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AERIAL ATTACKS ON CIVILIANS AND THE HUMANITARIAN LAW OF WAR: TECHNOLOGY AND TERROR FROM WORLD WAR I TO AFGHANISTAN

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In 1945, the United States Supreme Court affirmed the conviction of General Tomoyuki Yamashita, former Commanding General of the Fourteenth Army Group of the Imperial Japanese Army.¹ The Court found Yamashita had “unlawfully disregarded and failed to discharge his duty as commander to control the operations of the members of his command,” resulting in the unjustifiable mistreatment and killing of more than twenty-five thousand unarmed civilians.² The Supreme Court stressed that the aim of the humanitarian law of war to “protect civilian populations . . . from brutality would largely be defeated if the commander of an invading army could with impunity neglect to take reasonable measures for their protection.”³

General Douglas MacArthur, Commanding General for the American Armed Forces in the Far East, earlier affirmed Yamashita’s conviction and death sentence and proclaimed, “the soldier, be he friend or foe, is charged with the protection of the weak and unarmed.”⁴ He admonished that the violation of this “sacred trust” both “profanes his [the soldier’s] entire cult” and “threatens the very fabric of international society.”⁵ MacArthur proclaimed

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1. *In re Yamashita*, 327 U.S. 1, 5, 25 (1946).

2. *Id.* at 14.

3. *Id.* at 15.

4. COURTNEY WHITNEY, THE CASE OF GENERAL YAMASHITA: A MEMORANDUM 3 (1950) (General Headquarters, Supreme Commander for the Allied Powers, Government Section).

5. *Id.*

that the “traditions of fighting men are long and honorable” and are based upon the “noblest of human traits—sacrifice.”⁶ He condemned Yamashita for having contravened his “soldier faith” and for placing a “blot upon the military profession” and “a stain upon civilization,” whose record stands as “a memory of shame and dishonor that can never be forgotten.”⁷

As suggested by MacArthur’s condemnation, the protection of civilians is the touchstone of the humanitarian law of war.⁸ The sole object of warfare is to weaken the enemy’s military capacity.⁹ The civilian population, accordingly, shall not be singled out for attack or threats of violence that are intended to spread terror among the civilian population.¹⁰ Succinctly stated, “attacks shall be limited strictly to military objectives.”¹¹

These principles arguably have been honored in the breach.¹² In the early days of World War I, Kaiser Wilhelm wrote to Austrian Kaiser Franz Joseph that “everything must be put to fire and sword: men, women and children and old men must be slaughtered and not a tree or house left standing.”¹³ The Kaiser observed that these “methods of terrorism” would terminate the war in two months, while “considerations of humanity” would unnecessarily prolong the struggle.¹⁴

The German military manual complained, “the tendency of thought of the last century was dominated essentially by humanitarian considerations which not infrequently degenerated into sentimentality and flabby emotion.”¹⁵ These values, according to the manual, were in “fundamental contradiction with the nature of war and its object.”¹⁶ The manual prohibited poi-

6. *Id.*

7. *Id.*

8. See Hague Convention (No. IV) Respecting the Law and Customs of War on Land, Oct. 18, 1907, 36 Stat. 2277, T.S. No. 539, 1 Bevans 631 [hereinafter Hague Convention].

9. Declaration Renouncing the Use, in Time of War, of Explosive Projectiles Under 400 Grammes Weight, Dec. 11, 1868, reprinted in 1 AM. J. INT’L L. 95 (Supp. 1907) (adopted by the International Military Commission at St. Petersburg).

10. Protocol Additional to the Geneva Conventions of 12 August, 1949, and Relating to the Protection of Victims of International Armed Conflicts, June 8, 1977, art. 51(2), 1977 U.N. Jurid. Y.B. 95, reprinted in 16 I.L.M. 1391 [hereinafter Protocol I].

11. *Id.* art. 52(2). Military objectives are “limited to those objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization, time, in the circumstances ruling at the time, offers a definite military advantage.” *Id.*

12. See generally CALEB CARR, THE LESSONS OF TERROR: A HISTORY OF WARFARE AGAINST CIVILIANS: WHY IT HAS ALWAYS FAILED AND WHY IT WILL FAIL AGAIN (2002).

13. William Adams, *The American Peace Commission and the Punishment of Crimes Committed During War*, 39 L.Q. REV. 245, 248 (1923) (quoting a letter from Kaiser Wilhelm to Austrian Kaiser Franz Joseph).

14. *Id.*

15. Hugh H.L. Bellot, *War Crimes: Their Prevention and Punishment*, II TRANSACTIONS GROTIUS SOC’Y 31, 41 (1917).

16. *Id.*

son, assassination, unnecessary suffering and the refusal of quarter so long as the “object of war may be attained by milder means.”¹⁷

The Preliminary Peace Conference at Versailles appointed a Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties.¹⁸ The Commission’s report of 1919 concluded that despite “explicit regulations, of established customs, and of the clear dictates of humanity, Germany and her allies have piled outrage upon outrage.”¹⁹ This included violations of the rights of civilians which “primitive barbarism, aided by all the resources of modern science, could devise for the execution of a system of terrorism carefully planned and carried out to the end.”²⁰ Belgium protested the deportation of civilians to Germany for involuntary labor²¹ and noted that it had protested in vain against the “unspeakable suffering inflicted on thousands of innocent people” in the camps where they have been “huddled together, in order that this herd of pitiable human cattle may be sorted out and enslaved for the ends of despotism.”²²

The military targeting of civilians continued in World War II. At the conclusion of the war, nineteen German officials were convicted of various crimes, including crimes against peace, war crimes and crimes against humanity before the International Military Tribunal at Nuremberg.²³ In discussing the German General Staff and High Command, the Tribunal noted that these military men were “responsible in large measure for the miseries and suffering that have fallen on millions” and had proven to be a “disgrace to the honorable profession of arms.”²⁴ Absent the efforts of these military minions, the devilish designs of Hitler and his cohorts “would have been academic and sterile.”²⁵ They were centrally connected to criminal conduct on a “scale larger and more shocking than the world has ever had the misfortune to know.”²⁶

The International Military Tribunal argued that these crimes were the result of the German conception of “total war”²⁷ that subordinated the ethics of armed conflict to the exigencies of the military moment.²⁸ The initial Nazi

17. *Id.* at 42.

18. Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties, Report Presented to the Preliminary Peace Conference, *reprinted in* 14 AM. J. INT’L L. 95 (1920).

19. *Id.* at 113.

20. *Id.*

21. *Memoire of the Belgian Government in Regard to the Deportation and Forced Labor of the Belgian Civil Population Ordered by the German Government*, 11 AM. J. INT’L L. 99, 111 (Supp. 1917).

22. *Id.* at 111.

23. *See* United States v. Hermann Goering, 22 TRIAL OF THE MAJOR WAR CRIMINALS 411, 588-89 (1948).

24. *Id.* at 522.

25. *Id.*

26. *Id.* at 523.

27. *Id.* at 469.

28. *Id.* at 470.

military campaigns in Poland and the Soviet Union were characterized by the murder and mistreatment of civilians.²⁹ This was “part of a plan to get rid of whole native populations by expulsion and annihilation, in order that their territory could be used for colonization by Germans.”³⁰

The *Einsatzgruppen*, or killing squads, shadowed Nazi troops as the German army swept through Russia.³¹ These units were responsible for as many as two million murders.³² Those detained in the dock were not safely sequestered behind desks during the war; they were in the field, actively supervising, controlling and directing this “bloody harvest.”³³ The defendants contended that their actions were motivated by self-defense, a claim which the Tribunal noted would permit a State to abrogate the legal protections afforded noncombatants under the humanitarian law of war based on the unilateral claim that the civilians were deemed dangerous.³⁴ Men, women and children were summarily executed; it was feared that adolescents who were permitted to survive would seek revenge in adulthood for the killing of their parents.³⁵ Millions of people, whose only offense was that they were deemed to be racial or social inferiors or ideologically suspect, were exterminated.³⁶ Poles opposed to the Reich’s occupation policies were tortured, impressed into involuntary labor and executed.³⁷ The Tribunal in the *High Command* case concluded, “[n]o nation, no army, and its leaders of any time, civilized or uncivilized, labor under so great a load of guilt as do Hitler’s Germany, its army and its leaders in their treatment of these unfortunate people.”³⁸

During the Vietnam War, American troops killed as many as 347 non-combatants at My Lai.³⁹ In the end, only Lieutenant William Calley was found guilty of murder and was paroled after serving one-third of his ten-year sentence, a term of imprisonment which had been set at life by the trial court but was then drastically reduced by military officials.⁴⁰ Prosecutor Aubry Daniels unsuccessfully implored President Richard Nixon to refrain from interfering with Calley’s sentence: “For this nation to condone the acts of Lieutenant Calley is to make us no better than our enemies and make any

29. *Id.* at 478.

30. *Id.* at 480.

31. United States v. Otto Ohlendorf et al., IV TRIALS OF WAR CRIMINALS BEFORE THE NUERNBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO. 10, 411, 414 (1950).

32. *Id.* at 412-13.

33. *Id.* at 412.

34. *Id.* at 462-63.

35. *Id.* at 415.

36. United States v. Wilhelm von Leeb, XI TRIALS OF WAR CRIMINALS BEFORE THE NUERNBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO. 10, 462, 495 (1950).

37. *Id.* at 496.

38. *Id.* at 495-96.

39. See Matthew Lippman, *War Crimes: The My Lai Massacre and the Vietnam War*, 1 SAN DIEGO JUST. J. 295, 309 (1993).

40. *Id.* at 318-19, 329.

pleas by this nation for the humane treatment of our own prisoners meaningless.”⁴¹

In 1992, Serbia launched a campaign to cleanse Bosnia of Muslims through mass murder, torture, rape, sexual assault, destruction of property and cultural and religious structures, and attacks on hospitals.⁴² A United Nations Commission of Experts concluded that this effort to extend the geographic dominance of the Serbian population was carried out with “extreme brutality and savagery” in order to instill fear in the civilian population and cause them to flee.⁴³ The systematic commission and failure to prevent and to punish these offenses, in the view of the Commission of Experts, evidenced a centralized and coordinated policy of ethnic persecution.⁴⁴

In December 1994, a report by the Commission of Experts on Rwanda concluded that since April 6, 1994, half a million civilians had been killed and some reliable estimates had even placed the deaths at close to one million.⁴⁵ The evidence indicated that Hutu violence was carried out in a planned and systematic fashion and was motivated by ethnic hatred and by a desire to exterminate the Tutsi.⁴⁶

In sum, modern armed conflict has been characterized by a persistent pattern of targeting civilians. This tactic has taken on an even more deadly character with the advent of air warfare. This article outlines the position and plight of civilians subjected to aerial bombardment during World Wars I and II, the Vietnam War, and the military campaigns in Iraq, Kosovo and Afghanistan, and advocates the explicit international legal regulation of aerial combat.

I. INTERNATIONAL LAW AND THE EARLY YEARS OF AERIAL WARFARE

In 1899, the First Hague Peace Conference adopted a Declaration prohibiting the launching of projectiles and explosives from balloons and other instrumentalities.⁴⁷ The Contracting Parties agreed to prohibit, for five years, the launching of projectiles and explosives from balloons, or by “other new

41. *Id.* at 318-19.

42. Final Report of the United Nations Commission of Experts Established Pursuant to Security Council Resolution 780 (1992), paras. 133-34, U.N. SCOR, 49th Sess., U.N. Doc. S/1994/674 (1994).

43. *Id.* para. 135.

44. *Id.* para. 313.

45. Letter from the Secretary-General to the President of the Security Council Transmitting the Final Report of the Commission of Experts, U.N. Doc. S/1994/1405, para. 57 (Dec. 9, 1994), reprinted in UNITED NATIONS, THE UNITED NATIONS AND RWANDA 1993-1996, 415, 421 (1996).

46. *Id.* para. 58.

47. Declaration Concerning the Prohibition, for the Term of Five Years, of the Launching of Projectiles and Explosions from Balloons or Other New Methods of a Similar Nature, 29 July 1899, 32 Stat. 1839, reprinted in A MANUAL ON INTERNATIONAL HUMANITARIAN LAW AND ARMS CONTROL AGREEMENTS 97 (Cherif Bassiouni ed., 2000) [Balloon Declaration I].

methods of a similar nature.”⁴⁸ The Declaration was only binding in the event of a conflict between two Signatory States.⁴⁹

The instrument was adopted at the plenary session without debate.⁵⁰ The Dutch delegate captured the consensus of the conference when he expressed uncertainty as to how to proceed in light of the astonishing “progress of science” which resulted in the realization of devices “hitherto beyond belief.”⁵¹ For instance, he anticipated that the deployment of projectiles containing “deleterious” devices which, when dropped from balloons, would render enemy troops unable to engage in combat.⁵² The Declaration was re-opened for signature in 1907 and was then to remain in force until the Third Peace Conference,⁵³ which was scheduled for 1915, but never convened.⁵⁴ This second document proved far less significant than the earlier version; France, Spain and Russia declined to ratify the 1907 instrument and Germany conditioned its ratification on the acceptance of the Declaration by all parties participating in the conference.⁵⁵

Arthur K. Kuhn, writing in 1910, speculated that the acceptance of the 1899 prohibition on the deployment of projectiles from balloons was attributable to the fact that, at the time, the deployment of aircraft during warfare remained at an inchoate stage of development.⁵⁶ The compromise provision, which stated that the Convention would only be in effect for five years, facilitated acceptance by those States anticipating innovations in air warfare.⁵⁷

48. *Id.*

49. *Id.*

50. Hamilton DeSaussure, *The Laws of Warfare: Are There Any?*, 5 INT’L LAW. 527, 530 (1971). The Russian government, in 1899, proposed that the First Hague Conference address the dropping of projectiles or explosives from balloons. Arthur K. Kuhn, *The Beginnings of an Aerial Law*, 4 AM. J. INT’L L. 109, 118 (1910).

51. DeSaussure, *supra* note 50, at 530.

52. *Id.*

53. Declaration Relative to Prohibiting the Discharge of Projectiles and Explosives from Balloons, 18 Oct. 1907, 36 Stat. 2439, *reprinted in* BASSIOUNI, *supra* note 47, at 135 [hereinafter Balloon Declaration II].

54. Detlev F. Vagts, *The Hague Conventions and Arms Control*, 94 AM. J. INT’L L. 31, 35 (2000).

55. DeSaussure, *supra* note 50, at 530. *See* George B. Davis, *The Launching of Projectiles from Balloons*, 2 AM. J. INT’L L. 528, 528-29 (1908). Twenty-seven States ratified the Convention and seventeen States failed to ratify the 1907 instrument, including France, Germany, Italy, Japan, Mexico and Russia. Kuhn, *supra* note 50, at 119. Great Britain, which declined to ratify the Declaration in 1899, accepted the 1907 instrument. *Id.* Balloons had been “employed for more than a century for purposes of observation, signalling, transmission of dispatches and as a means of escape from besieged” locales. James W. Garner, *Aerial Bombardment of Undefended Towns*, 9 AM. J. INT’L L. 93, 93 (1915). During the attack against Venice in 1849, the city endured the dispatch of explosives launched from two hundred small balloons. *Id.* Balloons also were employed in the siege of Paris in 1870 and were deployed by the Japanese in the battle of Liao-Yang in 1904. *Id.* The Germans treated balloonists as war criminals during the Franco-Prussian War. *See* Kuhn, *supra* note 50, at 116.

56. Kuhn, *supra* note 50, at 119.

57. *Id.* at 118. All participating nations, with the exception of Great Britain, Italy, Japan and Luxembourg, ratified the Declaration. *Id.*

Twenty-seven States ratified the Hague Convention of 1907, which also was of limited duration.⁵⁸ Kuhn explained this retreat from restraining the scope of warfare as a product of the States' self-interest in exploiting the developing and promising technology of air warfare.⁵⁹ Germany, for instance, had developed aerial weaponry as well as sophisticated defensive measures by this time and had little interest in being fettered by legal restrictions.⁶⁰ This apprehension was not entirely unfounded because the text of the Declaration broadly applied to the launching of projectiles from balloons or by "other new methods of a similar nature," phraseology which might be invoked to limit the future development of air warfare.⁶¹

There also was language in the Hague Convention of 1907 that may have potentially limited the scope of air attacks.⁶² Article 25 provided that "the attack or bombardment, by whatever means, of towns, villages, dwellings, or buildings which are undefended is prohibited."⁶³ The language "by any means whatever" was incorporated on the initiative of France and, in the view of some scholars, was meant to apply to aerial bombardments.⁶⁴ This prohibition in Article 25, while unlimited in duration, was limited to attacks against the confusing concept of "undefended" towns and sites.⁶⁵ This presumably permitted the attack on objects of military import while prohibiting the direct bombardment of towns bereft of defenses as well as vulnerable and undefended sites such as hospitals, churches, art galleries, stores and

58. *Id.* at 119. Two unsuccessful amendments were proposed. *Id.* at 118-19. A Russian amendment would have limited attacks against undefended cities. *Id.* at 119. An Italian proposal would have prohibited the utilization of non-dirigible balloons to deliver projectiles and explosives. *Id.* The Italian amendment also would have provided that the restrictions on land and naval warfare should apply to aerial warfare "wherever compatible with this new method of combat." *Id.*

59. *Id.* at 119.

60. *Id.* at 120. England, which had declined to ratify the Convention in 1899, now saw itself as increasingly vulnerable to an attack from the European Continent and ratified the 1907 Convention. *Id.* at 119-20.

61. Balloon Declaration II, *supra* note 53. Balloons had been utilized for more than a century for observation, signaling, transmission of dispatches and escape from besieged locations. Garner, *supra* note 55, at 93. In 1849, two hundred balloons filled with explosives were directed against Vienna. Balloons were utilized in the siege of Paris in 1870 and were deployed by the Japanese during the battle of Liao-Yang in 1904. *Id.* Airplanes, rather than balloons, were utilized in Turco-Italian and Balkan Wars. *Id.* See Davis, *supra* note 55, at 529. See also James W. Garner, *Destruction of Towns and of Institutions Devoted to Religion, Education, Science and Art, as Punitive Measures*, 9 AM. J. INT'L L. 101, 101 (1915).

62. See Hague Convention, *supra* note 8.

63. *Id.* art. 25.

64. Garner, *supra* note 55, at 96-97. The Convention was signed by all the States represented at the Conference with the exception of China, Spain and Nicaragua. *Id.* at 97.

65. *Id.* at 97. The text does not define the terms "defended" and "undefended." *Id.* The presence of troops and barracks is sufficient for a city or town to be considered defended; it is not necessary that the site be fortified. *Id.* at 97-98. These sites are subject to attack. A town is considered defended when means are taken to prevent the entrance of the enemy. *Id.* at 98. An undefended city is open to incursion by the enemy. *Id.*

private residences.⁶⁶ The means and methods of attacking defended cities were further qualified by the moral imperative of the Martens Clause in the preamble, which provided: "inhabitants and the belligerents remain under the protection and the rule of the principles of the law of nations, as they result from the usages established among civilized peoples, from the laws of humanity, and the dictates of public conscience."⁶⁷

James Garner, one of the leading American international lawyers of his era,⁶⁸ critically observed that the clumsy and uncoordinated character of aerial navigation made it "impossible" to limit air bombardment to legitimate military targets and that, at any rate, bombs inevitably would damage homes, hospitals, churches and parks.⁶⁹ Garner, therefore, comfortably and confidently condemned indiscriminate attacks on locales far removed from the frontlines as "contrary to the generally accepted notions of civilized warfare."⁷⁰

The intent to prohibit the aerial attack of undefended cities was further clarified by the report of the American delegation accompanying the Hague Convention of 1907 regulating naval bombardment which, in Article 1, prohibited the bombardment by naval forces of undefended ports, towns, villages, dwellings or buildings.⁷¹ The American delegation noted in its report that the latter article "brings the rules of land and naval warfare into exact harmony."⁷²

In 1911, the Institute of International Law, meeting in Madrid, debated whether aircraft may be utilized during armed conflict and whether limita-

66. *Id.* at 98-101. See Hague Convention, *supra* note 8, art. 27. This requires that in "sieges and bombardments all necessary steps must be taken 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." *Id.* The Hague Convention also prohibits the destruction or seizure of "the enemy's property unless such destruction or seizure be imperatively demanded by the necessities of war." *Id.* art. 23(g). The employment of arms "calculated to cause unnecessary suffering" also is impermissible. *Id.* art. 23(e).

67. Hague Convention, *supra* note 8, at pmbl. The fact that aviators acted within the letter of the law would not mean that they were in conformity with the natural law impulse underlying the Martens Clause. This, for instance, presumably would prohibit attacks which foreseeably may cause collateral damage to civilians and to civilian objects. See Garner, *supra* note 55, at 100. Article 53 of the Hague Convention was the first effort to combine strictures on land, sea or air warfare in requiring that compensation be paid to private individuals following the conclusion of hostilities for the seizure of goods seized on "land, at sea, or in the air." See Hague Convention, *supra* note 8, art. 53.

68. Matthew Lippman, *The Prosecution of Josef Altstoetter et al.: Law, Lawyers, and Justice in the Third Reich*, 16 DICK. J. INT'L L. 343, 363 n.198 (1998).

69. Garner, *supra* note 55, at 101.

70. *Id.*

71. Kuhn, *supra* note 50, at 121 (discussing Convention Concerning Bombardments by Naval Forces in Time of War, Oct. 18, 1907, art. 1, 36 Stat. 2351).

72. Quoted in *id.* Geoffrey Best argues that it would be "perverse" to assume that the Hague peace conference did not intend to extend the principles pertaining to land and naval war to aerial attacks. See GEOFFREY BEST, HUMANITY IN WARFARE 263 (1980).

tions should be placed upon their deployment.⁷³ Some favored the prohibition on the employment of airplanes during hostilities and pointed to the expense already associated with maintaining a military; others advocated limiting the utilization of projectiles; while a third group argued that aircraft should be authorized to respond in self-defense.⁷⁴ The Institute concluded aerial warfare should be permitted on the condition that no greater danger is created for those not engaged in conflict than in the case of land or naval conflict.⁷⁵ There was a strong strain of educated opinion that viewed this position as unnecessarily limiting, and argued that air war was a cost-effective and potentially powerful weapon, transforming the resort to war into an anti-querian curiosity.⁷⁶

In 1915, the Germans launched zeppelins against British cities.⁷⁷ The crude technology of aerial artillery attacks limited Germany's ability to target specific objectives and the aerial campaign was largely irrelevant to the outcome of World War I.⁷⁸ Still, 208 British civilians were killed by German bombing in 1915, terrorizing the population and undermining morale.⁷⁹ The Germans rationalized that these unprecedented urban aerial raids on civilians constituted permissible acts of reprisal for the British naval blockade of Germany, which allegedly resulted in the starvation and death of innocents.⁸⁰ The Allied Powers, rather than contesting the legality of the German attacks, retaliated by bombing cities in the Reich.⁸¹

II. THE HAGUE RULES OF AERIAL WARFARE

The Conference on the Limitation of Armament, meeting between November 12, 1921 and February 6, 1922, formed a Committee on Limitation of Armament, which determined that it was unrealistic to impose limitations on the number or characteristics of aircraft that may be deployed by a single State.⁸² The committee further opined that the employment of aircraft in

73. Blewett Lee, *Sovereignty of the Air*, 7 AM. J. INT'L L. 470, 478-79 (1913).

74. *Id.* at 479.

75. *Id.*

76. Kuhn, *supra* note 50, at 132.

77. JAMES F. WILLIS, PROLOGUE TO NUREMBERG: THE POLITICS AND DIPLOMACY OF PUNISHING WAR CRIMINALS OF THE FIRST WORLD WAR 16 (1982).

78. *Id.*

79. *Id.*

80. *Id.* These attacks escalated in 1917 and, aggregated, some nine thousand German bombs weighing two hundred eighty tons were delivered by fifty-one Zeppelin and fifty-two Gotha raids against Great Britain. *Id.* 1,413 were killed and 3,408 were wounded in these raids. ROBERT A. PAPE, BOMBING TO WIN: AIR POWER AND COERCION IN WAR 59 (1996).

81. WILLIS, *supra* note 77, at 16. The first deployment of a Zeppelin against a city was, in August 1914, when the Germans launched an attack on Liège in Belgium in retaliation for the city's refusal to surrender. BARBARA W. TUCHMAN, THE GUNS OF AUGUST 176 (1962). Thirteen bombs were dropped and nine civilians were killed. *Id.* Barbara W. Tuchman writes that this "inaugurated a twentieth century practice." *Id.*

82. Conference on the Limitation of Armament, 790 (1922) (18th Mtg.).

armed conflict should be governed by the rules of land warfare as adapted to the characteristics of aerial attacks by a conference to be held at a later date.⁸³ The chair of the committee, Secretary of State Charles Evans Hughes of the United States, cautioned that it was futile to attempt to limit the technological development of aircraft, which promised to be “the most formidable military weapon of the future.”⁸⁴

A subcommittee report reiterated the utilization of aircraft should be covered by the rules of warfare as tailored to the characteristics of aerial warfare.⁸⁵ Carlo Schanzer of Italy introduced a resolution recognizing that the bombardment of undefended towns, villages, dwellings and buildings by aircraft was prohibited under international law and was binding on all civilized nations.⁸⁶ The French Delegation endorsed these sentiments, but stressed that Article 25 of the Hague Convention of 1907 already prohibited the attack or bombardment of undefended towns, villages, dwellings or buildings.⁸⁷ However, Elihu Root of the United States contended that clarification of this rule as applied to air warfare was required because fortified towns generally were not equipped to rebuff aerial attacks.⁸⁸ He suggested that the relevant distinction was the military value of a site; a railroad junction or munitions factory might be bombed while a population center should be immune from attack.⁸⁹ Sir Robert Borden of Canada objected to proposals for legal regulation that must consider railroad junctions and munitions factories because clusters of innocent civilians typically surrounded such sites.⁹⁰

Senator Schazner did not insist on bringing his resolution to a vote and expressed satisfaction that the committee recognized the issues raised by air warfare.⁹¹ Chairperson Hughes’ proposal was unanimously adopted to create a drafting subcommittee to consider the legal rules required to regulate aerial warfare.⁹² The committee, comprised of representatives of the United States, Great Britain, France, Italy and Japan, was to evaluate whether the existing rules of international law adequately covered the new methods of aerial attack introduced since 1907 and, if not, what modifications in the existing rules were required.⁹³

83. *Id.*

84. *Id.* at 796.

85. *Id.* at 800. An advisory committee to the American delegation specified that the attack on “towns, villages, dwellings or buildings that are undefended is prohibited. The bombardment of fortified places or of munition factories is legitimate, but cities and towns, unless defended, should be spared, and every safeguard should be invoked to protect noncombatants against attack from the air.” *Id.*

86. *Id.* at 802.

87. *Id.* (statement by Admiral De Bon).

88. *Id.* at 804.

89. *Id.*

90. *Id.* at 806.

91. *Id.* at 804-06.

92. *Id.* at 808, 812.

93. *Id.* at 814 (19th Mtg.).

This resulted in the 1923 Hague Rules of Aerial Warfare, which, while failing to attract sufficient support to assume a legally binding status and stature, has been recognized as generally embodying customary international law.⁹⁴ The commission worked from drafts submitted by the United States and Great Britain.⁹⁵ It noted that the Declaration Prohibiting the Discharge of Projectiles and Explosives from Balloons of 1907 was sufficiently broad to include aerial bombing.⁹⁶ This document, however, was limited in duration and only applied to conflicts between States Parties.⁹⁷ The number of signatories to the 1907 Declaration was also sufficiently modest such that the instrument could only have limited impact.⁹⁸ The commission thus concluded a more general declaration was required.⁹⁹

The commission noted the horror evoked during World War I over the indiscriminate bombing of noncombatant populations who were not in the theater of military operations.¹⁰⁰ This helped to create a universal consensus that limitations must be imposed on aerial attacks.¹⁰¹ Then again, States were unlikely to confine their freedom of action and limit the military deployment of this new air technology.¹⁰² The best that could be hoped for was to agree on legitimate objects of attack, yet it was precisely this area on which it was most difficult to reach a consensus.¹⁰³

In the end, a measure of agreement was reached.¹⁰⁴ Article 22 of the Hague Rules of Aerial Warfare prohibited aerial bombardment for “the purpose of terrorizing the civilian population, of destroying or damaging private property not of a military character, or of injuring noncombatants.”¹⁰⁵ Article 24 specified that an aerial bombardment was legitimate only when directed exclusively at a military objective, a target whose “destruction or injury would constitute a distinct military advantage to the belligerent.”¹⁰⁶ A limited number of legitimate targets were specified: military forces, works, estab-

94. Rules of Aerial Warfare (1923), contained in *Commission of Jurists to Consider and Report Upon the Revision of the Rules of Warfare*, 32 AM. J. INT'L L. 1, 12 (Supp. 1938) [hereinafter *Aerial Warfare*]. The Air Force military manual states that although the Hague Rules “have some authority because eminent jurists prepared them, they do not represent existing customary law as a total code.” DEPARTMENT OF THE AIR FORCE, INTERNATIONAL LAW—THE CONDUCT OF ARMED CONFLICT AND AIR OPERATIONS (AF PAMPHLET 110-31, Nov. 19 1976), 5-3 [hereinafter DEPARTMENT OF THE AIR FORCE] (emphasis omitted).

95. *Aerial Warfare*, *supra* note 94, at 12.

96. *Id.* at 22 (Bombardment) (citing Balloon Declaration II, *supra* note 53).

97. *Id.*

98. *Id.* at 22-23.

99. *Id.* at 23.

100. *Id.* at 22.

101. *Id.*

102. *Id.*

103. *Id.*

104. *Id.*

105. *Id.* art. 22. Aerial bombardment may not be utilized to enforce compliance with requisitions or payment of contributions of money required by the armed forces. *Id.* art. 23.

106. *Id.* art. 24(1).

lishments and depots; factories manufacturing arms, ammunition or distinctive military supplies; and communications or transportation utilized for military purposes.¹⁰⁷ Aircraft were to abstain from attack in those instances in which these sites could not be targeted without the indiscriminate bombardment of the civilian population.¹⁰⁸

Attacks on cities, towns, villages, dwellings or buildings were legitimate in the immediate area of the operations of land forces provided that there existed 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."¹⁰⁹

Article 25 provided that all necessary steps must be taken to avoid attacking, as far as possible, buildings dedicated to religion, art, science, medicine and structures of historic significance.¹¹⁰ Further protections were set forth in Article 26, which established zones of protection around historic monuments enjoying immunity from aerial bombardment.¹¹¹ These were not to exceed five hundred meters in width.¹¹²

The international community was torn over the military prospects and perils of aerial bombardment. The Hague Rules of Aerial Warfare evidenced a general movement to constrain the calamitous consequences of aerial bombardment. The uncertain stance of the international community is reflected in the fact that the instrument failed to receive ratification. However, the central provisions of the instrument are recognized as a component of customary law.¹¹³

III. THE LEAGUE OF NATIONS

The principles articulated in the Hague Rules of Aerial Warfare were invoked by the League of Nations in denouncing the aerial bombardments of China and Spain in the 1930s.¹¹⁴ In 1937, Japanese forces invaded Central and North China.¹¹⁵ The Chinese alleged that the Japanese bombed Red

107. *Id.* art. 24(2).

108. *Id.* art. 24(3). "The bombardment of cities, towns, villages, dwellings or buildings not in the immediate neighborhood of the operations of land forces is prohibited." *Id.* art. 24(3).

109. *Id.* art. 24(4). "A belligerent state is liable to pay compensation for injuries to persons or to property caused by the violation" of the provisions of Article 24. *Id.* art. 24(5).

110. *Id.* art. 25. Essential steps must be taken by the commander to avoid buildings dedicated to "public worship, art, science or charitable purposes, historic monuments, hospital ships, hospitals and other places where the sick and wounded are collected, provided such buildings, objects or places are not at the time used for military purposes." *Id.* art. 25. Such buildings must be designated by marks visible in day and night to aircraft. *Id.* art. 25.

111. *Id.* art. 26(1).

112. *Id.* art. 26(3).

113. See *supra* notes 94-112 and accompanying texts.

114. See PAPE, *supra* note 80, at 336-38.

115. See Communication, dated August 30, 1937, from the Chinese Government to the Secretary-General (C.342.M.232.1937.VII), 18 LEAGUE OF NATIONS O.J. 653, 655 (1937).

Cross vans and hospitals and pointed to a number of attacks against civilians, including the killing of two hundred and wounding of five hundred in Shanghai.¹¹⁶ A significant number of the victims were women, children and refugees waiting to be transported to safety.¹¹⁷ In 1937, the League condemned the Japanese aerial bombing of undefended Chinese cities, which resulted in the inexcusable killing of hundreds of innocent civilians.¹¹⁸ The United States Secretary of State, Cordell Hull, forwarded a communiqué to the General Assembly following the vote in which he proclaimed, “any general bombing of an extensive area wherein there resides a large populace engaged in peaceful pursuits is unwarranted and contrary to the principles of law and of humanity.”¹¹⁹

In June 1938, the Cuban delegate protested to the Assembly of the League of Nations the bombing of open and unprotected towns in Spain and the resulting slaughter of the elderly, women and children.¹²⁰ Cuba called for “universal reprobation” of these acts, which it characterized as “the deeds of uncivilised people dominated by primitive tribal passions.”¹²¹ In August 1938, the Spanish government placed on the League of Nations agenda the question of the protection of civilian noncombatant populations against aerial bombing.¹²² The importance of this request was emphasized by a Commission of Investigation constituted by the United Kingdom, which determined that non-military targets were intentionally targeted in Spain.¹²³ The Spanish delegate, Mr. Pablo de Azcárate, noted that over one thousand air attacks had been directed at civilian populations involving twenty-four thousand bombs, seven thousand civilian dead, eleven thousand wounded and ten thousand buildings partially or totally destroyed.¹²⁴

The Third Committee of the League of Nations reported popular opinion had consistently expressed its horror over the bombing of civilians that typically does not serve a military purpose and merely causes unnecessary suffering.¹²⁵ The Committee concluded that the prohibition on the bombing

116. Communication, dated September 12, 1937, from the Chinese Government to the Secretary-General (C.376.M.253.1937.VII); *id.* at 655, 656-57.

117. *Id.* at 657.

118. Records of the 18th Ordinary Session of the League Assembly, Plenary Meetings, LEAGUE OF NATIONS O.J. Spec. Supp. 169, at 83, 90 (9th Plenary Mtg., Sept. 28, 1937).

119. *Id.* at 91 (10th Plenary Mtg., Sept. 30, 1937).

120. Letter, dated June 2, 1938, from the Permanent Delegate of Cuba to the Secretary-General (C.210.M.116.1938.IX), 19 LEAGUE OF NATIONS O.J. 880 (1938) [hereinafter LEAGUE OF NATIONS].

121. *Id.*

122. Telegram, dated August 10, 1938, from the Spanish Government to the Secretary-General; *id.*

123. Protection of Civilian Populations against Bombing from the Air in Case of War, Resolution of the League of Nations Assembly, LEAGUE OF NATIONS O.J. Spec. Supp. 182, at 16 (1938) [hereinafter Protection of Civilian Populations].

124. LEAGUE OF NATIONS, *supra* note 120, at 18 (Third Committee, 3rd Plenary Mtg., Sept. 17, 1938).

125. Protection of Civilian Populations, *supra* note 123, at 15.

of civilians was a recognized and established principle of international law and its affirmation would merely reiterate a rule that governments were bound to respect.¹²⁶ The challenge remained to establish a comprehensive set of regulations tailored to air war, which took the lessons of experience into account.¹²⁷

The General Assembly, on September 30, 1938, endorsed the Third Committee's draft resolution and recommendation.¹²⁸ The resolution noted that three principles provided the basis for any subsequent regulation of air war.¹²⁹ These were the prohibition on intentionally bombing civilian populations, the limitation on targets of attack to military objectives and the avoidance of the negligent bombing of civilian populations.¹³⁰ The Assembly also recommended that the League Council conduct a study of wanton and reckless aerial attacks.¹³¹

The Hague Rules of Aerial Warfare¹³² and the League of Nations¹³³ proclaimed that aerial bombing was to be carried out in a discriminate fashion. This was a retreat from the philosophy articulated in the 1920s and 1930s by the so-called "prophets" of aerial warfare: Giulio Douhet of Italy, Hugh Trenchard of Great Britain and Billy Mitchell of the United States, all of whom argued that the airplane had revolutionized warfare by eliminating the distinction between combatants and noncombatants.¹³⁴ These military men argued that attacks on civilians and on the urban infrastructure inevitably would lower morale and create social disorder, leading to popular agitation for the termination of an armed conflict.¹³⁵ This psychological penetration, rather than material devastation, was the central and crucial component of this new city busting strategy.¹³⁶ Aerial bombing would not only lead to a quick resolution of armed conflicts, but would also be more humane in that aerial acrobatics would come to overshadow and overtake the trials, tribulations and terror of trench warfare.¹³⁷

126. *Id.*

127. *Id.*

128. *Id.* at 15-17.

129. *Id.* at 16.

130. *Id.*

131. *Id.* at 16-17.

132. Aerial Warfare, *supra* note 94, at 23-26.

133. See *supra* notes 114-31 and accompanying texts.

134. See ERIC MARKUSEN & DAVID KOPF, *THE HOLOCAUST AND STRATEGIC BOMBING: GENOCIDE AND TOTAL WAR IN THE TWENTIETH CENTURY* 201-02 (1995).

135. See PAPE, *supra* note 80, at 60. Trenchard believed the firm British character and capacity to absorb attacks would permit the English to persevere over more psychologically precarious foes. *Id.* at 60-61.

136. See *id.* at 61.

137. See MARKUSEN & KOPF, *supra* note 134, at 202. The United States adopted an industrial web strategy that targeted the central components of the urban economy in order to cause chaos. PAPE, *supra* note 80, at 62-63. The enemy population would be starved rather than incinerated. *Id.*

In the end, the militaristic motives and imperatives of World War II overwhelmed inchoate efforts to restrain the employment of air power.

IV. AN OVERVIEW OF AERIAL WARFARE DURING WORLD WAR II

A. Germany

Immediately following Hitler's invasion of Poland in September 1939, President Franklin Delano Roosevelt urged Great Britain, France and Germany to publicly pledge to refrain from the aerial targeting of urban areas.¹³⁸ Two weeks later, in the House of Commons, English Prime Minister Neville Chamberlain vowed to avoid intentional attacks on "women and children and other civilians for purposes of mere terrorism."¹³⁹ Belligerents generally adhered to this policy and practiced a measure of self-restraint: Great Britain, for instance, instructed pilots to jettison excess bombs when weather conditions interfered with target identification, avoid population centers and limit attacks to daylight precision bombing.¹⁴⁰

This mutual restraint was breached on September 17, 1939, when the German air force (Luftwaffe) reduced Warsaw to rubble.¹⁴¹ The Luftwaffe coordinated this urban bombing with the blitzkrieg attack by German ground forces which, in combination, resulted in the rapid surrender of Poland within two weeks.¹⁴² On October 16, 1939, Great Britain responded by re-treating from the regime of aerial restraint.¹⁴³

The air war spiraled out of control. On May 14, 1940, Germany launched a substantial strike against Rotterdam in Holland.¹⁴⁴ Great Britain undertook a night mission against several cities in the industrial Ruhr region, which resulted in significant damage to residential areas.¹⁴⁵ A month later,

138. MARKUSEN & KOPF, *supra* note 134, at 151.

139. *Quoted in id.*

140. *Id.* at 152.

141. *Id.* at 152-53.

142. *Id.*

143. *Id.* at 153. There were three approaches to bombing. The industrial web theory targeted central economic sites, primarily electric power grids, in an effort to create fiscal collapse and to undermine morale. PAPE, *supra* note 80, at 62-63. By 1943, United States strategy shifted to the strategic interdiction of those portions of the economy directly linked to the military power of the Wehrmacht. *Id.* at 262-63. This centered on the attack against the facilities manufacturing ball bearings. *Id.* at 263-64. The third strategic approach involved direct attacks on German population centers. *Id.* at 260. This was adopted as the central British strategy and later was incorporated as part of the American strategic plan. *Id.* at 260-62. The goal was to render enemy territory uninhabitable and to intimidate and frighten the population. *Id.* at 260-61.

144. MARKUSEN & KOPF, *supra* note 134, at 153. Reports recorded thirty thousand dead; the actual number may have been roughly one thousand. *Id.* This was perceived as an intentional attack, but German officials appear to have made an effort to terminate the mission. *Id.*

145. *Id.*

Germany launched the Battle of Britain, an air offensive against England.¹⁴⁶ The combination of night bombing and the targeting of military facilities within London resulted in severe damage to the central city.¹⁴⁷ England retaliated with an attack on industrial sites in Berlin.¹⁴⁸ Hitler launched a nine-month air campaign against civilian targets within London; by mid-May 1941, the death toll stood at forty-five thousand with more than 3.5 million homes destroyed or seriously damaged.¹⁴⁹

On October 1940, the British shifted from “precision” bombing to “area” or “saturation” bombing, which indiscriminately deployed high explosives and incendiary weapons against German industrial and military installations situated within densely populated residential areas.¹⁵⁰ The resulting fires were fueled by continued aerial sorties, which prevented fire fighters from dousing the flames.¹⁵¹ On November 14, 1940, the Germans retaliated by attacking Coventry in England, leaving five hundred dead and destroying twenty thousand homes.¹⁵²

The British grew increasingly frustrated over the loss of aircraft and failure to erode German determination and discipline.¹⁵³ They shifted to direct attacks on civilian workers in an effort to undermine morale and impede war production.¹⁵⁴ This policy was spearheaded by Arthur Harris, an unapologetic advocate of attacking noncombatants, who was appointed to direct the Bomber Command.¹⁵⁵ A relentless series of air raids by American and British forces were then initiated.¹⁵⁶ In March 1942, the town of Lübeck and its wooden architecture were ignited by three hundred tons of bombs released by 234 bombers.¹⁵⁷ The Luftwaffe retaliated by targeting the militarily marginal sites of Oxford and Exeter.¹⁵⁸

On May 30, 1942, Harris launched one thousand bombers against Cologne; one thousand four hundred tons of bombs were dropped, resulting in the razing of six hundred acres.¹⁵⁹ Between March and July 1943, forty-three raids were directed against manufacturing sites in the Ruhr region, in addi-

146. *Id.*

147. *Id.* at 154.

148. *Id.*

149. *Id.*

150. *Id.* at 155.

151. *Id.*

152. *Id.*

153. *Id.* at 156.

154. *Id.*

155. See generally HENRY PROBERT, *BOMBER HARRIS: HIS LIFE AND TIMES: THE BIOGRAPHY OF MARSHAL OF THE ROYAL AIR FORCE SIR ARTHUR HARRIS, THE WARTIME CHIEF OF BOMBER COMMAND* (2001).

156. See MARKUSEN & KOPF, *supra* note 134, at 157-63. The Americans continued to adhere to precision bombing and attacked during the day. The British attacked at night. *Id.* at 157-58.

157. *Id.* at 157.

158. *Id.*

159. *Id.*

tion to the attacks against Berlin.¹⁶⁰ In July 1943, the British and Americans launched Operation Gomorrah, which was designed to destroy Hamburg.¹⁶¹ The city was engulfed in a mass of flames, heat and smoke, which resulted in the death of forty-five thousand civilians¹⁶² and the destruction of thirteen square city miles in two days of bombing.¹⁶³ Markusen and Kopf recount that people were “turned into human torches by the intense heat,” babies were “torn by the high winds from their mothers’ arms and sucked into the flames,” and rescuers entering homes found “bones suspended in congealed fat.”¹⁶⁴

Sixteen major bombing raids against Berlin followed between November 1943 and March 1944.¹⁶⁵ The Germans retaliated with five thousand V-1 buzz bombs and V-2 missile attacks against Great Britain, which resulted in the death of several thousand.¹⁶⁶ This air campaign culminated in the February 1945 attack on Dresden in eastern Germany.¹⁶⁷ Estimates are that, following fourteen hours of bombing, the death toll numbered between seventy thousand and one hundred and thirty-five thousand.¹⁶⁸

As the war drew to a close, the Americans reconsidered their plan to engage only in precision bombing and adopted the British model of targeting civilians.¹⁶⁹ In August 1944, President Roosevelt proclaimed that the Allied Powers must “castrate the German people” in order to prevent the perpetuation of Nazism.¹⁷⁰ In February 1945, over nine hundred United States bombers struck Berlin, killing as many as twenty-five thousand; ten days later the Americans joined the British in bombing Dresden.¹⁷¹

B. Japan

Various American study commissions advised that incendiary bomb attacks against Japan’s highly flimsy and inflammable urban architecture would set the country’s cities ablaze and cripple the economy.¹⁷² General Curtis LeMay abandoned all pretense of precision bombing and directed American pilots to fire-bomb residential areas.¹⁷³ On March 9, 1945, the

160. *Id.* at 158.

161. *Id.*

162. *Id.* at 158-59.

163. *Id.* at 160.

164. *Id.* at 159.

165. *Id.* at 160.

166. *Id.*

167. *Id.* at 161.

168. *Id.* at 162.

169. *Id.* at 167.

170. *Quoted in id.* at 168.

171. *Id.* at 168.

172. *Id.* at 173-75.

173. *Id.* at 175.

Americans launched a low-altitude bombing raid against Tokyo.¹⁷⁴ The residential area targeted for attack housed numerous small-scale manufacturing facilities.¹⁷⁵ Over three hundred planes dropped roughly two thousand tons of bombs at a target area of three miles by four miles, which housed roughly 1.25 million people.¹⁷⁶ The temperature emitted from the firestorm exceeded one thousand eight hundred degrees Fahrenheit.¹⁷⁷ The canals boiled and houses and individuals spontaneously burst into flames.¹⁷⁸ The stench of burning flesh filled the skies two miles above the city.¹⁷⁹ The United States Strategic Bombing Survey set the death toll from the six-hour raid at 87,793 with 40,918 injuries;¹⁸⁰ sixteen square miles of the city were reduced to rubble in what is considered the “most devastating air attack in history.”¹⁸¹ Between March 11 and March 19, a series of raids against Nagoya, Osaka and Kobe destroyed an additional sixteen square miles of some of Japan’s most significant cities.¹⁸² Between May and August, fire-bombing destroyed fifty-eight cities and virtually every sizable town had been incinerated.¹⁸³

In the end, 178 square miles were destroyed, comprising forty percent of the urban areas of the sixty-six cities attacked; twenty-two million people, thirty percent of Japan’s entire population, were left without homes,¹⁸⁴ and nine hundred thousand civilians were dead.¹⁸⁵ In June 1945, General Bonner Fellers sent a confidential memo to General Douglas MacArthur describing the fire-bomb raids as “one of the most ruthless and barbaric killings of non-combatants in all history.”¹⁸⁶

This, of course, was a prelude to dropping atomic bombs on August 6, 1945 and August 9, 1945.¹⁸⁷ As many as one hundred and forty thousand people were killed immediately at Hiroshima, and seventy thousand were

174. *Id.* at 175-78.

175. *Id.* at 176.

176. *Id.* at 178.

177. *Id.*

178. *Id.* at 178-79.

179. *Id.* at 179.

180. *Id.*

181. PAPE, *supra* note 80, at 103.

182. *Id.*

183. MARKUSEN & KOPF, *supra* note 134, at 180. Secretary of War Henry Stimson exempted Kyoto due to its religious significance. *Id.* As the incendiary-bombing campaign continued, smaller locales were added to the target list and, by July 1945, cities with populations of one hundred thousand to two hundred thousand were subject to attack. *Id.*

184. PAPE, *supra* note 80, at 104.

185. *Id.* Japan’s combat casualties were approximately seven hundred and eighty thousand. *Id.* Sixty-four cities were the target of saturation bombing; an average of forty percent of each site was destroyed, over two-thirds of civilians experienced air raids, and more than one-third lived in neighborhoods which were bombed. *Id.* Japanese civilians suffered nine hundred thousand deaths (1.2 percent of the population) as compared to three hundred and thirty thousand Germans (0.5 percent of the population). *Id.* at 129. Sixty-seven percent of those subjected to bombing reported “intense fright and fear of death.” *Id.* at 130.

186. ROBERT B. EDGERTON, WARRIORS OF THE RISING SUN 317 (1997).

187. MARKUSEN & KOPF, *supra* note 134, at 180.

killed at Nagasaki.¹⁸⁸ Thousands of others died as a result of the delayed effects of radiation.¹⁸⁹ Admiral William Leahy, President Harry Truman's Chief of Staff, would write in his postwar memoirs that as the first country to deploy the atomic bomb, the United States "adopted an ethical standard common to the barbarians of the Dark Ages."¹⁹⁰

V. NUREMBERG

The text of the Nuremberg Charter seemingly invited examination of the legality of German aerial tactics.¹⁹¹ The war crimes provision, for instance, encompassed the "wanton destruction of cities, towns or villages, or devastation not justified by military necessity."¹⁹² Indiscriminate air attacks against urban areas also might be included within the prohibition under crimes against humanity as "inhumane acts committed against any civilian population."¹⁹³ The Nuremberg Tribunal noted that the war crimes article merely reflected the provisions of the Hague Convention of 1907 which, by 1939, had been recognized as binding customary law by all civilized nations.¹⁹⁴ Those inhumane acts charged in the indictment committed in execution of, or in connection with, Germany's wars of aggression that did not constitute war crimes were deemed by the Tribunal to constitute crimes against humanity.¹⁹⁵ In commenting upon the German General Staff and High Command, which included the leadership of the Air Force, the Tribunal noted that these officers were responsible for the "miseries and suffering that have fallen on millions of men, women, and children."¹⁹⁶ The conduct of these commanders disgraced "the honorable profession of arms."¹⁹⁷ Absent their support, Hitler's ambitions and aspirations would have remained "academic and sterile."¹⁹⁸ The Tribunal, however, failed to provide a detailed discussion of the international legality of Germany's aerial war campaign.¹⁹⁹ In discussing Hermann Goering, the Commander-in-Chief of the Luftwaffe, the Court did

188. *Id.* at 182.

189. *Id.*

190. *Quoted in id.* at 251.

191. *See* Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis Powers and Charter of the International Military Tribunal, Aug. 8, 1945, 59 Stat. 1544, 82 U.N.T.S. 279 [hereinafter Nuremberg Charter].

192. *Id.* art. 6(b).

193. *Id.* art. 6(c).

194. *See* United States v. Hermann Goering, 22 TRIAL OF THE MAJOR WAR CRIMINALS 411, 497 (1948).

195. *Id.* at 498.

196. *Id.* at 522.

197. *Id.*

198. *Id.*

199. *See generally id.*

make reference to Germany's indiscriminate aerial attacks on Poland and other victims of the Reich's wars of aggression.²⁰⁰

The decision to refrain from prosecuting those who ordered, organized or carried out aerial attacks violative of the Nuremberg Charter likely reflected the fact that both Germany and the Allies engaged in similar tactics.²⁰¹ The Tribunal, for instance, declined to deliberate on the charge that Admiral Karl Doenitz waged unrestricted submarine warfare and explained that both the United Kingdom and the United States pursued identical policies.²⁰² A similar rationale was invoked in acquitting Doenitz's successor, Admiral Paul Raeder, who was charged with sinking unarmed merchant and neutral ships as well as with the non-rescue and machine-gunning of survivors.²⁰³

Brigadier General Telford Taylor, Chief United States Counsel for War Crimes, wrote in his Final Report to the Secretary of the Army that belligerents on both sides generally disregarded rules regulating military combat and that, as a result, in drafting the Nuremberg indictment this criminal category proved relatively unimportant.²⁰⁴ He noted that while the Germans bombed Warsaw, Rotterdam, Belgrade and London, the Allies attacked German and Japanese cities.²⁰⁵ This "deliberate policy" was an "eloquent witness" that the "aerial bombardment of cities and factories" had become a "recognized part of modern warfare as carried on by all nations."²⁰⁶ As a result, Taylor observed that the decision was made at Nuremberg to avoid allegations arising out of aerial warfare, a trial tactic that seemed well-advised in light of the fact that the charges of illegal submarine warfare brought against Admirals Raeder and Doenitz only met with "technical success."²⁰⁷ He concluded that, in his opinion, the legal and moral issues arising out of aerial and submarine warfare could not be advanced or settled by the criminal process at Nuremberg.²⁰⁸

A second series of prosecutions were conducted by the occupying powers in Germany pursuant to Control Council Law No. 10, an administrative order that provided a uniform set of procedures and principles for Allied occupation courts.²⁰⁹ Once again, little attention was devoted to combat crimes

200. *Id.* at 526.

201. *See id.* at 559.

202. *Id.*

203. *Id.* at 563.

204. TELFORD TAYLOR, FINAL REPORT TO THE SECRETARY OF THE ARMY ON THE NUERNBERG WAR CRIMES TRIALS UNDER CONTROL COUNCIL LAW NO. 10, 65 (1997).

205. *Id.*

206. *Id.*

207. *Id.*

208. *Id.*

209. *See* Control Council Law No. 10, reprinted in VI TRIALS OF WAR CRIMINALS BEFORE THE NUERNBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO. 10 XVIII (1952).

or to aerial atrocities.²¹⁰ Field Marshal Erhard Milch, Inspector General of the Luftwaffe and State Secretary of the Air Ministry, was convicted of war crimes and crimes against humanity based, in part, on his employment of slave labor and prisoners of war in concentration camps.²¹¹ Judge Michael A. Musmanno, in his concurring opinion, contended that the fact that Luftwaffe and Allied air raids unintentionally killed and injured women, children and the elderly did not justify intentionally stripping civilians of their civil rights and subjecting them to slave labor: the fact that “military necessity unintentionally victimizes a civilian population” did not mean that “political domination may strip them of their civil rights and subject them to intentional torture and possible death.”²¹² This statement by Judge Musmanno significantly recognized that the humanitarian law of war authorized the incidental killing of civilians and the destruction of civilian objects in aerial attacks against legitimate military targets.²¹³

The American Control Council Law No. 10 Court in the *Einsatzgruppen* case offered an expanded analysis.²¹⁴ The Tribunal dismissed the contention that the defendants who organized and directed Nazi death squads must be exonerated from the charge of killing civilian populations because Allied regimes brought about the death of noncombatants through bombing.²¹⁵ The Court determined that Nazi Germany engaged in an aggressive war, which included unprovoked aerial attacks against London, Coventry, Rotterdam and Warsaw, as well as other population centers.²¹⁶ The Allied Powers lawfully retaliated and targeted Berlin, Dresden, Hamburg, Cologne, and additional German cities.²¹⁷ These attacks concededly resulted in civilian deaths, but even had they not been undertaken in response to the acts of Germany, the Tribunal noted that there was “no parallelism between an act of legitimate warfare, namely the bombing of a city, with a concomitant loss of civilian life, and the premeditated killing of all members of certain categories of the civilian population in occupied territory.”²¹⁸

The Tribunal noted that cities were attacked for “tactical purposes,” resulting in the militarily advantageous destruction of communications, railroads, ammunition plants and factories.²¹⁹ The death and maiming of civilians inevitably resulted from these attacks.²²⁰ This, according to the Tribunal,

210. See TAYLOR, *supra* note 204, at 65-66.

211. United States v. Milch, II TRIALS OF WAR CRIMINALS BEFORE THE NEURNBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO. 10, 353, 773, 797 (1950).

212. *Id.* at 797, 849-50 (Musmanno, J., concurring opinion).

213. See *id.*

214. United States v. Otto Ohlendorf et al., IV TRIALS OF WAR CRIMINALS BEFORE THE NEURNBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO. 10, 411 (1950).

215. *Id.* at 466.

216. *Id.*

217. *Id.* at 466-67.

218. *Id.* at 467.

219. *Id.*

220. *Id.*

was distinct from an army dragging men, women and children from their homes and intentionally executing them.²²¹

The single purpose of bombing, according to the Tribunal, was the capitulation of the besieged nation.²²² Surrender resulted in the termination of the attack and an end to the killing.²²³ The Nazi extermination of the Jews, however, continued long after the termination of hostilities.²²⁴ This could not be credibly characterized as an act of self-defense; the notion that Jews constituted a menace to Germany was contrary to “all facts, all logic and all law.”²²⁵

This textual discussion strongly suggested that international law countenanced the incidental killing of civilians during aerial bombing.²²⁶ This, however, raised additional issues. Was there a point at which the number of civilian casualties would be disproportionate to the value of the military target? Could a meaningful distinction be drawn between foreseeable and intentional civilian injury? What obligation was there to take measures to avoid civilian casualties? Was there an obligation to only undertake attacks which endangered civilians as a last resort? Could the intentional targeting of urban populations be condoned as an act of reprisal? Would the legitimacy of the humanitarian law of war suffer from a policy that countenanced the intentional or incidental killing of civilian urban populations, most of whom likely would be women, children, elderly, sick or infirm?²²⁷

VI. POST-NUREMBERG PROCEEDINGS

In June 1944, General Walter Warlimont, the Deputy Chief of Military Operations in Berlin, wrote to his subordinates that enemy pilots should be subjected to summary “lynch justice.”²²⁸ The Foreign Office endorsed Warlimont’s stance as a deterrent to enemy air attacks in a letter addressed to the High Command of the Armed Forces.²²⁹ On May 30, 1944, Martin Bormann, the Chief of the Party Chancellery, issued a secret circular to Nazi Party leaders concerning “people’s justice” against Allied pilots apprehended in Germany.²³⁰ Bormann stated that over the past weeks English and American

221. *Id.* The Tribunal dismissed the analogy between intentionally shooting civilians and deploying the atomic bomb, noting this weapon was developed in order to overcome military resistance. *Id.*

222. *Id.*

223. *Id.*

224. *Id.*

225. *Id.* at 470.

226. *See supra* notes 214-25 and accompanying texts.

227. *See id.*

228. *United States v. Josef Altstoetter, III TRIALS OF WAR CRIMINALS BEFORE THE NUERNBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO. 10, 954, 1095 (1951).*

229. *Id.* at 1095-96.

230. *See* Secret Circular from Martin Bormann to Nazi Party Leaders, 30 May 1944, Concerning “People’s Justice Against Anglo-American Murderers,” *III TRIALS OF WAR*

fliers repeatedly strafed women, children, farmers and civilians from “a low height, thus murdering in the most despicable manner defenseless civilians—especially women and children.”²³¹ He stated that on several occasions crew members who were forced to abandon their craft were “lynched” by the population.²³² Bormann noted approvingly that police or criminal proceedings had not been lodged against the perpetrators.²³³ The Reich Chancellery, in turn, transmitted Bormann’s letter to the Justice Ministry.²³⁴ Justice Minister Otto Thierack responded by directing that allegations of lynch justice should be submitted to his office in order to determine whether the charges should be quashed.²³⁵ The American Tribunal in the *Justice* case determined that the Justice Ministry intervened to frustrate criminal investigations of the murder of Allied pilots and failed to find a single instance in which an indictment was filed.²³⁶ The Court, in convicting defendant Herbert Klemm, former State Secretary in the Ministry of Justice, determined that he was knowingly connected with suppressing the punishment of the murderers of Anglo-American airmen.²³⁷

The trial of Kurt Student, Commander-in-Chief of the German forces in Crete, was the single post-World War II prosecution that directly addressed liability for aerial bombardment.²³⁸ The fourth charge in the eight-count indictment issued by a British military court against Student alleged that, on May 24, 1941, an aircraft under his command bombed a hospital marked with a red cross.²³⁹ This occurred during an assault by German parachutists on the Island of Crete.²⁴⁰ The prosecution alleged that the hospital could not have been targeted by the thoroughly disciplined German troops absent the knowledge and participation of the accused.²⁴¹ Student, however, was acquitted based on the fact that he presumably was not involved in target selection and, in any event, reconnaissance photos failed to reveal that the target was a hospital.²⁴²

CRIMINALS BEFORE THE NUERNBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO. 10, 577 (1951) [hereinafter Justice Docs.].

231. *Id.*

232. *Id.*

233. *Id.* at 578.

234. Letter from Lammers to Reich Minister of Justice Thierack, 4 June 1944, Concerning “People’s Justice Against Anglo-American Murderers,” and Enclosing Bormann’s Circular to Nazi Party Leaders on this Subject; *id.* at 578, 579.

235. *Id.*

236. United States v. Josef Altstoetter, III TRIALS OF WAR CRIMINALS BEFORE THE NUERNBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO. 10, 1097-98 (1951).

237. *Id.* at 1095, 1099.

238. See Trial of Kurt Student, (Brit. Milit. Ct., Luneberg, Germany, 6th–10th May, 1946), IV L. REP. TRIALS WAR CRIM. 118 (U.N. War Crimes Comm’n, 1948).

239. *Id.*

240. *Id.*

241. *Id.* at 124 (Notes on the Case).

242. *Id.* at 120.

A number of cases affirmed that captured Allied pilots were protected prisoners of war.²⁴³ An American military commission on the unlawful killing of United States' prisoners of war convicted Albert Bury, former police chief of Langenselbod, Kreis Hanau, Germany and Wilhelm Hafner, an officer under Bury's command.²⁴⁴ Hafner followed Bury's order to remove a captured American airman to a secluded spot and shoot him.²⁴⁵ Bury alleged Reich officials had ordered that "terror flyers" were no longer to be granted the protections accorded to prisoners of war and were to be killed by lynching or beating.²⁴⁶ Both of the accused were sentenced to death by hanging²⁴⁷ for violating their internationally imposed obligation to provide humane treatment to prisoners of war.²⁴⁸

The United States Military Commission rejected the defense of superior orders, determining that Bury possessed the latitude to determine whether or not a specific flyer should be killed and there was no compelling reason to have so expeditiously dispatched the captured pilot.²⁴⁹ Hafner did not protest or resist the order and when he reported to Bury that he had shot the pilot, Bury replied, "[I]t is right so."²⁵⁰

Johannes Oenning, a former member of the Hitler youth, and Emil Nix, who served as a police officer in the Reich, were accused of killing a Royal Air Force Officer.²⁵¹ It was alleged Nix directed defendant Oenning and a military police officer to do what they liked with the pilot.²⁵² The English officer was then taken to a secluded location, shot, and his body secretly buried.²⁵³ Nix was acquitted while Oenning was convicted and sentenced to eight years in prison.²⁵⁴

Oberfeldwebel Karl Amberger was in charge of escorting five captured Allied pilots to a railroad station.²⁵⁵ Amberger claimed he viewed the prisoners talking to one another in a suspicious fashion and, along with two others,

243. See Trial of Albert Bury and Wilhelm Hafner, (U.S. Milit. Comm'n, Freising, Germany, 15th July, 1945), III L. REP. TRIALS WAR CRIM. 62 (U.N. War Crimes Comm'n, 1948).

244. *Id.*

245. *Id.*

246. *Id.*

247. *Id.*

248. *Id.* at 64 (Notes on the Case).

249. *Id.*

250. *Id.*

251. Trial of Johannes Oenning and Emil Nix, (Brit. Milit. Ct., Borken, Germany, 21st-22nd Dec., 1945), XI L. REP. TRIALS WAR CRIM. 74 (U.N. War Crimes Comm'n, 1949).

252. *Id.*

253. *Id.*

254. *Id.* See also Trial of Hans Renoth and Three Others, (Brit. Milit. Ct., Elten, Germany, 8th-10th Jan., 1946), XI L. REP. TRIALS WAR CRIM. 76 (U.N. War Crimes Comm'n, 1949) (two German police officers and two customs officials convicted of beating to death an American airman who enjoyed the status of a prisoner of war).

255. Trial of Karl Amberger (The Dreierwalde Case), (Brit. Milit. Ct., Wuppertal, Germany, 11th-14th Mar., 1946), I L. REP. TRIALS WAR CRIM. 81 (U.N. War Crimes Comm'n, 1947) (killing of four Allied airmen who were prisoners of war).

opened fire, killing four of the pilots.²⁵⁶ He was convicted and sentenced to death.²⁵⁷ The Court rejected the mitigating claim that Amberger believed the prisoners had been responsible for killing forty civilians and airmen on the airfield at Dreierwalde.²⁵⁸ The Court, in reaching this verdict, issued important legal rulings, determining that airmen who were apprehended following their descent from aircraft fell within the protection accorded to combatants, who having laid down their arms, or having no means of defense, have surrendered.²⁵⁹ The Court also explicitly ruled that the killing of prisoners of war constituted a war crime under customary and positive international law.²⁶⁰ The Tribunal also clarified that a prisoner who was attempting to escape, or was reasonably believed to be attempting to escape, may be wounded or inadvertently killed.²⁶¹

Japanese military men were convicted in several trials of the unfair and illegal prosecution of captured Allied airmen in contravention of the rights to be accorded to prisoners of war.²⁶² In *Isayama*, fourteen American airmen were captured by the Japanese Formosan Army and interrogated for alleged violations of Formosan Military Law.²⁶³ The law applied to enemy airmen captured within the jurisdiction of the 10th Area Army, and provided punishment for individuals who engaged in a number of acts, including bombing and strafing with the intent to wound, kill or intimidate civilians, destroying non-military objectives or violating human rights by carrying out inhuman acts.²⁶⁴ The punishment was death, but could be modified to life or to not less than ten years' imprisonment.²⁶⁵ The charge was to be prosecuted before a military tribunal composed of two army officers and one judicial officer appointed and supervised by the relevant commander.²⁶⁶

The United States Military Commission determined that the conviction of the American airmen, in part, rested on falsified admissions of guilt en-

256. *Id.* at 83.

257. *Id.* at 83-84.

258. *Id.* at 84. Amberger's defense that the prisoners had attempted to escape was dismissed and he was convicted and sentenced to death by hanging. *Id.* at 83-84.

259. *Id.* at 85-86 (citing Hague Convention, *supra* note 8, art. 23(c)).

260. *Id.* at 86.

261. *Id.*

262. See Trial of Lieutenant-General Shigeru Sawada and Three Others, (U.S. Milit. Comm'n, Shanghai, 27th Feb.-15th Apr., 1946), V L. REP. TRIALS WAR CRIM. 1 (U.N. War Crimes Comm'n, 1948).

263. Trial of Lieutenant-General Harukei Isayama and Seven Others, (U.S. Milit. Comm'n, Shanghai, 1st-25th July, 1946), V L. REP. TRIALS WAR CRIM. 60 (U.N. War Crimes Comm'n, 1948). These fourteen airmen were comprised of radiomen, photographers and gunners who were captured between October 12, 1944, the date on which the law was issued, and February 27, 1945. *Id.* at 61. The pilots and co-pilots were sent to Tokyo to stand trial. *Id.*

264. *Id.* It also was a crime to enter the jurisdiction with the intent to carry out any of these acts. *Id.*

265. *Id.*

266. *Id.*

tered into evidence.²⁶⁷ The Americans were also not permitted to obtain evidence or witnesses on their own behalf²⁶⁸ and were denied counsel and interpreters during their trials, which typically only lasted a single day.²⁶⁹ The fourteen Americans were executed and buried in a mass grave on June 19, 1945.²⁷⁰ The Japanese defendants served in a variety of capacities at the trials, including judges, prosecutors and responsible officers who were variously sentenced to terms ranging from twenty years to life in prison for participating in illegal and false trials and unlawful killings.²⁷¹

In *Hisakasu*, five Japanese military men were convicted of participating in an illegal, unfair and false trial, which resulted in the unlawful killing of an American pilot.²⁷² The prisoner had been charged with bombing a thirty-ton civilian vessel in Hong Kong harbor, allegedly causing the death of eight Chinese civilians.²⁷³ The pilot was charged with violating the Japanese Airmen Act, which condemned bombing, strafing or attacking the private property of a non-military nature with the intent of destroying, damaging or burning.²⁷⁴

The prosecution relied on two documents reciting the damage to the vessel in addition to an investigative report and an interrogation of the accused in Japanese in which the pilot denied his involvement.²⁷⁵ The members of the military court unanimously voted to convict the American and sentenced him to death.²⁷⁶ The Japanese defendants were convicted of participating in an illegal, unfair, false and null trial which resulted in the unlawful killing of the accused, and were variously sentenced to imprisonment for periods ranging from fifty years to life or death by hanging.²⁷⁷ The lead defendant, General Tanaka Hisakasu, was condemned to death based on the fact that he requested permission from Tokyo to conduct the trial, directed the preparation of the report which was introduced into evidence, discussed strategy with the prosecution on numerous occasions, approved the death penalty and execution and failed to submit the record and sentence for approval by his superior as required under Japanese military law.²⁷⁸ The Court, in reaching this decision, appeared to rely on the failure to provide the accused a lawyer or an opportunity to prepare his defense or to secure evi-

267. *Id.*

268. *Id.* at 62.

269. *Id.* at 65 (Notes on the Case).

270. *Id.* at 63.

271. *Id.* at 64.

272. Trial of General Tanaka Hisakasu and Five Others, (U.S. Milit. Comm'n, Shanghai, 13th Aug.-3rd Sept., 1946), V L. REP. TRIALS WAR CRIM. 66, 70 (U.N. War Crimes Comm'n, 1948).

273. *Id.* at 67.

274. *Id.*

275. *Id.*

276. *Id.* at 68.

277. *Id.* at 70.

278. *Id.* at 69-70.

dence, the absence of witnesses to corroborate the documentary record, the defendants' disregard of the accused's claim of innocence and the summary nature of the proceedings.²⁷⁹

These cases established that the pilots and crew of military aircraft were entitled to the rights and privileges accorded to prisoners of war.²⁸⁰ As prisoners, they may only be punished for violations of the laws and customs of war following proceedings conducted in accordance with due process principles.²⁸¹

In 1948, the International Military Tribunal at Tokyo convicted twenty-five high-ranking Japanese civilian and military officials of crimes against peace and war crimes.²⁸² A central count concerned the treatment meted out to captured American aviators.²⁸³ Prime Minister Hideki Tojo issued retroactive regulations applicable to eight pilots whose planes were shot down during the first American raid on Tokyo on April 18, 1942.²⁸⁴ These regulations, dated August 13, 1942, were applicable to enemy fliers who raided Japan, Manchukuo or Japanese operational areas.²⁸⁵ Offenses enumerated in the law included air attacks against civilians, private property of a non-military nature and non-military objectives, as well as other violations of international humanitarian law.²⁸⁶ Violations of the regulations were punishable by death or imprisonment for ten years or more.²⁸⁷ The International Tribunal at Tokyo observed, with some irony, that the Japanese themselves engaged in an indiscriminate bombing campaign in China.²⁸⁸

The American fliers were held in solitary confinement, tortured for eighteen days and eventually signed inculpatory statements written in Japanese, which they did not comprehend.²⁸⁹ The Americans then were starved and ill-treated: three were sentenced to death and five were condemned to life imprisonment.²⁹⁰ This established the precedent. Enemy aviators who were apprehended were starved, tortured and often killed without trial.²⁹¹ In those instances in which court-martials were conducted, the proceedings typically were a mere formality.²⁹² In June 1945, the Commandant of the

279. *Id.* at 71 (Notes on the Case).

280. *See supra* notes 243-61 and accompanying texts.

281. *See supra* notes 262-79 and accompanying texts.

282. *See* International Military Tribunal at Tokyo (1948), in II THE LAW OF WAR: A DOCUMENTARY HISTORY 1029, 1157-59 (Leon Friedman ed., 1972) [hereinafter Tokyo War Crimes Trial].

283. *Id.* at 1067.

284. *Id.*

285. *Id.*

286. *Id.* at 1067-68.

287. *Id.* at 1068.

288. *Id.*

289. *Id.*

290. *Id.*

291. *Id.*

292. *Id.*

Military Police for Japan wrote to various subordinates expressing his view that trials were unnecessarily delaying executions; consequently, ninety aviators were immediately killed.²⁹³ Others died as a result of torture while those who were executed were variously subjected to firing squads, decapitation or immolated by civilian crowds after being paraded through the streets.²⁹⁴

Prime Minister Hideki Tojo was determined to have been aware of the mistreatment of the aviators and yet failed to take adequate steps to prevent their abuse; he was convicted of this and other crimes²⁹⁵ and sentenced to death.²⁹⁶ War Minister Shunroko Hata was also found to have breached his duty to safeguard prisoners²⁹⁷ and was convicted of various offenses and sentenced to life in prison.²⁹⁸

The post-Nuremberg prosecutions conspicuously avoided addressing the international legality of aerial attacks. The trials, however, clearly established that pilots who were apprehended were to be accorded prisoner of war status and were entitled to due process protections in prosecutions for war crimes.²⁹⁹ Pilots, unlike civilian victims of air attacks, were thus to be accorded protection under the humanitarian law of war.³⁰⁰

VII. HIROSHIMA AND NAGASAKI

The Tokyo Tribunal condemned Japanese massacres and atrocities in China while failing to address Japanese aerial tactics.³⁰¹ The Tribunal may have anticipated that this might invite the defense that the United States grossly and wantonly violated international law by deploying the atomic bomb.³⁰² The official American rationale was that the bomb preserved the lives of combatants who otherwise would have been killed in an invasion of Japan.³⁰³ There are substantial questions as to whether the bomb was deployed for strategic reasons as opposed to the rationales of revenge, projection of American power and intimidation of the Soviet Union.³⁰⁴ The atomic

293. *Id.* at 1069.

294. *Id.* at 1070.

295. *Id.* at 1154.

296. *Id.* at 1158.

297. *Id.* at 1131.

298. *Id.* at 1157.

299. *See supra* notes 282-98 and accompanying texts.

300. *Id.*

301. Tokyo War Crimes Trial, *supra* note 282, at 1055-56.

302. *See* Elizabeth S. Kopelman, *Ideology And International Law: The Dissent of the Indian Justice at the Tokyo War Crimes Trial*, 23 N.Y.U. J. INT'L L. & POL. 373, 392 (1991).

303. The figure as to lives saved was as high as five hundred thousand. Gar Alperovitz dismisses this figure as inflated and sets the figure at seven thousand to eight thousand. GAR ALPEROVITZ, *THE DECISION TO USE THE ATOMIC BOMB AND THE ARCHITECTURE OF AN AMERICAN MYTH* 518 (1995).

304. *Id.* at 519, 523-27.

bomb also raised significant legal issues pertaining to the safety and security of civilians, which only received superficial examination during the decision-making process by the American executive branch.³⁰⁵

The deployment of this “doomsday” weapon eroded American restraints on aerial bombardment.³⁰⁶ Decision-makers now abandoned the official policy against aerial attacks on noncombatants and accepted that this might constitute a humane policy, which could expeditiously end the war.³⁰⁷ This was rationalized on the grounds that the entire Japanese population, including children, was involved in the war effort and therefore an appropriate target of attack.³⁰⁸ There also was a moral imperative: restraints on the deployment of armed force must be loosened in a conflict that threatened the very survival of America.³⁰⁹ Still, Secretary of War Henry L. Stimson would later write regretfully that in this “last great action of the Second World War we were given final proof that . . . [w]ar in the twentieth century has grown steadily more barbarous, more destructive, more debased, in all aspects.”³¹⁰

In 1963, in *Shimoda*, a Tokyo District Court determined that the United States atomic attack on Japan contravened international legal standards.³¹¹ The Court, however, went on to determine that the plaintiffs lacked legal standing to recover damages from the Japanese government.³¹² The Tribunal observed that the atomic bomb was “stronger” than weapons of the past in “power of destruction and casualty”³¹³ and constituted a “really cruel weapon.”³¹⁴ The Court stressed that while there was no express prohibition on the deployment of atomic bombs during World War II, the weapon contravened core principles of the humanitarian law of war.³¹⁵

The Japanese panel stated that according to the customary international law of land warfare, a defended city is a locale resisting occupation by enemy forces; a city that is distant from the battlefield and not in danger of enemy occupation, even where armed with defensive installations, is catego-

305. *See id.* at 529.

306. *See* RONALD TAKAKI, *HIROSHIMA: WHY AMERICA DROPPED THE ATOMIC BOMB* 6-7, 14 (1995).

307. *Id.* at 26-27.

308. *Id.* at 28.

309. *Id.* at 28-29. Hiroshima had served as an assembly area for troops. *Id.* at 46. The United Strategic Bombing Survey confirmed that 3,243 troops were killed. *Id.* Seventy thousand were instantly killed and, by 1950, another one hundred and thirty thousand had likely died as a result of injury or radiation. *Id.* at 47.

310. *Quoted in id.* at 130-31.

311. *Ryuichi Shimoda et al. v. The State* (355 Hanrei Jiho 17), *reprinted in* 8 JAP. ANNUAL INT’L L. 212 (1964). *See also* Richard A. Falk, *The Shimoda Case: A Legal Appraisal of the Atomic Attacks upon Hiroshima and Nagasaki*, 59 AM. J. INT’L L. 759, 759 (1965).

312. *Ryuichi Shimoda et al. v. The State* (355 Hanrei Jiho 17), *reprinted in* 8 JAP. ANNUAL INT’L L. 212, 242-50 (1964).

313. *Id.* at 233.

314. *Id.* at 234.

315. *Id.* at 235.

rized as an undefended city.³¹⁶ Indiscriminate attacks were permitted against the former, while only bombardment of military objectives was permitted against the latter.³¹⁷ The Court argued that the Hague Rules of Aerial Warfare incorporated and refined this distinction and were regarded as an authoritative source in regards to air warfare.³¹⁸ Neither Hiroshima nor Nagasaki were within the zone of conflict or resisted Allied occupation and, accordingly, were immune from attack.³¹⁹

The deployment of an atomic bomb was equivalent to the “blind” bombardment of these locales and constituted “an illegal act of hostility as the indiscriminate aerial bombardment on undefended cities.”³²⁰ The Court accepted that an attack might be mounted on an entire zone containing a well-fortified military objective because the damage to non-military objectives likely would be “small in comparison with the large military interests and necessity.”³²¹ However, neither Hiroshima nor Nagasaki contained concentrations of major military objectives that might be permissibly targeted.³²²

The bombings of Hiroshima and Nagasaki were also contrary to the prohibitions under international law on the imposition of “unnecessary pain in war” and the employment of “inhumane means” of “injuring the enemy.”³²³ The Court found that the atomic bomb had caused superfluous and unnecessary injury to civilians, the residents of Hiroshima and Nagasaki, and that their offspring remained imperiled as a result of radiation eighteen years following the attack.³²⁴ The impact of the bomb was analogous and more severe than the pain resulting from poison and poison gas, which were prohibited under the humanitarian law of war.³²⁵

The International Court of Justice (ICJ) affirmed the Tokyo Court’s general analysis in 1996.³²⁶ The Court could not preclude that the threat or use of nuclear weapons would be permissible in instances of self-defense or survival, but held that nuclear weapons were “scarcely reconcilable” with the humanitarian law of war, which precluded the utilization of weapons inher-

316. *Id.* at 236, 238.

317. *Id.* at 238.

318. *Id.* at 237 (citing and quoting Rules of Aerial Warfare, *supra* note 94).

319. *Id.* at 239.

320. *Id.* The District Court recognized that the notion of total war was leading to an expansion of scope of military targets. *Id.* However, this notion is not so expansive as to include schools, churches, monuments, hospitals and private homes and property. *Id.* at 239-40.

321. *Id.* at 240.

322. *Id.*

323. *Id.* This involves a balance between military necessity, efficiency and humane feelings. *Id.*

324. *Id.* at 241.

325. *Id.* at 241-42.

326. *See Legality of the Threat or Use of Nuclear Weapons (Advisory Opinion)*, 1996 I.C.J. 226 (July 8).

ently incapable of distinguishing between civilian and military targets or which resulted in “unnecessary suffering to combatants.”³²⁷

It is painful to quote Justice Radhabinod Pal of India, dissenting to the judgment of the International Military Tribunal for the Far East, who observed, the “decision to use the atom bomb is the only near approach to the directives of the German Emperor during the first world war and of the Nazi leaders during the second world war.”³²⁸ The aerial bombardment of civilian populations was now an accepted wartime tactic.

VIII. VIETNAM

The United States pursued a policy of unrestricted bombing in Vietnam designed to terrorize the peasantry and to deny safe haven to the enemy.³²⁹ Noam Chomsky, writing in 1971, contended the conflict in Indochina constituted a “record of war crimes and crimes against humanity, a record of mounting horror.”³³⁰ He noted that since the early 1960s, American forces had been involved in “bombing, strafing, forced population removal of millions of peasants, crop destruction and defoliation, destruction of agricultural lands and the irrigation system.”³³¹ Gabriel Kolko wrote that the United States transformed South Vietnam into a “sea of fire as a matter of policy, turning an entire nation into a target. . . . [I]t destroys villages, slaughters all who are in the way, uproots families, and shatters a whole society.”³³²

Chomsky reported that half of the South Vietnamese population had been killed, injured or driven from their homes.³³³ Refugees recounted living in caves and tunnels in order to protect themselves against the bombing, and fleeing ever-deeper into the safety of the forest.³³⁴ Chomsky described millions of acres pockmarked with bomb craters and a half a million acres of crop land poisoned by defoliants and lying fallow.³³⁵ By the end of 1969, the United States had deployed an air ordinance volume in Vietnam and Laos

327. *Id.* para. 95. The Court could not “reach a definitive conclusion as to the legality or illegality of the use of nuclear weapons by a State in an extreme circumstance of self-defence, in which its very survival would be at stake.” *Id.* para. 97.

328. *Quoted in* FRANCIS A. BOYLE, *THE CRIMINALITY OF NUCLEAR DETERRENCE* 71 (2002). *See generally* Guenter Lewy, *Superior Orders, Nuclear Warfare, and the Dictates of Conscience: The Dilemma of Military Obedience in the Atomic Age*, 55 AM. POL. SCI. REV. 3, 3 (1961).

329. Noam Chomsky, *The Rule of Force in International Affairs*, 80 YALE L.J. 1456, 1471 (1971).

330. *Id.* at 1472.

331. *Id.*

332. Gabriel Kolko, *War Crimes and the Nature of the Vietnam War*, in *CRIMES OF WAR: A LEGAL, POLITICAL-DOCUMENTARY, AND PSYCHOLOGICAL INQUIRY INTO THE RESPONSIBILITY OF LEADERS, CITIZENS, AND SOLDIERS FOR CRIMINAL ACTS IN WARS* 403, 412 (Richard A. Falk et al. eds., 1971).

333. Chomsky, *supra* note 329, at 1474.

334. *Id.*

335. *Id.* at 1472-73.

twice as large as that which it employed during World War II.³³⁶ Seventy tons of bombs were dropped for every square mile of North and South Vietnam; and over five hundred pounds of bombs were dropped for every individual.³³⁷ Pilots fired indiscriminately at targets within free fire zones and pursued a scorched earth strategy to deny resources to guerillas.³³⁸ The viciousness of this policy was illustrated in 1964 by the employment of fifty thousand tons of napalm, a highly flammable liquid weapon that scorched the body, and cluster bombs, which scattered hundreds of steel pellets at high velocity over a wide area.³³⁹ Civilian defense analyst Daniel Ellsberg, the purveyor of the Pentagon Papers, wrote that American decision-makers utilized euphemistic phrases such as “water-drip technique,” “hot-cold treatment” and “salami-slice,” to avoid confronting the insidious implications of their policies.³⁴⁰ He noted, in retrospect, that this was the antiseptic “language of torturers.”³⁴¹

The United States concurred with the position of the International Committee of the Red Cross that the parties to the Vietnam conflict were bound by the provisions of the Geneva Conventions of August 12, 1949 for the “protection of the victims of war.”³⁴² The United States protested that North Vietnam’s parading of American airmen through Hanoi was a violation of the 1949 Convention on the Treatment of Prisoners of War, which stipulated that prisoners must be safeguarded against violence, intimidation and public curiosity.³⁴³ Hanoi responded that the 1949 Geneva Convention was inapplicable because neither North Vietnam nor the United States had formally declared a state of war.³⁴⁴ This, of course, disregarded the fact that the text of the Convention stipulated that it “shall apply to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recog-

336. EDWARD S. HERMAN, *ATROCITIES IN VIETNAM: MYTHS AND REALITIES* 55 (1970).

337. *Id.*

338. *Id.* at 62.

339. *Id.* at 72. See also Michel Krepon, *Weapons Potentially Inhumane: The Case of Cluster Bombs*, 52 *FOREIGN AFF.* 595, 595-605 (1974) (discussing the use of napalm and cluster bombs in Vietnam).

340. DANIEL ELLSBERG, *PAPERS ON THE WAR* 319-20 (1972).

341. *Id.* at 320.

342. See Letter, dated June 11, 1965, on behalf of Jacques Freymond, Vice President of the International Committee of the Red Cross, to U.S. Secretary of State Dean Rusk, *reprinted in* 4 *I.L.M.* 1171 (1965); Letter, dated Aug. 10, 1965, from U.S. Secretary of State Dean Rusk to Jacques Freymond, Vice President of the International Committee of the Red Cross, *reprinted in* 4 *I.L.M.* 1173 (1965) (discussing Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287).

343. Thomas H. Sponsler, *The Universality Principle of Jurisdiction and the Threatened Trial of American Airmen*, 15 *LOY. L. REV.* 43, 57 (1968-69) (quoting Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, art. 13, 6 U.S.T. 3316, 75 U.N.T.S. 135) [hereinafter POW Convention].

344. Sponsler, *supra* note 343, at 57.

nized by one of them.”³⁴⁵ In addition, a declaration of war was not a requisite to recognizing a state of armed conflict under international law.³⁴⁶

In 1965, the North Vietnamese regime informed the Red Cross that the United States and its South Vietnamese allies were engaging in a war of “great atrocity” and employing arms and methods of warfare, which have “long been prohibited by international law.”³⁴⁷ The Vietnamese condemned the United States for engaging in a war of aggression and for violating the humanitarian law of war through the indiscriminate utilization of napalm and chemicals; arbitrary attacks on hospitals, schools, markets, and villages; and the massacre of innocent civilians.³⁴⁸ The North Vietnamese regarded these as the actions of “pirates” and “major criminals,” in violation of the laws of the Democratic Republic of Vietnam.³⁴⁹ Support for this policy of prosecution could be found in the obligation of the High Contracting Parties to the Geneva Conventions to detain and to punish individuals alleged to have committed “grave breaches” of the Convention before their domestic courts or to hand such individuals over to another High Contracting Party for trial.³⁵⁰

The North Vietnamese were admonished that they would be cast as war criminals in the event that they prosecuted and punished American pilots and that such retaliation would be certain, severe and swift.³⁵¹ It was pointed out that the aerial bombardment of population centers was an accepted tactic of modern warfare and that pilots should not be subject to criminal punishment

345. *Id.* (quoting Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, art. 2, 6 U.S.T. 3114, 75 U.N.T.S. 31).

346. *Id.* at 57.

347. Letter, dated Aug. 31, 1965, from Bui Tan Linh, acting head of the Cabinet, to the International Red Cross, Application of Geneva Conventions in Viet-Nam: Letter of Democratic Republic of Viet-Nam, *reprinted in* 5 I.L.M. 124 (1966).

348. *Id.*

349. *Id.* This was consistent with the view of North Korea and the People’s Republic of China during the Korean conflict that soldiers fighting for the “bourgeois” and “imperialist” forces were war criminals who were not entitled to international protection. Sponsler, *supra* note 343, at 56-57 (quoting *Treatment of British Prisoners of War in Korea* (Ministry of Defense, 1955), *quoted in* Howard S. Levine, *Penal Sanctions for Maltreatment of Prisoners of War*, 56 AM. J. INT’L L. 433, 443 n.37 (1962)). A prisoner of war may not “be tried or sentenced for an act which is not forbidden by the law of the Detaining Power or by international law, in force at the time the said act was committed.” POW Convention, *supra* note 343, art. 99. The North Vietnamese filed a reservation to Article 85. Sponsler, *supra* note 343, at 58. Article 85 provided that prisoners of war “prosecuted under the laws of the Detaining Power for acts committed prior to capture shall retain, even if convicted, the benefits of the present Convention.” POW Convention, *supra* note 343, art. 85.

350. Sponsler, *supra* note 343, at 57 (quoting POW Convention, *supra* note 343, art. 129). The relevant “grave breaches” included willful killing and torture or inhuman treatment, as well as the extensive destruction and appropriation of property “not justified by military necessity and carried out unlawfully and wantonly.” Convention for the Amelioration of the Condition of Wounded, Sick and Ship-Wrecked Members of Armed Forces at Sea, Aug. 12, 1949, art. 51, 6 U.S.T. 3217, 75 U.N.T.S. 85.

351. Sponsler, *supra* note 343, at 63-64.

for carrying out lawful orders.³⁵² In the end, the North Vietnamese capitulated to international pressure and announced that they would not subject American airmen to trial.³⁵³

Telford Taylor, the former lead United States prosecutor at Nuremberg, concluded that American aerial tactics in Vietnam, which targeted entire villages thought to harbor guerillas, flagrantly violated the prohibition in the Geneva Convention on “collective penalties” and “reprisals” against innocent civilians.³⁵⁴ Taylor argued that this disproportionate and indiscriminate deployment of armed force was distinct from a situation in which bombing was directed at a military target and incidentally injured civilians or damaged private property.³⁵⁵ He noted that it was a war crime to shoot the inhabitants of a village and it would be equally criminal to kill them through an aerial assault.³⁵⁶

The North Vietnamese, whatever the merits of their claims, were justifiably criticized for threatening to contravene the due process rights accorded to pilots under international law and, in the end, were deterred from prosecuting an entire category and class of pilots as war criminals.³⁵⁷ At the same time, the condemnation of their planned prosecutions, in part, was also indicative of the fact that aerial bombardment of civilian targets was sufficiently common that this practice had largely been removed from the purview of international legal regulation.³⁵⁸

IX. PROTOCOL I TO THE GENEVA CONVENTIONS

In 1977, the United States Air Force issued a manual to clarify the law of air warfare.³⁵⁹ The pamphlet significantly proclaimed that the principles of the law of armed conflict are the same in land, sea or air warfare, but may vary in application.³⁶⁰

The manual was clarified and extended in the 1977 Protocol Additional to the Geneva Conventions of 12 August, 1949, and Relating to the Protection of Victims of International Armed Conflict, which is generally recognized as embodying customary international law regarding the protection of civilians in armed conflict.³⁶¹ Article 49 of the Convention provides a single

352. *Id.* at 64.

353. *Id.* at 65.

354. See TELFORD TAYLOR, NUREMBERG AND VIETNAM: AN AMERICAN TRAGEDY 144-45 (1970) (quoting Convention Relative to the Protection of Civilian Persons in Time of War, *supra* note 342, art. 33).

355. *Id.* at 142-43.

356. *Id.* at 145.

357. See *supra* notes 347-53 and accompanying texts.

358. See TAYLOR, *supra* note 354, at 38-40, 143.

359. See DEPARTMENT OF THE AIR FORCE, *supra* note 94, at 1-1.

360. *Id.*

361. Protocol I, *supra* note 10. See George Aldrich, *Prospects for United States Ratifications of Additional Protocol I to the 1949 Geneva Conventions*, 85 AM. J. INT'L L. 1, 1

standard for all means and methods of warfare and provides that the articles pertaining to civilians apply to “all attacks from the sea or from the air against objectives on land.”³⁶²

Article 48 sets forth the principle of discrimination and stipulates that the Parties to a conflict shall “at all times distinguish between the civilian population and combatants and between civilian objects and military objectives.”³⁶³ Belligerents, accordingly, shall only direct their attack against military targets.³⁶⁴ The commentary to the Convention observes that this provision is the touchstone of the modern humanitarian law of war.³⁶⁵ The modern development of long-range artillery and the lengthy reach and lethal character of aerial urban bombardment necessitated that the humanitarian law of war explicitly and clearly distinguish and differentiate between permissible military and impermissible civilian targets.³⁶⁶

Article 51 affirms the customary rule that the innocent civilian population and individual civilians shall be protected against “dangers arising from military operations.”³⁶⁷ Acts or threats of violence whose primary purpose is to spread terror among the civilian population are prohibited,³⁶⁸ along with indiscriminate attacks that strike civilian and military objectives without distinction.³⁶⁹ The commentary observes that this affirms the “unlawful character of certain regrettable practices” during World War II, intended to “destroy all life in a particular area or to raze a town to the ground” without a “substantial military” advantage.³⁷⁰ These indiscriminate attacks include bombardments not directed at a specific military objective,³⁷¹ assaults employing methods or “means of combat which cannot be directed at a specific

(1991). See generally David G. Burwell, *Civilian Protection in Modern Warfare: A Critical Analysis of the Geneva Civilian Convention of 1949*, 14 VA. J. INT'L L. 123 (1973).

362. Protocol I, *supra* note 10, art. 49(3). For a definition of civilian, see *id.* art. 50.

363. *Id.* art. 48.

364. *Id.*

365. International Committee for the Red Cross, Commentaries to the Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977, para. 1863 (art. 48), available at <http://www.icrc.org/ihl.nsf> (last visited June 14, 2002) [hereinafter Commentaries].

366. *Id.* para. 1866. The “customary rule was affected to such an extent that one might have wondered whether it still existed.” *Id.* The “repeated use of reprisals” resulted in the systematic attack on “towns and their inhabitants.” *Id.* para. 1867.

367. Protocol I, *supra* note 10, art. 51(1).

368. *Id.* art. 51(2). Civilians shall be protected under the Convention “unless and for such time as they take a direct part in hostilities.” *Id.* art. 51(3).

369. *Id.* art. 51(4). The commentary pertaining to civilians distinguishes between direct participation in hostilities and participation in the war effort. Commentaries, *supra* note 365, para. 1945 (art. 51). Absent this differentiation, there would be no meaningful distinction between civilians and combatants under the humanitarian law of war. *Id.*

370. Commentaries, *supra* note 365, para. 1946 (art. 51).

371. Protocol I, *supra* note 10, art. 51(4)(a). For a definition of military targets, see *id.* art. 52(2). Belligerents possess a duty to spare civilians and civilian objects. *Id.* art. 57. A military objective may not result in excessive civilian injury “in relation to the expected direct and specific military advantage.” Commentaries, *supra* note 365, para. 1953 (art. 51).

military objective,³⁷² and methods or means of combat “the effects of which cannot be limited.”³⁷³

Article 51 also categorizes a bombardment as indiscriminate which “treats as a single military objective a number of clearly separated and distinct military objectives located in a city town, village or other area containing a concentration of civilians or civilian objects.”³⁷⁴ This was intended to prohibit carpet or saturation bombing that would likely injure or harm civilians.³⁷⁵ An additional category of indiscriminate attack is a bombing that “may be expected” to cause incidental injury or death or damage to civilian property that “would be excessive in relation to the concrete and direct military advantage anticipated.”³⁷⁶ Ambiguity and doubt should be resolved in favor of the protection of the civilian population³⁷⁷ and, in any event, incidental civilian losses and damages should “never be extensive.”³⁷⁸

Reprisals against the civilian population or civilians are prohibited.³⁷⁹ This provision was a reaction to the reliance on reprisals during World War II to justify waging war “almost indiscriminately” which “resulted in countless civilian victims.”³⁸⁰ The prohibition is expressed in a “peremptory character” and does not admit to derogation on the grounds of military necessity or exigency.³⁸¹ The presence or movement of civilian populations also shall not be utilized to immunize certain objects or areas from attack.³⁸² This is intended to prevent civilians from being deployed as a shield against an armed assault.³⁸³

Article 52 reiterates that civilian objects shall not be subject to attack or reprisal³⁸⁴ and defines military objects as targets “which by their nature, location, purpose or use make an effective contribution to military action and

372. Protocol I, *supra* note 10, art. 51(4)(b). This encompasses both weapons and the mode of employing weapons that cannot be directed at specific military objective. Commentaries, *supra* note 365, para. 1957 (art. 51).

373. Protocol I, *supra* note 10, art. 51(4)(c). This is directed at the deployment of a weapon, such as fire or water, under circumstances in which they cannot be limited, Commentaries, *supra* note 365, para. 1963 (art. 51), as well as weapons with inherently indiscriminate effects, such as bacteriological agents or nuclear weapons. *Id.* paras. 1965-66.

374. Protocol I, *supra* note 10, art. 51(5)(a).

375. Commentaries, *supra* note 365, para. 1968 (art. 51).

376. Protocol I, *supra* note 10, art. 51(5)(b).

377. Commentaries, *supra* note 365, para. 1979 (art. 51).

378. *Id.* para. 1980. “The Protocol does not provide any justification for attacks which cause extensive civilian losses and damages. Incidental losses and damages should never be extensive.” *Id.* These provisions should lead those responsible for such attacks “to take all necessary precautions before making their decision, even in the difficult constraints of battle conditions.” *Id.* para. 1981.

379. Protocol I, *supra* note 10, art. 51(6).

380. Commentaries, *supra* note 365, para. 1982 (art. 51).

381. *Id.* para. 1984. Reprisals are limited to a choice of weapons and methods of combat used against military objectives. *Id.* para. 1985.

382. Protocol I, *supra* note 10, art. 51(7).

383. *See* Commentaries, *supra* note 365, para. 1985 (art. 51).

384. Protocol I, *supra* note 10, art. 52(1).

whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage.”³⁸⁵ In instances of doubt as to whether an object is customarily utilized for civilian purposes, such as when a church or school is being used “to make an effective contribution to military action, it shall be presumed not to be so used.”³⁸⁶

The commentary notes that objects whose “nature” makes a contribution to military action includes material directly utilized by the armed forces, such as weapons, equipment, fortifications and command centers.³⁸⁷ Various objects assume military significance based on their “location,” including bridges or seaports.³⁸⁸ “Purpose” and “use” anticipates that a locale, such as a hotel, might be utilized to house troops or to serve as a command center.³⁸⁹ A site’s destruction, capture or neutralization must provide a “definite military advantage.”³⁹⁰ It is not sufficient that an attack only offers a potential or indeterminate benefit.³⁹¹ Potential injury to civilians also must be taken into account in targeting.³⁹²

Article 54 prohibits military operations “to attack, destroy, remove or render useless objects indispensable to the survival of the civilian population.”³⁹³ This includes attacking foodstuffs, crops, livestock, drinking water installations and irrigation works for the specific purpose of denying sustenance to the civilian population.³⁹⁴ These objects also shall not be the targets of reprisals.³⁹⁵

Article 57 imposes a burden of “constant care” to “spare” civilians and civilian objects.³⁹⁶ Accordingly, individuals planning or ordering an attack shall “do everything feasible” to verify that the objectives to be assaulted are neither civilians nor civilian objects.³⁹⁷ The burden is on the commanding officer to ensure that information is accurate and to require additional data in the event of doubt or uncertainty.³⁹⁸ Individuals planning or ordering an attack shall also take “all feasible precautions in the choice of means and methods of attack” to avoid or to minimize incidental loss of civilian life, in-

385. *Id.* art. 52(2).

386. *Id.* art. 52(3).

387. Commentaries, *supra* note 365, para. 2020 (art. 52).

388. *Id.* para. 2021.

389. *Id.* para. 2022. Factories devoted to the production of consumer “dual function” as well as military goods may be subject to attack depending upon the loss of human life and anticipated military advantage. *Id.* para. 2023.

390. *Id.* para. 2024.

391. *Id.*

392. *Id.*

393. Protocol I, *supra* note 10, art. 54(2).

394. *Id.* Derogation from Article 54 is permissible when required by imperative military necessity to defend a national territory against invasion. *Id.* art. 54(5).

395. *Id.* Starvation of civilians is prohibited. *Id.* art. 54(1). The prohibition shall not apply to the means of sustenance for members of the armed forces. *Id.* art. 54(3).

396. *Id.* art. 57(1).

397. *Id.* art. 57(2)(a)(i).

398. Commentaries, *supra* note 365, para. 2195 (art. 57).

jury or damage to civilians.³⁹⁹ Decision-makers are to adhere to the principle of proportionality and to refrain from an attack that “may be expected” to cause incidental injury or loss of civilian life or damage to civilian objects “which would be excessive in relation to the concrete and direct military advantage anticipated.”⁴⁰⁰

An attack must be cancelled or suspended in the event it is determined that the assault is not aimed at a military target or may be expected to cause excessive damage.⁴⁰¹ Effective advance warning is required for attacks that “may affect the civilian population, unless circumstances do not permit.”⁴⁰² In those instances in which a choice is presented between several military objectives yielding the same military advantage, decision-makers shall select that objective which “may be expected to cause the least danger to civilian lives and to civilian objects.”⁴⁰³ Article 57 also specifically provides that in the conduct of military operations at sea or in the air, belligerents shall take “all reasonable precautions to avoid losses of civilian lives and damage to civilian objects.”⁴⁰⁴

According to the commentary to Article 57, the phrase “everything feasible” connotes “everything that was practicable or practically possible, taking into account all the circumstances at the time of the attack.”⁴⁰⁵ The text cautions that this should not be qualified by considerations of the “success of military operations,” because this might cause decision-makers to neglect the requisite “humanitarian obligations.”⁴⁰⁶ The interpretation of the phrase “everything feasible,” as with the entire Protocol, shall be guided by considerations of “common sense and good faith.”⁴⁰⁷

Article 58 provides that Parties to a conflict, to the extent “feasible,” shall remove the civilian population and material under their control from

399. Protocol I, *supra* note 10, art. 57(2)(a)(ii).

400. *Id.* art. 57(2)(a)(iii). This requires a balance between the necessities of war and humanitarian requirements. Commentaries, *supra* note 365, para. 2206 (art. 57). Military commanders must utilize common sense and good faith in weighing the humanitarian and military interests involved. *Id.* para. 2208. The danger posed to the civilian population and civilian objects depends upon the proximity of the civilians to the military target, the danger posed by the terrain, the accuracy of the weapons, weather conditions, the danger posed by the military target, and the ability of the belligerents to deliver the munitions to the target. Commentaries, *supra* note 365, para. 2212 (art. 57). In instances of doubt, the duty to spare civilians and civilian objects in the conduct of military operations is the guiding principle. *Id.* para. 2215.

401. Protocol I, *supra* note 10, art. 57(2)(b). This applies to those carrying out the attack as well as to decision-makers. Commentaries, *supra* note 365, para. 2221 (art. 57). Of course, the increased range of attack complicates verification. *Id.* paras. 2220-21.

402. Protocol I, *supra* note 10, art. 57(2)(c). This is intended to permit civilians to protect themselves. Commentaries, *supra* note 365, para. 2225 (art. 57).

403. Protocol I, *supra* note 10, art. 57(3).

404. *Id.* art. 57(4).

405. Commentaries, *supra* note 365, para. 2198 (art. 57).

406. *Id.*

407. *Id.* Individuals launching an attack are to “take the necessary identification measures in good time in order to spare the population as far as possible. It is not clear how the success of military operations could be jeopardized by this.” *Id.*

the vicinity of military objectives,⁴⁰⁸ avoid locating military objectives within or proximate to densely populated areas,⁴⁰⁹ and take “other necessary precautions” to safeguard the civilian population and civilian objects under their control against the dangers of military operations.⁴¹⁰

In summary, the 1977 Protocol I to the Geneva Conventions, in reaction to the targeting of civilians during World War II, establishes a clear obligation on belligerents to protect and to safeguard civilians during military operations.⁴¹¹ The Protocol prohibits the direct targeting of and reprisals against civilians,⁴¹² as well as indiscriminate attacks imperiling civilian populations.⁴¹³ The Convention also contains a comprehensive definition of permissible military targets.⁴¹⁴ A specific duty of care is placed on belligerents in planning and carrying out attacks,⁴¹⁵ as well as on those States with actual or legal control over civilian populations.⁴¹⁶ Article 85 enumerates grave breaches of the Protocol constituting war crimes when causing death or serious injury to the body or health.⁴¹⁷ These include selecting a civilian population or individual civilians as the object of attack;⁴¹⁸ launching an indiscriminate attack on a civilian population or civilian objects with the knowledge that such attacks “will cause excessive loss of life, injury to civilians or damage to civilian objects;”⁴¹⁹ targeting non-defended localities and demilitarized zones;⁴²⁰ and “launching an attack against works or installations containing dangerous forces in the knowledge that such an attack will cause excessive loss of life, injury to civilians or damage to civilian objects.”⁴²¹ The Protocol’s principles and protections provided a framework of analysis that was rapidly swept aside by the exigencies of modern war and the advancing technology of air attacks.

408. Protocol I, *supra* note 10, art. 58(a).

409. *Id.* art. 58(b).

410. *Id.* art. 58(c). Article 59 prohibits Parties to the conflict from attacking “non-defended localities.” *Id.* art. 59(1). The term feasible was utilized to stress “that no one can be required to do the impossible. In this case it is clear that precautions should not go beyond the point where the life of the population would become difficult or even impossible.” Commentaries, *supra* note 365, para. 2245 (art. 59). In addition, a belligerent “cannot be expected to arrange its armed forces and installations in such a way as to make them conspicuous to the benefit of the adversary.” *Id.* para. 2246.

411. *See supra* notes 363-64 and accompanying texts.

412. *See supra* notes 367-83 and accompanying texts.

413. *See supra* notes 370-78 and accompanying texts.

414. *See supra* notes 384-92 and accompanying texts.

415. *See supra* notes 396-404 and accompanying texts.

416. *See supra* notes 408-10 and accompanying texts.

417. Protocol I, *supra* note 10, arts. 85(3)-(5).

418. *Id.* art. 85(3)(a).

419. *Id.* art. 85(3)(b).

420. *Id.* art. 85(3)(d).

421. *Id.* art. 85(3)(c).

X. THE GULF WAR

On August 2, 1990, one hundred and twenty thousand Iraqi troops invaded and occupied neighboring Kuwait.⁴²² The United Nations Security Council acted expeditiously in condemning the invasion and demanding Iraq's unconditional withdrawal,⁴²³ freezing foreign assets, imposing economic sanctions,⁴²⁴ and calling for the utilization of all necessary means to restore international peace and security.⁴²⁵ A thirty-nine day assault by Coalition Forces drove Iraq from Kuwait and reinstated the Emir of Kuwait.⁴²⁶

A privately organized International War Crimes Tribunal convicted the United States of nineteen crimes allegedly committed by American forces during the Gulf War.⁴²⁷ These offenses, in part, included the intentional destruction of "facilities essential to civilian life and to economic productivity,"⁴²⁸ the indiscriminate deployment of weapons of mass destruction⁴²⁹ and the intentional attack on "installations containing dangerous substances and forces."⁴³⁰

The initial complaint drafted by the Commission of Inquiry recorded that the United States flew one hundred and ten thousand sorties, dropping eighty-eight thousand tons of bombs which, in aggregate, were roughly seven times more powerful than the atomic bomb that destroyed Hiroshima.⁴³¹ Only seven percent of the bombs utilized were laser guided "smart bombs."⁴³² These reportedly were accurate eighty to ninety percent of the time, while conventional unguided bombs missed their targets approximately seventy-five percent of the time.⁴³³ This meant that seventy percent of the bombs dropped during the Gulf War were inaccurate.⁴³⁴

422. Chris af Jochnick & Roger Normand, *The Legitimation of Violence: A Critical History of the Gulf War*, 35 HARV. INT'L L.J. 387, 389 (1994).

423. S.C. Res. 660, U.N. SCOR, 45th Sess., 2932d mtg., U.N. Doc. S/RES/660 (1990).

424. S.C. Res. 661, U.N. SCOR, 45th Sess., 2933d mtg., U.N. Doc. S/RES/661 (1990).

425. S.C. Res. 678, U.N. SCOR, 45th Sess., 2963d mtg., U.N. Doc. S/RES/678 (1990).

426. af Jochnick & Normand, *supra* note 422, at 390. The United States suffered two hundred forty casualties. *Id.* at 391.

427. International War Crimes Tribunal, United States War Crimes Against Iraq, Final Judgment: International War Crimes Tribunal (1992), *available at* <http://deoxy.org/wc/warcrim3.htm> (last visited June 14, 2002). The full report absent the judgment is contained in RAMSEY CLARK ET AL., WAR CRIMES: A REPORT ON UNITED STATES WAR CRIMES AGAINST IRAQ I (1992) [hereinafter CLARK I].

428. CLARK I, *supra* note 427, at 14.

429. *Id.* at 14-17.

430. *Id.* at 18.

431. *Id.* at 14.

432. Francis Kelly, *War Crimes Committed Against the People of Iraq*, in CLARK I, *supra* note 427, at 47.

433. *Id.* at 47-48.

434. *Id.*

This inaccuracy resulted in inadvertent injury to noncombatants and damage to civilian homes and facilities.⁴³⁵ Thirty percent of the total tonnage was dropped from B-52s flying at forty thousand feet and releasing five hundred or seven hundred and fifty pound bombs over densely populated areas.⁴³⁶ In some instances the Coalition allegedly engaged in indiscriminate attacks. The Commission, for instance, alleged that Iraq's second largest city of Basra was carpet-bombed by B-52s.⁴³⁷ Ramsey Clark, with some exaggeration, set the death toll of Iraqis during the Gulf War at one hundred and fifty thousand civilians, including at least one hundred thousand postwar deaths.⁴³⁸

The most devastating attack on civilians occurred when the United States sent a laser-guided ordinance down a ventilation shaft, destroying the al-Amariyah bomb shelter in Baghdad and killing at least three hundred people, and perhaps as many as one thousand six hundred.⁴³⁹ The American military claimed this was a command and control center and therefore a legitimate target.⁴⁴⁰ Critics, however, alleged the building had served as a civilian shelter for several weeks.⁴⁴¹

Some contended that the United States deliberately targeted and endangered civilians in order to lower morale, disrupt the Iraqi economy and create an increased dependency on the West.⁴⁴² They pointed to the September 1990 statement by Air Force Chief of Staff, Michael Dugan, who announced that the United States' aim was to damage the Iraqi regime by attacking downtown Baghdad and bombing power stations, roads and petroleum production facilities.⁴⁴³

Critics pointed out that the United States' target list was designed to inflict political and economic harm rather than achieve a military advantage.⁴⁴⁴ Sixteen power stations were bombed, reducing electrical output to four percent of the prewar capacity, creating a public health emergency.⁴⁴⁵ This de-

435. *Id.* The claim that this was a technologically sophisticated air campaign also is belied by the fact that roughly eighty-two thousand tons of bombs were non-precision guided conventional bombs and only seven thousand tons were guided bombs. Paul Walker, *U.S. Bombing—The Myth of Surgical Bombing in the Gulf War*, in CLARK I, *supra* note 427, at 83, 87.

436. Walker, *supra* note 435, at 87. See also RAMSEY CLARK, *THE FIRE THIS TIME: U.S. WAR CRIMES IN THE GULF* 74 (1992) [hereinafter CLARK II].

437. Kelly, *supra* note 432, at 48. The United States deployed fire bombs, napalm and concussion bombs. Walker, *supra* note 435, at 86.

438. CLARK II, *supra* note 436, at 83. The indirect effects include the damaged infrastructure, safety and health services and disease. *Id.* at 84.

439. Kelly, *supra* note 432, at 48-49.

440. *Id.* at 49.

441. *Id.*

442. CLARK II, *supra* note 436, at 61.

443. *Id.* Dugan was terminated following this statement. *Id.*

444. *Id.* at 59-64.

445. *af* Jochnick & Normand, *supra* note 422, at 403-04. Absent electricity, water could not be purified, sewage treated, water borne diseases multiplied and hospitals lacked adequate

struction proved to be of minimal military import relative to the amount of civilian suffering because the Coalition already eliminated command and control and communication facilities, weapons plants, troop concentrations and various other military targets.⁴⁴⁶ Iraq, in any event, reportedly possessed alternative military power and communication facilities.⁴⁴⁷ Despite the fact that the Iraqi military stockpiled sufficient oil to support the war, the Coalition decimated the oil industry.⁴⁴⁸ Aerial attacks also were directed against civilian vehicles, bridges and factories producing textiles, foodstuffs, cement, household goods and other commercial products.⁴⁴⁹ In addition, hospitals throughout the country were bombed.⁴⁵⁰ The detrimental impact of this aerial campaign is illustrated by a survey of sixteen thousand Iraqi children, which concluded that the postwar increase in “disease and malnutrition caused child mortality to triple, resulting in forty-seven thousand excess deaths among children under five in the first eight months following the Gulf War.”⁴⁵¹

In 1991, Martti Ahtisaari, United Nations Under-Secretary-General for Administration and Management, concluded that the Gulf War had “near-apocalyptic results upon the economic infrastructure,” that “most means of modern life support ha[d] been destroyed or rendered tenuous” and that Iraq had been “relegated to a pre-industrial age.”⁴⁵² Chris af Jochnick and Roger Normand observe that Hiroshima had been bombed in order to propel the Japanese to surrender.⁴⁵³ In contrast, they contend that the attack on Iraq was unrelated to military objectives and was instead designed to create a weakened and dependent postwar environment that would not tolerate the regime of Saddam Hussein.⁴⁵⁴

The Department of Defense responded to charges of indiscriminate and intentional targeting of civilians and the civilian infrastructure in a 1992 re-

power. Kelly, *supra* note 432, at 54. The interruption of agriculture and transportation led to famine and starvation. CLARK II, *supra* note 436, at 75.

446. af Jochnick & Normand, *supra* note 422, at 404.

447. *Id.* The military possessed “mobile stand-by generators and a buried fiber-optics network.” *Id.* at 405.

448. *Id.* at 406.

449. *Id.*

450. Kelly, *supra* note 432, at 53-54.

451. af Jochnick & Normand, *supra* note 422, at 401.

452. *Report to the Secretary-General on Humanitarian Needs in Kuwait and Iraq in the Immediate Post-Crisis Environment by a Mission to the Area Led by Mr. Martti Ahtisaari, Under-Secretary-General for Administration and Management*, U.N. SCOR, U.N. Doc. S/1991/22366 (1991), reprinted in CLARK I, *supra* note 427, at 236, 238.

453. af Jochnick & Normand, *supra* note 422, at 409-10.

454. *Id.* at 410-12. The authors observe that this may be a testimony to the weakness of the military regime regulating aerial warfare. *Id.* “The Pentagon has admitted it targeted civilian structures both to demoralize the populace and exacerbate the effects of sanctions. Many attacks were carried out in daytime, when Iraqi civilians would undoubtedly be present.” CLARK II, *supra* note 436, at 69.

port on the Gulf War.⁴⁵⁵ The document noted that the Office of General Counsel of the Department of Defense provided advice to decision-makers on a range of issues, including humanitarian law.⁴⁵⁶ The report emphasized that target lists were examined to ensure consistency with American obligations under international law.⁴⁵⁷ This process ensured that the United States discriminated in target selection between combatants and noncombatants, and between legitimate military targets and civilian objects.⁴⁵⁸ The Americans also matched available weapons systems to selected targets in order to limit damage to military objects.⁴⁵⁹

The report stated that the United States adhered to the principle of proportionality and avoided military action in instances where the collateral damage to civilians outweighed the military advantage.⁴⁶⁰ This balancing, according to the Department of Defense, may be undertaken on a target by target basis, or may be evaluated in light of the objectives of the campaign.⁴⁶¹ The report claimed that steps were taken to minimize the risk of injury to noncombatants.⁴⁶² Attacks on targets situated within populated areas were carried out with weapons systems possessing the “greatest possible accuracy” and posing the “least risk” to civilian objects and population.⁴⁶³ Aircrews were advised to refrain from attack in those instances in which a positive identification of targets was lacking.⁴⁶⁴ The Department of Defense concluded that despite the “most discriminate air campaign in history, including extraordinary measures by Coalition aircrews to minimize collateral civilian casualties, the Coalition could not avoid causing some collateral damage and injury.”⁴⁶⁵

The Pentagon report provided various explanations for these collateral civilian casualties, injuries and damage.⁴⁶⁶ The document noted that objects intended for civilian use also typically were employed for military purposes in a modern society.⁴⁶⁷ A bridge, highway or railroad might have possessed both civilian and military import.⁴⁶⁸ An electrical grid may be relied upon to

455. See *United States: Department of Defense, Report to Congress on the Conduct of the Persian Gulf War—Appendix on the Role of the Law of War* (Apr. 19, 1992), reprinted in 31 I.L.M. 612 (1992) [hereinafter *Department of Defense*].

456. *Id.* at 627.

457. *Id.* at 622.

458. *Id.* at 621.

459. *Id.* at 622.

460. *Id.*

461. *Id.*

462. *Id.*

463. *Id.*

464. *Id.*

465. *Id.* at 623.

466. *Id.*

467. *Id.*

468. *Id.*

power both civilian and military communication systems and industries.⁴⁶⁹ Iraq, according to the Pentagon, used civilian utilities to support the military and armaments industry and usually located these facilities in residential areas.⁴⁷⁰ Coalition attacks on these sites inevitably placed civilians at risk, despite efforts to minimize the potential harm.⁴⁷¹ Bridges crossing the Euphrates River contained multiple fiber-optic links that provided Saddam Hussein with secure communication to his forces; civilians utilizing the bridges at the time of the attack, unfortunately, were at risk.⁴⁷²

Iraq, according to the Pentagon, also deliberately utilized civilian populations and objects as shields for soldiers, weapons and military equipment.⁴⁷³ Helicopters, for instance, were placed adjacent to mosques and medical and cultural sites; a supply of missiles was discovered inside a school and chemical bomb equipment was located in a sugar factory.⁴⁷⁴ The Pentagon Report contended that the Coalition was fully warranted, as a matter of law, in targeting vital military sites in civilian areas.⁴⁷⁵ At the same time, military targets in populated areas or adjacent to protected cultural sites were not attacked in those instances in which the potential danger or damage outweighed the potential military advantage.⁴⁷⁶

Iraq, according to the Department of Defense, also painted a false and distorted picture of indiscriminate bombing that "did not accurately reflect the high degree of care exercised by the Coalition in attack of Iraqi targets."⁴⁷⁷ The decimation attributed to American bombing, in fact, resulted from Iraq's war with Iran, a prewar earthquake and as a consequence of Iraq's deliberate dismantling and damaging of a mosque.⁴⁷⁸ Iraq, moreover, invited noncombatant casualties by moving military objects into civilian areas and placing aircraft adjacent to significant historic and cultural sites.⁴⁷⁹ This contravened its obligation to safeguard civilians and civilian sites through the evacuation of civilians, separation of military objects from the civilian population and the initiation of air raid precautions.⁴⁸⁰

469. *Id.*

470. *Id.*

471. *Id.* Objects utilized concurrently for civilian and military purposes may be subject to attack in the event that there is a military advantage to be gained. *Id.* Destruction of the communications system was essential to the crippling of the highly centralized Iraqi military. *Id.*

472. *Id.* at 623-24.

473. *Id.* at 624.

474. *Id.*

475. *Id.*

476. *Id.*

477. *Id.* Some of this damage was caused by Iraqi surface-to-air missiles and anti-aircraft munitions. *Id.*

478. *Id.* A bomb crater near the mosque resulted from an air strike directed against a military target. *Id.*

479. *Id.* at 626.

480. *Id.* at 625.

The Pentagon noted that while neither the United States nor Iraq was a signatory to the 1977 Protocol, this instrument codified customary practice in regards to the obligation of belligerents toward civilians, which was “binding” on all Nation-States.⁴⁸¹ Iraq, instead of taking precautions, intentionally placed civilians at risk.⁴⁸² The Pentagon stressed that the presence of these noncombatants did not render a site immune from bombardment, so long as the attacker exercised “reasonable precautions to minimize incidental or collateral injury . . . consistent with mission accomplishment and allowable risk to the attacking forces.”⁴⁸³ At the same time, the defending party had to “exercise reasonable precautions” to separate the civilian population and civilian objects from military sites and could not utilize civilian populations or objects to shield legitimate targets.⁴⁸⁴

The Department of Defense contended that the al-Amariyah bunker was camouflaged and secured with barbed wire and armed guards, and constituted a legitimate target.⁴⁸⁵ The unfortunate deaths of noncombatants resulted from the fact that Coalition forces were unaware that the civilian families of officers working in the bunker were permitted access during the evening hours.⁴⁸⁶ Targeting decisions were necessarily made based on the assessment of information “reasonably available” to decision-makers.⁴⁸⁷ The fact that the Iraqi regime improperly permitted civilian access to a military target made this tragedy inevitable and unavoidable.⁴⁸⁸

The Pentagon thus attributed primary responsibility for civilian casualties to Saddam Hussein’s failure to separate civilian and military targets, and to Saddam’s deployment of civilians as human shields.⁴⁸⁹ The document argued that Iraq’s shielding of military targets with civilians illustrated the lack of realism of Article 51 of the Protocol, which provided that Iraq’s violation of the Convention did not release the United States from the legal obligation to take prudent precautionary measures in regards to the civilian population.⁴⁹⁰ This placed primary legal responsibility on the Coalition, despite the fact that it was Iraq that deployed noncombatants as a shield.⁴⁹¹ The Department of Defense was also critical of the Protocol, which provided that in instances of doubt whether an object normally dedicated to civilian purposes was being deployed for military means, the site should be presumed to

481. *Id.*

482. *Id.*

483. *Id.*

484. *Id.*

485. *Id.* at 626.

486. *Id.*

487. *Id.*

488. *Id.*

489. See *supra* notes 466-76 and accompanying texts.

490. *Department of Defense, supra* note 455, at 627, discussing Protocol I, *supra* note 10, art. 51(8).

491. *Id.*

be performing a civilian function.⁴⁹² This, according to the Pentagon, did not reflect the customary requirements of the humanitarian law of war, and improperly shifted the burden to the party launching an attack, which typically lacked full awareness of the facts and circumstances.⁴⁹³ An attacking belligerent rarely possessed the requisite degree of certainty, and the Protocol encouraged defenders to integrate civilian and military functions.⁴⁹⁴

In the case of the al-Amariyah bunker, Coalition forces possessed evidence that this was utilized as a command and control center, but were unaware that the site also was being employed as a civilian bomb shelter.⁴⁹⁵ An attack may have been withheld, had the American forces possessed knowledge of the presence of civilians.⁴⁹⁶ However, the Pentagon stressed without explanation that Iraq was in violation of its obligations to separate civilian and military sites and the Coalition was entitled as a matter of military necessity to launch an attack.⁴⁹⁷

The Report's concluding section noted that operations during the Gulf War were carried out in accordance with the United States' historic adherence to the humanitarian law of war.⁴⁹⁸ The operations were conducted with "exceptional care" to minimize collateral damage to the population and property.⁴⁹⁹ At the same time, the Pentagon stressed that Iraqi violations of the humanitarian law of war should be punished in order to deter future violators.⁵⁰⁰

In summary, critics of American military tactics and strategy during the Gulf War alleged that the United States was intentionally targeting Iraqi civilians and the civilian infrastructure in order to lower morale, enhance dependency on the West and encourage popular dissatisfaction with Saddam Hussein.⁵⁰¹ Much of the bombing necessarily was indiscriminate, given the Coalition's reliance on high-altitude B-52 bombers.⁵⁰² Nevertheless, the Pentagon contended that extraordinary care was taken to ensure adherence to the humanitarian law of war.⁵⁰³ According to the Department of Defense, the collateral damage to civilians, for the most part, resulted from Iraq's placement of military sites in population centers and utilization of civilians as human

492. *Id.* discussing Protocol I, *supra* note 10, art. 52(3).

493. *Id.* This, according to the Pentagon Report, demands a degree of certainty from an attacker that rarely exists in combat and encourages a defender to ignore the obligation to separate the civilian population. *Id.*

494. *Id.*

495. *Id.* at 627.

496. *Id.*

497. *Id.*

498. *Id.* at 644.

499. *Id.*

500. *Id.*

501. *See supra* notes 442-43 and accompanying texts.

502. *See supra* note 436 and accompanying text.

503. *See supra* notes 490-94 and accompanying texts.

shields.⁵⁰⁴ American decision-makers, in the end, questioned the Geneva Protocol's imposition of the burden of care on the attacking military rather than on the belligerent with command and control over the targeted sites.⁵⁰⁵

The legality of American aerial policy was challenged in the court-martial of Army Reserve Captain Huet-Vaughn.⁵⁰⁶ In August 1991, Huet-Vaughn was convicted of "desertion with the intent to avoid hazardous duty" and vital national service; she was sentenced to dismissal from the military, confinement for thirty months and forfeiture of all pay and allowances.⁵⁰⁷ In December 1991, the convening military authority reduced the period of confinement to fifteen months.⁵⁰⁸ The Court of Military Review held that the trial judge committed prejudicial error when he granted the government's motion in limine to restrict Huet-Vaughn from testifying and presenting evidence concerning her motive, which she contended was relevant to the element of specific intent.⁵⁰⁹ This excluded evidence pertaining to the fact that Huet-Vaughn's desertion "was not based on a specific intent to avoid hazardous duty and to shirk important service"; her intent was to expose the criminal nature of the impending Persian Gulf War to the public.⁵¹⁰

Huet-Vaughn, despite the judge's ruling, had been permitted to testify at trial that she was a physician and anti-nuclear and social activist, whose reserve unit was assigned to participate in the Operation Desert Shield.⁵¹¹ After much personal reflection and reading, Huet-Vaughn testified that she concluded participation in the Gulf War, with the impending utilization of weapons of mass destruction that likely would likely cause thousands of civilian deaths, violated her oath as a physician and officer.⁵¹² She testified that upon receiving her orders to report to the Persian Gulf, she deserted the armed services and traveled to the United Nations, the United States Congress, media organizations and anti-war rallies in order to educate the public and to build opposition to the war.⁵¹³ She stated that this public purpose, rather than a desire to avoid hazardous duty, motivated her to desert the military.⁵¹⁴

504. See *supra* notes 466-76 and accompanying texts.

505. See *supra* notes 490-94 and accompanying texts.

506. United States v. Huet-Vaughn, 39 M.J. 545 (ACMR 1994), 43 M.J. 105 (1995).

507. 39 M.J. at 547.

508. *Id.*

509. *Id.* at 548.

510. *Id.* at 549. Huet-Vaughn also unsuccessfully attempted to introduce evidence of her good-faith belief that war crimes would be committed during Operation Desert Shield and that she reasonably believed she was authorized under the Nuremberg Principles and applicable United States law to refuse to participate in the conflict. *Id.* She further contended, "her testimony and the testimonies of her witnesses were relevant to the defense of mistake of law." *Id.*

511. 43 M.J. at 109.

512. *Id.* at 108-10.

513. *Id.* at 109-11.

514. *Id.* at 112.

The United States Court of Appeals for the Armed Forces reversed the ruling of the Court of Military Review and determined that the trial judge properly ruled that evidence pertaining to Huet-Vaughn's motivation was irrelevant as to whether she quit her unit with the intent to avoid hazardous duty or to shirk important service.⁵¹⁵ The Court accordingly set aside the decision of the United States Army Court of Military Review.⁵¹⁶ The Appellate Court went on to observe that the evidence of Captain Huet-Vaughn's testimony at trial pertaining to her conscientious opposition to the Gulf War "did not negate her intent to avoid deploying to the Persian Gulf. To the contrary, it tended to prove that she intended to avoid deployment by showing that she was opposed to the war on moral and humanitarian grounds."⁵¹⁷ The Court of Appeals thus affirmed the exclusion of testimony pertaining to American aerial attacks from trial.

XI. KOSOVO

The North Atlantic Treaty Organization (NATO) launched Operation Allied Force, on March 24, 1999, in what would prove to be a successful effort to halt Serbia's ethnic cleansing of the Kosovo province.⁵¹⁸ NATO reported that by early July, 37,465 sorties had been launched against nine hundred targets and that thirty-five percent of the twenty-six thousand weapons employed were so-called "smart" or guided bombs.⁵¹⁹

NATO and the United States portrayed this as an accurate and well-coordinated campaign.⁵²⁰ In September 1999, Secretary of Defense William Cohen proclaimed, "[o]f the thousands of bombs that were dropped and the missiles that were fired, nearly all of them hit their intended target. Of all those thousands of weapons that were dropped and expended, approximately 20 had unintended consequences or were not on target."⁵²¹ General Wesley Clark, commander of NATO forces in the war, in October 1999, stated, "I just want to emphasize the incredible precision of the bombing; the fact that on 78 days, with over 23,000 weapons dropped or fired, there were only 20 incidents of collateral damage . . . that's an incident rate of less than 1/10 of 1 percent."⁵²²

515. *Id.* at 113.

516. *Id.* at 116.

517. *Id.*

518. HUMAN RIGHTS WATCH, CIVILIAN DEATHS IN THE NATO AIR CAMPAIGN 1 (Feb. 2000), available at <http://www.hrw.org/reports/2000/nato/Natbm200-01.htm> (last visited June 14, 2002). Thirteen of the nineteen NATO nations deployed aircraft in the campaign: Belgium, Canada, Denmark, France, Germany, Italy, the Netherlands, Norway, Portugal, Spain, Turkey, the United Kingdom and the United States. *Id.* at 1-2.

519. *Id.* at 3.

520. *Id.*

521. Quoted in *id.* at 5.

522. Quoted in *id.*

The non-governmental organization Human Rights Watch found ninety incidents in which civilians were killed and concluded that as few as 489, and as many as 528, Yugoslav noncombatants were killed in the bombing campaign.⁵²³ Between 303 and 352 deaths were due to twelve such incidents.⁵²⁴ These twelve were the only occurrences in which ten or more civilian deaths were confirmed.⁵²⁵

In evaluating the international legality of the NATO bombing campaign, Human Rights Watch utilized the relevant standards set forth in Protocol I, which have been recognized by the United States as part and parcel of customary international law.⁵²⁶ The evaluation was guided by the principle of discrimination, which limits bombardment to military targets;⁵²⁷ and by the standard of proportionality, which mandates that the concrete military advantage of an attack must outweigh the resulting civilian casualties and that, in any event, an attack may not cause excessive civilian casualties or damage.⁵²⁸ The principles of discrimination and proportionality require that all feasible precautions should be undertaken to collect accurate information concerning the prospective target.⁵²⁹ Human Rights Watch suggested that NATO's determination to avoid casualties among pilots and ground forces led to a reliance on inherently inaccurate high-altitude bombing missions, which were not aided by observers on the ground.⁵³⁰

Human Rights Watch paid particular attention to several bombing attacks emblematic of NATO's bombing campaign.⁵³¹ On April 14, 1999, NATO aircraft conducted repeated bombings of a twelve-mile section of a road connecting Djakovica and Decane in western Kosovo, killing roughly seventy-three civilians and injuring thirty-six.⁵³² Human Rights Watch argued that NATO statements and modifications in policies seemed to constitute a concession that sufficient precautions had not been taken to ensure civilians were not targeted during attacks on military vehicles.⁵³³

On May 13, 1999, roughly eighty-seven displaced Kosovar civilians were killed and sixty were wounded by bombs targeting the village of Korisa in Kosovo.⁵³⁴ Human Rights Watch determined that Korisa was a legitimate

523. *Id.* at 4.

524. *Id.*

525. *Id.* The Yugoslav regime estimated civilian casualties at between one thousand two hundred and five thousand seven hundred civilians. *Id.* at 5. NATO's figures indicated one thousand five hundred civilians were killed. *Id.* at 6.

526. *Id.* at 7.

527. *Id.*

528. *Id.* at 8.

529. *Id.* at 9.

530. *Id.* Human Rights Watch noted that Yugoslavia had put noncombatants at risk on several occasions and shared responsibility in these instances with NATO. *Id.*

531. *See id.* at 11-16.

532. *Id.* at 11.

533. *Id.* at 11-12.

534. *Id.* at 12.

military camp and command post that housed artillery.⁵³⁵ Eyewitnesses reported that the Serb forces illegally utilized the refugees as human shields.⁵³⁶ At the same time, Human Rights Watch noted that violations of the law of war did not release an adversary from the obligation to respect civilian immunity.⁵³⁷ There was no indication that NATO selected this target with knowledge that hundreds of displaced civilians were present.⁵³⁸ Nevertheless, Human Rights Watch concluded the excessive civilian death toll suggested that NATO failed to ensure there were no civilians present at Korisa.⁵³⁹

NATO also bombed a military base adjacent to the Dubrava penitentiary.⁵⁴⁰ Human Rights Watch concluded that the Coalition forces, once again, did not take adequate precautions.⁵⁴¹

The most controversial attack was directed against Serb Radio and Television (RTS) headquarters in Belgrade on April 23, 1999.⁵⁴² Human Rights Watch questioned whether the facility was being utilized to incite violence and contended that, at most, the station was issuing propaganda supportive of the war.⁵⁴³ Warnings had been issued to Western journalists utilizing the facility who, in turn, alerted their Serbian colleagues.⁵⁴⁴ However, a lengthy period had passed and the Serbs presumably no longer feared an attack,⁵⁴⁵ sixteen RTS technicians and workers were killed and sixteen were wounded in the attack.⁵⁴⁶

Human Rights Watch concluded that the attack on the station might have demoralized the population and reduced government support, but this did not offer a concrete and direct military advantage and transform the station into a legitimate military target.⁵⁴⁷ Attacking the urban studios, rather than the transmitters, served little purpose because the broadcasters were able to easily shift operations.⁵⁴⁸ In addition, the risks of attacking this urban target outweighed any measurable military benefit.⁵⁴⁹

NATO also confirmed seven definite and five possible deployments of cluster bombs.⁵⁵⁰ An attack on the Nis airfield killed fourteen civilians and

535. *Id.*

536. *Id.* at 13.

537. *Id.*

538. *Id.*

539. *Id.*

540. *Id.* at 13-14.

541. *Id.* at 15.

542. *Id.*

543. *Id.*

544. *Id.*

545. *Id.*

546. *Id.*

547. *Id.*

548. *Id.*

549. *Id.* NATO failed to issue the required advance warning of the attacks, as required by Article 57(2) of Protocol I. Protocol I, *supra* note 10, art. 57(2).

550. *Id.* at 15-16.

injured twenty-eight when the bomb malfunctioned and bomblets sprayed across the city.⁵⁵¹ Following this incident, the United States restricted the use of cluster bombs.⁵⁵²

Carla del Ponte, prosecutor of the International Criminal Tribunal for the former Yugoslavia (ICTY), convened a committee to determine whether charges should be brought against the NATO officials who planned, directed or carried out the bombing campaign.⁵⁵³ The Committee focused its discussion on NATO's target selection.⁵⁵⁴

The Committee accepted that roughly five hundred civilians had been killed during the bombing campaign.⁵⁵⁵ These casualty figures were surprisingly modest, in light of the fact that the Coalition dropped 23,614 air munitions.⁵⁵⁶ This data, according to the Committee, failed to indicate that "NATO may have conducted a campaign aimed at causing substantial civilian casualties either directly or incidentally."⁵⁵⁷ The Committee determined that NATO attacked "legitimate military objectives," and that there was "nothing inherently unlawful" about flying above the height subject to attack by air defenses.⁵⁵⁸ Despite the fifteen thousand feet minimum altitude specified by NATO, target identification generally proved accurate.⁵⁵⁹

Several incidents proved particularly problematic, but were not deemed to require further investigation.⁵⁶⁰ In each instance, the Committee concluded that the law was not "sufficiently clear," or investigations were "unlikely to result in the acquisition of sufficient evidence to substantiate the charges against high level accused or against lower accused for particularly heinous

551. *Id.* at 16.

552. *Id.*

553. FINAL REPORT TO THE PROSECUTOR BY THE COMMITTEE ESTABLISHED TO REVIEW THE NATO BOMBING CAMPAIGN AGAINST THE FEDERAL REPUBLIC OF YUGOSLAVIA (2000), available at <http://www.un.org/icty/pressreal/nato061300.htm> [hereinafter NATO] (last visited June 14, 2002). The threshold test as to whether to investigate an incident was whether "credible evidence tending to show that crimes within the jurisdiction of the Tribunal may have been committed in Kosovo." *Id.* para. 5 (quoting *Request by Prosecutor, Pursuant to Rule 7*). The Committee initially disposed of the issue of NATO's contravention of environmental standards in warfare. *See id.* paras. 14-24. The relevant standards are set forth in Protocol I. Protocol I, *supra* note 10, arts. 35(3), 55. There also was no prohibition on the employment of depleted uranium projectiles. NATO, *supra*, para. 26. The Committee also noted that there was no specific treaty provision prohibiting or restricting the use of cluster bombs, however, they must be employed in accordance with general principles regulating weapons. *Id.* para. 27.

554. *See* NATO, *supra* note 553, paras. 28-56. "It is difficult to describe the fire bombing of Hamburg, Dresden and Tokyo as anything other than attacks intended to kill, terrorize or demoralize civilians. Whether or not these attacks could be justified legally in the total war context of the time, they would be unlawful if they were required to comply with Protocol I." *Id.* para. 43.

555. *Id.* para. 53.

556. *Id.* para. 54.

557. *Id.*

558. *Id.* paras. 55-56.

559. *Id.* para. 56.

560. *Id.* para. 57.

offenses.”⁵⁶¹ The first involved an April 1999 laser guided bomb attack, which hit a five-carriage passenger train crossing the Leskovac railway bridge over the Grdelica gorge and Juzna Morava river in eastern Serbia.⁵⁶² Ten people were killed and fifteen injured in this assault, which NATO claimed was directed at the bridge serving as a re-supply route for Serb forces in Kosovo.⁵⁶³ The Committee affirmed that the bridge was the object of the attack, and that the train had not been visible to the pilot or weapons officer, who were many miles from the attack site and relied on a five-inch radar screen in making the rapid decision to fire.⁵⁶⁴ The train only was visible following the release of the bomb.⁵⁶⁵ The Committee differed on the propriety of launching the second bomb attack.⁵⁶⁶

Another incident involved the attack on the Djakovica convoy on April 14, 1999, which resulted in between seventy and seventy-five people killed and roughly one hundred injured.⁵⁶⁷ NATO pilots, flying at fifteen thousand feet or higher and relying on unaided visual identification, attacked two vehicle convoys, both of which, unknown to the pilots, included civilian vehicles.⁵⁶⁸ The attack was directed against Serb military forces conducting ethnic cleansing operations and burning houses along the road between Prizren and Djakovica.⁵⁶⁹ The F-16 attack aircraft were flying at several hundred miles an hour at an advanced altitude and halted their attack when it was discovered that civilians had been targeted.⁵⁷⁰

The Committee then turned its attention to the bombing of the RTS broadcasting headquarters, which resulted in the death of roughly seventeen people.⁵⁷¹ As noted, NATO justified the attack based on the dual civilian and military use of the communications system.⁵⁷² In addition to the attack on RTS, radio relay buildings and towers were hit along with electrical power transformer stations in an effort to impede the Yugoslav military command and control and air defense systems.⁵⁷³

561. *Id.* para. 90.

562. *Id.* para. 58.

563. *Id.*

564. *Id.* paras. 59-61.

565. *Id.* para. 61.

566. *Id.* para. 62.

567. *Id.* para. 63.

568. *Id.* para. 64.

569. *Id.*

570. *Id.* para. 69. “While this incident is one where it appears the aircrews could have benefitted from lower altitude scrutiny of the target at an early stage, the committee is of the opinion that neither the aircrew nor their commanders displayed the degree of recklessness in failing to take precautionary measures which would sustain criminal charges.” *Id.* para. 70.

571. *Id.* para. 71.

572. *Id.* paras. 72-74.

573. *Id.*

The Committee concluded that an attack based on a desire to limit command, control and communications systems was “legally acceptable.”⁵⁷⁴ An assault aimed at disrupting the propaganda message of the Yugoslav regime in order to undermine the morale of the population and armed forces, however, would not satisfy the requirement that a target make an effective contribution to a belligerent’s military machine and result in a definite and concrete military advantage.⁵⁷⁵ There was no indication that the Yugoslav regime’s use of the station went beyond propaganda and incited popular violence.⁵⁷⁶

The Committee concluded that NATO’s targeting of the RTS building in order to prevent propaganda was secondary to the desire to disable the Serbian military command and control system.⁵⁷⁷ The station thus was a “legitimate objective,” and while “the civilian casualties were unfortunately high” they did “not appear to be clearly disproportionate.”⁵⁷⁸ Some members of the investigative group believed that NATO failed to make “every possible effort to avoid civilian casualties and collateral damage.”⁵⁷⁹ However, the majority pointed out that because foreign media representatives were warned of an attack, Yugoslav officials might have had similar knowledge of attack warnings.⁵⁸⁰ The Committee noted that while NATO possessed a continuing duty to warn civilians of the attack, “the advance notice given by NATO may have in fact been sufficient under the circumstances” and that Yugoslav authorities remained “partially responsible for the civilian casualties.”⁵⁸¹

The most visible error in targeting occurred on July 5, 1999, when missiles launched from NATO aircraft hit the Chinese embassy in Belgrade, killing three Chinese citizens, injuring fifteen others and causing substantial damage.⁵⁸² The embassy was incorrectly identified as the Yugoslav Federal Directorate for Supply and Procurement (FDSP), a legitimate military target.⁵⁸³ The error resulted from a Central Intelligence Agency officer’s reliance on faulty target identification techniques that were unquestioningly accepted by senior military personnel.⁵⁸⁴ The United States subsequently issued

574. *Id.* para. 75.

575. *Id.* para. 76.

576. *Id.*

577. *Id.*

578. *Id.* para. 77.

579. *Id.*

580. *Id.*

581. *Id.* The RTS building was a legitimate military target and the issue remained whether the civilian casualties were disproportionate to the military advantage. *Id.* para. 75. The Committee adopted a contextual approach and concluded NATO was aware that several strikes would be required to disable the intricate and complex command and control network. *Id.* para. 78. Other targets included transmission towers and control buildings of the Yugoslavia radio relay network, both of which were essential to the direction and control of the army and special forces in Kosovo and were central in the Yugoslav air defense network. *Id.*

582. *Id.* para. 80.

583. *Id.*

584. *Id.* paras. 81-83.

a formal apology for targeting an illegitimate site and agreed to pay compensation to both the Chinese government and the families of individuals killed or injured.⁵⁸⁵ The Committee declined to undertake an investigation, concluding the aircrew should not be assigned responsibility because they had been ordered to attack the “wrong target.”⁵⁸⁶ Senior military leaders also relied in good faith on faulty information that had been provided by officials of another agency.⁵⁸⁷

The Committee also determined that it would not investigate the circumstances surrounding the dropping of ten bombs on the village of Korisa on May 14, 1999, which resulted in the killing of as many as eighty-seven civilians and the wounding of sixty.⁵⁸⁸ NATO, in contrast to other incidents, did not concede that there had been a targeting error and insisted that intelligence indicated a Serbian military camp and command post was located nearby to the village.⁵⁸⁹ The pilot was able to identify silhouettes of military vehicles on the ground immediately prior to dropping ten laser guided and gravity bombs and was unaware of the presence of civilians.⁵⁹⁰ The Committee noted that there was some indication that Kosovar civilians were utilized as human shields and Yugoslav forces may have been partially responsible for the deaths.⁵⁹¹ The final report concluded there was a lack of “credible information” to determine whether a crime had been committed by the aircrew or by the NATO chain of command.⁵⁹²

The failure of the prosecutor for the ICTY to pursue prosecutions of NATO officials and airmen compounded the earlier refusal of the ICJ to issue provisional measures to halt the bombing of Yugoslavia.⁵⁹³ Yugoslavia contended that Belgium and other NATO members were engaged in genocide that entailed the pollution of the environment, destruction of the economy and extermination of the population.⁵⁹⁴ The ICJ, however, declined to exercise jurisdiction and determined that the essential characteristic of genocide was lacking: the intentional destruction of a national, ethnical, racial or

585. *Id.* para. 84.

586. *Id.* para. 85.

587. *Id.*

588. *Id.* paras. 86, 89.

589. *Id.* para. 86.

590. *Id.* para. 87.

591. *Id.* para. 88.

592. *Id.* para. 89.

593. *See* Legality of the Use of Force (Yugo. v. Belg.), 1999 I.C.J. 105 (Order of June 2, 1999), available at http://www.icj-cij.org/icjwww/idocket/iybe/iybeorders/iybe_iorder_19990602.htm. Yugoslavia filed requests for provisional measures against Belgium, Canada, France, Germany, Italy, the Netherlands, Portugal, Spain, the United Kingdom and the United States. *See* Peter H. F. Bekker, *International Decision: Legality of Use of Force*, 93 AM. J. INT'L L. 928 (1999).

594. Legality of the Use of Force (Yugo. v. Belg.), 1999 I.C.J. 105, para. 35 (Order of June 2, 1999), available at http://www.icj-cij.org/icjwww/idocket/iybe/iybeorders/iybe_iorder_19990602.htm.

religions group.⁵⁹⁵ The Court stressed that “the threat or use of force against a State cannot in itself constitute an act of genocide within the meaning of Article II of the Genocide Convention.”⁵⁹⁶

In summary, Human Rights Watch attributed NATO’s faulty targeting to a combination of indiscriminate bombing and intelligence failures.⁵⁹⁷ The investigative committee appointed by the ICTY, however, stressed that NATO acted in a prudent and responsible fashion in light of the speed, fluidity, complexity and uncertainty of the Kosovo campaign.⁵⁹⁸ These differing interpretations seemed to reflect the inherent uncertainty of the legal obligations to “do everything feasible” to verify that targets are neither civilians nor civilian objects;⁵⁹⁹ to “take all feasible precautions” to minimize the incidental loss of civilian life;⁶⁰⁰ to refrain from attacks that “may be expected to cause incidental loss of life;”⁶⁰¹ and to select a military objective that may be “expected to cause the least danger to civilian lives and to civilian objects.”⁶⁰² Commentators are left to evaluate the targeting of the railway bridge, civilian vehicles and Chinese embassy in light of these standards, and to better define the scope of permissible military targets, particularly in regards to dual-use facilities.⁶⁰³

The Statute of the newly established international court significantly limited the scope of liability under the Protocol by adopting a stringent specific intent standard in regards to the targeting of civilians,⁶⁰⁴ civilian objects⁶⁰⁵ and clearly excessive incidental injury or loss of life.⁶⁰⁶ This seems to ease the burden of investigation and precaution placed upon belligerents deploying armed aircraft, and only encompasses the most certain and conspicuous criminal conduct.⁶⁰⁷

The Kosovo campaign was the culmination of the trend towards “virtual war” in which militarily sophisticated Western regimes relied on precision bombing and high technology to intervene in industrializing and militarily weak territories to protect human rights.⁶⁰⁸ The aim of the Kosovo campaign was to conduct a casualty-free campaign based on strict legal constraints in

595. *Id.* para. 40.

596. *Id.*

597. *See supra* notes 523-52 and accompanying texts.

598. *See supra* notes 553-96 and accompanying texts.

599. Protocol I, *supra* note 10, art. 57(2)(a)(i).

600. *Id.* art. 57(2)(a)(ii).

601. *Id.* art. 57(2)(b).

602. *Id.* art. 57(3).

603. *See supra* notes 387-95 and accompanying texts.

604. Rome Statute of the International Criminal Court, July 17, 1998, art. 8(2)(b)(i), U.N. Doc. A/CONF.183/9 (1998), *reprinted in* 37 I.L.M. 999 (1998).

605. *Id.* art. 8(2)(b)(ii).

606. *Id.* art. 8(2)(b)(iv).

607. *See supra* notes 396-400 and accompanying texts.

608. *See* MICHAEL IGNATIEFF, *VIRTUAL WAR: KOSOVO AND BEYOND* 3-5 (2000).

targeting.⁶⁰⁹ The focus on disrupting Yugoslavia's domestic military's command, control and communication systems, however, typically required urban attacks on dual-use facilities that inevitably resulted in unintentional and unavoidable civilian injuries and deaths.⁶¹⁰ Noncombatant casualties also resulted from the reliance on air power to interdict and confront combatants rather than risk the loss and expense of inserting ground troops.⁶¹¹ These types of casualties drew attention precisely because they belied the claim that the air campaign was conducted in a clean and antiseptic fashion.⁶¹² At the same time, public knowledge and awareness of the consequences and contours of combat was limited to press reports, which inevitably were skeletal in a war primarily fought through distant technological targeting.⁶¹³ This "virtual war" proved to be the paradigm pursued by American forces in Afghanistan.

XII. AFGHANISTAN

The United States attack on Afghanistan constituted an unprecedented technological assault.⁶¹⁴ American aerial forces relied on intelligence from Predator drones equipped with Hellfire antitank missiles, which instantaneously relayed battlefield video to AC-130 gunships, Global Hawk unmanned reconnaissance surveillance drones, U-2 spy planes, RC-135 Rivet Joint electronic eavesdropping vehicles and land-based special operatives equipped with communications devices, range finders and lasers that directed bombs to the targets.⁶¹⁵ The most innovative development was the Joint Direct Attack Munition (JDAM), which attached to the tail of a conventional bomb and then directed the munition to a target utilizing continuous position updates from satellites in orbit.⁶¹⁶ A similar device was developed for cluster bombs, a container that upon explosion emitted hundreds of small and lethal bomblets across a vast area.⁶¹⁷ The Wind Corrected Muni-

609. *See id.* at 101, 186, 200.

610. *See id.* at 108, 170.

611. *See id.* at 174-76.

612. *See id.* at 166, 170.

613. *See id.* at 191-96.

614. *See* Eric Schmitt, *Improved U.S. Accuracy Claimed in Afghan Air War*, N.Y. TIMES, Apr. 9, 2002, at A16.

615. *See* Eric Schmitt & James Dao, *Use of Pinpoint Air Power Comes of Age in New War*, N.Y. TIMES, Dec. 24, 2001, at A1.

616. *Id.* Testing has shown that the JDAM typically falls within thirteen yards of its target. *Id.* The JDAM also has an internal navigation system that can be programmed with target coordinates from the launching aircraft; this usually lands within thirty yards of the target. *Id.* Over four thousand two hundred JDAM's were dropped, roughly one-third of the munitions utilized in the war. *Id.* The accuracy of so-called "dumb" bombs has "improved with more accurate airplane radars and better computers that gauge the ballistics of weapons." Schmitt, *supra* note 614.

617. Schmitt & Dao, *supra* note 615.

tions Dispenser prevented these weapons from being blown-off course and purportedly guided the cluster container within thirty feet of the target.⁶¹⁸

American commanders in Saudi Arabia collected and integrated this intelligence information and coordinated attacks utilizing these component intelligence parts.⁶¹⁹ This information was used to determine which aircraft to dispatch, the type and size of bombs to use, as well as the best approach route.⁶²⁰ Lawyers reviewed the targets and evaluated the risk to civilians.⁶²¹

Between October 2001 and April 2002, more than twenty-two thousand bombs and missiles were dropped in Afghanistan, which was similar to the total dropped in Serbia and roughly one-tenth of the number deployed in the Persian Gulf.⁶²² In Afghanistan, roughly sixty percent of the munitions were guided to their targets by lasers or satellites.⁶²³ The figure for Serbia was thirty-five percent and eight percent for the Persian Gulf War.⁶²⁴ Military officials claimed, in aggregate, that roughly seventy-five percent of the bombs and missiles hit their target; an analysis of Naval and Marine Corps aircraft placed the effectiveness of the bombing at between seventy-five and eighty percent.⁶²⁵ The rate during the Gulf War and in Serbia reportedly was forty-five to fifty percent.⁶²⁶ This nevertheless meant that a significant number of bombs in Afghanistan missed their target and may have caused unanticipated and unknown injury and property damage.⁶²⁷ Still, the commander of United States forces in Afghanistan, General Tommy Franks, characterized the Afghan campaign as the most "accurate war fought in this nation's history."⁶²⁸ This infatuation with technological advance led defense analyst Philip S. Meilinger to write that air-launched munitions were the most humane and least damaging element in the modern military arsenal.⁶²⁹

Secretary of Defense Donald Rumsfeld and other military men consistently claimed the American bombardment generally was accurate and resulted in limited collateral damage.⁶³⁰ Secretary Rumsfeld, however, conceded, "from time to time, innocent people, noncombatants, undoubtedly are

618. *Id.*

619. *Id.*

620. *Id.*

621. Barry Bearak, Eric Schmitt & Craig S. Smith, *Uncertain Toll in the Fog of War: Civilian Deaths in Afghanistan*, N.Y. TIMES, Feb. 10, 2002, at A1.

622. Schmitt, *supra* note 614.

623. *Id.* These weapons purportedly were ninety percent accurate. *Id.* This meant fewer bombs were required, which reduced the risk of collateral damage. *Id.*

624. *Id.*

625. *Id.*

626. *Id.*

627. *Id.*

628. Bearak, Schmitt & Smith, *supra* note 621.

629. Philip S. Meilinger, *A Matter of Precision*, FOREIGN POL'Y, Mar.-Apr., 2001, at 78, 78-79.

630. Bearak, Schmitt & Smith, *supra* note 621.

killed and that is always unfortunate.”⁶³¹ He observed that it was “next to impossible” to calculate civilian casualties, given the lack of access to target sites, passage of time and the Islamic tradition of rapidly burying bodies and repairing property damage.⁶³² The American military, of course, was reluctant to concede that the bombing campaign might have resulted in civilian deaths.⁶³³ Researchers placed the number of deaths, three months into the air campaign, at between roughly one and four thousand.⁶³⁴ The head of Afghanistan’s interim government, Hamid Karzi, strongly supported American action in Afghanistan, but cautioned, “we must also make sure our civilians do not suffer.”⁶³⁵ Zalmay Khalizad, United States special envoy to Afghanistan, regretted that civilians unintentionally had been targeted and placed responsibility on Al Qaeda and the Taliban for initiating the conflict.⁶³⁶

In October 2001, the Department of State issued a fact sheet on the avoidance of civilian casualties.⁶³⁷ The document claimed that the United States was taking “extraordinary measures to avoid civilian casualties” and was only targeting “military and terrorist sites.”⁶³⁸ At the same time, the fact sheet conceded that weapons and munitions could not be one hundred percent accurate; there had been civilian casualties for which the United States had apologized and, despite good faith efforts, could not be “entirely avoided.”⁶³⁹ The utilization of precision weapons, however, limited the extent and scope of civilian injury.⁶⁴⁰

A study of civilian casualties by the *New York Times* questioned the claims of the Department of State and reported that America’s “high-tech, out-of-harm’s-way strategy” in Afghanistan had “produced a pattern of mis-

631. *Id.*

632. *Id.* Secretary of Defense Rumsfeld, in February, admitted United States forces mistakenly might have targeted innocent Afghans, believing they were hostile forces. See Eric Schmitt, *Error Possible in Attacks, Rumsfeld Says*, N.Y. TIMES, Feb. 5, 2002, at A13.

633. See Bearak, Schmitt & Smith, *supra* note 621 (quoting William H. Arkin, former Army intelligence analyst and military adviser to Human Rights Watch).

634. *Id.* Professor Marc W. Herold, an economist at the University of New Hampshire, calculated at least 3,767 civilian casualties from October 7 to December 6, 2001. *Id.* Carl Conetta, co-director of the Project on Defense Alternatives, adopted a more critical stance and placed the figure at between one thousand and one thousand three hundred deaths. *Id.*

635. Amy Waldman, *Afghan Leader Warily Backs U.S. Bombing*, N.Y. TIMES, Jan. 2, 2002, at A1. See also Henri E. Cauvin, *In Statement, Mandela Shifts on All-Out Support for War*, N.Y. TIMES, Jan. 3, 2002, at A13.

636. Mark Landler, *Bombing Necessary Despite Toll on Civilians, U.S. Envoy Says*, N.Y. TIMES, Jan. 9, 2002, at A11.

637. U.S. Department of State, Office of International Information Programs, FACT SHEET: U.S. MILITARY EFFORTS TO AVOID CIVILIAN CASUALTIES (Oct. 25, 2001), available at <http://usinfo.state.gov/topical/pol/terror/01102503.htm> (last visited June 14, 2002).

638. *Id.*

639. *Id.*

640. *Id.* These weapons are calibrated to the nature of the target and to the risk of civilian casualties. *Id.*

takes” that “killed hundreds of Afghan civilians.”⁶⁴¹ On-site reviews of eleven locations where air strikes killed as many as four hundred civilians indicated that American commanders, on various occasions, relied on mistaken, incomplete, inaccurate and intentionally misleading information provided by locale Afghans harboring vendettas.⁶⁴² The United States’ aversion to ground operations prevented the verification of this often faulty information.⁶⁴³ A number of incidents in Afghanistan raised doubts concerning the United States’ claim that civilians had not been injured in the American bombing campaign.⁶⁴⁴

In October 2001, American planes attacked a military base and police station in Tirin Kot, a Taliban occupied area in southern Afghanistan, hitting a tractor-trailer and killing the driver, seventeen children and three women.⁶⁴⁵ Relatives carried the wounded to a house that, in turn, was bombed, killing most of the wounded and injuring those who intervened to offer assistance.⁶⁴⁶ The United States claimed precision-guided munitions were utilized and there was no evidence of civilian casualties.⁶⁴⁷ There also was an attack on the village of Karam, in eastern Afghanistan, resulting in an unknown number of civilian casualties.⁶⁴⁸

In November 2001, Amy Waldman reported on a cluster bomb attack, which killed twelve noncombatants in a village in the Ghor Province.⁶⁴⁹ She interviewed a twenty-five year old Afghan whose father and three uncles died in the assault.⁶⁵⁰ The young man now found himself responsible for sup-

641. See Dexter Filkins, *Flaws in U.S. Air War Left Hundreds of Civilians Dead*, N.Y. TIMES, July 21, 2002, at A1.

642. *Id.*

643. *Id.* This mistaken targeting strained relations between the United States and the indigenous Afghan population. *Id.*

644. See Thom Shanker, *Rumsfeld Calls Civilian Deaths Relatively Low*, N.Y. TIMES, July 23, 2002, at A9. Secretary of Defense Donald Rumsfeld disputed the study’s conclusions and contended there were fewer civilian casualties than “perhaps any war in modern history,” and the Coalition forces “have gone to extraordinary lengths not only to avoid civilian deaths but to save civilian lives.” *Id.* Secretary Rumsfeld stated that he knew of “no instance” in which a local Afghan leader provided false information to American forces in order to eliminate opposition figures and groups. *Id.* The Taliban, of course, were notorious for atrocities. See Carlotta Gall, *Killings From Taliban’s Era Still Haunt a Valley*, N.Y. TIMES, July 25, 2002, at A1.

645. See Carlotta Gall, *October Strike on Taliban Hit Civilians, Survivors Say*, N.Y. TIMES, Feb. 13, 2002, at A1.

646. *Id.*

647. *Id.*

648. See Barry Bearak, *U.S. Raid Kills Unknown Number in an Afghan Village*, N.Y. TIMES, Oct. 13, 2001, at B1.

649. Amy Waldman, *Bomb Remnants Increase War’s Toll*, N.Y. TIMES, Nov. 23, 2001, at B4.

650. *Id.*

porting the family.⁶⁵¹ Another victim lost his leg and eyesight and his face was disfigured.⁶⁵²

The unexploded remnants of the cluster bomb were scattered proximate to the village and were the same color as food packages dropped by the United States.⁶⁵³ Amy Waldman recounted one young man who innocently picked up a bomblet, lost three fingers and confronted the amputation of his hand.⁶⁵⁴ A second youth was decapitated when a bomblet exploded.⁶⁵⁵ The non-governmental organization, Doctors Without Borders, reported civilian deaths in the area were “unacceptably high,” counting eighty dead and fifty wounded, including women and children.⁶⁵⁶ Donald Rumsfeld dismissed the medical group’s call for the United States to practice proportionality in the utilization of armed force as suggesting a moral equivalence between Al Qaeda, the Taliban and the United States.⁶⁵⁷ He contended that there was consistent planning to ensure that only military sites were targeted and “there were no off-target hits, so there were no collateral damage worries in this series of strikes.”⁶⁵⁸

American bombers also targeted the Tora Bora cave complex where Osama bin Laden was suspected of hiding and hit three villages, killing over seventy civilians.⁶⁵⁹ It was speculated that this may have resulted from misinformation provided by local Afghans to American forces.⁶⁶⁰ Afghan villagers in the region accused the United States of killing more than one hundred fifty civilians in six incidents, including an attack on a mosque.⁶⁶¹ Rear Admiral Craig R. Quigley, chief spokesperson for the American Central Command, pronounced that the United States had been “meticulous reporting

651. *Id.*

652. *Id.*

653. *Id.*

654. *Id.*

655. *Id.* Cluster bomblets contribute to the large number of mines littering the country; estimates range from six hundred and thirty-four thousand to twenty million. C.J. Chivers, *400 Demolition Experts Will Try to Harvest Afghanistan’s Field of Mines*, N.Y. TIMES, Dec. 18, 2001, at B1.

656. John H. Cushman Jr., *War’s Hidden Cost*, N.Y. TIMES, Dec. 9, 2001, § 4, at 14.

657. *Id.*

658. *Id.*

659. Tim Weiner, *U.S. Bombs Hit 3 Towns, Afghans Say; Pentagon Denies It*, N.Y. TIMES, Dec. 2, 2001, at B2.

660. *Id.*

661. John F. Burns, *Villagers Say Errors by U.S. Causing Grief for Innocent*, N.Y. TIMES, Feb. 2, 2002, at A9. Civilians reportedly died in six different American attacks between November 15 and the beginning of February. *Id.* A villager in Zani Khel reportedly extended hospitality to an individual who later was identified as a Taliban commander fleeing Kabul. *Id.* Several hours later a bomb struck the villager’s compound, killing twenty people, including his wife, three grandsons and six granddaughters. *Id.* The local warlord blamed rivals who may have deliberately misled the Americans in an effort to destabilize the controlling clan. *Id.*

whenever we have killed a single person” and that “there was no chance the village was targeted improperly.”⁶⁶²

On December 20, 2001, in Paktia Province, American warplanes attacked a convoy, killing up to fifty or sixty people.⁶⁶³ The survivors scrambled towards two villages that also were targeted.⁶⁶⁴ The Pentagon contended that the victims were Taliban leaders who fired at American planes.⁶⁶⁵ The survivors contended that the convoy was transporting tribal elders who had been invited to Kabul for the inauguration of interim president Hamid Karzi.⁶⁶⁶ There is evidence they were targeted by a regional warlord who was seeking to eliminate individuals whom he viewed as opposed to his local leadership.⁶⁶⁷

On February 4, 2002, a Predator drone operated by remote control fired at least one antitank missile at a group of men near a former Al Qaeda training base, killing at least one.⁶⁶⁸ The Pentagon responded to claims that the victims had been foraging for scrap metal by alleging there was a “mosaic” of information indicating the men were engaged in “suspicious activities.”⁶⁶⁹ There was speculation that one of the individuals was Osama bin Laden, leader of Al Qaeda.⁶⁷⁰ However, reports subsequently indicated the men were impoverished villagers who were scavenging metal in order to earn money.⁶⁷¹

In July 2002, American pilots responded to what officials claimed was anti-aircraft fire and bombed four villages in southern Afghanistan.⁶⁷² It later was established that American, Afghan and coalition forces were conducting

662. Quoted in Weiner, *supra* note 659.

663. Eric Schmitt, *Pentagon Says U.S. Airstrike Killed Women and Children*, N.Y. TIMES, Mar. 13, 2002, at A11.

664. Filkins, *supra* note 641.

665. Schmitt, *supra* note 663.

666. *Id.* The article discusses a March attack by American aircraft against a vehicle carrying suspected Al Qaeda. *Id.* In addition to adult males, it later was determined that women and children had been killed. *Id.* Secretary of Defense Rumsfeld argued that the noncombatants were in the zone of battle as a matter “of their own free will.” *Id.* The article also references an October attack in which an errant bomb struck a building housing a United Nations land mines removal mission, killing four individuals. *Id.* In the same month, a Red Cross warehouse was attacked when the military neglected to remove the building from the target list. *Id.* In another incident, incorrect coordinates were entered on a bombing mission, resulting in a two thousand pound satellite bomb hitting civilian houses rather than Kabul airport, resulting in the death of four individuals. *Id.* The complex politics surrounding the attack on the convoy is discussed in, Amy Waldman, *Debate Over U.S. Raid on Convoy Exposes Fluid Loyalties in Area Shaken by War*, N.Y. TIMES, Dec. 28, 2001, at B3.

667. Filkins, *supra* note 641.

668. James Dao, *U.S. Defends Missile Strike, Saying Attack was Justified*, N.Y. TIMES, Feb. 12, 2002, at A12.

669. *Id.*

670. *Id.*

671. See John F. Burns, *U.S. Leapt before Looking, Angry Villagers Say*, N.Y. TIMES, Feb. 17, 2002, at A12.

672. Carlotta Gall, *Hunt for Taliban Leaves Village with Horror*, N.Y. TIMES, July 8, 2002, at A1.

search and reconnaissance missions in the area and that the gunfire was from people celebrating at an engagement party.⁶⁷³ The return fire from AC-130 aircraft resulted in forty-eight dead and one hundred seventeen injured; most of the casualties were women and children.⁶⁷⁴ An American spokesperson explained that the personnel on the aircraft believed they were under sustained attack.⁶⁷⁵ The military later blamed faulty intelligence from an Afghan seeking to advantage himself in a local power struggle.⁶⁷⁶

Despite the methodical process of target-selection, the United States rapidly exhausted fixed target sites in Afghanistan and pilots were returning without discharging their munitions.⁶⁷⁷ As early as mid-October, American pilots were authorized to select their own targets and to fire without restraint within areas thought to be under Taliban control.⁶⁷⁸ On one occasion, a Red Cross warehouse a mile from the Kabul airport was mistakenly bombed.⁶⁷⁹

In April 2002, dozens of Afghan families who lost relatives as a result of American bombings traveled to Kabul seeking compensation.⁶⁸⁰ Petitions from four hundred families were transmitted to the American embassy by an eight-year old girl, Amina, who lived with her father, the only other survivor in her eighteen-person family.⁶⁸¹ Nine-year old Abdul described being blinded by shrapnel while a young couple recounted a cluster bomb attack that killed their two children.⁶⁸²

673. *Id.*

674. *Id.*

675. Carlotta Gall & Eric Schmitt, *Shocked Afghans Criticize U.S. Strike; Toll is Some 40 Dead and 100 Wounded*, N.Y. TIMES, July 3, 2002, at A3.

676. Gall, *supra* note 672. Afghan President Hamid Karzi summoned American military officials to his office for an explanation. Elisabeth Bumiller, *Bush Offers Karzai Sympathy on Dead*, N.Y. TIMES, July 6, 2002, at A1. President George Bush telephoned Hamid Karzi to express his sympathies for the killing of innocents. *Id.* Dexter Filkins writes that the strategy of attacking with overwhelming force on "questionable targets" began several months prior to the July attack, when Americans attacked the village of Niazi Qala fifty miles south of Kabul, killing fifty-two people. Filkins, *supra* note 641. The residents denied the village harbored any members of the Taliban. *Id.*

677. See James Dao, *The New Air War: Fewer Pilots, More Hits and Scarcer Targets*, N.Y. TIMES, Nov. 29, 2001, at B1.

678. Steven Lee Myers & Thom Shanker, *Pilots Told to Fire at Will in Some Zones*, N.Y. TIMES, Oct. 17, 2001, at B2.

679. *Id.*

680. Carlotta Gall, *Shattered Afghan Families Demand U.S. Compensation*, N.Y. TIMES, Apr. 8, 2002, at A11.

681. *Id.*

682. *Id.* Family members of Americans killed in the attack on the World Trade Towers met with Afghans who lost relatives during United States bombing. See Mark Landler, *Sharing Grief to Find Understanding*, N.Y. TIMES, Jan. 17, 2002, at A4. Rita Lasar of New York City, mourning the death of her brother, remarked to one Afghan that all those who died were "collateral damage" of the conflict. *Id.* The Central Intelligence Agency, on at least one occasion, paid the families of innocents one thousand dollars. John Kifner, *A Question for Afghanistan: Who's the Proxy Here?*, N.Y. TIMES, Feb. 17, 2002, § 4, at 3.

The United States, however, has consistently resisted conceding civilians were directly targeted.⁶⁸³ The initial American response was to catalogue atrocities committed by Al Qaeda and the Taliban in order to shift attention from the American bombing campaign.⁶⁸⁴ Despite occasional admissions and apologies,⁶⁸⁵ the United States official stance was to dismiss allegations of civilian casualties.⁶⁸⁶ In response to accusations that Northern Alliance troops killed hundreds of Taliban fighters, Donald Rumsfeld intoned that people making such allegations “have been absolutely lying through their teeth, week after week after week, throughout the whole thing.”⁶⁸⁷ Secretary Rumsfeld resented the implication that “America is what’s wrong with the world” when it was the Taliban who have “done enormous humanitarian harm.”⁶⁸⁸ He concluded with the familiar theme that the American campaign “will prove to have been the change of hands with the least loss of life of any time in modern memory in that country [in Afghanistan].”⁶⁸⁹ As the war wound down, the media were able to more confidently traverse the country and document civilian casualties.⁶⁹⁰ These incidents typically were attributed to misleading information provided by informants in a country in which Secretary of Defense Rumsfeld explained, “people who are friendly and unfriendly are constantly meeting together. Indeed, sometimes the same people can be friendly and later unfriendly within a short period of time. There are also people who pretend they’re friendly and who, in fact, are not very friendly, and who provide aid and comfort and assistance to the Taliban and Al Qaeda that are still in the country.”⁶⁹¹

There was a strong sentiment that concern with civilian casualties unduly complicated and confounded the American military campaign.⁶⁹² *New York Times* columnist Nicholas D. Kristof contended that despite the loss of civilian life, the American intervention in Afghanistan was a supreme humanitarian gesture.⁶⁹³ Kristof points out that under the Taliban two hundred and twenty-five thousand children died before the age of five and fifteen thousand women died during pregnancy or childbirth.⁶⁹⁴ These numbers

683. See Eric Schmitt, *After January Raid, Gen. Franks Promises to Do Better*, N.Y. TIMES, Feb. 8, 2002, at A14.

684. See Dana Milbank, *U.S. Takes Offensive in Information War with List of Enemy Crimes*, WASH. POST, Nov. 22, 2001, at A38, available at <http://www.washingtonpost.com/ac2/wp-dyn/A776-2001Nov21>.

685. See *supra* note 631 and accompanying text.

686. See John F. Burns, *P.O.W.'s Were Shot; Question Is How Many?*, N.Y. TIMES, Nov. 14, 2001, at B3.

687. *Id.*

688. *Id.*

689. *Id.*

690. Kifner, *supra* note 682.

691. *Id.*

692. See Peter Steinfels, *Beliefs; In the Heat of War, Confronting a Moral Principle of Keeping Civilians Immune from Direct Attack*, N.Y. TIMES, Apr. 6, 2002, at B6.

693. Nicholas D. Kristof, *A Merciful War*, N.Y. TIMES, Feb. 1, 2002, at A25.

694. *Id.*

likely would have escalated as international organizations retreated from Afghanistan in response to the arrest of Christian aid workers.⁶⁹⁵ Following the American intervention, there was a renewed multinational commitment that resulted in seven hundred and thirty-four thousand children being vaccinated against measles in a country where there had not been a single instance of a child having been vaccinated in the previous ten years.⁶⁹⁶ Kristof estimated that as a result of the American intervention, mortality rates would drop by fifty percent and over a million children would gain access to education.⁶⁹⁷

This calculus, however, is not a component of the positive humanitarian law of war.⁶⁹⁸ As noted, the distinction between permissible military and impermissible civilian targets is the fundamental guiding principle of the law of war.⁶⁹⁹ There is little support for the proposition that the United States or coalition forces have intentionally targeted civilians.⁷⁰⁰ However, there seems to have been a failure to take every feasible measure to ensure that military rather than civilian populations and objects were attacked.⁷⁰¹ Reliance on high-altitude aerial bombardment, rather than ground forces, resulted in the utilization of means or methods of attack which, when combined with faulty intelligence, created an enhanced risk of the accidental and incidental civilian injury and loss of life.⁷⁰² The *New York Times* study indicated a number of civilian deaths resulted from bombs hitting their intended target.⁷⁰³ The fatalities resulted from faulty information, mistakes in target identification, the utilization of excessive force and a rapid and rushed decision-making process.⁷⁰⁴ The burden rested on the relevant American officers and officials to ensure information was accurate and to request additional information in the event of doubt.⁷⁰⁵

In summary, the noncombatant injuries and deaths in Afghanistan were the inevitable result of a campaign relying on high technology to defeat an opposing force that sought safety and security through integration into the indigenous population.⁷⁰⁶ This civilian shield plainly contravened the obligation to avoid the exploitation and endangerment of innocents.⁷⁰⁷ However, in the *Hostage* case, an American court clearly established the violation of the humanitarian law of war cannot be countenanced on the grounds of expedi-

695. *Id.*

696. *Id.*

697. *Id.*

698. *See supra* notes 363-410 and accompanying texts.

699. *See supra* notes 363-66 and accompanying texts.

700. *See supra* notes 641-44 and accompanying texts.

701. *See supra* notes 668-71 and accompanying texts.

702. *See supra* note 641 and accompanying text.

703. Filkins, *supra* note 641.

704. *Id.*

705. *See supra* notes 396-400 and accompanying texts.

706. *See supra* notes 641-44 and accompanying texts.

707. *See supra* notes 408-10 and accompanying texts.

ence or necessity in combating indigenous forces:⁷⁰⁸ “If adequate troops were not available or if the lawful measures against the population failed in their purpose, the occupant could limit its operations or withdraw from the country in whole or in part, but no right existed to pursue a policy in violation of international law.”⁷⁰⁹

XIII. CONCLUSION

In the late nineteenth and early twentieth centuries, the international community experienced halting success in regulating the utilization of aerial bombardment from balloons.⁷¹⁰ Language in the 1907 Hague Convention seemed to constrain the bombing of undefended cities and might be interpreted to limit attacks against civilians and civilian objects.⁷¹¹ The intentional targeting of civilians in aerial attacks during World War I suggested aircraft were viewed as outside the parameters of the humanitarian law of war and these attacks stood as a harbinger of the technology and tactics employed during World War II.⁷¹²

The 1923 Hague Rules of Aerial Warfare constituted a comprehensive, but ultimately unsuccessful, effort to establish binding international standards for the regulation of aerial bombardment. The Convention did strongly suggest that the basic principles of the humanitarian law of warfare were applicable to aircraft.⁷¹³ The principle provisions of the Hague Rules of Aerial Warfare later were recognized as customary international law and invoked by the League of Nations to condemn the aerial assaults launched by Spain and China during the 1930s.⁷¹⁴ The restrictions on air attacks in these international documents were in conflict with the primordial philosophy of the founding fathers of air-launched attacks.⁷¹⁵

This sense of restraint was overcome, during World War II, by the exigencies of the armed conflicts in Europe and Asia and degenerated into unbridled air attacks against urban areas.⁷¹⁶ Prosecutions, however, were not conducted against officers and airmen involved in aerial attacks.⁷¹⁷ In addition, language in the *Einsatzgruppen* case suggested that the incidental injury and killing of civilians during an aerial attack was permissible under the

708. See *United States v. Wilhelm List, XI TRIALS OF WAR CRIMINALS BEFORE THE NEURNBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO. 10, 1230, 1273 (1950)*.

709. *Id.* at 1273.

710. See *supra* notes 47-61 and accompanying texts.

711. See *supra* notes 62-67 and accompanying texts.

712. See *supra* notes 77-81 and accompanying texts.

713. See *supra* notes 104-12 and accompanying texts.

714. See *supra* notes 114-31 and accompanying texts.

715. See *supra* notes 132-37 and accompanying texts.

716. See *supra* notes 138-90 and accompanying texts.

717. See *supra* notes 204-08 and accompanying texts.

humanitarian law of war.⁷¹⁸ Some isolated prosecutions were brought before military courts for the abuse of Allied airmen.⁷¹⁹ Critics pointed to the failure to explore the implications of the dropping of the atomic bomb as indicative of the policy of selective prosecution and “victors’ justice”⁷²⁰ which animated these prosecutions.⁷²¹

The United States waged unrestricted aerial warfare during the Vietnam War. North Vietnam’s planned prosecution of American airmen blatantly contravened international due process standards. At the same time, the international criticism of the North Vietnamese was indicative of the acceptance of unbridled aerial warfare as lawful under international law.⁷²²

In 1977, the United States issued a manual on the conduct of air warfare, which recognized that aerial tactics and strategies were constrained by the general principles of the humanitarian law of war.⁷²³ This was clarified and elaborated in the 1977 Geneva Protocol, which recognized that air campaigns were subject to the principles of discrimination and proportionality. The United States is not a signatory to the Protocol, but recognizes the principles pertaining to noncombatants as binding customary international law.⁷²⁴

The bombing campaign during the Gulf War suggested that direct targeting of civilians was being replaced by singling out of so-called “dual-use” facilities, which created conditions of hardship and deprivation for noncombatants.⁷²⁵ This campaign also raised the issues of Iraq’s responsibility for allegedly situating military targets amidst civilian populations and objects and the appropriate response of the United States.⁷²⁶

The Kosovo campaign epitomized the new technologically sophisticated form of aerial warfare, which purportedly involves fewer bombs with reduced civilian casualties and collateral damage.⁷²⁷ Critics contended the United States utilized this technological capacity to intentionally and wantonly target civilians.⁷²⁸ The committee appointed by the ICTY, however, determined that civilians were injured or killed as a result of unavoidable and undetectable errors and intelligence failures.⁷²⁹

The Afghan air campaign typified the new “virtual war”⁷³⁰ in which technologically sophisticated, high altitude aerial bombardments are em-

718. See *supra* notes 214-25 and accompanying texts.

719. See *supra* notes 228-300 and accompanying texts.

720. See Timothy L.H. McCormack, *Selective Reaction to Atrocity: War Crimes and the Development of International Criminal Law*, 60 ALB. L. REV. 681, 717 (1997).

721. See *supra* notes 301-27 and accompanying texts.

722. See *supra* notes 329-58 and accompanying texts.

723. See *supra* notes 359-60 and accompanying texts.

724. See *supra* notes 361-410 and accompanying texts.

725. See *supra* notes 427-51 and accompanying texts.

726. See *supra* notes 473-80 and accompanying texts.

727. See *supra* notes 518-22 and accompanying texts.

728. See *supra* notes 526-49 and accompanying texts.

729. See *supra* notes 555-96 and accompanying texts.

730. See *supra* notes 608-13 and accompanying texts.

ployed against even the most limited targets in an effort to avoid combat casualties.⁷³¹ This resulted in a heavy reliance on aerial electronic surveillance and intelligence operatives, some of whom proved unreliable and contributed to the faulty targeting that killed or injured civilians.⁷³²

A review of aerial bombardment in the twentieth century suggests the contemporary terrorist assault on civilians should be seen as an extension of the lack of regard and respect for noncombatants in contemporary warfare. Civilian injuries and deaths are the inevitable outcome of high-altitude bombing strategies and increasingly are excused or dismissed as mistakes or errors. Decision-makers thus are not required to justify whether the resulting civilian fatalities are disproportionate to the anticipated military advantage. These injuries and deaths, instead, are excused as unanticipated and unavoidable rather than as the result of a rational calculus.⁷³³ Collateral damage against civilians has come to be accepted as part of the price of armed conflict.⁷³⁴ This perspective suggests there must be an international initiative to draft and disseminate a set of strict standards governing air warfare and to hold individuals personally accountable. Such an effort would enhance the credibility of those who justifiably castigate and condemn terrorist violence against civilians.⁷³⁵

731. *See supra* notes 614-29 and accompanying texts.

732. *See supra* notes 641-79 and accompanying texts.

733. *See supra* notes 630-31 and accompanying texts.

734. *See supra* notes 692-97 and accompanying texts.

735. *See CARR, supra* note 12 and accompanying text.

