

XVIII

Chivalry in the Air?

Article 42 of the 1977 Protocol I to the Geneva Conventions

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THE DECISIVE TEST FOR ANY RULE OF HUMANITARIAN LAW is whether, to the soldier in an active combat situation, it would appear to be an instinctively apparent and reasonable rule. In my experience as a teacher and lecturer, I have found that any initial skepticism soldiers may have as to the laws of war is quickly dispelled when one enumerates the basic norms of humanitarian law.¹ No soldier, in my experience, has ever seriously questioned Common Article 3² norms such as respect for civilians, persons *hors de combat*, and prisoners of war. From that initial premise, a teacher finds it easier to proceed to the more involved rules that often require legal training for their effective implementation.

If a rule of humanitarian law fails the instinctive morality test of the combat soldier, that rule will most probably not be applied in actual combat. Although the rule may be applied in a forensic *post mortem* as part of a military disciplinary court, we will not have achieved our objective, namely that it be applied by soldiers in the heat of battle.

Does the rule as to protection of airmen³ in distress pass the decisive test? Would it seem to ground troops to be instinctively wrong and immoral to fire on a crew parachuting from a military aircraft in distress? There seems to be near unanimity in the manuals and legal textbooks that, in principle, airmen

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parachuting from an aircraft in distress are to be considered *hors de combat* during their descent and should be treated as such.⁴

The first attempt to draft the rule in codified form was in the 1923 Hague Rules of Air Warfare, which stated:

Article 20

When an aircraft has been disabled, the occupants, when endeavouring to escape by means of parachute, must not be attacked in the course of their descent.⁵

The Commission of Jurists who drew up this rule did not claim at the time that they were codifying customary law but only that it “seemed desirable to prohibit” such forms of “injuring the enemy.”⁶ The rule, however, appears to have been viewed as uncontroversial and was accepted without debate.⁷ State practice and judicial opinion since then point to the development of the rule into international custom. The International Committee of the Red Cross (ICRC) referred to it in 1971 as “a common-law rule,”⁸ and Bothe, Partsch, and Solf write, “withholding attack against airmen descending from a disabled aircraft had certainly hardened into customary international law.”⁹ DeSaussure states that “while descending air crewmen were occasionally attacked in World War II in areas where their capture was not probable, the practice in Korea, Indochina, and the Mideast *points to a developing custom* which unconditionally exempts any occupant leaving a disabled aircraft from being attacked either from the air or from the ground.”¹⁰

The issue of protection of airmen in distress was extensively debated during the Humanitarian Law Conference.¹¹ The rule, as finally adopted in Article 42 of Protocol I,¹² states:

Article 42

1. No person parachuting from an aircraft in distress shall be made the object of attack during his descent.
2. Upon reaching the ground in territory controlled by an adverse Party, a person who has parachuted from an aircraft in distress shall be given an opportunity to surrender before made the object of attack, unless it is apparent that he is engaging in a hostile act.
3. Airborne troops are not protected by this Article.

Four of the issues of principle concerning airmen in distress that were raised during the Conference were:

What is the justification for granting special protection to airmen?

Does the rule apply to airmen in distress parachuting onto friendly territory?

What behaviour by the airmen during descent, if any, negates the protection?

What protection is to be granted to airmen in distress once they have landed?

Justification for the Protection Granted to Airmen in Distress

The practice of not shooting at an airman in distress appears to have been part of the mutual chivalry of airmen in the 1st World War. Spaight, the leading authority on this issue, wrote, some fifty years ago, that "the effect of the use of aircraft in war was at first to restore to warfare something of the spirit which went out with the Middle Ages. After 600 years, chivalry re-emerged in strange company."¹³ Spaight also adds a very practical argument that there is a military advantage to encouraging enemy airmen to abandon their aircraft since "if airmen know that, if they escape by parachute, they will become an easy target during their descent, it will incline them to harden their hearts and to remain at their post."¹⁴

As part of preparations for reviewing the laws of war,¹⁵ in 1969 the ICRC convened a conference of experts. Among the issues raised was that of airmen in distress, with the Report of the Conference focusing on the comparison between airmen in distress and "a shipwrecked individual."¹⁶ However, the Conference did not propose specific language. The ICRC position paper presented to the subsequent 1971 Conference of Experts did propose a specific provision on airmen in distress, explaining it in terms of "presumption of harmlessness" and "giving the individual the benefit of the doubt."¹⁷ The Israeli delegation, which submitted a proposal of its own at the Conference,¹⁸ explained that an airman "having parachuted from his aircraft, is in a state of helplessness and military ineffectiveness, and (should) be considered *hors de combat*."¹⁹ At the second session of the Conference, in 1972, the ICRC presented a revised text.²⁰ The commentary thereto submitted by the ICRC again referred to the "shipwrecked" analogy.²¹ The report of the second session of the Conference did not include a discussion of the justification of the need for such an article.²²

The issue of the justification, if any, for granting special protection to airmen beyond that granted to other combatants was debated during the

Humanitarian Law Conference. One of the justifications raised was the idea of chivalry. The delegate from Belgium declared that "there was a tradition among fighter pilots that a pilot who had been shot down should be considered to be in a similar situation to that of a rider unhorsed in battle" and that it was a "rule of chivalry."²³ The Canadian representative categorically stated that shooting at an airman in distress "would run counter to the entire tradition of chivalry, for the very idea of shooting in cold blood at a human being descending by parachute in distress and probably already wounded, was monstrous."²⁴ The delegate of the Netherlands limited himself in this respect to hoping that "all States would carry chivalry beyond the limits imposed by the legal rule as now adopted."²⁵ By contrast, Egypt's delegate, although accepting the rule in principle, objected to the introduction of the justification of chivalry and pointed out that

one could look at the situation from the standpoint of chivalry but that would be rather strained and exaggerated. Because chivalry presupposed equality of opportunity in fighting, it implied giving the adversary the opportunity to fight for his life, to kill or be killed. To adopt that concern for chivalry in the situation under discussion would be pushing it too far, because infantrymen were by no means equal in armament to a pilot. If they were ordered to let him go, he would return and fight them, not with a simple rifle—the same weapon that they had—but with a fighter aircraft equipped with all the means of destruction which the human mind had been able to devise and put into use . . . considerable military interests must not be sacrificed to mere considerations of chivalry.²⁶

Mr. de Preux, of the ICRC, referred to the fact that although airmen in distress are covered by the general rule as to *hors de combat*, "the importance of aviation in modern conflicts warranted the adoption of a special provision to ensure the normal functioning of air operations and the protection of airmen."²⁷ During the plenary discussions of the Conference, Mr. Pictet, on behalf of the ICRC, explained that "the serviceman who, to save his life, parachuted from an aircraft in distress was a victim, shipwrecked as it were in the air and that was the idea which should have precedence."²⁸ The representative of Israel stressed that such an airman was *hors de combat* and should not be attacked for that reason,²⁹ while the delegate from the Federal Republic of Germany forcefully declared that "a person parachuting from an aircraft in distress was reduced to helplessness in the true sense of the word during his descent and an attack on him would be tantamount to an execution."³⁰ Possibly summarising the essence of the justification for the rule, the Portuguese delegate stated that in such circumstances the airman "could neither defend himself nor attack

nor escape.”³¹ De Preux, in the ICRC Commentary on Article 42, refers to past “cameraderie” between airmen but observes, I believe correctly, that as regards the delegates at the Humanitarian Law Conference, “the majority considered that airmen in distress are comparable to the shipwrecked persons protected by the Second Convention.”³²

It may be regrettable that chivalry is no longer with us, but I believe it is healthier for the development of humanitarian law to base the norm on the accepted definition of a combatant who is *hors de combat* rather than dwell on analogies to battling knights.

Does the Rule Apply to Aircrews About to Land in Their Own Territory or in Friendly Territory?

The 1923 Hague Air Rules do not distinguish between an airman parachuting over hostile territory and one parachuting over friendly territory. Spaight appears, however, to leave the rule as to protection of airmen parachuting over their own territory open to question. He writes that “when the descent is over ground held by the forces hostile to those to which the parachutist belongs, to shoot him is at once inhumane and a waste of ammunition. He must be captured in any case, if he succeeds in landing.”³³ If the justification for protection is, as Spaight seems to suggest, only the certainty of capture, then there is no justification for granting protection if the airmen parachute over friendly territory. If, however, the justification is, as I believe it is, humanitarian and analogous to the protection of those shipwrecked at sea, then the question of where an airman is about to land is irrelevant.

The 1969 ICRC Report enumerates “the nationality of the territory on which they are to land” as one of the factors some experts thought should be considered.³⁴ In its report to the 1971 Experts Conference, the ICRC commented that “such a view is incompatible with humanitarian principles” and set out the rule without any mention as to territory.³⁵ The draft rule proposed by Israel in 1971,³⁶ and by the ICRC in 1972,³⁷ contained no reference to whether aircrews in distress were about to land in friendly territory or in territory controlled by the enemy. The proposed rule was unequivocal as to the protection to be granted while the airmen were descending by parachute.³⁸ The 1971 Israeli proposal stated that “airmen in distress shall not be attacked in the course of their descent,”³⁹ and the 1972 ICRC text proposed that the occupants of aircraft in distress “shall not be attacked during their descent.”⁴⁰ The commentary by the ICRC to the 1972 Conference did not refer to the issue of

where the airmen might land.⁴¹ The question, however, was raised during the 1972 Conference by one expert who

stressed that a flyer in distress could sometimes guide his parachute so as to reach the territory controlled by his own forces and that, in this case, by virtue of international law, he could be attacked like an enemy who was not really *hors de combat* and who attempted to elude capture.⁴²

The text proposed by the ICRC in 1973 to the Humanitarian Law Conference reaffirmed the principle of protection of occupants of an aircraft in distress "when they are obviously *hors de combat*," but omitted any explicit reference to protection during descent.⁴³ However, basing itself on military manuals, the ICRC Commentary to the 1973 Draft stated that it was irrelevant whether the aircraft occupants were due to land on territory controlled by friendly or hostile forces.⁴⁴ At the first session of the Humanitarian Law Conference, the Israeli delegation proposed an amendment to the basic ICRC text, which included the phrase that an airman in distress "would be considered *hors de combat* during the course of his descent."⁴⁵

At the third session of the Humanitarian Law Conference, the Third Committee formed a working group to discuss the article dealing with airmen in distress. The Rapporteur, George Aldrich, reported that

A number of delegations stated that immunity from attack during descent would be unrealistic in a case where it were clear that the airman would return to his armed forces by landing in territory controlled by them or by an ally. Many other delegations argued, on the contrary, that an airman descending by parachute should be considered temporarily *hors de combat* for humanitarian reasons until he reaches the ground.⁴⁶

He consequently submitted the following proposal, with the disputed phrase in square brackets:

1. No person parachuting from an aircraft in distress shall be made the object of attack during his descent [unless it is apparent that he will land in territory controlled by the party to which he belongs or by an ally of that party.]

The Egyptian delegation, which had proposed the phrase in square brackets, decided to withdraw its proposal. Notwithstanding the Egyptian withdrawal, it was put to vote at the insistence of Iraq and adopted by the Third Committee.⁴⁷ A number of delegations, including those of the United Kingdom, Federal Republic of Germany, Canada, Israel, and Belgium, consequently found

themselves voting against the Article as a whole. Stating that the amendment adopted was such “as to change existing law,” the UK delegation found it “hard to accept.”⁴⁸ The delegate of the Federal Republic of Germany explained that his delegation had objected to the amendment because “the mere possibility that he might resume combat activities did not deprive a person of the protection to which he was entitled,”⁴⁹ and the Canadian delegate expressed hope that those delegations that had supported the amendment “would withdraw their proposal.”⁵⁰ The Israeli delegation labeled the amendment “in contradiction with existing law,”⁵¹ while the U.S. delegate declared that the amendment

would be incompatible with the other provisions of humanitarian law . . . which provided that persons that had fallen into the power of an adverse Party under unusual conditions of combat, which prevented their evacuation, must be released. Those prisoners, too, could resume combat, but it was inadmissible that they should all be shot. By the same token, it was inadmissible that a parachutist *hors de combat* could be shot down, on the pretext that he might resume his military activities.⁵²

At the final session of the Conference, the Working Group decided to reopen the issue, its Rapporteur reporting:

The Working Group proposes amending the text of this paragraph to prohibit attacks against airmen descending by parachute, regardless of which Party controls the territory into which they are descending. It was felt that an airman in this situation is temporarily *hors de combat* as effectively as if he were unconscious and that it would be inappropriate for a Protocol designed to expand humanitarian protections to authorize making him a legitimate object of attack while in that helpless position.⁵³

In an unusual move, Committee III decided to reconsider the Article and to adopt it without the phrase in square brackets.⁵⁴

A proposal by Sixteen Arab and other States proposing reintroduction of the qualification as to the territory where the airman would land was later submitted to the Plenary of the Conference.⁵⁵ In introducing the Sixteen State proposal, the Syrian delegate explained that there was no cause to give privileged treatment to “a person descending by parachute who was obviously trying to escape to a territory controlled by his country, or by a friendly country.”⁵⁶ Iraq’s representative stated that it “was not possible to remain a mere spectator in the midst of ruins and see the dead, and to watch the descent of airmen ready to start again at the first opportunity.”⁵⁷ Similarly, Libya’s delegate argued that it was not “human to give a chance to pilots ordered to destroy countries,”⁵⁸

and the Sudanese delegate asserted that “a pilot forced to bail out from a doomed aircraft should not be considered to be *hors de combat* if he attempts to land on territory controlled by his own side or its allies, for his attempt indicates his intention to land in a safe place and to continue fighting immediately after he has landed.”⁵⁹ Mr. Pictet, on behalf of the ICRC, vociferously objected to the Sixteen State proposal, stating that it would

introduce into the Conventions an element that was outside their framework and contrary to their spirit . . . whether an airman landed in friendly or hostile territory, whether he rejoined his unit or was taken prisoner, should remain secondary considerations. A shipwrecked person was a victim of the conflict and should be protected in all circumstances. The ICRC would be dismayed to see a provision making it lawful to kill an unarmed enemy, who was not himself in a position to kill, introduced into law which had hitherto been purely humanitarian. It would set a dangerous precedent.^{60, 61}

The Sixteen State amendment was put to the vote and defeated.⁶²

The text, as finally adopted, makes no distinction as regards the territory where the parachutist is likely to land. The clear rule is that one does not shoot at a person parachuting from an aircraft in distress. It is, I believe, a reflection of a rule of customary international law.

Hostile Attitude during Descent?

If an aircraft carrying paratroopers or other airborne troops is in distress, clearly the troops who parachute from such an aircraft are not necessarily *hors de combat*. Theoretically, even an airman parachuting from an aircraft in distress who attempts to use a weapon during his descent is not at the time *hors de combat*.

The various drafters of the provision providing protection to airmen in distress attempted to find a way to exclude these two categories from the protection of persons *hors de combat*. Participants at the 1969 Experts Conference, “generally admitted that an airmen in distress, cut off and *not employing any weapon*, should be respected.”⁶³ (Emphasis added.) The 1971 Israeli proposal contained no reference to hostile behaviour by an airman; however, the text presented by the ICRC in 1972 conditioned the protection of airmen in distress by the phrase “unless their attitude is hostile.”⁶⁴ At the 1972 Conference, a question was raised as to the definition of the phrase “hostile attitude,”⁶⁵ but no expert appears to have objected to the principle of such a restriction. Proposals submitted by the U.S. and GDR repeated the reference to “hostile attitude”

used in the ICRC text.⁶⁶ The text presented by the ICRC to the 1973 Humanitarian Law Conference did not contain any reference to "hostile attitude," presumably since the ICRC had widened the scope of the protection to include occupants of an aircraft even prior to their abandoning the aircraft.

Israel submitted a proposal to the first session of the Humanitarian Law Conference which added the following to the ICRC text:

2. A person parachuting from an aircraft in distress and whose attitude in the course of his descent is not manifestly hostile shall be considered *hors de combat* during the course of his descent.⁶⁷

The Israeli proposal thus combined an explicit reference to persons parachuting in distress with a restriction as to hostile attitude. At the second session of the Conference, Egypt and other Arab States proposed replacing the general protection for the occupants of an aircraft in distress proposed by the ICRC with a reference to "persons parachuting from aircraft in distress . . . provided they are obviously *hors de combat*."⁶⁸

During the discussion in Committee III, and in the Working Group on the subject, there was general support for the idea of restricting the protection to persons who had abandoned the aircraft. Occupants of an aircraft in distress would thus not be entitled to protection until they had actually parachuted from the aircraft.⁶⁹ As to "hostile attitude" during descent, there was general agreement on "explicitly excepting airborne troops from the protection of the article, even if they were forced to leave their aircraft."⁷⁰ The Working Group proposed adding the phrase "Airborne troops are not protected by this Article," a proposal adopted by Committee III and the Conference as a whole. With the addition of specific language relating to airborne troops, the Working Group and, subsequently, Committee III and the Conference as a whole decided that any other reference to "hostile attitude" during descent was superfluous. During the final session of the Conference, the Philippine delegation proposed adding the phrase "unless he commits a hostile act during such descent."⁷¹ France's delegate objected, stating "he knew from personal experience that it was impossible for a person parachuting from an aircraft to use his weapon during the descent, for at that time his sole concern was to prepare for landing."⁷² Along the same lines, Switzerland's delegate commented that "he failed to see its practical bearing."⁷³ The delegate of the Federal Republic of Germany thought "it involved some risk, because it might be very widely interpreted,"⁷⁴ and Iran's delegate pointed out that "such a provision might lead to abuse, for once a parachutist had been fired on, it would be easy to find reasons to justify that action."⁷⁵ Syrian, Jordanian, and Libyan delegates, among others,

supported the Philippines' amendment, stating that there could be cases where a parachutist might use his weapon. The proposal failed to obtain the required two-thirds majority and was consequently not adopted.⁷⁶

What Protection is to be Granted to Airmen in Distress after They Have Parachuted to the Ground?

An airman parachuting in distress who, on landing, is rendered *hors de combat* on account of wounds he incurred or by virtue of being unconscious is clearly entitled to the same protection as any other combatant in that situation. A question arises, however, of whether the airman should be entitled to any special protection beyond that granted to all combatants. The justification for such extra protection is set out by de Preux, who writes that "The intent to surrender is assumed to exist in an airman whose aircraft has been brought down, and any attack should be suspended until the person concerned has had an opportunity of making this intention known."⁷⁷

The 1969 Conference of Experts did not specifically address this issue, but at the subsequent 1971 Conference of Experts, the Israeli expert proposed a rule stating:

Airmen in distress shall be given, upon reaching the ground, a reasonable opportunity to lay down their arms and surrender.⁷⁸

He explained his proposal by stating that "the situation of an airman on the ground, after having bailed out involuntarily from his aircraft is similar to persons in distress at sea."⁷⁹ The text proposed by the ICRC for the 1972 Conference of Experts refrained from adopting the proposal. However, the U.S. experts proposed a similar rule:

They (airmen parachuting in distress) shall, if they have landed in territory controlled by their enemy, and are not in a hostile attitude, be afforded a reasonable opportunity to surrender.⁸⁰

The ICRC again refrained from incorporating such a rule in the text that it proposed in 1973 to the Humanitarian Law Conference. In introducing the text in the second session of the Conference, the ICRC representative stated that "once they had reached the ground, all airmen should be afforded the same safeguards as during their descent by parachute."⁸¹ This would seem to have been an excessively far-reaching protection, as during their descent the rule is an absolute prohibition of attack. No delegation appears to have raised

this issue. In the same second session of the Conference, Israel again proposed the rule that:

Upon reaching the ground, such person shall be given a reasonable opportunity to surrender.⁸²

The issue was transferred to a Working Group, which suggested the following text:

Upon reaching the ground in territory controlled by an adverse party, a person who has parachuted from an aircraft in distress shall be given an opportunity to surrender before being made the object of attack, unless it is apparent that he is engaged in a hostile act.⁸³

The Rapporteur's comment on the text was that

The Committee decided not to try to define what constituted a hostile act, but there was considerable support for the view that an airman who was aware of the presence of enemy armed forces and tried to escape was engaging in a hostile act. On the other hand, merely moving in the direction of his own lines would not, by itself, mean that that he should not be given an opportunity to surrender, for he might not know in which direction he was going or that he was visible to enemy armed forces.⁸⁴

This text, which was similar to the 1972 U.S. proposal, was subsequently adopted by Committee III and the Plenary without any further substantial debate. It would be a reasonable surmise that the relative lack of controversy over this rule was due to its less than absolute nature. Introducing phrases such as the reference to who controls the territory of the landing and not committing "a hostile act" presumably made the rule more acceptable to some States. This contrasts with the controversy over the rule as to protection during descent, one which was made absolute and not subject to such limitations.

Conclusion

The atmosphere at the Humanitarian Law Conference, which took place between 1973 and 1977, was strongly affected by anti-American and anti-Western sentiment resulting from the war in Vietnam. There was vocal Third World support for National Liberation Movements and Arab and Third World support for the Palestinian cause. These elements combined to tilt the

balance against classical law of war. I believe that Protocol I has done a disservice to international law by weakening the all-important distinction between combatants and non-combatants and by indirectly introducing ideas of just and unjust wars into *jus in bellum*.

Concerning protection of airmen in distress, Protocol I has, however, clearly enunciated and elucidated an important principle of customary international law. The reason for the surprising clear headedness of the Conference on this subject may well be the conservative nature of military legal advisers. While fighting wars of "National Liberation" may seem to military men an esoteric manifestation of UN political jargon, protection of aircrews is real life. Attending the Conference one felt that, on the issue of aircrews, it was lawyers from JAG departments and military officers who set the tone. It is interesting in this context to note that Egypt, at the later stages of the Conference, departed ranks from the other Arab States and participated in the drafting of the provision. The close contact between the U.S. delegation and the Egyptian delegation at the Conference may well have been a herald of the future Egyptian association with the United States and the subsequent Egyptian-Israeli Peace Treaty.

Notes

1. For example, the *Basic Rules of International Humanitarian Law in Armed Conflict* in BASIC RULES OF THE GENEVA CONVENTIONS AND THEIR ADDITIONAL PROTOCOLS 7, International Committee of the Red Cross (1983), (Reprint 1987).

2. Article 3 common to the four 1949 Geneva Conventions.

3. The term "airmen" is used to include "airwomen." A term "airperson" is not in current usage.

4. See, for example, BRITISH MANUAL OF MILITARY LAW, Part III 44, art. 119 ["It is lawful to fire on airborne troops . . . It is, on the other hand, unlawful to fire at other persons descending by parachute from disabled aircraft."]; INTERNATIONAL LAW—THE CONDUCT OF ARMED CONFLICT AND AIR OPERATIONS, (US) DEPARTMENT OF THE AIR FORCE, para. 4-2 (e), (1976) ["When an aircraft is disabled and the occupants escape by parachutes, they should not be attacked in their descent."]; THE LAW OF LAND WARFARE 17, (US) DEPARTMENT OF THE ARMY FIELD MANUAL FM 27-10 (1956); ANNOTATED SUPPLEMENT TO THE COMMANDER'S HANDBOOK ON THE LAW OF NAVAL OPERATIONS, NWP 9 (REV.A)/FMFM 1-10 (1989); HUMANITARIAN LAW IN ARMED CONFLICTS—MANUAL 442, at 44; (Federal Ministry of Defence of the Federal Republic of Germany VR II 3 ed., 1992); OPERATIONS LAW FOR ROYAL AUSTRALIAN AIR FORCE COMMANDERS 8-26, DI (AF) AAP 1003 (1994); LAW OF WAR WORKSHOP 7-12, INTERNATIONAL AND OPERATIONAL LAW DEPARTMENT, THE JUDGE-ADVOCATE GENERAL'S SCHOOL, UNITED STATES ARMY (1998); OPPENHEIM'S INTERNATIONAL LAW 521, VOL. II, 7TH ed., (H. Lauterpacht ed., 1952); MORRIS GREENSPAN, THE MODERN LAW OF LAND WARFARE 318 (1959); HOWARD S. LEVIE, THE CODE OF INTERNATIONAL ARMED CONFLICT, VOL. I, 222 (1986); INGRID DETTER DE LUPIS, THE LAW

OF WAR 244 (1987); FREDERIC DE MULINEN, HANDBOOK ON THE LAW OF WAR FOR ARMED FORCES 113, International Committee of the Red Cross Geneva (1987); FRIEDRICH AUGUST FREIHERR VON DER HEYDTE, AIR WARFARE, ENCYCLOPEDIA OF INTERNATIONAL LAW, Vol. I, 82 Rudolf Bernhardt ed., (1992); L.C. GREEN, THE CONTEMPORARY LAW OF ARMED CONFLICT 143 (1993); THE HANDBOOK OF HUMANITARIAN LAW IN ARMED CONFLICTS 295 Dieter Fleck ed., (1995).

5. Rules of Air Warfare drafted by a Commission of Jurists at the Hague, December 1922–February 1923. Text taken from 32 AJIL (Part I) (Official Documents) 21 (1938). The text was never officially adopted as a treaty.

6. *Commission of Jurists to Consider and Report Upon the Revision of the Rules of Warfare, General Report*, 32 AJIL (Part I) 1, 21 (1938).

7. See report of debate in LA GUERRE AERIENNE, REVISION DES LOIS DE LA GUERRE, LA HAYE 1922–1923, PARIS, LA DOCUMENTATIONS INTERNATIONALE 193 (1930); William L. Rodgers, *The Laws of War Concerning Aviation and Radio*, 17 AJIL (Part II) 629 (1923).

8. Conference of Government Experts on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, IV, Rules Relative to Behaviour of Combatants, Submitted by the International Committee of the Red Cross, 8 (1971).

9. NEW RULES FOR VICTIMS OF ARMED CONFLICTS, COMMENTARY ON THE TWO 1977 PROTOCOLS ADDITIONAL TO THE GENEVA CONVENTIONS OF 1949, 230, Michael Bothe, Karl Josef Partsch, Waldemar A. Solf eds., (1982).

10. Hamilton DeSaussure, *Recent Developments in the Laws of Air Warfare*, ANNALS OF AIR AND SPACE LAW, Vol. I–1976, at 33, 43. (Emphasis added).

11. Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts (Geneva 1974–1977).

12. 1977 Geneva Protocol I Additional to the Geneva Conventions of 12 August 1949.

13. J.M.SPAIGHT, C.B., C.B.E., AIR POWER AND WAR RIGHTS 110 (3d ed., 1947).

14. *Id.* at 163. The 1976 US Air Force Manual states the same justification. See note 4 *supra*, footnote 14.

15. Alternatively, the more politically correct term “International Humanitarian Law Applicable in Armed Conflict.”

16. Reaffirmation and Development of the Laws and Customs Applicable in Armed Conflict, Report Submitted by the International Committee of the Red Cross to the XXIst International Conference of the Red Cross, 77 (1969).

17. Conference of Government Experts on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, IV, Rules Relative to Behaviour of Combatants, Submitted by the International Committee of the Red Cross, 9 (1971).

18. CE/Com.III/C.3 appears in Annexes to Part Four of the Report of Commission III, at 105, International Committee of the Red Cross, Conference of Government Experts on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, Report on the Work of the Conference (1971).

19. Col. Z. Hadar, Main Statements of the Delegation of Israel, Conference of Government Experts on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, Geneva, 24 May–12 June 1971, Israel Ministry of Justice, 25 (1971).

20. Article 36, International Committee of the Red Cross, Conference of Government Experts on the Reaffirmation and Development of International Humanitarian Law Applicable

in Armed Conflicts, Vol. I, Basic Texts, Documentary Material submitted by the International Committee of the Red Cross (1972).

21. International Committee of the Red Cross, Conference of Government Experts on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, Geneva, 3 May–3 June 1972, (second session) II Commentary, part 1, Documentary Material submitted by the International Committee of the Red Cross, 70, (1972).

22. International Committee of the Red Cross, Conference of Government Experts on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, second session, 3 May–3 June 1972, Report on the Work of the Conference, Vol. I, Report of Commission III, at 132, (1972).

23. Official Records of the Diplomatic Conference on the Government Experts on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts (CDDH/III/SR.47, para. 52).

24. *Id.*, para. 69.

25. *Id.*, para. 68.

26. CDDH/III/SR.48, para. 15.

27. CDDH/III/SR.30, para. 1.

28. CDDH/SR.39, para. 89.

29. The present author, CDDH/III/SR.30, para. 4.

30. CDDH/III/SR.47, para. 51.

31. CDDH/III/SR.48, para. 1.

32. Jean De Preux, *Article 42—Occupants of aircraft*, in COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949, 494 (Yvez Sandoz, Christophe Swinarski, Bruno Zimmermann eds., 1987).

33. Spaight, *supra* note 13, at 155.

34. Report of the ICRC to the 1969 Conference, *supra* note 16.

35. Rules submitted by the ICRC to the 1971 Conference, *supra* note 17, at 8.

36. Israel proposal, *supra* note 18.

37. Article 36, International Committee of the Red Cross, Conference of Government Experts on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, Geneva, 3 May–3 June 1972, (second session) II, Basic Texts, Documentary material submitted by the International Committee of the Red Cross, 14 (1972).

38. The question of hostile intent is dealt with later in this paper.

39. Israel proposal, *supra* note 18.

40. ICRC Text, *supra* note 17.

41. ICRC Commentary, *supra* note 22.

42. Report of the 1972 Conference, *supra* note 22.

43. Article 39, International Committee of the Red Cross, Draft Additional Protocols to the Geneva Conventions of August 12, 1949, at 13 (1973).

44. Commentary on Article 39, International Committee of the Red Cross, Draft Additional Protocols to the Geneva Conventions of August 12, 1949, Commentary (1973).

45. CDDH/III/69.

46. CDDH/III/338, Report to Committee III on the work of the Working Group, Submitted by the Rapporteur.

47. 28 votes to 21, with 21 abstentions. CDDH/III/SR.47, para. 25.

48. CDDH/III/SR.47, para. 49.

49. *Id.*, para. 51.

50. *Id.*, para. 69.

51. *Id.*, para. 71.
52. *Id.*, para. 79.
53. CDDH/III/391 Report to Committee III on the work of the Working Group, Submitted by the Rapporteur.
54. 52 votes to 12 with 14 abstentions. CDDH/III/SR.59, para 8.
55. CDDH/414. Egypt was not among the co-sponsoring States.
56. CDDH/SR.39, para. 72.
57. *Id.*, para. 96.
58. *Id.*, para. 103
59. *Id.*, annexed written explanations of vote, at 117.
60. *Id.*, paras. 88–90.
61. The representative of Canada, Mr. Green “endorsed on all points” the statement of the ICRC representative. CDDH/SR.39, para.102.
62. Forty-seven votes to 23, with 26 abstentions. CDDH/SR.39, para. 110.
63. ICRC Report to 1969 Conference, *supra* note 16.
64. Article 36, ICRC Basic Texts submitted to the 1972 Conference, *supra* note 20.
65. CE/COM III/C 31, Proposal submitted by the experts of the Philippines, International Committee of the Red Cross, Conference of Government Experts on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, Geneva, 3 May–3 June 1972 (second session) II, Report of the Work of the Conference, Vol. II (Annexes) (1972).
66. CE/COM III/C 12, CE/COM III/C 25, Proposals submitted by the experts of the U.S. and GDR respectively, International Committee of the Red Cross, Conference of Government Experts on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, Geneva, 3 May–3 June 1972, (second session) II Report of the Work of the Conference, Vol. II (Annexes) (1972).
67. CDDH/III/69.
68. CDDH/III/244.
69. CDDH/III/SR.30, paras. 2-27, CDDH/III/338.
70. CDDH/III/338.
71. CDDH/413.
72. CDDH/SR.39, para. 77.
73. *Id.*, para. 75.
74. *Id.*, para. 76.
75. *Id.*, para. 81.
76. Twenty-nine votes in favour, 27 against and 34 abstentions. CDDH/SR.39, para. 85.
77. Jean De Preux, *supra* note 32, at 498.
78. Israel proposal to 1971 Conference, *supra* note 18.
79. Col. Z. Hadar, *supra* note 19, at 26.
80. Proposal submitted by the experts of the United States of America, CE/COM III/C 11, International Committee of the Red Cross, Conference of Government Experts on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, Geneva, 3 May–3 June 1972 (second session) II, Report of the Work of the Conference, Vol. II (Annexes) (1972).
81. CDDH/III/SR.30, para. 2.
82. CDDH/III/69.
83. CDDH/236/Rev/1. Annex.
84. CDDH/236/Rev.1, para. 30.