses where they live cannot, consequently, be attacked from the air?

Generalizing from this last reflection, can it not even be said that any prohibition, however useful in itself, of acts of war aimed at the civilian population, might well become a dead letter if the destruction of buildings in which civilians live were regarded as legitimate, even when they contained no military personnel or material? It must be clearly established that such buildings, especially houses where people live, are not military objectives and cannot therefore be attacked as such, unless, of course, they are at the same time employed for military purposes.
There is a special case of this general rule which calls in particular for consideration, namely:

Prohibition of terror bombing.

The above term is applied to bombing operations which strike at the civilian population with the intention of weakening the capacity for resistance of the armed forces by making its members anxious about the fate of their families, or possibly even with the intention of sowing such panic among the population that the Government is forced to surrender or ask for an armistice.

Article 22 of the draft text produced by the Commission of Jurists of 1922 (C. of T., p.4) forbids any aerial bombardment the purpose of which is to terrorize the civilian population. The unlawful character in positive law of this type of bombing is regarded as well established by many publicists, among them Mr. Lauterpacht, who draws attention in this connection to the fact that the statute of the Nuremberg Tribunal made the motiveless destruction of towns and villages a war crime. The reaffirmation of this particular law should not, we feel, give rise to much difficulty.

The Experts will therefore have to say if it is possible, in connection with aerial warfare, to prohibit - with all the consequences which this would entail - attacks aimed deliberately at the civilian population. It would appear advisable for this question to be considered independently of questions relating to the losses which attacks on military objectives may cause among the civilian population.

Limitation of bombing to military objectives.

Three main questions could be studied under this heading: the conception of what constitutes a military objective, the conditions for a legitimate attack on military objectives and, finally, the precautions which should be taken when bombarding such objectives.

Definition of a military objective.

In the domain of the laws of aerial warfare, the rule confining aerial bombardments exclusively to military objectives would appear to be the one which is most generally accepted at the present time. It is to be found in all the attempts at codification since the First World War, and Governments have constantly referred to it since that time. But the conception of what
actually constitutes a military objective has not been defined or specified in any text officially recognised by States; nor are experts in international law in agreement on the subject, so far as certain of its aspects are concerned at any rate.

It is obvious that the protection of civilian populations depends to a very great extent upon the interpretation which belligerents give to this conception. The new Geneva Conventions themselves now contain references to "military objectives" in connection with the siting of hospitals and the location of security zones (see Article 18 of the Fourth Convention - C. of T. p.34), the object of such references being to increase the degree of protection given to protected persons. In the same way a great many practical civil defence measures are or will be taken in relation to military objectives.

Under these circumstances, do the Experts not think that it is imperative to reach a minimum measure of agreement and precision regarding the actual conception of what constitutes a military objective? This necessity has already been stressed by the International Committee of the Red Cross in its appeal of March 1940. The essential thing is to reach agreement, whatever the solution finally adopted: whether it is a limitative definition, like the one given in the Hague Rules of 1923; or a broader and more general formula, on the lines of those given in the Monaco drafts or in the proposals of the International Law Association, bringing in the idea of military value or purpose; or again, a definition of the type just suggested combined with a restrictive enumeration of establishments the bombing of which is prohibited.

It would in particular be desirable for the Experts to come to a decision with regard to an extension of the meaning of the words "a military objective" which occurred during the last world war, when it was taken as including target area bombing.

Can this method of bombing be considered to be a "natural development" of the normal conception of a military objective, as has been suggested? Is there not, on the contrary, great danger, from the point of view of the efficient protection of defenceless civilians, in abandoning the conception of a military objective in the strict sense of the term (a localized target the character of which is obvious by its very nature) for the more general conception of a zone of attack? In actual fact, the delimitation of such zones will depend, in the final analysis, upon the attacking force. Finally it should not be forgotten that the systematic bombardment of such zones or areas may well entail the destruction - no longer involuntary - of persons or objects which have no military value, or even the destruction of buildings and establishments whose attack is specifically prohibited by international law. The special protection which civilian hospitals should enjoy in virtue of the 1949 Geneva Conventions in any case appears incompatible with the idea of target area bombing.
Conditions for a legitimate attack on a military objective.

The Experts might examine here two rules forbidding bombing in cases where certain conditions in regard to the military objective have not been fulfilled.

Under the first rule, formulated in Article 24 of the Hague rules of 1923 (C. of T., p.5), air bombardment is only legitimate when the total or partial destruction of the military objective would constitute an obvious military advantage. (This condition is sometimes regarded as forming part of the actual definition of a military objective).

The second rule, expressed in a League of Nations Resolution of 30 September 1938, lays down that only those objectives which are "identifiable" (i.e. identifiable as such) can be legitimately attacked (C. of T., p.14).

It follows that where there is any uncertainty either in regard to the military advantage which will result from the destruction of a target, or in regard to the target being in fact a military objective, the attacking Party must refrain from bombing it.

This principle of abstention in case of doubt - which is valid in many fields of law - is, as we hardly need to point out, of very great importance for the protection of the civilian population in cases where the bombing may affect them. Unfortunately, belligerents do not appear to have been inspired by it when making air attacks.

Would it not be possible, however, to reaffirm the two rules mentioned above, making due provision, if necessary, for the special case of bombing carried out in the zone of operations, where the degree of uncertainty in regard to the really military character of objectives, or the advantage to be obtained from their destruction, is bound to be less?

Precautions to be taken when bombing a military objective.

Most of the attempts at codification insist on precautions being taken in cases where the bombing may affect the civilian population. Certain rules prohibit all bombing of a military objective when there is too great a risk of hitting the civilian population in the neighbourhood (Article 24 (3) of the Hague Rules of 1923, C. of T., p.5; Article 5 of the draft text drawn up by the International Law Association, C. of T., p.17); others merely point out that it is necessary for the attacking forces to take special precautions in such cases (Resolution of the League of Nations, I (3) ) (C. of T., p.14).
The precautions to be taken may concern the type of projectiles used; we have already raised this question in connection with Article 23 (e) of the Hague Regulations (see p. 7). They may also concern the manner in which the bombing is carried out. We spoke of the abusive use of rights in connection with certain projectiles; surely then it is possible to speak of culpable and inadmissible negligence when the dispersion of the bombs is abnormally great in relation to the size of the target which has to be destroyed? The extent of dispersion obviously depends on several variable factors (the height at which the aircraft is flying, the accuracy with which the bombs are aimed, etc.); but is it not in any case necessary to reaffirm that the attacking force is under an obligation to take all necessary steps to avoid bombing defenceless persons by negligence? There have been cases in which it has been possible to spare, deliberately, buildings in the immediate proximity of a military objective; surely the existence of such cases should encourage us to be fairly strict in this respect.

Such a reminder appears all the more essential when one thinks of the configuration of towns today: in most of them establishments sheltering people who are specially protected under the Geneva Conventions (hospitals, schools, old people's homes) - which it is impossible to move for numerous reasons - are situated at a sufficient distance from points which may become military objectives, to be safe provided the attacks on those objectives are carried out with the necessary precautions, but where they are bound to be hit by indiscriminate bombing.

Should some distinction not be made, in regard to the precautions to be taken, between the actual zone of military operations and the territory outside that zone, greater precautions being stipulated in the latter case?

Would it not also be as well if the rule dealing with the precautions to be taken made specific mention of certain types of buildings, especially hospitals, as was done in Article 27 of the Hague Regulations? (May we refer to our remarks on this subject on page 6).

The question of the precautions to be taken is a particularly burning one where bombing with guided missiles is concerned. Such bombing has so far been carried out solely by way of reprisals, and in a completely indiscriminate fashion. Even should these weapons be used for bombing well-defined military objectives, are they capable of hitting their target with the required accuracy? Or are we not justified in thinking, on the contrary, that it will be a very long time before they are able to satisfy the rule in regard to the taking of necessary precautions, and that they will thus continue to answer justly to the description of "blind weapons"?
c) - Enquiry into other possible standards for the governance of bombing from the air.

Under this heading the Experts will no doubt be able to suggest various questions relating to bombing from the air which are not yet referred to in any of the regulations in force or planned, and might form the subject of specific rules. The following may be mentioned for a start:

Rule for specially protected installations.

Besides the notion of a military objective, the law of nations, in particular the Geneva Conventions and also the instruments relating to the protection of works of art, has developed the idea of an establishment or building which must under no circumstances be the object of an attack from the air, i.e., which is specially protected in this way within the general framework of the overall protection granted to non-combatants. These two conceptions are furthermore often to be found side by side in the various attempts at codification.

If the difficulty of arriving at a precise definition of what constitutes a military objective finally appears insuperable, would it not be advisable to call attention, in an ad hoc rule, to the establishments, installations and buildings which enjoy special protection, and above all try to add to the list of such places?

In this connection one might, in particular, consider including the following:

Prisoner of war camps and camps for civilian internees;

Establishments reserved for the use of those members of the civilian population who, though not sick, are particularly weak; (e.g. homes for old people, day-nurseries, children's homes, certain establishments for invalids, etc.);

Safety zones, corresponding to the conditions now laid down and about to be recognized.

The Experts may also wish to consider the possibility of including buildings and installations not mentioned above, but which figure in Article 27 of the Hague Regulations.

For some of these buildings and installations the question of the measures to be taken in order to ensure their immunity will also arise, particularly in regard to their marking and control. The measures already laid down in the Geneva Conventions
and the solutions envisaged in some of the attempts at codification offer a lead in this respect (see Article 25 of the Hague Regulations of 1923). With regard to control in general, the Experts are asked to refer to what is said further on.

Protection of certain types of ships against bombing from the air.

The questions under this heading are of a rather special type, which it might perhaps be easier to consider in a study dealing with the laws of maritime warfare in view of their close connection with that subject. We thought, however, that it would be useful to include them here as a reminder, and in case the Experts should have occasion to broach them.

(a) Merchant shipping.

The Committee of legal experts which met in 1931 under the auspices of the ICRC, considered (C. of T., p.68) that it would be advisable to extend to air forces the stipulations of Article 1 of the Washington Treaty of 6th February 1922, relating to the protection of the lives of neutrals and non-combatants at sea in wartime (1), and of Article 22 of the Treaty of London of 22nd April, 1930, concerning the limitation and reduction of naval armaments. The obligations imposed by these provisions

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(1) The Article in question reads as follows:

"The Signatory Powers declare that among the rules adopted by civilized nations for the protection of the lives of neutrals and non-combatants at sea in time of war, the following are to be deemed an established part of international law:

1. A merchant vessel must be ordered to submit to visit and search to determine its character before it can be seized. A merchant vessel must not be attacked unless it refuses to submit to visit and search after warning, or to proceed as directed after seizure.

A merchant vessel must not be destroyed unless the crew and passengers have been first placed in safety.

2. Belligerent submarines are not under any circumstances excepted from the universal rules above stated; and if a submarine cannot capture a merchant vessel in conformity with these rules, the existing law of nations requires it to desist from attack and from seizure and to permit the merchant vessel to proceed unmolested".
both on surface vessels and submarines should, the Committee considered, be imposed by analogy on aircraft.

What is the Experts' opinion on the subject?

(b) Vessels (other than hospital ships) transporting persons protected under the Geneva Conventions.

The International Committee has, on several occasions, drawn the attention of Governments to the problem of the safety of prisoners of war who are transferred by sea. This problem is a very serious one, as more than 10,000 people have perished as a result of submarine or air action while being transported in this way. The Conferences which established the texts of the Geneva Conventions of 1949 did not, for various reasons, have an opportunity of finding a solution to this problem. It is true that it presents many difficulties, the chief of which would appear to be the vital importance which belligerents attach to the sinking of enemy ships.

Would it nevertheless be possible - so far as attacks from the air are concerned, at any rate - to agree to adopt, as basis for a code of rules, the principle that a belligerent is prohibited from bombarding enemy ships which are carrying no one but prisoners of war, with the exception, of course, of the prisoners' escort and the crew? The practical application of such a principle might be accompanied by a number of special conditions, such as: the presence on board of a supervising body with complete freedom of action, special marking, the stipulation that the ship must carry a minimum number of prisoners in proportion to its tonnage, etc.

A rule of this kind should also apply to the transfer by sea of civilian internees in an enemy country, or of members of the population of an occupied territory.

The problem of reprisals.

According to a fairly widely held opinion, the increase in aerial bombing in the course of the Second World War and the indiscriminate nature of many of the raids was due very largely to recourse having been had to mutual reprisals.

Thus the danger of the rapid and disastrous amplifications inherent in the use of reprisals, to the detriment of non-combatants, was once again confirmed. The same phenomenon has already been noted, for example, in connection with reprisals against prisoners of war during the 1914-18 War, and far from reestablishing the law, tends to destroy it.
Hence the idea of abolishing or at least endeavouring to regularize the recourse to reprisals, with a view to reinforcing the protection afforded to defenceless persons. Is the realization of such an idea feasible in connection with aerial bombardment?

It is true that the risk of reprisals is not so great when the rules to be observed are less open to question— that is to say when they are more precise—and when rules of procedure governing the establishment and the redress of violations exist. Do the Experts not think that, this being so, a preliminary means of avoiding reprisals and their disastrous consequences would be to evolve these two sets of rules?

Would it not, however, be advisable to go even further and to prohibit all retaliatory bombardments which affect non-combatants? If it should not appear possible to go as far as that, would it not at least be essential not only to draw attention to the generally accepted rules of conduct in regard to reprisals (1), but also to envisage certain supplementary restrictions dictated by motives of humanity? It should in any case be possible for sick and injured civilians and the civilians living in safety zones and localities to be immune from retaliation.

Could a further possibility also be envisaged namely, that retaliatory bombardments upon non-combatants be only authorized if and when they are in response to violations committed in a similar case and only after formal notice has been given to the initial transgressor?

(1) In this connection we may quote Article 86 of the "Oxford Manual":

"In grave cases in which reprisals appear to be absolutely necessary, their nature and scope shall never exceed the measure of the infraction of the laws of war committed by the enemy.

They can only be resorted to with the authorization of the commander-in-chief.

They must conform in all cases to the laws of humanity and morality."
3.- POSSIBILITY OF INSTITUTING PROCEEDINGS TO PREVENT OR
ASCertain BREACHES OF THE RULES

Necessity for control.

In its report the Committee of legal experts convened
by the ICRC in 1931 said (C. of T., p.69) that: "It should be
possible for any infringement of the rules of international law
mentioned in the present Report to be the subject of an immediat-
investigation by an impartial body, which it would be advisable
to plan in peacetime. Intervention by such a body should not only
be aimed at ascertaining whether the accusations made are well-
founded and at placing the facts before the public; it should
also be of such a character as to prevent recourse to measures
which might aggravate the situation".

The advisability of instituting an effective system
for supervising the application of the restrictive rules governing
bombing from the air has often been pointed out. It would help
to avoid recourse being had to reprisals with their disastrous
consequences; moreover, if the practice of inflicting individual
sanctions were to develop in connection with breaches of the laws
of aerial warfare, supervision might prevent the danger of abuses
and arbitrary decisions. It is sometimes suggested, incidentally,
that to draw up a code of rules governing bombing from the air
without at the same time providing machinery for establishing
violations of those rules, might be very dangerous, as it would
be equivalent to opening the door still wider than it is at
present to allegations concerning breaches, which could not be
checked.

Do the Experts share these views on the necessity of
closely associating rules aimed at the establishment of infrac-
tions with the fundamental rules already discussed?

Nature and organization of control measures.

Authorities on international law who recognize the im-
portance of supervision in this field do not in general, it is
true, expatiate on the methods to be used or on the difficulties
involved. In this connection, would it not be advisable, when
considering the nature of the supervision required, to distinguish
its two different aspects?

Supervision might be concerned, in the first place, with
existing conditions, which should, as a general rule, be easy to
establish. It would be a matter of verifying the execution of
the measures which a belligerent is obliged to take, sometimes
in virtue of international law, to protect his civilian population as far as may be possible — and in particular certain buildings or certain zones — from bombing from the air: it would involve verification of their distance from the nearest military objective, noting the presence or absence of elements of the armed forces, checking on their marking, etc. This form of control should be quite possible to institute, even if it demanded a large staff and frequent, or even continuous, checking. (In this connection we may point out that in the case of the safety zones provided for in the new Geneva Conventions, the Commissions of control will remain permanently in the zones).

Once an adequate system supervision had been instituted under the first heading, it might perhaps be easier to exercise the second form of control which consists in investigating cases of bombing which infringe the rules laid down. Supervision under this heading will most often take the form of an investigation, after the event, of circumstances which only existed momentarily, even if they left clearly visible consequences. Hence the very great difficulty of exercising it, especially if it must extend to the whole territory, and in particular to the regions near the zone of military operations. It may for this reason be desirable to limit it to certain types of offence, or to certain territories.

Let us turn to the actual organization of the system of control.

In the draft texts produced during the inter-war period, as well as in the Conventions actually in force, there has been a progressive tendency to adopt one of two possible alternatives. The first is to set up a special international body for the specific purpose of exercising control. But in view of the difficulty of constituting such a body, especially after the outbreak of hostilities, preference has usually been given — at any rate in the most recent codes of rules — to a second possibility — supervision by the Protecting Power and its representatives.

This latter solution has even, as we know, been the subject of fairly elaborate rules in the new Geneva Conventions, which lay down in detail the rights and duties of the Protecting Powers and provide for their replacement should occasion arise.

Would it be possible to entrust the supervision of the application of the rules governing bombing from the air to the Protecting Power, whose duties under the Geneva Conventions are already very extensive? If so, their task will be a particularly onerous one and will bring them face to face with problems which they have not yet, so it would appear, had occasion to envisage or solve.

We should also note the solution proposed in the draft Convention of UNESCO for the protection of cultural property.
This constitutes an extension of the institution of Protecting Power, a Commissioner-General coming between the Protecting Powers and the State in which they are exercising their functions. He is chosen by common accord, from an international list of suitably qualified persons, by the Party with which he will carry out his duties and by the Protecting Powers of the opposing belligerents. He has to supervise the control activities of the various Protecting Powers and make all necessary representations to the Party in question and to enemy States, to ensure the proper application of the provisions of the Convention.

The provisional agenda does not for the moment include any reference to sanctions (though this question is covered in part under the heading of reprisals). May we draw attention, however, to the case of the individual penal sanctions which may be inflicted for breaches of the rules concerning bombing, as happened during the last world war (1). Would it not be well, in such cases, to lay down the principle that persons accused of such breaches must be accorded safeguards in regard to a fair trial and rights of defence not inferior to those by which prisoners of war benefit under the third Geneva Convention of 1949.

4. - FORM TO BE GIVEN TO THE FUNDAMENTAL RULES AND RULES OF PROCEDURE WHICH MAY BE ELABORATED BY THE COMMISSION, WITH A VIEW TO FACILITATING THEIR SUBSEQUENT RECOGNITION AND PRACTICAL APPLICATION

Consideration of this item is optional and will depend on the results reached in the discussions on the preceding questions. It is therefore unnecessary to deal with it here at any great length.

We shall confine ourselves to pointing out that if the fundamental rules and rules in regard to procedure established by the Commission are such as to permit the problem of their final drafting to be envisaged, two groups of questions might be considered by the Experts.

(1) It is well known that one belligerent country introduced a law inflicting the death penalty on those responsible for bombing not aimed at military objectives.
In the first place, in what form would these rules have the greatest chance of being adopted by Governments? The idea of an international Convention is the first possibility which strikes one; but certain advantages might attach to presentation in other forms - as a declaration, for instance, or as a protocol annexed to an instrument already in existence, or as a Resolution of an intergovernmental Conference, or even as a solemn declaration binding the Parties above all morally.

In the second place, through what further stages should these rules pass before being submitted to Governments for recognition, in order that they may acquire an adequate degree of elaboration? And in particular, to what types of meeting (private, Red Cross or intergovernmental) should they still be submitted?
N'existe pas en anglais

Le 15 avril 1954

**LISTE DES EXPERTS**

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