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**AIR BOMBARDMENT AND THE  
LAW OF ARMED CONFLICT**

**By**

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## **About the Author**

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## INTRODUCTION

Viewed in its true light, aerial warfare admits no defence, only offence. We must therefore resign ourselves to offensives the enemy inflicts upon us, while striving to inflict even heavier ones upon him. This is the basic principle which must govern the development of aerial warfare.

Giulio Douhet 1921<sup>1</sup>

Since the first aerial bombing attack in 1849,<sup>2</sup> air bombardment has attracted controversy and criticism. Much of the criticism has come from those who maintain that many aspects of air bombardment are contrary to the international law of armed conflict.

One of the earliest examples of offensive military power, projected from the third dimension, was the air strike on Turkish lines by Lieutenant Cavetti of the Italian Regii Aeronautica. The first attack and the following raids were condemned because the Turks alleged a field hospital had been bombed. However, no similar protest was made when 152 shells from naval gunfire landed in the same lines.<sup>3</sup>

The early example illustrates the problems air planners can face ensuring compliance with uncertain international law. These problems can be compounded by an enemy who uses alleged violations for propaganda purposes. The challenge for the international jurist is to ensure the humanitarian aims of the law are not perverted for political or military purposes. This dilemma has persisted throughout the history of air bombardment.

The early air power theorists recognised the terror air bombardment could cause. They predicted air power, primarily through air bombardment, would revolutionise warfare because it would make drawn-out land campaigns irrelevant. Wars would be won because air bombardment would wreak such destruction on belligerent nations that the populace would sue for peace. To achieve this aim Giulio Douhet in 1921 advocated heavy aerial strikes against all strategic enemy targets, including civilians, incorporating incendiary and gas attacks as well as high explosives.<sup>4</sup>

In some respects the pioneer air power theorists were right, as the emergence of air power fundamentally changed the nature of war. However, air bombardment alone did not fulfil the war winning dreams of the theorists. What air power could do was incorporate the civilian population into the battlefield. No longer were civilians immune from the horrors of war. As demonstrated by the air attacks upon London, during World War I, no one within enemy air range was safe. It therefore fell upon the international community to attempt to draft laws to protect the innocent victims of war.

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<sup>1</sup> Douhet, G., 'Command in the Air' in Ball D. (ed.), *The Future of Tactical Air Power in the Defence of Australia*, Strategic and Defence Studies Centre, Australian National University, Canberra, 1977. p 8.

<sup>2</sup> Parks, W.H., 'Air War and the Law of War', *Air Force Law Review*, Vol 32, No 1, 1990, p 44, from Kennett, L., 'A History of Strategic Bombing', 1982, pp 1-9. The first bombing raid took place in 1849, when the Austrians launched unmanned bomb-carrying balloons against Venice.

<sup>3</sup> Saundby, R., *Air Bombardment: The Story of its Development*, Chatto & Windus, London, 1961, p 7.

<sup>4</sup> Douhet, G., *Command of the Air*, 1921, extract in RAAF Staff College Study Folder Air Power Theory, Study Folder 2A, RAAF Staff College, RAAF Base Fairbairn, Canberra, 1991, p 163.

International law, through the Law of Armed Conflict,<sup>5</sup> has attempted to legitimise air bombardment by restricting its use, particularly against civilians. Prior to World War II, the international laws which existed developed through custom rather than treaty. Unfortunately, this area of the law was, and continues to be, bedevilled by its complexity and plagued by parochial national interests. The 1977 Protocols Additional to the Geneva Conventions have attempted to codify the existing customary international law, as well as create new law.

The Additional Protocols have been ratified or acceded to by 97 States. They are quickly being established as the international standard. Many of the rules they contain are restatements of previously accepted customary law. This essay will review some of the most important air bombardment campaigns and the developments in international law which have accompanied the progress and use of strategic aerial bombardment.

## EARLY HISTORY

Wars in the late Middle Ages could have been described as truly 'total'; that is all property whether public or private, belonging to the enemy under his control, was lawfully subject to looting and wanton destruction.<sup>6</sup> However, with the rise of regular armies, established codes of conduct gradually became accepted. Concepts of Christian chivalry were instrumental in this acceptance.

### Early History of the Law of Armed Conflict

The Dutch jurist Hugo Grotius in 1625 wrote what is generally accepted as the first textbook on international law. This book was the first to set out 'rules of war' and it introduced the doctrine of proportionality. By 1800, several broad but well-established rules covered the protection of civilian lives and property.

During the American Civil War, Dr Frances Lieber was directed by President Lincoln to draw up a code of conduct for the Union Army. Lieber's code reflected the practices which had been established in Europe and is regarded as the first succinct codification of the classic law of war. Article 15 of the code summarised the law on damage to enemy life and property.

Military necessity admits of all direct destruction of life and limb of armed enemies, and other persons whose destruction is incidental or unavoidable in the armed contest of war ... it allows of all destruction of property, and obstruction of the ways and channels of traffic, travel or communication, and all withholding of sustenance or means of life from the enemy.

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<sup>5</sup> The United Nations developed the term Law of Armed Conflict (LOAC) to replace the traditional Law of War (LOW) applicable to armed conflicts. The basis of this is, in theory, that the United Nations Charter has outlawed war. The ADF, CDF, USAF, and USN use the term LOAC, some other agencies still use LOW.

<sup>6</sup> Carnahan B. M., 'The Law of Air Bombardment in its Historical Context', 17, *Air Force Law Review*, Montgomery, Alabama, 1975, p 39.

This article was applied to protect civilian, neutral property but claims for damages for property which was used to support the confederate state were rejected, for example, British owned cotton. These claims were disallowed because of cotton's importance as the South's sole foreign trade product. Similarly, accidental destruction of neutral property during siege bombardment was not protected.<sup>7</sup>

### **International Treaties**

During the 1800s a series of international conferences were conducted. These resulted in a number of Treaties which attempted to alleviate the calamities of war and established that 'the only legitimate object which States should endeavour to accomplish during war is to weaken the military forces of the enemy.'<sup>8</sup>

These international treaties developed two streams of international law of war: the humanitarian stream – Geneva Law; and laws which regulated the means and methods of warfare – Hague Law. While there was generally little dispute about Geneva Law, negotiations concerning Hague Law were protracted and nations often failed to agree on terms. The regulation of air power was hampered by this as nations refused to concede possible future technological advantages. However, this trend was not confined to air power. As early as 1139 when the Lutheran Council tried to ban cross-bows and later when Marsal Saxe and Bayard tried to restrict muskets nations have tried to control technological advances.<sup>9</sup> Britain in an attempt to maintain its imperial naval supremacy proposed to legislate against its principal threat, the submarine. While it failed to prohibit submarines entirely, it did succeed in containing them by providing that they must adhere to the traditional rules of capture. However, pragmatism triumphed and the provisions of the 1930 London Naval Treaty were subsequently ignored by both the Allied and Axis powers in World War II.<sup>10</sup>

This trend to restrict technological advance was evident in the first treaty which recognised air power. The 1899 Hague Conference agreed to prohibit the dropping of projectiles from balloons. This prohibition applied for five years and was followed by a legal vacuum in the area of written regulation of aerial warfare. This vacuum was recognised by Air Marshal Sir Arthur Harris, Commander of the Royal Air Force's Bomber Command during World War II, when he wrote: 'International law can always be argued pro and con, but in the matter of the use of aircraft in war there is, it so happens, no international law at all'.<sup>11</sup> While Air Marshal Harris was not alone in this view, a body of substantial customary international law did exist. However, the law was complicated, misunderstood and so plagued with practical difficulties that its successful application was almost impossible.

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<sup>7</sup> *ibid.*, pp 41-42.

<sup>8</sup> Boyd, P. M., 'The Laws of Armed Conflict, Definition, Sources, History', *Australian Defence Force Journal*, No 86, Jan/Feb 1991, p 21.

<sup>9</sup> Spaight J. M., *Air Power and War Rights*, Longmans Green & Co., London, 1924, p 28.

<sup>10</sup> Park, W. H., *Conventional Aerial Bombing and the Law of War*, US Naval Institute Proceedings, 1982, p 28.

<sup>11</sup> *ibid.*, p 22.

## Early Air Bombardment History

Following the Regia Aeronautica's lead other nations were quick to adopt air bombardment as a means of warfare. During World War I, German Zeppelins, Gothas and Giants conducted air raids on London to try to force the British to sue for peace. While this type of attack was condemned as contrary to the Law of War, the raids were viewed with distaste primarily because they were unorthodox, unethical and unpredictable. Professional soldiers had a long recognised unwritten code of conduct and air bombardment was seen as breaching this code. One of the fundamental rules was that you do not target civilians. The apparently indiscriminate German bombings clearly did not comply. In this very early example, an inability to discriminate military from civilian targets emerged as the principal problem air planners had to overcome.

Towards the end of World War I, the British formed the Independent Air Force and conducted strategic air attacks on railway facilities in France, and factories in the Ruhr and Rhineland. These were generally regarded as ineffective because of inaccuracy and an inability to concentrate the firepower applied.<sup>12</sup> The RAF did, however, find a use for strategic aerial bombardment in its Middle East colonies in the 1920s and 1930s.

Britain was experiencing difficulty maintaining law and order in its colonies in the Middle East. The traditional control mechanism, the army, was having little success and consuming a disproportionate amount of resources dealing with rebel tribesmen in outlying areas. In 1922, the RAF deployed bombers to Mesopotamia (now Iraq). These aircraft controlled unrest by threatening to bomb the villages of troublesome locals. If the threat did not work a bomber was sent out to destroy a significant local target. With minimum damage to the village and little loss of life the bomber stopped unrest amongst the local population. This was seen as a cost-effective way of enforcing British law and order. Significantly, this was a clear example of a technically advanced nation employing its high technology to subdue a technically backward nation. Colonial policing using air power was also conducted by Spain and France in Morocco, the US in Latin America, and France again as late as the Algerian War.

The emergence of the technological edge as a decisive factor has meant that nations have engaged in frantic races to ensure that their air power matches their neighbour's. At the same time humanitarians have attempted to restrict the use of air power.

## AIR BOMBARDMENT IN WORLD WAR II

Prior to World War I there were only two provisions that had been drafted with air power specifically in mind. One was the previously discussed prohibition on air bombardment from balloons which had not been endorsed beyond 1907. The second was article 25 of the 1907 Hague Convention which stated that: 'The attack of bombardment, *by whatever means*, of towns, villages, dwellings or buildings which are undefended is prohibited'. The record of negotiations show that the words 'by whatever means' were inserted to regulate air bombardment.

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<sup>12</sup> *ibid.*, p 20.

While this has been referred to as a basis for attempts to limit air operations and to support protests about 'illegal air campaigns', the historical definition of 'undefended cities' covers only those cities which might be seized by occupying ground forces, without the use of force. Cities beyond the immediate battle zone are clearly not within that definition.<sup>13</sup> The application of these general rules of war to air attacks was further established by the decision of the Greco-German Mixed Arbitral tribunal in *Coenca versus Germany*. This case concerned the destruction of private property by the Zeppelin bombing of Salonika in 1916, when that city was under Allied occupation, even though Greece was officially neutral. The principles to emerge from the case were that the 1907 Hague Convention could be applied to air bombardment and the bombardment in issue was contrary to international law. The reasons for that decision were that the night bombing from 3000 metres was indiscriminate and there was no warning as required under article 26.<sup>14</sup>

An attempt was made in 1922 to produce a code of law to govern aerial warfare. This represented the only attempt, prior to the 1977 Additional Protocols, to lay down a set of rules in this area. The code was intended to balance the 'necessities of war and the requirements of standards of civilisation'. While certain nations, notably Japan in 1938, indicated an intent to be bound by the rules, the restrictions had little impact on World War II. This paucity of conventional rules left airmen without authoritative and practical guidance.<sup>15</sup>

### **Recognition of Restrictions on Air Bombardment**

The Luftwaffe recognised legal restraints by issuing a service directive entitled *The Conduct of War*. At paragraph 186 it stated: 'attacks on cities for the purpose of terrorising the civilian population are absolutely forbidden'. The directive acknowledged that the most important task of the Luftwaffe was an offensive against 'the combat strength of the enemy, and its population's will to resist'. This recognition was acknowledged by Field Marshal Kesselring when he wrote in his memoirs that in 1937 the Air Force Regulations incorporated moral principles 'which our conscience told us to respect'. These principles limited attacks to strictly military targets.<sup>16</sup>

The British in the 1939 edition of the *Manual of Air Force Law* stated: 'It has not yet been possible to include in this volume a chapter relating to air warfare'. Guidance to the US Army Air Force was minimal but the US Navy had a 1941 directive that prohibited air bombardment for the purpose of terrorising the civilian population. The Italian Air Force appeared to repudiate Douhet by setting out in its law of war manual that 'bombardment for the sole purpose of punishing civilian populations or of destroying or damaging properties of non-military importance is in every case prohibited'.<sup>17</sup>

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<sup>13</sup> De Saussure, 'The Laws of Air Warfare: Are There Any?', 12, *JAG Law Review*, Montgomery, Alabama, 1970, p 33.

<sup>14</sup> Green, L. C., *Essays on the Modern Law of War*, Transnational Publishers, Dobbs Ferry, New York, 1985, pp 137-138.

<sup>15</sup> *ibid.*, p 33.

<sup>16</sup> Kesselring, A., *The Memoirs of Field-Marshal Kesselring*, William Kimber, London, 1953, p 44.

<sup>17</sup> Parks, W.H., 'Air War and the Law of War', *The Air Force Law Review*, Vol 32, No 1, 1990, Judge Advocates General's Department, Washington, 1990, pp 38-42.

All the major powers of World War II recognised the rule of law that governed war but had difficulty laying down exactly what those rules were in respect of aerial bombardment. The generally accepted fundamental restrictions were that terror campaigns against civilians were immoral and that air planners should attempt to minimise damage to non-military personnel and property. The doctrine of proportionality was alive but the practical problems associated with its application had not been addressed in a manner that provided air planners with clear guidance.

### **World War II Bombing Campaigns**

Some commentators have alleged that the air campaigns of World War II provide there were no rules. They argue that indiscriminate bombing was conducted and that this resulted in huge numbers of civilian dead. These commentators further contend that the failure of the Nuremberg trials to successfully prosecute airmen legitimised these operations. The fact that the morale of 'the people' was made a target has been used to support this view.<sup>18</sup> What these commentators have not addressed is the state of the law of war at the start of the war, particularly regarding reprisals, and the practical limitations on accurate targeting.<sup>19</sup> It was these two factors that led to the number of civilian dead and widespread destruction not the absence of, or blatant disregard for the law of armed conflict.

During the early stages of the Battle of Britain the Luftwaffe had concentrated its attacks on British airfields and the aircraft production industry. These attacks were having a severe effect on Britain's ability to control the air and ultimately win the air battle. The turning point occurred on 24 August 1940 when German bombs fell on London. By way of reprisal, 81 British bombers attacked Berlin the following night. This led Hitler to order Goering to switch the focus of German air attacks from direct military targets to London and other cities. This respite allowed RAF Fighter Command to survive, regroup, and eventually re-establish some degree of air control. The inability of the Luftwaffe to control the air over Britain was a prime factor in the postponement of Operation Sealion, the planned invasion of Britain.<sup>20</sup>

It is ironic that the initial bombing of London was caused by navigational error.<sup>21</sup> Following the RAF's reprisal attack against Berlin, Hitler declared: 'When they declare they will attack our cities in great measure, we will eradicate their cities ... The hour will come when one of us will break, and it will not be Nationalist Socialist Germany!'.<sup>22</sup> In the subsequent spiral of attacks on cities, both belligerents justified their actions on the grounds of lawful reprisals. The RAF after the bombing of Coventry authorised 'area attacks' with the objective of destroying German civilian morale as well as industrial targets.<sup>23</sup> Area bombing was bound to be indiscriminate due to the gross inaccuracy of bombing systems.

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<sup>18</sup> Carnahan, B. M., 'The Law of Air Bombardment in its Historical Context', 17, *Air Force Law Review*, Montgomery, Alabama, 1975, p 53.

<sup>19</sup> *ibid.*, p 53.

<sup>20</sup> Saundby, *Air Bombardment: The Story of its Development*, p 110.

<sup>21</sup> Carnahan, *Air Force Law Review*, p 54.

<sup>22</sup> Murray, W., *Luftwaffe*, George Allen & Unwin, Sydney, 1985, p 54.

<sup>23</sup> *ibid.*, p 54.



It was bombing inaccuracy which led to the acquittal of Herman Goering, the German Air Minister, on charges of devastation 'of towns, not justified by military necessity, in violation of the law of war'. The Nuremberg Tribunal accepted the evidence which indicated that military targets were the objectives of attacks on Warsaw, Rotterdam and Coventry but the inability to accurately discriminate these targets from their civilian localities was the cause of the destruction of civilian areas.<sup>24</sup>

Similar problems confronted allied air planners who chose military targets in heavily populated areas only to discover the circular probable error (CEP) was many thousands of feet.<sup>25</sup> In August 1941 the Butt Report, a study of RAF night bombing, showed that two-thirds of Allied bombs fell more than five miles from their intended target.<sup>26</sup> There were many reasons for the magnitude of the errors, including technical limitations of the bomb sights, weather, lack of training, camouflage, poor intelligence, enemy air defences and human factors. Accordingly, what was often described as indiscriminate bombing was in fact aircrew trying to do a difficult job in almost impossible conditions. While it appeared that the planners had disregarded the law of armed conflict, the actual situation was that they lacked the requisite intent to be guilty of any war crime.

While the air force commanders during the Second World War could be accused of being reckless as to the targets they sought to destroy by air bombardment, in reality they had little or no clear, practical guidance as to what was acceptable. The limited capacity of air bombardment to precisely strike targets was a hurdle they could not overcome. What was required were clear, workable, international legal standards. It was the responsibility of the nations of the world to establish these.

## POST WORLD WAR II DEVELOPMENTS

### The Nuremberg Trials

The initial forum which raised international law issues relevant to air bombardment was the post World War II war crime trials, notably those of German leaders at Nuremberg. Goering, the Luftwaffe Commander-in-Chief, was amongst those tried by the International Military Tribunal (IMT) at Nuremberg. His indictment included: War Crimes – 'Cities and towns were wantonly destroyed without military justification or necessity'.<sup>27</sup> Interestingly the judgment on this count, while convicting Goering, makes no specific mention of this aspect of the alleged breach of international law.

Field Marshal Kesselring had testified, on behalf of Goering, that only military targets were the objects of aerial bombardment and everything possible was done to spare civilians. On cross-examination he was not shaken on the basic facts of his explanations and the prosecution did not produce any evidence contradicting him.

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<sup>24</sup> Murray, *Luftwaffe*, p 54.

<sup>25</sup> Circular Error of Probability (CEP) is the measure of 50 per cent of the bombs falling on average within a circle of the specified radius.

<sup>26</sup> Saward, D., *Bomber Harris*, Cassell, Buchan & Enright, London, 1984, p 111.

<sup>27</sup> Friedman, L., *The Law of War – A Documentary History Volume II*, Random House, New York, 1972, p 945.

One could imagine Air Marshal Harris being able to raise a similar defence if he ever found himself facing a war crimes tribunal for his policy of area attacks. The failure of the prosecution to successfully prosecute for war crimes relating to air bombardment demonstrates that at least initially both sides during World War II attempted to obey the international legal restraints that existed.<sup>28</sup> Unfortunately, the development of the concept of 'total war' from the perceived breaches by the 'other side' and the recognised right of reprisal led to an escalating series of reprisal and counter reprisal raids. These quickly became established policy and resulted in the London blitz and Bomber Command's 'Area Attacks'. The fact that the IMT did not specifically deal with air bombardment reflects the inadequacies of the international legal regime covering the subject.

The other significant development, which occurred within days of the conclusion of World War II, was the review of the Geneva Conventions. The International Committee of the Red Cross (ICRC) invited a number of nations to send representatives to Geneva to discuss proposals for possible amendments to international conventions. These centred on proposals to review the laws relating to prisoners of war and civilian internees, and was a clear reaction to the horrors perpetrated during the war. The conferences which resulted from the initiative produced the four 1949 Geneva Conventions which dealt with: prisoners of war, wounded and sick in the field, the protection of civilians, and shipwreck at sea. These conventions have been almost universally accepted by nations as the code of conduct which apply to armed conflict, whether war has been declared or not.

The 1949 Geneva Conventions do not directly address the problems posed by aerial bombardment, but they do contain provisions which state that prisoners of war and medical units and their personnel shall not be subject to attack. Significantly, these articles recognised the role of the defending belligerent by providing that medical establishments are to be situated 'in such a manner that attacks against military objectives cannot imperil their safety'.<sup>29</sup> This is the first formal sign that the actions of a defender have a significant effect on the ability of an attacker to conform to international law.

The next significant post-war treaty which deals with air bombardment is the 1954 Hague Cultural Property Convention. This codified the law relating to the protection of cultural property. The Treaty spells out the mutual obligations of both defenders and attackers to respect cultural property situated within their own territory, as well as in the territory of other nations. It prohibits the use of such property or its surrounding area for uses which may expose the property to destruction, and restrains any act of hostility against such property.

The period after the Second World War did not bring a permanent peace but rather a number of major conflicts. The Vietnam conflict saw an extensive, non-nuclear strategic air campaign characterised by controversy and allegations that air bombardment had been carried out in violation of the law of armed conflict. Simultaneously, the US military complained that their operations were unduly

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<sup>28</sup> Carnahan, *Air Force Law Review*, p 56.

<sup>29</sup> Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Art 19.

restricted by targeting lists and rules of engagement that denied them the opportunity to act effectively. These restrictions were imposed by civilian bureaucrats with little or no military training.

### **Vietnam Conflict**

The early air campaigns in Vietnam were dominated by the political restrictions imposed by President Johnson. The President turned to air power to achieve his goal of an independent, stable, non-communist South Vietnam. At the same time he was preoccupied with preventing an escalation of the war through Chinese intervention, and keeping domestic and world public attention focused away from Vietnam. Many of his advisers viewed 'Rolling Thunder', the bombing campaign 1965-1968, as a compromise means of achieving a number of disparate ends. These included: bolstering South Vietnamese morale, breaking Hanoi's will, securing negotiating leverage and conveying America's political resolve.<sup>30</sup> Here was a classic situation where air power was expected to be a panacea to a highly complex political situation.

Amongst the numerous political constraints was the need to maintain America's image both domestically and abroad. The initial list of targets submitted by the air planners focused on industrial targets as the proper objectives of the air campaign. The air planners shunned targets near civilian centres and other potentially devastating targets like the Red River dykes. After the Tet Offensive in 1968, perceptions changed and the planner's advice was that targets near population centres should be attacked. This was an attempt to make the North Vietnamese population 'wince' at the destruction of military targets. At the same time air commanders recognised the need to minimise civilian casualties. They wanted to demonstrate that air bombardment could be effective without being wanton.<sup>31</sup>

While President Johnson and his Secretary of Defence, Robert McNamara, accepted advice from professional military officers, they personally imposed strict controls on weaponry, targets and sortie rates. Many of the decisions affecting the bombing campaign were made at the President's famous Tuesday lunches. The decision makers were the President and some of his closest advisers, with limited military input. Here was a situation where the highest national authority was metaphorically climbing into a cockpit and deciding who was to be attacked, how often they would be attacked and what sort of weapons were to be used.

Because of the attention the bombing campaign received, the US executive was concerned about the political fallout which was caused by reports of civilian casualties. A staff officer who worked for McNamara described the Secretary's thinking: 'Every target was weighed for the impact on the press (and) public opinion ... and not on whether the mission would help us win the war'.<sup>32</sup>

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<sup>30</sup> Clodfelter, M., *The Limits of Air Power – The American Bombing of Vietnam*, The Free Press, New York, 1989, p 205.

<sup>31</sup> *ibid.*, pp 126-127

<sup>32</sup> Parks, W. H., 'Vietnam and Desert Storm: A Practicing Lawyer Looks at National Security Law', a speech given at American Bar Association's Standing Committee on Law and National Security Symposium, *National Security Law: A Review of the Emerging Field*, Washington DC, 4 April 1991, p 4.

To minimise bad press, bombing decisions were made with the aim of causing *minimum civilian casualties*. This has been described as ‘one of the more egregious errors of Rolling Thunder’.<sup>33</sup> As has been discussed, the legal restraint on aerial bombing recognised that civilian casualties would occur if military targets were located near populated areas. The law required military commanders to be cognisant of the risks of collateral damage and further, that they take steps to prevent *excessive or unjustified civilian injuries*. Any decision to bomb involved a balancing of collateral damage and the importance of the military target.

The North Vietnamese soon became aware of these restraints and took advantage of the sanctuaries they provided by placing military targets in populated areas and siting air defence units on restricted targets such as the Red River dykes,<sup>34</sup> thus exposing these areas to collateral damage. These restraints, made on political not legal grounds, caused the military commanders to try to achieve the war aims with one hand tied behind their back. It resulted in an ineffective campaign and unnecessary losses. These same mistakes were not repeated by President Nixon when he authorised the Linebacker bombing operations.

Linebacker I, May 1972 to January 1973, was more ambitious than Rolling Thunder. Its objectives were to destroy internal military stockpiles, curtail external resupply, inhibit supplies reaching the battlefield and destroy and targets which provided direct military support to North Vietnam’s war effort.<sup>35</sup> When General J. W. Vogt was asked by the President what he needed to accomplish his mission his requests were few, but one in particular was critical. He asked that Nixon not repeat the Johnson Administration practice of exclusive Executive control of target selection.

President Nixon agreed without dissent.<sup>36</sup> This decision allowed flexibility in planning and permitted the air commander to get on with this task. While some political restrictions remained, the commander was not hampered by misconceived and misunderstood legal restraints. Reasonable precautions were taken to minimise civilian casualties. This was possible because the new precision guided bombs allowed better target discrimination through greater accuracy. However, no sanctuary was provided to an enemy who refused to accept responsibility for its civilian population. As a result, Linebacker I had a greater effect on the war in three months than Rolling Thunder had in three and a half years.<sup>37</sup>

Extensive propaganda efforts by the North Vietnamese have resulted in Linebacker I, and its follow up Linebacker II, being described as indiscriminate ‘carpet bombing’. Critics have compared the campaigns to the massive destruction caused by aerial bombing during World War II. Counter critics have described these writings as ‘shoddy scholarship, particularly in the promiscuous use of terms and estimations’.<sup>38</sup>

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<sup>33</sup> Parks, W. H., ‘Rolling Thunder and The Law of War’, 33, *Air University Review*, January-February 1982, p 17.

<sup>34</sup> *ibid.*, p 12.

<sup>35</sup> Parks, W. H., ‘Linebacker and the Law of War’, 33, *Air University Review*, Number 6, 1983, p 5.

<sup>36</sup> *ibid.*, p 9.

<sup>37</sup> *ibid.*, p 12.

<sup>38</sup> *ibid.*, p 21.

There are two criteria which should be applied when judging the lawfulness of these air campaigns: what was the law relating to air bombardment in 1972; and did the United States obey that law? Any judgment must be made in the light of the technical advances which had improved accuracy, but failed to make bombing precise. On this basis the Linebacker campaigns were lawful.<sup>39</sup> However, observance of the law depended upon value judgments made by military commanders. The international media branded some of these judgments as criminal. In the light of falling public support for the war, these accusations provided further ammunition to domestic anti-war efforts. Both the media and the air commanders had little precise legal guidance available and the lack of authoritative counsel resulted in misunderstandings. The 1977 Additional Protocols to the 1949 Geneva Conventions are an attempt to codify the rules and provide the necessary guidance.

### 1977 ADDITIONAL PROTOCOLS TO THE GENEVA CONVENTIONS

After World War II and the Vietnam conflict the ICRC attempted to formulate specific rules to regulate air warfare. Air bombardment was high on the agenda because of the civilian losses that characterise modern warfare. The ICRC has attempted to remove civilians from the battlefield, while at the same time air power had demonstrated there is no haven for any belligerent national, regardless of whether they are military or civilian.

Diplomatic conferences in the 1970s formulated two Protocols, one relating to international armed conflict, the other to non-international armed conflict. Many commentators have argued that the new rules are fundamentally flawed and impractical.<sup>40</sup> President Ronald Reagan went as far as writing to the Australian Prime Minister R. J. Hawke in an attempt to dissuade him from proceeding with Australian ratification.<sup>41</sup> Despite this criticism, the articles in Protocol I relating to air bombardment have for the first time provided specific guidance to air commanders and are binding on the military personnel of the nations which have ratified the Protocols.

These new rules are a clear attempt to direct air power's destructive potential. The need to satisfy this goal has been accepted by many nations, including the United States, following the horrifying experiences of recent conflicts.<sup>42</sup> Many of the provisions reaffirm existing rules of customary international law, so nations are bound to comply with these provisions, regardless of whether they have ratified the Protocols or not. The general aims of the Protocols are as follows: to develop basic humanitarian principles; the right of parties to choose the means and methods of

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<sup>39</sup> *ibid.*, pp 26-27.

<sup>40</sup> Parks, W. H. has been critical of the Protocols particularly in *Air War and The Law of War*. Locally Greville, P. J. has expressed his concern in *Why Australia Should not Ratify the New Law of War*, Strategic and Defence Studies Centre Working Paper No 175, Australian National University, Canberra, 1989.

<sup>41</sup> *The Sydney Morning Herald* published parts of the text of President Reagan's letter to Mr Hawke, Sep 1989.

<sup>42</sup> Blix, H., *Area Bombardment: Rules and Reasons*, this article was supplied by staff from the Directorate of Air Force Legal Services, Russell Offices, Canberra, p 38.

warfare are not unlimited; and there must always be a distinction between the military and civilians.<sup>43</sup>

While the articles themselves are couched in legalistic formulae they must be recognised for what they are: the product of an international diplomatic conference. Most of the nations of the world were represented at the conferences and the Protocols, like all laws, are political documents. Nevertheless, they represent a comprehensive attempt to provide international legislation on one of mankind's most difficult subjects. It is clear that military commanders have the challenge and responsibility of making the laws work. This will only be possible if the articles are interpreted in a way which allows military commanders to achieve their mission and at the same time comply with the humanitarian ideals that the Protocols represent.

## CONTEMPORARY DEVELOPMENTS

The articles comprising the new rules regulating air bombardment in the Additional Protocols are briefly summarised in Annex A. They provide a definition of military objects and prohibit attacks against all other targets. Indiscriminate attacks are prohibited and specific protection is provided for installations containing dangerous forces. The nine articles which directly address air bombardment are the first comprehensive attempt to set out some rules in this field.

While criticism has been based on the complexity of these rules, the focus of all international law and humanitarian law in particular is that elaborating war crimes and setting criteria for commanders' responsibilities is not so much to punish as to educate. The essential purpose is to create a constant awareness of broadly supported and sanctioned limitations on behaviour, even in war. This awareness is then likely to result in actions designed to minimise the cruelty and suffering which results from armed conflict. This is especially important in areas where technological advances increase the destructive capabilities of weapons systems.<sup>44</sup> As well as increasing weapons systems capability, more advanced bombing systems should serve humanitarian ideals by increasing bombing accuracy.

### Operation Desert Storm

There is a clear relationship between the accuracy of aerial bombing systems and a commander's ability to obey the law of armed conflict. This is evident if the bombing campaigns of the Second World War and Vietnam are compared with the recent air war conducted in the Persian Gulf.

Whereas the mass destruction and death involving the civilian community in the Second World War was due to gross bombing and navigation errors and a deliberate campaign to bomb cities, in Iraq Stealth bombers were able to aim for and put bombs into very small openings such as windows. The improved precision meant that what took thousands of sorties, bombs and aircraft using bombing techniques in World

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<sup>43</sup> *New Rules for Victims of Armed Conflict*, ICRC Commentary on Protocols Additional to the Geneva Conventions of 12 August 1949, Martinus Nijhoff Publishers, Geneva, 1987, p 588.

<sup>44</sup> Littauer, R. and Uphoff, N., (eds.), *The Air War in Indochina*, Beacon Press, Boston, 1972, p 142.

War II can now be done with the same probability of success and far less risk to aircrew or civilians with a single aircraft. The CEP has gone from thousands of feet to just a few feet.<sup>45</sup> The improvement has been achieved through the use of a sophisticated suite of precision guided munitions coupled with state of the art aircraft and modern navigation systems.

Despite not being signatories to the Additional Protocols, the US commanders went to great pains to ensure that their air target lists complied with the international law of armed conflict. Some 49 USAF legal officers together with the US Central Command (CENTAF) legal staff were directly employed in providing specialist legal advice. A significant number worked around the clock at CENTAF headquarters reviewing air tasking orders. It was found that many commanders were overly sensitive to what may or may not be legal. The legal advisers were able to clarify the legal constraints and this would often result in expanded target lists and more importantly reduce the danger to pilots caused by overly restrictive rules of engagement.<sup>46</sup>

Despite these steps, collateral damage did occur and the Iraqis were quick to use this as part of the propaganda war conducted through the international media. The celebrated cases of the baby milk factory and civilian bunker bombed in Baghdad are graphic examples. While an attacker can ensure legal vetting of all targets and deliver the bombs accurately, collateral damage will still occur if the defender puts barbed wire around structures and fails to mark the objects as a civilian shelter. Provisions exist for the defending party to clearly identify civilian sites. While the failure to do this does not absolve an attacker from responsibility, any responsibility for collateral injuries must be shared by the defending party.

The lessons of the Desert Storm for air planners are many and they are still emerging. One lesson is that the international law of armed conflict is an important factor that will directly affect military operations. If modern air commanders are to achieve their military objectives they need to know and properly apply the constraints that international law dictates. No longer will public opinion, both domestic and international, allow them to plead ignorance.

## CONCLUSION

Since the first use of the air for military attack, national leaders have had to answer the questions of how far they should go. The scope of air bombardment includes attacks on the full spectrum of a nation's infrastructure, including its civilian population. Attack by gas, nerve, chemical and bacteriological agents as well as more conventional explosives are all possible. The early air power theorists recognised that the nature of war had changed with the emergence of air power and the advanced technologies that allowed the medium to be fully exploited. Douhet went as far as advocating total war against the enemy state, making no differentiation between military and civilian objects. While air commanders generally accepted that there

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<sup>45</sup> Information supplied by Wing Commander A. Hemmingway who visited the USAF International Law Division, in the Pentagon in April 1991.

<sup>46</sup> Information provided by Squadron Leader P. Cronan following his attendance at The Operational Law Seminar, held at The Judge Advocates General's School, University of Virginia, Charlottesville, Virginia, May 1991.

were some limits to air bombardment, no precise rules were developed until well after the mass death and destruction caused by bombing during World War II.

Momentum for change also came after the Vietnam conflict when some air attacks were branded as contrary to the international law of war. While the cause of much of the horrors of World War II were attributable to poor navigation and inaccurate bombing, many critics seized on the uncertainty of the international law on air bombardment to brand US Commanders as war criminals following air operations over Vietnam. This was despite the fact that the Americans were careful to cause minimal civilian damage in the face of North Vietnamese disregard of their duty to protect their citizens.

The technological advances since Vietnam mean that nations can greatly reduce the gross bombing errors that plagued earlier campaigns. What was required was a workable set of rules which served humanitarian ideals and allowed air planners to pursue a war winning strategy. The 1977 Additional Protocols to the Geneva Conventions are the international community's answer to the growing military arsenal which has the ability to kill millions and devastate all sectors of human society.

The basic aim of all international law is to develop a culture of acceptance. Without general acceptance the law will fail. The US, and its Allies, during Operation Desert Storm appear to have substantially complied with the new rules while at the same time insisting that they will not ratify the rules because they are unworkable. The US-led coalition issued specific legal guidance to its air planners during Desert Storm and early reports indicate this guidance was followed.

While the new rules are restrictive, the constraints they impose are manageable and are founded on noble humanitarian ideals. The total offence advocated by some early air power theorists is not possible and cannot be employed today because of political, moral and legal reasons. The ultimate objective of any armed conflict is to ensure a true and lasting peace. Compliance with the international law of armed conflict is crucial if this objective is to be attained.

## **Annex:**

### A. Summary of Additional Protocol Articles



## ANNEX A

### SUMMARY OF ADDITIONAL PROTOCOL ARTICLES

The articles comprising the new rules regulating air bombardment in the Additional Protocols can be summarised as follows:

- a. The Civilian population ‘as such’ shall not be the subject of attack, military operations shall only take place against military objectives.<sup>47</sup>
- b. Methods which indiscriminately strike or affect the civilian population and combatants, or civilian objects and military objectives, are prohibited.<sup>48</sup>
- c. Attacks against civilians by way of reprisals are forbidden.<sup>49</sup>
- d. Civilian objects are all objects which are not military objects, military objects are those objects which contribute to military action and whose neutralisation offers a military advantage.<sup>50</sup>
- e. Acts of hostility against cultural objects or places of worship are forbidden.<sup>51</sup>
- f. It is prohibited to destroy, remove or render useless objects indispensable to the survival of the civilian population.<sup>52</sup>
- g. Works or installations containing dangerous forces eg. dams, shall not be attacked unless those objects are providing regular, significant and direct support to military operations.<sup>53</sup>
- h. Air planners and commanders must take all feasible precautions to minimise incidental loss of civilian life.<sup>54</sup>
- i. Parties shall take action to separate civilians from military objectives and take other measures to protect their civilian population.<sup>55</sup>

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<sup>47</sup> Protocols additional to the Geneva Conventions of 12 August 1949, IRIC, Geneva, 1977, art 48 and 51(1).

<sup>48</sup> *ibid.*, art 51(5).

<sup>49</sup> *ibid.*, art 51(6).

<sup>50</sup> *ibid.*, art 52.

<sup>51</sup> *ibid.*, art 53.

<sup>52</sup> *ibid.*, art 54.

<sup>53</sup> *ibid.*, art 56.

<sup>54</sup> *ibid.*, art 57.

<sup>55</sup> *ibid.*, art 58.