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The Protection of Civilians from Bombardment by Aircraft: The Ineffectiveness of the International Law of War

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COMMENTS

THE PROTECTION OF CIVILIANS FROM BOMBARDMENT BY AIRCRAFT: THE INEFFECTIVENESS OF THE INTERNATIONAL LAW OF WAR.*

Silent leges inter arma. Cicero, Pro Milone, IV, 10.

Expediency goes with security, while justice and honor cannot be followed without danger. Thucydides, The Peloponnesian War, V, 17.

King Henry—God bless him—will have to say for reasons of state, that he never meant this to happen; and there is going to be an awful row. T. S. Eliot, Murder in the Cathedral.

I. INTRODUCTION

There is no doubt that international law is still suffering from the vagaries of weakness and the lack of an authoritative source. Such immaturity signifies a situation where the jurisprudential question of the sources of law is much more alive than in settled systems of national law. The present world order is caught in the matrix of evolution. Nowhere is the confusion of the matrix more apparent than in the laws of warfare. The demands of morality, meta-legal processes, prophecy, terror, jurisprudential theories swirl about in a maelstrom which is both a diagnosis and a prognosis of the world in which we live.

The problem of the international law of war, especially as restricted to the bombardment of civilian populations and cities, is not subject to positive law in the ordinary sense because the minimums of authority and consent for such a law do not exist. Nevertheless, it is assumed that there is a recognition of at least the need for such a law. To assume otherwise is to leave thought in chaos. It is also assumed that disobedience to the international law which we do have has nothing to do with the need for specification and implementation.

There is another broader assumption, that the limitation of warfare must be based as much on the recognition of the need for rational policy as upon the existence of international law, strictly so-called. The individual nations which have the capacity to subject other peoples to attack by weapons of mass destruction must also realize that they have a responsibility for other peoples as well.

*The opinions and conclusions expressed herein are those of the author and do not necessarily represent the views of The Judge Advocate General’s School or any other governmental agency.
The determination of war policy cannot be made during the heat of war. The man on horseback then has fully the advantage of action over thought. During World War II, the Lord Bishop of Chichester complained of British bombing policy:

I have recalled the joint declaration and these pronouncements because it is so easy in the process of a long and exhausting war to forget that they were once held without question to imply, and because it is a common experience in the history of warfare that not only war but actions taken in war as military necessities are often supported at the time by a class of arguments which, after the war is over, people find are arguments to which they never should have listened.¹

Viscount Trenchard, in saying that Chichester's sincerity was not enough, appealed to the sincerity of those who were getting killed in carrying out the policy:

Think of the feeling of the young men who go out on these great bombing battles day after day and night after night.²

Behind this exchange in the House of Lords lay years of policy struggle and an indistinct body of international law. That struggle and that law will be explored in this article.

II. THE DEVELOPMENT OF RULES

During the era of limited warfare, limited at least to the less sophisticated minds of a more civilized century, attempts were made to restrict warfare. Some of the rules and principles then laid down have been used by analogy to apply to later weapons.

In 1868 the Declaration of St. Petersburg stated “That the only legitimate object which States should endeavor to accomplish during war is to weaken the military forces of the enemy.”³

In 1899, when balloons were still ineffective, the Contracting Powers at the first Hague Conference agreed to prohibit for five years the launching of projectiles and explosives from balloons or by other methods of a similar nature. A renewal of the prohibition was agreed to in 1907, again for a limited time, but without the former unanimity.⁴

The Annex to the Hague Convention on Land Warfare of 1899 did state in Article 25:

The attack or bombardment of towns, villages, dwellings, or buildings which are undefended is prohibited.

¹ 130 H.L. DEB. (5th ser.) 739 (1944).
² Id. at 832.
Unfortunately, the restriction on bombardment of undefended towns meant that the regulations was tied in with the rationale of siege bombardment because it has always been unlawful to attack a town which is open to occupation anyway. The rule is reminiscent of later rules forbidding terror bombing.

In 1907, Article 22 of the Regulations Respecting the Laws and Customs of War on Land was adopted. It gave one general applicable principle:

The right of belligerents to adopt means of injuring the enemy is not unlimited.5

Because of the failure to develop air rules in 1907, the Russians proposed an amendment to Article 25 of the Laws and Customs of Land Warfare. Italy also offered an amendment. As a result, the following was adopted:

The attack or bombardment, by whatever means, of towns, villages, dwellings, or buildings which are undefended is prohibited.6

The 1907 rules on bombardment by naval forces were similar. Article 1 stated that “The bombardment by naval forces of undefended ports, towns, villages, dwellings, or buildings is forbidden.” However, Article 2 gives an exception:

Military works, military or naval establishments, depots of arms or war materiel, workshops or plants which could be utilized for the needs of the hostile fleet or army, and the ships of war in the harbor, are not, however, included in this prohibition. . . .

[The commander] incurs no responsibility for any unavoidable damage which may be caused by a bombardment under such circumstances.7

Article 27 of the 1907 Regulations, devoted to sieges and bombardments, only demanded that the attacker take

... all necessary steps ... to spare, as far as possible, buildings dedicated to religion, art, science, or charitable purposes, historic monuments, hospitals and places where the sick and wounded are collected, provided they are not being used at the time for military purposes.8

It should be noted that this rule does not protect noncombatants because of the needs of the attacking force in the zone of combat.

At the Madrid Session of the Institute of International Law, held in 1911, M. Fauchille presented some articles on air warfare:

Art. 6. The bombardment by aircraft of towns, villages, habitations or buildings which are not defended is forbidden.

The rules established by the Hague Conventions of 18th October, 1907, relative to Sieges and Bombardments by Land or Naval Forces, are applicable to aerial war.

6 Printed in 2 id. at 652.
7 Printed in 2 id. at 439.
8 Printed in 2 id. at 389.
These suggestions were rejected because of the complaint that they were out of proportion to existing capacities for navigation. So the Conference adopted this rule:

Aerial war is permitted, but only on the condition that it does not present for the persons or property of the peaceable population greater dangers than land or sea warfare.\(^9\)

World War I practices were limited in scope and did not see the full development of the scope of air warfare because fortunately the war ended before bombardment squadrons were developed in large numbers.\(^{10}\) More important for future practice was the development of the theory of the Independent Air Force. An Italian, General Douhet, devoted his life successfully to the gospel of strategic bombing. He is worth quoting \textit{in extenso}:

The prevailing forms of social organization have given war a character of national totality—that is, the entire population and all the resources of a nation are sucked into the maw of war. And, since society is now definitely evolving along this line, it is within the power of human foresight to see now that future wars will be total in character and scope. . . .

. . . .

It is useless to delude ourselves. All the restrictions, all the international agreements made during peacetime are fated to be swept away like dried leaves on the winds of war. A man who is fighting a life-and-death fight—as all wars are nowadays—has the right to use any means to keep his life. War means cannot be classified as human and inhuman. War will always be inhuman . . . . The purpose of war is to harm the enemy as much as possible; and all means which contribute to this end will be employed, no matter what they are. . . .

. . . .

We dare not wait for the enemy to begin using the so-called inhuman weapons banned by treaties before we feel justified in doing the same. . . . Owing to extreme necessity, all contenders must use all means without hesitation, whether or not they are forbidden by treaties, which after all are nothing but scraps of paper compared to the tragedy which would follow.\(^{11}\)

It was in this atmosphere after a great war in which aerial theory had not been put into practice that a Commission of Jurists developed Rules of Warfare for Aircraft at the Hague, rules which were never ratified. The Commission was set up after the Washington Conference of 1922. It was composed of representatives from the United States, the British Empire, France, Japan, Italy and Holland. The rules they adopted for bombardment filled in the lacunae of the Hague Peace Conference rules stringently:

\begin{quote}
\textbf{Article 22}
\end{quote}

Aerial bombardment for the purpose of terrorising the civilian population, of destroying or damaging private property not of military character, or of injuring noncombatants is prohibited.

\(^9\) Printed in Lin, \textit{supra} note 4, at 81.

\(^{10}\) \textit{Spaight, Air Power and War Rights} 6–7 (3d ed. 1947).

\(^{11}\) \textit{Douhet, The Command of the Air} 5–6, 181, 189 (Ferrari transl. 1942).
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Article 24

(1) Aerial bombardment is legitimate only when directed at a military objective, that is to say, an object of which the destruction or injury would constitute a distinct military advantage to the belligerent.

(2) Such bombardment is legitimate only when directed exclusively at the following objectives: military forces; military works; military establishments or depots; factories constituting important and well-known centers engaged in the manufacture of arms, ammunition or distinctively military supplies; lines of communication or transportation used for military purposes.

(3) The bombardment of cities, towns, villages, dwellings, or buildings not in the immediate neighborhood of the operations of land forces is prohibited. In cases where the objectives specified in paragraph 2 are so situated, that they cannot be bombarded without the indiscriminate bombardment of the civilian population, the aircraft must abstain from bombardment.

(4) In the immediate neighborhood of the operations of land forces, the bombardment of cities, towns, villages, dwellings or buildings is legitimate provided that there exists a reasonable presumption that the military concentration is sufficiently important to justify such bombardment, having regard to the danger thus caused to the civilian population.12

The proposals of the United States Secretary of War prior to the meeting of the commission of Jurists had been much more specific but nevertheless both he and the Secretary of the Navy approved these provisions. The Secretary of the Navy went further in saying that the draft would have a value for guidance whether it became a treaty or not.13 Although it was reported that the rules were to be submitted to the Senate, the draft was quietly shelved.14

The Disarmament Conference of 1932 tried to deal with the problem again. The Benes Resolution of July 1932 agreed on a prohibition against air attack on civilian populations. British proposals in 1933 floundered when Britain sought to eliminate the bomber and aerial bombardment “save for police purposes in certain outlying regions.”15

During the debate over the bombing of Gernika, Mr. Eden, the Secretary of State for Foreign Affairs, stated in the House of Commons that there was only one rule of international law regarding the bombing of civilians, “that direct, deliberate and intentional bombing of non-combatants, as such, is illegal.”16 However, on 21 June 1938, the Prime Minister, Mr. Chamberlain, expanded this test:

I think we may say that there are, at any rate, three rules of international law or three principles of international law which are as applicable to warfare from the air as they are to war at sea or on land. In the first place, it is against international law to bomb civilians as such and to make deliberate attacks upon civilian populations. That is undoubtedly a violation of international law.

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12 [1923] 1 FOREIGN REL. U.S. 77 (1938). Section 5 is omitted.
13 Letter from the Secretary of the Navy to the Secretary of State, 19 May 1923, in id. at 87-89.
15 SPAIGHT, op. cit. supra note 10, at 247.
16 331 H.C. DEB. (5th ser.) 339 (1938).
In the second place, targets which are aimed at from the air must be legitimate military objectives and must be capable of identification. In the third place, reasonable care must be taken in attacking these military objectives so that by carelessness a civilian population in the neighborhood is not bombed.\textsuperscript{17}

Broad as Mr. Chamberlain's rules are, they bear the same phraseology as the resolution and recommendation of the report of the Third Committee of the League of Nations of 30 September 1938:

(1) The international (sic) bombing of civilian populations is illegal;
(2) Objectives aimed at from the air must be legitimate military objectives and must be identifiable;
(3) Any attack on legitimate military objectives must be carried out in such a way that civilian populations in the neighborhood are not bombed through negligence.\textsuperscript{18}

III. THE DEVELOPMENT OF PRE-WORLD WAR II POLICY

The burden of the development of bombardment policy after World War I lay with Great Britain. She developed a separate air arm and a separate Bomber Command within that arm. Psychologically, Britain wanted to eliminate as a possibility the terrible losses of land warfare that decimated her armies in World War I. This was to be a return to the tradition of reliance on a special arm similar to the old combination of the Royal Navy, a small professional army and the land forces of the allies.\textsuperscript{19}

In 1923 at a conference held by the Chief of the Air Staff, it was said: The question had been asked at Camberley "Why is it that your policy of attack from the air is so different from the policy of the Army, whose policy it is to attack the enemy's army, while yours is to attack the civil population." The answer was that we were able to do this while the Army were not, and so go straight to the source of supply and stop it. Instead of attacking a machine with 10 bombs we would go straight to the source of supply of the bombs and demolish it, and the same with the source of production of the machine. . . . The Army policy was to defeat the enemy Army—ours to defeat the enemy nation. The Army only defeated the enemy Army because they could not get at the enemy nation.\textsuperscript{20}

The attitude of Douhet was deep in those who headed the British air arm. But there was a difficulty in convincing others. The problem of aerial bombardment was extensively discussed in 1928. Trenchard, the Chief of Air Staff, drew up a memo in which he said:

As regards the question of legality, no authority would contend that it is unlawful to bomb military objectives, wherever situated. There is no written

\textsuperscript{17} 337 id. at 937.
\textsuperscript{18} DRAFT RULES 149.
\textsuperscript{19} See Cate, Plans, Policies, and Organization, in 1 THE ARMY AIR FORCES IN WORLD WAR II 557, 592 (Craven & Cate eds. 1948).
international law as yet upon this subject, but the legality of such operations was admitted by the Commission of Jurists who drew up a draft code of rules for air warfare at The Hague in 1922–23. Although the code then drawn up has not been officially adopted it is likely to represent the practice which will be regarded as lawful in any future war. Among military objectives must be included the factories in which war material (including aircraft) is made, the depots in which it is stored, the railway termini and the docks at which it is loaded or troops entrain or embark, and in general the means of communication and transportation of military personnel and material. Such objectives may be situated in centers of population in which their destruction from the air will result in casualties also to the neighboring civilian population, in the same way as the long-range bombardment of a defended coastal town by a naval force results also in the incidental destruction of civilian life and property. The fact that air attack may have that result is no reason for regarding the bombing as illegitimate provided that all reasonable care is taken to confine the scope of the bombing to the military objective. Otherwise a belligerent would be able to secure complete immunity for his war manufactures and depots merely by locating them in a large city. . . . What is illegitimate, as being contrary to the dictates of humanity, is the indiscriminate bombing of a city for the sole purpose of terrorising the civilian population.  

Milne, the Chief of the Imperial General Staff blasted Trenchard's arguments as leading to an advocacy of indiscriminate bombing of undefended towns and of their unarmed inhabitants. He drew attention to another section of the Hague rules:

"I feel compelled to draw attention to the fact that, in quoting the opinion of the Commission of Jurists on this subject, the Chief of the Air Staff seems to have overlooked an important qualification which was entered by this Body when defining the legality of air operations against factories situated away from the fighting areas. Their report states in Article 24, paragraph (3), that, where such objectives cannot be bombarded without the indiscriminate bombardment of the civilian population, aircraft must abstain from bombardment."

Milne based his main arguments on expediency:

"Whatever views may be held as to the ethical or moral rights of the case, the point of real importance to this Empire, and about which there should be no doubt, is the practical aspect; in effect is such a policy expedient?"

The catalyst of expediency led to a confusion of desirable and ethical military ends. The Western Air Plans of 1937 were drawn up for various eventualities. W.A. 5 was the direct offensive on German industry in the Ruhr. Although attacks on such industry would be legitimate:

There was another reason for which it was doubtful whether such a plan as W.A. 5 could be put into operation. In view of the British air inferiority it is not surprising to find that the possibility of restricting bombing to purely military objectives now received fresh and sympathetic consideration. Such restriction

21 Id. at 73.
22 Id. at 78.
23 Id. at 79.
24 1 id. at 94–95, 97.
had indeed always been part of official policy if the means could be found to
make it effective. On 21st June 1938 the Prime Minister announced in the
House of Commons that Britain would only bomb purely military objectives
and even so would take due care to avoid civilian casualties... Both the Air
Officer Commanding-in-Chief, Bomber Command, and the Air Ministry were
of opinion that restrictions on bombing would be an advantage and official
riders were sent to the former to confine his attacks to the... plans which were
obviously aimed at military objectives.25

It appears that the British felt that there were some sanctions in
international law but wanted these sanctions to be more than strictly
kept in order to protect themselves. This is what led to the confusion
of thought which is well projected in the British history:

Part of the argument centered upon the difference between “military” and
“civilian” targets and developed somewhat along the lines of the conventions
which had been attached to military and naval warfare. There was a school
of thought which demanded that bombing should be restricted to “military
targets” which could be destroyed without undue risk to “civilian” life or
property...

Obviously a strict interpretation of these obscure questions meant the absolute
prohibition of all strategic bombing and the confinement of all operations to
the actual area of... fighting. It meant, indeed, the kind of restriction which
was, in fact, applied to Bomber Command at the outset of the Second World
War. On the other hand, once it had been agreed that this restriction was too
narrow—once it had been decided to extend the definition of “military targets”—
then the limit was very difficult to see. In modern war between major powers
there is, after all, practically nothing worth attacking which does not have some
bearing upon the national war effort. Even the national churches pray for
national victory....

Thus, the moral argument about strategic bombing, once that kind of warfare
had been accepted at all, tended to degenerate into the drawing of distinctions
between necessary and unnecessary destruction. But at this point it merged
with and became indistinguishable from the strategic argument, for clearly
it was against every strategic precept to waste bombs, bombers and bomb
crews... 26

It should be pointed out that although the United States advocated a
policy of bombardment of selected key spots in enemy industry (at least
in Europe), the Army Air Forces did not reject the concept of bombing
of enemy cities as such:

Only when the industrial fabric of Germany began to crack should the AAF
turn to area bombing of cities for morale purposes.27

This quote is taken from Air War Plans Division 1 of 11 September 1941,
a portion of a Joint Board Estimate of United States Over-All Production

25 Id. at 99.
26 Id. at 14–15.
27 Cate, supra note 19, at 599.
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Requirements. Policy makers in the United States had failed to integrate what international law there was into policy, just as the British had.28

IV. THE DEVELOPMENT OF POLICY DURING AND AFTER WORLD WAR II

The ingredients of international law and national policy were put into the crucible of war from 1939 to 1945 and were found wanting in the protection of civilians from bombardment. Moreover, bombardment was found wanting as an efficient weapon for achieving the ends of war, in the way it was used.

The Germans used their air force at the beginning of the war mainly for land battles, in connection with what was essentially siege bombardment.29 Hitler's Directives for the Conduct of the War attempted to protect civilian populations in Belgium, Holland and Luxembourg and the attack on Britain was to be aimed at Britain's economy.30 Directive No. 13 stated that the attack on England "is to be opened with a devastating attack in reprisal for the English attacks against the Ruhr area" but in accord with the principles of Directive No. 9 which limited the attacks to the war economy. Directive No. 17 of 1 August 1940 stated that Hitler reserved for himself "the decision on terror attacks as a means of reprisal."31

At any rate, the development of unlimited warfare and bombardment from the air was the policy of the victorious powers, not of Germany, whatever Germany was responsible for in Poland or at Rotterdam and Coventry.32

In line with the early policy of expediency in order to protect Britain from bombing, the British refrained from attacks on German war industry. On 1 September 1939, President Roosevelt had asked that civilian populations of unfortified cities be spared. The English and French replied that they would bomb only military objectives in the narrowest sense and Hitler did the same. But on 10 May 1940, the British announced through the Foreign Office that the right was reserved to take any action appropriate in the event of the bombing of civilian populations.33

28 The author apologizes for not considering World War II development of policy by the United States. Lack of time prevented consideration of primary sources. Apparent lack of open discussion by Air Force officials prevents consideration of the secondary sources.
30 See 8 DEPT STATE, DOCUMENTS ON GERMAN FOREIGN POLICY, 1918-1945, at 316, 430, 463 (1954).
31 See id. at 463; 9 id. at 427; 10 id. at 390.
33 SPAIGHT, op. cit. supra note 10, at 265.
The British historians have stated:

This policy of restricted bombing was, however, a matter of expedience as much as of morality, for the performance of the Luftwaffe in Poland, where bombing was often indiscriminate, was soon taken by some highly placed officers to free Britain from the moral obligation assumed by the acceptance of the Roosevelt appeal. Though as Air Commodore Slessor said, "Indiscriminate attack on civilian populations as such will never form part of our policy," he felt that it would be legitimate to attack the Ruhr power stations and oil plants.\(^{31}\)

But the British had to change their policy:

The conditions of limited warfare were, however, sufficiently violent to reveal one fundamental operational fact. This was that Bomber Command could not carry out a strategic offensive in daylight. Between September 1939 and the launching of the offensive in May, 1940, the force, therefore, turned to night action. By November 1942, however, the process was almost complete and bombing policy had progressed through a series of less and less precise aims to that of general area attack on whole towns.

The change in bombing policy was not due solely to the recognition of operational facts, though these alone did make it inevitable. It was also due to a positive eagerness, shared by prominent members of the War Cabinet, that the Germans should get as good as they were giving.\(^{35}\)

The British did at times return with their bombs early in the war because they could not find their targets. The practice changed after the indiscriminate attack on London on 7 September 1940, although the British claimed that military targets were still aimed at.\(^{36}\)

On 24 August, London central had been attacked for the first time. On the first night after this attack, Bomber Command attacked Berlin but not against the policy of precision bombing.\(^{37}\) Paradoxically, it is possible that the German shift of attack from the sector stations to London in September as reprisal for the "reprisal" raid of 25 August was a factor which saved the United Kingdom. As a matter of fact, the first raid on London was an accident.\(^{38}\)

The problem of who started what in bombing civilians is necessarily unclear since the Germans had the same operational difficulties as the British. Certainly, even the reprisals were not really reprisals. At least both sides claimed that their "reprisals" were really aimed at military targets.

As early as September 1940, Bomber Command under Sir Charles Portal believed that the by-product of hitting civilians should become an end-product. The Vice-Chief of Air Staff, Sir Richard Peirse, "believed that what was inevitable was also desirable only in so far

\(^{34}\) 1 WEBSTER & FRANKLAND, op. cit. supra note 20, at 135, quoting Plans Memo of 7 Sept 1936.

\(^{35}\) Id. at 130.

\(^{36}\) SPAIGHT, op. cit. supra note 10, at 268-69.

\(^{37}\) Id. at 53-54; 1 WEBSTER & FRANKLAND, op. cit. supra note 20, at 152.

as it remained a by-product of the primary intention to hit a military target in the sense of a power station . . . ." 39

The search for policy now became highly complex, without any real guidelines other than those of maximum destruction while looking for something better. It was pointed out by the Minister for Air, Sir Archibald Sinclair, on 16 June 1941, that the program for obliteration bombing was too heavy for industry to bear, intimating a desire to try day bombing again. 40 Sir John Dill, Chief of the Imperial General Staff, made the same remark on 2 June 1941, stating that the attack on morale took large forces so that transport should be the primary target with morale as primary when bomber forces were large enough. 41

What ensued was that communications and morale became twin target systems and the Director of Bombing Operations had already placed them together on 13 May 1941, because communications targets were adjacent to workers' dwellings and congested areas of industry. 42

Lord Trenchard's argument on 19 May 1941 was this:

... if you are bombing a target at sea, then 99 per cent of your bombs are wasted, but not only 99 per cent of your bombs are wasted but pilots (etc.). So, too, if the bombs are dropped in Norway, Holland, Belgium or France, 99 per cent. do Germany no harm, but do kill our old allies, or damage their property or frighten them or dislocate their lives. . . . If, however, our bombs are dropped in Germany, then 99 per cent. which miss the military target all help to kill, damage, frighten or interfere with Germans in Germany and the whole 100 per cent. of the bomber organization is doing useful work, and not merely 1 per cent. of it. 43

Morale was defined only at the end of 1941 because of United States insistence and criticism. The attack on morale included

"the disruption of transportation, living and industrial facilities of the German population rather than the more restricted meaning." This definition implied that the attack was directed not so much to destroying the German worker's will to work as to deprive him of the means of working effectively. This distinction became more apparent in later stages of area bombing. It is obviously different [it is indeed not] from that put forward by Lord Trenchard and others who had supported the attack on morale earlier in 1941. 44

On 14 February 1942, Air Vice-Marshall Bottomley wrote to the Acting Chief of the Bomber Command:

In accordance with these principles and conditions, a review has been made of the directions given to you in Air Ministry letter dated 9.7.41, and it has been decided that the primary objective of your operations should now be focussed on the morale of the enemy civil population and in particular, of the industrial workers. 45

39 1 WEBSTER & FRANKLAND, op. cit. supra note 20, at 154.
40 See id. at 177.
41 See 4 id. at 198-99.
42 See 1 id. at 297; 4 id. at 136.
43 4 id. at 195.
44 1 id. at 298. The bracketed comment is mine.
45 4 id. at 144.
Portal in a minute to Bottomley specifically said:

I suppose it is clear that the aiming points are to be the built-up areas, not, for instance, the dockyards or aircraft factories. . . .

To keep its place in the war, the strategic air offensive had to show results. This led to the 1,000 bomber raid on Cologne of 30 May 1942, the first of the great raids.

It had been claimed, even during the war, that the attack on morale, even as the broader definition would have it, was a waste. The broader definition solved United States criticism by including legitimate targets within its ambiguous words.

More practical uses for bombers were suggested until such time as operational difficulties were solved. There was a fight to have aircraft transferred to Coastal Command which was stoutly resisted by Air Marshal Harris who said it took some 7,000 hours of flying to destroy one submarine at sea while this was enough to destroy one-third of Cologne in one night. Blackett put the emphasis positively, away from mere destruction, saying each bomber could save at least six merchant ships in 30 sorties while in bombing Berlin it could drop less than 100 tons of bombs and kill not more than a couple of dozen enemy men, women, and children and destroy a number of houses.

The bombing of French targets in 1942 led to much criticism because of the damage done to French civilians. The resulting directive of 29 October 1942 showed that operational considerations did not have to be the paramount considerations in bombardment:

It was in an effort to bring up to date a code of rules for operations in this delicate but unavoidable situation that the Air Ministry, to whom the responsibility for such political matters was customarily left, issued the directive of October 29. Bombardment was to be confined to military objectives. The intentional bombardment of civilian populations, as such, was forbidden. It must be possible to identify the objective. The attack must be made with reasonable care to avoid undue loss of civilian life in the vicinity of the target, and if any doubt existed as to the possibility of accurate bombing or if a large error would involve the risk of serious damage to a populated area no attack was to be made. The provisions of Red Cross conventions were, of course, to be observed. Military objectives were defined broadly to include any sort of industrial, power, or transportation facility essential to military activity. . . .

In conclusion, the directive stressed that none of the foregoing rules should apply in the conduct of air warfare against German, Italian, or Japanese territory, except that the provisions of Red Cross conventions were still to be observed, for consequent upon the enemy's adoption of a campaign of unrestricted warfare,
the Cabinet have authorized a bombing policy which includes the attack on enemy morale.\textsuperscript{51}

Further problems arose to plague the independent air force concept. Air Marshal Harris had depended primarily on destruction of everything to carry out Bomber Command’s mission. In Coventry, 100 out of 1,922 acres had been destroyed. But in Hamburg, 6,200 out of 8,382 acres were destroyed; in Essen 1,030 out of 2,630.\textsuperscript{52} Yet the German Air Force was not dead by the end of 1943, and the approach of Overlord made it imperative that the Allies gain air superiority. And even the American Eighth Air Force policy of precision bombing was failing because of a lack of air support while the British casualties on night raids were also mounting.\textsuperscript{53}

The British historians have commented on the dilemma:

It might appear, and it has often been suggested, that a great moral issue was involved in this situation, but the moral issue was not really an operative factor. The choice between precision and area bombing was not conditioned by abstract theories of right and wrong, nor by interpretations of international law. It was ruled by operational possibilities and strategic intentions.\textsuperscript{54}

Reduced to plain English, this means that policy was being made up on a day-to-day basis, ignoring any moral factor and failing to establish sound military policy besides. The authors go on to draw a distinction without a difference:

The issue did not concern simply the operational distinction between day precision and night area bombing, though that was to some extent involved. It arose from the strategic difference between selective and general attack. Selective bombing was based upon the principle that “it is better to cause a high degree of destruction in a few really essential industries than to cause a small degree of destruction in many industries.” It could be pursued by precision bombing, which would strike at individual factories and plants in the particular key industries which had been selected, and by area bombing, which would strike at particular towns associated with those industries. The principle of general attack . . . postulated the theory that the only effective attack as that which, by cumulative results, produced such a general degree of devastation in all the major towns that organized industrial activity would cease owing to a combination of material and moral effects.\textsuperscript{55}

At any rate, the British started to get qualms about night area attacks and in the beginning of 1944 had to shift over to at least selective attack.\textsuperscript{56} It was admitted:

This emphasis upon the value of selective attack corresponded more closely to the aim which had inspired the efforts of the Eighth Air Force than to the

\textsuperscript{52} 2 Webster & Frankland, \textit{op. cit. supra} note 20, at 48.
\textsuperscript{53} Id. at 37-39.
\textsuperscript{54} Id. at 22.
\textsuperscript{55} Id. at 5.
\textsuperscript{56} Id. at 4-6.
policy which had generally and primarily governed the conduct of Bomber Command since the summer of 1941. Yet it was undoubtedly the apparent failure of the Eighth Air Force, culminating in the Schweinfurt disaster of October 1943, which had produced this shift. The continuing growth of the German fighter force and the evident failure of the Eighth Air Force to check it coupled with the approach of Overlord and the overwhelming need for air superiority, had virtually forced the Air Staff into what amounted to a policy of desperation. The general area assault appeared to be not only extravagant but also irrelevant.  

The Casablanca directive which had been sent to Sir Arthur Harris on 4 February 1943 was ambiguous in its policy. Harris changed some words and introduced the new version as a direct quote in order to make morale the supreme objective of the Combined Bomber Offensive. This duplicity in the making of policy was matched on the public level:  

The conduct of the strategic air offensive had long been regarded with suspicion by sections of public opinion in Britain. It was generally regarded as morally legitimate to bomb strategic objectives such as factories, oil plants . . . even if this did incidentally cause severe destruction of residential areas and of civilian life and limb. On the other hand, the view that it was morally legitimate to bomb residential areas, even if the object was to reduce military or industrial activity, was frequently challenged, and the more apparent it became that in the majority of the major area attacks, Bomber Command was, in fact, aiming at the centres of the residential areas, the more pronounced the protests became.  

Nevertheless, the view that the Air Staff . . . were ultimately responsible for the decision to carry out . . . "terror bombing" had grown up with . . . the bombing offensive. This was undoubtedly at least partly attributable to the nature of the frequent public and in some cases private pronouncements which Sir Archibald Sinclair found it his duty to make. In these he did not concede that one of the objects of area bombing was the reduction of civilian and especially industrial morale by the bombing of housing and public utilities and so, of course, of the populations themselves. He usually, and, on public occasions, invariably, suggested that Bomber Command was aiming at military or industrial installations as, of course, it sometimes was.  

For example, the Secretary of State for Air said at various times:  

The objects of our bombing offensive in Germany are to destroy the capacity of Germany to make war and to relieve the pressure of the German Air Force and Armies on our Russian allies. No instruction has been given to destroy dwelling houses rather than assault factories, but it is impossible to distinguish in night bombing between the factories and dwellings which surround them.  

On 3 November 1943, the question was put to him:  

In view of the fact that our bombing is discriminatory and that we seek only industrial targets, whereas the German bombers over this country go for civilian targets in a large percentage of cases, do not these figures afford further proof  

57 Id. at 71.  
58 Id. at 14.  
59 3 id. at 114.  
60 379 H.C. Deb. (5th ser.) 1364 (1943); cf. 388 H.C. Deb. (5th ser.) 155 (1943); 395 H.C. Deb. (5th ser.) 337-38 (1943).
of the desirability of concentrating our heavy bombers and those of the United States here on destroying the war production of the enemy? 61

Sinclair replied ambiguously that "certainly all our bombing attacks are directed to the destruction and dislocation of the German war machine."

Amazingly, after the conquest of the German Air Force which had been necessary for D-Day, the renewal of the Battle of Berlin was projected in July of 1944 not as against industry but as against morale. There was one suggestion to obliterate towns of 20,000 population but this was said to effect too small a portion of Germany. The policy did lead to the attack on Dresden in February 1945, the climax of the night area offensive. 62 After the attack, the public outcry was so great that on 28 March 1945, the Prime Minister addressed a minute to General Ismay and the Chief of the Air Staff:

The destruction of Dresden remains a serious query against the conduct of Allied bombing. I am of the opinion that military objectives must henceforward be more strictly studied in our own interests than that of the enemy.

The Foreign Secretary has spoken to me on this subject, and I feel the need for more precise concentration upon military objectives, such as oil and communications behind the immediate battle-zone, rather than on mere acts of terror and wanton destruction, however impressive. 63

Due to pressure from the Air Staff, Churchill withdrew the minute and reissued it on 1 April 1945, specifying only that methods be "reviewed from the point of view of our own interests." 64

On the other side of the world, the experts were slow to authorize area techniques in Japan. But the temptation was too great. Where 15 leading RAF area targets in Germany had contained only about 12.3 percent of greater Germany's total labor force, 14 leading Japanese urban areas contained 42.5 percent. Industry was more centralized as well, i.e., 40 percent of aircraft engine production was located in one city. 65

On 9-10 March 1945, 16 square miles of Tokyo were set ablaze with 78,000 Japanese killed. As one author phrased it:

With such obliteration of cities as accepted mode of warfare on both sides, it was difficult for most military chieftains to believe that a new weapon of destruction presented ethical questions not found in TNT and the fire bomb. 66

The ground had been well prepared for the use of the atomic bomb. There was a consistent recognition of some standard to be followed in

61 393 id. at 641.
63 Id. at 112.
64 Id. at 117.
66 KNEBEL & BAILEY, NO HIGH GROUND 98-99 (1960).
bombardment of cities, sometimes recognized as quite stringent. Nevertheless, the appeal to the undoubted crimes of the enemy led to so-called reprisals by Great Britain and the United States and then to an area bombing policy which was a real concession to the attitude that the end justifies the means.

Unfortunately, the means were ill-adapted to the avowed pragmatic purpose. The United States Strategic Bombing Survey concluded that area bombing was ineffective to achieve its ends. More amazingly, the British Bombing Survey Unit agreed, although the British had expended one-half their effort in area bombing:

On the evidence, they concluded that “area bombing against German cities could not have been responsible for more than a very small part of the fall which actually had occurred in German production by the spring of 1945, and . . . in terms of bombing effort, they were also a very costly way of achieving the results which they did achieve.”

Reich Minister Speer on 1 December 1944 said:

You must realize that those people of the enemy who work out the plans for the economic bombing attacks know German industry very well and that there is here a clever and far-reaching planning in contrast to our earlier raids on England. We have been lucky in that the enemy did not make methodical use of this detailed planning until the last half or three-quarters of this year and that before that he gave us enough time.

Speer confirmed these observations in interrogations after the War. To him, the night attacks against city centers were “incomprehensible” because the effects on industry were slight. Even when attacks were directed on industrial areas, and damaged to plants more widespread, the damage was not enough for destruction. The effect of raids like Cologne and Hamburg was primarily in their shock effect. But even Hamburg recovered speedily.

In an interrogation on 18 July 1945, Speer went on to say:

In spite of all this, however, the Allied air attacks remained without decisive success until early 1944. This failure, which is reflected in the armaments output figures of 1943 and 1944, is to be attributed principally to the tenacious efforts of the German workers and factory managers and also to the haphazard and too scattered form of attack of the enemy who until the attacks on the synthetic oil plants based his raids on no clearly recognisable economic planning.

The American attacks, which followed a definite system of assault on industrial targets, were by far the most dangerous. It was in fact these attacks which caused the breakdown of the German armaments industry. The night attacks did not succeed in breaking the will to work of the civilian population.

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67 Quoted in 4 WEBSTER & FRANKLAND, op. cit. supra note 20, at 48.
68 Id. at 49.
69 Id. at 358.
70 Id. at 375.
71 Id. at 380, 383.
V. THE DEVELOPMENTS OF RULES AFTER WORLD WAR II

After World War II, there has been little official development in the law regarding bombardment of civilians. But there has been a strange verification. At Nuremberg, it was stated by Sir David Maxwell-Fyfe:

These last documents seem to raise quite clearly the issues of *tu quoque*: If the Reich committed breaches of the laws and usages of war, other people did the same thing. The submission of the Prosecution is that that is entirely irrelevant. The standard is laid down by the conventions and it is no answer, even if it were true that someone else had committed breaches...  

And Mr. Justice Jackson said somewhat the same:

If Your Honor please, I believe it is a well-established principle of international law that a violation on one side does not excuse or warrant violations on the other side. There is, of course, a doctrine of reprisal, but it is clearly not applicable here, on any basis that has been shown.

In the Hostages Trial, the Tribunal concluded that the “rules of international law must be followed even if it results in the loss of a battle or even a war.”

Despite all the inhibitions on air warfare pointed out above and despite the resounding principles of the Nuremberg trials, air warfare had been used by the victorious Allies to an almost unlimited extent. Schwarzenberger has pointed out:

It is significant that, in the British directive [of 29 October 1942], the bombing policy adopted is not justified on the ground of reprisals, but based merely on a *tu quoque* argument. It is even more relevant that neither the Indictment leading to the trials of the German major war criminals before the International Military Tribunal at Nuremberg nor the Judgment itself deals expressly with the question of the legality of German air warfare or the most indiscriminate of all known forms of warfare, that is to say, the German V-weapons...

Whatever rules had exercised an inhibiting effect on the policy makers were highly confused to have allowed the situation to come to this pass. Atomic weaponry has made specification of inhibiting factories even more difficult. Army Field Manual 27-10 of July 1956 has already laid down the applicable lack of law:

The use of explosive “atomic weapons” whether by air, sea or land forces, cannot as such be regarded as violative of international law in the absence of any customary rule of international law or international convention restricting their employment.

There is no prohibition of general application against bombardment from the air of combatant troops, defended places, or other legitimate objectives.

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72 8 INT'L MILITARY TRIBUNAL, TRIAL OF MAJOR WAR CRIMINALS 178–79 (1947).
73 9 id. at 188.
74 Quoted in SINGH, NUCLEAR WEAPONS AND INTERNATIONAL LAW 212 (1959).
Interestingly enough, Article 25 of the Hague Rules for Land Warfare is specified in the Army Field Manual by an explanation relating to the naval rules:

Factories producing munitions and military supplies, military camps, warehouses storing munitions and military supplies, ports and railroads being used for the transportation of military supplies, and other places devoted to the support of military operations or the accommodation of troops may also be attacked and bombarded even though they are not defended.

... Particularly in the circumstances referred to in the preceding paragraph, loss of life and damage to property must not be out of proportion to the military advantage to be gained.77

The United States Air Force apparently has published nothing on the subject of the legal protection of civilians from bombardment. Rather, the mission of strategic operations was broadly defined.78

The International Committee of the Red Cross drew up draft rules which were submitted to the nations for consideration.79 Six out of 10 proposals to amend Article 14 relating to blind weapons were to prohibit such weapons entirely. Even so, General Gruenther, representative of the United States for the American Red Cross said that Articles 8, 9, 10 and 14 taken together “can be considered as virtually prohibiting the use of atomic weapons in war.”80 Mr. Siordet, Vice President of the International Committee of the Red Cross set the tone when he said:

The ICRC knows that in a conflict the preservation of a country’s safety may face it with harsh necessities. . . . On the other hand, its mission . . . is to proclaim and ceaselessly reaffirm the fact that humanity also has its necessities.81

The rules were constructed on the idea that the Hague Rules, although not completely modernized, expressed principles “which, in the absence of any more suitable code of rules, are and remain valid at all times.”82

Finally, to bring one development down to 1963, the policy of counterforce is being enunciated in today’s war councils. This policy is not law but it is based on a fundamental need for rationalization in conflict. Dr. Alain Enthoven, Assistant Secretary of Defense, has said:

In the nuclear age, military force will be too dangerous to use if our objectives are not carefully chosen and limited at each step of a conflict, and if the force cannot be used in a controlled and deliberate way to achieve precisely the objectives being sought. To fight for unlimited objectives, or to fight in an uncontrolled way would almost surely bring on almost unlimited destruction.

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77 Id. at 19.
80 Id. at 37.
81 Id. at 9.
82 DRAFT RULES 53-54.
Moreover, when force is being applied, the military action must not be allowed to control events and compel the President's decisions; rather, it should be the other way around. . . .

This belief may be contrasted to the view that "peace is peace and war is war," and in war military necessity is the only valid criterion for decision. . . . The President must be free to weigh the requirements of the military commander against other requirements. . . .

. . . .

Doubtless questions will arise in your minds as to whether nuclear war can and should be limited and controlled. First can it? The answer depends on our will to make it so.83

VI. THE THEORIES

Men such as Liddell Hart and Walter Lippman have pointed out that the modern democracies seem to be going the way of the Greeks. The democratic system brakes preparations for war but once passions are aroused, then no control exists. So it was that the theory of the Independent Air Force won out over the idea of precision bombing in World War II.84

One of the better authors on this subject has given almost a totally pragmatic cast to his approach to the problem of the protection of civilians:

The elements which form the basis of warfare rules fall into two main categories: a dominating group of military interests and a minor group growing out of "social sanction." This dominating group of military interests is bound up with state security and is motivated solely by utility. Its one standard is effectiveness. Checks on this effectiveness never come from within the group. The few restraints in force come from without from the common culture of the time expressed as a social sanction.85

Although the prediction was made before World War II that one of the main agencies of war would be poison gas,86 the social sanction, or the fear of reprisal, stopped the use of gas. There is a ferment today, even apart from the Ban the Bombers, which may lead to the avoidance of planned use of nuclear bombs on cities—the needs for tactical weapons against armies,87 the realization that exaggerated nationalism feeds the immoral use of technology,88 the prophetic voices of religious leaders.89

85 ROYSE, AERIAL BOMBARDMENT 1 (1928).
86 See Quindry, Aerial Bombardment of Civilian and Military Objectives, 2 J. AIR L. & COM. 474 (1931).
89 Merton, Peace: A Religious Responsibility, in BREAKTHROUGH TO PEACE 103 (New Directions paperback 1962).
The basic problem for international law has been well posed by Walter Stein:

In the normal run of the world, force is a right and necessary condition of order and humane existence. We cannot imagine a world that could not, man being what he is, require a measure of physical power, to restrain abuses of physical power. . . . Yet it is precisely at this moment of extreme need for physical protection that effective physical force seems to elude us, beyond its ultimate tolerable limits.90

In this context, the fight for international law takes substance. Granted that the Hague Rules protecting undefended cities except for military objectives have an old-fashioned cast, the rules did point the way to certain solutions by way of certain principles. Even the 1923 Draft Rules were too tightly drawn but they did give adequate guidelines which would have been better operational policy than that actually followed in World War II. Royse with all the cynicism of his utilitarianism gives a more practical guide as to what must be done. The policy makers for the military must set up the military posture in a fashion which is directed against the military force of the enemy.

With competing world systems, morality cannot be written into law because the structure cannot bear the strain. The principle of the inviolability of noncombatants is still a principle but not one that underlies the law of war. As one author has put it, the conceptual basis for a law of nuclear war must be that of legitimate military necessity.91 It would seem, however, that legitimate military necessity could well be immoral unless reference is made to something outside of the structure of international military law. Legitimate military necessity would seem to take its reference from within the military system. Legitimate military necessity has been defined as:

All measures immediately indispensable and proportionate to a legitimate military end, not prohibited by the laws of war or by the natural law, taken on the decision of a responsible commander subject to judicial review.92

This seems to be a circular definition because to appeal to the natural law is to go back to the “humanitarianism” originally rejected by the author.

During World War II, area bombing could well have been subject to the laws of proportionality up to a point, since it could have been conceivably argued that there was no other way to attack German industry. The argument would not have been valid because before D-Day direct attacks were made on civilians and after D-Day, the area bombing

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90 Stein, The Defense of the West, in Breakthrough to Peace 158 (New Directions paperback 1962).
policy was continued although it was no longer needed to protect operational safety. The Germans stated that the heavy raids were most dangerous because of their shock value when there was a sudden step-up in activity. This was possibly the greatest effect of the atomic bombs; they did help avert bloody land battles which would have killed many more Japanese, let alone Americans, and would have left a path of hate across Japan.93 Should both sides have the atomic bomb, the argument of proportionality diminishes because there is a vast possibility that the use of such weapons will have no rational connection with the end of a war, only with the beginning.

Schwarzenberger has rejected the notion that there are any law-creating processes, relevant legal principles or relevant individual rules to control the use of atomic weapons, let alone ordinary bombs.94 He comes to the conclusion that the protection of the enemy civilian population is limited to those who are not connected with the war effort and are remote from target areas.95 It is likely that his conclusion is influenced by a presupposition:

[T]he first, and most self-denying, duty of the international lawyer is to warn against the dangerous illusion that his findings on the legality or illegality of nuclear weapons are likely to influence one way or the other the decision on the use of these devices of mechanised barbarism.

. . . He must be willing to consider without fear or favour any changes in the structure of existing world society, however radical, which may be required to break the vicious circle of our system of world power politics in disguise.96

It is submitted that a limited international law is today without power to control war by laws of war, as is indicated by aerial bombing of civilian populations. Schwarzenberger’s conclusion can only lead to the attempt to make it policy that there must be a world government with a legal monopoly of force. Long range and idealistic as such an attempt is, there is no other substitute but cold war.

PAUL J. GODA*

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93 Cf. U.S. STRATEGIC BOMBING SURVEY, JAPAN’S STRUGGLE TO END THE WAR 8, 12 (1946); cf. the revelations of Lt. Col. Masataka Iwata, Japan War Revelation, San Jose Mercury, 14 Aug. 1965, p. 8, on the continuation of war if the atom bomb had not been dropped.

94 See SCHWARZENBERGER, op. cit. supra note 75, at 7–11.

95 See id. at 22.

96 Id. at 58.

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