

# REAPING THE WHIRLWIND: THE NORM OF RECIPROCITY AND THE LAW OF AERIAL BOMBARDMENT DURING WORLD WAR II

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*Despite the intense controversy surrounding the Allied bombing campaign during World War II, the extant scholarship lacks a detailed description of the law of war concerning aerial bombing as that law existed during the conflict — a remarkable gap in the research, considering the attention that has been devoted to this topic. This paper presents a brief history of the evolution of the law of war concerning aerial bombardment prior to and during World War II. The law of war in this period was shaped primarily by the norm of reciprocity, and this norm is critical to understanding how the Allies conceived of the bombing campaign. The norm of reciprocity had several functions deserving of examination: the norm, as a moral intuition, instilled a psychological motive for the Allied peoples to support the bombing, provided a framework of values to legitimate that support and then channelled that support into a policy perceived as legally just. The norm of reciprocity was central to legal justifications for the bombing campaign.*

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## I INTRODUCTION

Scholars frequently condemn the Allied bombing of Germany during World War II — the city of Dresden in particular — as a ‘war crime’.<sup>1</sup> Despite characterisations of the bombing campaign as illegal or unjust, the extant scholarship lacks any thorough examination of the law of war concerning aerial bombing during World War II.<sup>2</sup> This is a surprising gap in the literature considering the attention that has been devoted to the bombing campaign, with Richard Overy’s work standing out in the field.<sup>3</sup> Current scholarship is particularly lacking in analysis of the norm of reciprocity and the vital role of this norm in shaping the development of restrictions on aerial bombing.<sup>4</sup> The consequence of this void in legal history is that the fundamental justness of a major part of the war effort is misunderstood today.

This paper makes three substantial contributions to the debate over the bombing campaign. First, the paper asserts that the norm of reciprocity had a significant and underappreciated influence on the development of the law of aerial bombardment, both prior to and during World War II. The paper offers a re-examination of the historical development of the rules for aerial bombardment prior to World War II, along with the evolution and implementation of those rules during the war. Secondly, the paper describes how the prevailing norm of reciprocity legitimised the bombing campaign from the standpoint of the Allies’ ethical *and* legal justification for aerial bombardment. As psychologist Albert Bandura aptly notes, ‘[p]eople do not ordinarily engage in collective violence until they have justified

<sup>1</sup> See, eg, Owen Chadwick, ‘Bad for the Jews’, *The New York Review of Books* (online, 28 March 2002) <<http://www.nybooks.com/articles/2002/03/28/bad-for-the-jews/>>, archived at <<https://perma.cc/RCP5-RPXJ>>, stating that ‘[w]ithout any military justification, Arthur “Bomber” Harris ordered Dresden bombed out of existence in 1945 — a blatant war crime’; Donald Bloxham, ‘Dresden as a War Crime’ in Paul Addison and Jeremy A Crang (eds), *Firestorm: The Bombing of Dresden 1945* (Pimlico, 2006) 180, 180, stating that ‘[t]he bombing of Dresden on 13–14 February 1945 was a war crime’; Gary Jonathan Bass, *Stay the Hand of Vengeance: The Politics of War Crimes Tribunals* (Princeton University Press, 2000) 15–16, stating that ‘the fire-bombing of Dresden, ... could easily be considered a war crime’.

<sup>2</sup> Several works have touched upon sporadic periods in the development of restrictions on aerial bombing. The extant work has generally found that there were, in fact, no binding rules designed to restrict aerial bombardment at the outbreak of World War II: see below Part II. ‘Most air forces of the day’ saw ‘the 1923 *Hague Rules of Air Warfare*’ as ‘not legally binding’, and they believed that ‘[t]he murky laws on aerial bombardment that existed prior to World War II were much too weak a reed to constrain states’: Tami Davis Biddle, ‘Air Power’ in Michael Howard, George J Andreopoulos and Mark R Shulman (eds), *The Laws of War: Constraints on Warfare in the Western World* (Yale University Press, 1994) 140, 150, 157, citing *Rules concerning the Control of Wireless Telegraphy in Time of War and Air Warfare*. These rules are reproduced in ‘General Report of the Commission of Jurists at the Hague’ (1923) 17(4) *Supplement to the American Journal of International Law* 242, pt II (‘*Rules of Air Warfare*’). Direct quotations of these rules below are from the version located on the International Committee of the Red Cross web page: ‘Rules concerning the Control of Wireless Telegraphy in Time of War and Air Warfare’, *International Committee of the Red Cross* (Web Page) <<https://ihl-databases.icrc.org/ihl/INTRO/275>>, archived at <<https://perma.cc/3FJY-3DAQ>> (‘*Hague Rules of Air Warfare*’).

<sup>3</sup> Richard Overy, *The Bombing War: Europe 1939–1945* (Allen Lane, 2013) (‘*Bombing War*’).

<sup>4</sup> Peter Gray, in one of the few recent works to defend the legality of the Allied bombing campaign, does not discuss the legal ramifications of reciprocity, and only makes brief reference to retaliation: Peter Gray, ‘The Gloves Will Have to Come Off: A Reappraisal of the Legitimacy of the RAF Bomber Offensive against Germany’ (2010) 13(3) *Air Power Review* 9, 25–6 (‘The Gloves Will Have to Come Off’).

to themselves the morality of their actions'.<sup>5</sup> With Bandura's observation in mind, any account of Allied bombing during World War II must consider the influence of the norm of reciprocity. However, a critical distinction is in order at the outset: this paper does not claim that reciprocity explains the strategic rationale behind target selection or Allied tactics. Rather, reciprocity provided a normative reason or justification for aerial bombardment — from the perspective of the Allied nations — and this norm heavily influenced the law of war. Thirdly, the paper directly challenges the increasingly doctrinaire narrative that the Allied bombing campaign was illegal and/or unjust. The Allies integrated ethical, strategic and legal concerns in a way that remains relevant to contemporary conflict and military decision-making.

Part I discusses the norm of reciprocity, the sociohistorical background of this norm and its place in the law of war before World War II. The norm of reciprocity had several functions deserving of examination: the norm of reciprocity — as a moral intuition — instilled a psychological motive for the Allied peoples to support the bombing, provided a framework of values to legitimate that support and then channelled that support into a policy perceived as legally just. Part II reviews the development of codified legal restrictions specific to aerial bombardment prior to World War II. The prevailing norm of reciprocity was a critical component of the law of war as understood at the time.<sup>6</sup> Part III analyses how the law of war pertaining to aerial bombing was interpreted and applied during World War II. The historical evidence demonstrates that neither statute, nor customary international law, imposed prohibitions on aerial bombardment that would have limited the Allied bombing campaign in any significant way. Rather than defining the Allied bombing campaign as a violation of the laws of war, the campaign — including the Dresden raid — can be viewed as the logical outcome of the norm of reciprocity as applied to the law, in the context of total war conducted with few detailed legal restrictions. Part IV rigorously critiques Overy's influential claim that the British initiated indiscriminate bombing against Germany in World War II. The paper concludes with suggestions for further interdisciplinary exploration of the relationship between cultural norms, psychology and the law of war.

## II THE NORM OF RECIPROCITY

The norm of reciprocity explains how the Allies could ethically legitimise and legally justify aerial bombing during World War II. Sociologist Alvin W Gouldner, in his seminal article on reciprocity, explained: 'We owe others certain things because of what they have previously done for us, because of the history of previous interaction we have had with them. It is this kind of obligation which is entailed by the generalized norm of reciprocity.'<sup>7</sup>

The traditional view of reciprocity, which was predominant during World War II, was best expressed by renowned international legal scholar Hersch Lauterpacht, who noted: 'it is impossible to visualize the conduct of hostilities in which one

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<sup>5</sup> Albert Bandura, 'Aggression: A Learned Skill', *The Stanford Observer* (Stanford, October 1978) 5.

<sup>6</sup> See below nn 14–20.

<sup>7</sup> Alvin W Gouldner, 'The Norm of Reciprocity: A Preliminary Statement' (1960) 25(2) *American Sociological Review* 161, 171.

side would be bound by rules of warfare without benefiting from them and the other side would benefit from rules of warfare without being bound by them'.<sup>8</sup> According to Gouldner, '[h]istorically, the most important expression of homeomorphic reciprocity is found in the *negative* norms of reciprocity', or in other words, 'in sentiments of retaliation where the emphasis is placed not on the return of benefits but on the return of injuries, and is best exemplified by the *lex talionis*'<sup>9</sup> (or law of retaliation). In the realm of international law, negative reciprocity 'refers to state suspensions of legal obligations in response to breaches' by an opposing state.<sup>10</sup> The statement that best captured the norm of reciprocity during World War II was Air Marshal Arthur Harris' remark: 'The Nazis entered this war under the rather childish delusion that they were going to bomb everybody else and nobody was going to bomb them. ... They sowed the wind and now they are going to reap the whirlwind.'<sup>11</sup>

Reciprocity shapes the very nature of legal and ethical obligations.<sup>12</sup> The norm of reciprocity has long served a crucial role in war, and still does.<sup>13</sup> Speaking in 1987, Judge Abraham D Sofaer, a legal advisor to the United States Department of State, asserted that '[h]istorically, reciprocity has been the major sanction underlying the laws of war'.<sup>14</sup> Sean Watts notes: 'Conditions of reciprocity pervade modern law of war treaties and their forebears.'<sup>15</sup>

The norm of reciprocity serves an important role in promoting a modicum of fairness in war. It is a fundamental consequence of reciprocity that 'states that have been specially affected by the breach may unilaterally suspend the treaty in their relations with the breaching state'.<sup>16</sup> Reciprocity is enforced through, among several means, the legal mechanism of reprisal; if one belligerent violates the law

<sup>8</sup> H Lauterpacht, 'The Limits of the Operation of the Law of War' (1953) 30 *British Year Book of International Law* 206, 212.

<sup>9</sup> Gouldner (n 7) 172 (emphasis in original).

<sup>10</sup> Sean Watts, 'Reciprocity and the Law of War' (2009) 50(2) *Harvard International Law Journal* 365, 376.

<sup>11</sup> 'The Bombing of Germany', *American Experience* (Public Broadcasting Service, 2010) 3 <[https://www.pbs.org/wgbh/americanexperience/media/pdf/transcript/bombing\\_germany\\_transcript.pdf](https://www.pbs.org/wgbh/americanexperience/media/pdf/transcript/bombing_germany_transcript.pdf)>, archived at <<https://perma.cc/426W-N6CV>>.

<sup>12</sup> Susana Narotzky and Paz Moreno provide an ethnographic analysis of social relations and reciprocity within the Auschwitz concentration camp, asserting that '[t]he positive side of reciprocity is based on shared morality. Its negative side is rooted in a break, transformation or suspension of the moral order': Susana Narotzky and Paz Moreno, 'Reciprocity's Dark Side: Negative Reciprocity, Morality and Social Reproduction' (2002) 2(3) *Anthropological Theory* 281, 301.

<sup>13</sup> 'A principle of reciprocity may be understood to be reflected in law of war rules that reflect the golden rule': Office of General Counsel, Department of Defense (US), *Department of Defense Law of War Manual* (Manual, 13 December 2016) 91 [3.6.3.1] archived at <<https://perma.cc/HX9R-6UE8>>.

<sup>14</sup> Martin D Dupuis, John Q Heywood and Michèle YF Sarko, 'The Sixth Annual American Red Cross-Washington College of Law Conference on International Humanitarian Law: A Workshop on Customary International Law and the 1977 Protocols Additional to the 1949 Geneva Conventions' (1987) 2(2) *American University Journal of International Law and Policy* 415, 469. See also Mark Osiel, *The End of Reciprocity: Terror, Torture, and the Law of War* (Cambridge University Press, 2009) 480 n 240, who notes that the US has 'persistently objected' to the development of a customary rule prohibiting 'reprisals' against civilians, and so America is not bound by such an emergent rule.

<sup>15</sup> Watts (n 10) 366.

<sup>16</sup> *Ibid* 376.

of war, the other side might act in reprisal against that violation with similar force, in an effort to deter further violation.<sup>17</sup>

### A *Belligerent Reprisal*

Geoffrey Best, in his classic work, defined reprisal as ‘an act, perhaps unlawful in itself, justifiably undertaken with the specific object of pain[ing] a law-neglecting enemy back into conformity with the law’.<sup>18</sup> Watts defines reprisals as ‘violations of international law undertaken in response to unauthorized violations by another subject of international law’.<sup>19</sup> Michael J Kelly asserts that ‘[r]eprisals are as old as international law, if not older’.<sup>20</sup> As Watts observes, reprisal used to be ‘a fundamental and nearly universally recognized aspect of international law’.<sup>21</sup> Reprisal, once considered an integral consequence of reciprocity, was permitted during World War II.<sup>22</sup> According to APV Rogers, ‘[a]t the beginning of the Second World War, both sides declared an intention to spare the civilian population, subject to reciprocity’.<sup>23</sup> Recall that in Gouldner’s influential formulation, the law of retaliation exemplified ‘the *negative* norms of reciprocity’.<sup>24</sup> Rogers posits that ‘[s]tate practice in the Second World War’<sup>25</sup> was characterised by, among other factors, the doctrine of belligerent reprisal.<sup>26</sup> Similarly, as George H Aldrich asserts, ‘reprisals were long permissible under customary international law’.<sup>27</sup> The doctrine of belligerent reprisal ‘allows a belligerent, after a warning has remained unheeded, to take proportionate measures that would ordinarily be unlawful, in order to redress violations of the law of war by the enemy’.<sup>28</sup> In this redress of violations, or what Gouldner referred to as ‘the return of injuries’, we see the norm of negative reciprocity expressed.<sup>29</sup>

Kelly provides an especially astute assessment of the long history of reprisal, noting that the doctrine emerged in ancient Greece and survived until the modern day, which is ‘a testament to its grounding in immutable notions of justice and equity’.<sup>30</sup> Indeed,

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<sup>17</sup> ‘[B]elligerent reprisal’ during armed conflict ‘has been restricted but not completely outlawed under international humanitarian law’: Shane Darcy, ‘Retaliation and Reprisal’ in Marc Weller (ed), *The Oxford Handbook of the Use of Force in International Law* (Oxford University Press, 2015) 879, 880.

<sup>18</sup> Geoffrey Best, *Humanity in Warfare: The Modern History of the International Law of Armed Conflicts* (Weidenfeld and Nicolson, 1980) 167.

<sup>19</sup> Watts (n 10) 382.

<sup>20</sup> Michael J Kelly, ‘Time Warp to 1945: Resurrection of the Reprisal and Anticipatory Self-Defense Doctrines in International Law’ (2003) 13(1) *Journal of Transnational Law and Policy* 1, 4.

<sup>21</sup> Watts (n 10) 382.

<sup>22</sup> ‘[R]eprisals were long permissible under customary international law’: George H Aldrich, ‘The Laws of War on Land’ (2000) 94(1) *American Journal of International Law* 42, 57.

<sup>23</sup> APV Rogers, *Law on the Battlefield* (Manchester University Press, 3<sup>rd</sup> ed, 2012) 131.

<sup>24</sup> Gouldner (n 7) 172 (emphasis in original).

<sup>25</sup> Rogers (n 23) 17.

<sup>26</sup> *Ibid* 17–18.

<sup>27</sup> Aldrich (n 22) 57.

<sup>28</sup> Rogers (n 23) 18.

<sup>29</sup> Gouldner (n 7) 172.

<sup>30</sup> Kelly (n 20) 6.

[t]he concept of reprisal was born in notions of equity — if one was wronged by another’s illegal action, then the wronged individual was vested with a right of redress (forcible if necessary) against the wrongdoer that would, itself, normally be considered illegal.<sup>31</sup>

In fact, Best wrote, ‘reprisals are the law of war’s only regular sanction’.<sup>32</sup>

Reprisal can be thought of within the broader notion of retaliation.<sup>33</sup> The Lieber Code,<sup>34</sup> one of the earliest and most influential codifications of the law of war, condones retaliation while also seeking to confine the scope of retaliation:

The law of war can no more wholly dispense with retaliation than can the law of nations, of which it is a branch. Yet civilized nations acknowledge retaliation as the sternest feature of war. A reckless enemy often leaves to his opponent no other means of securing himself against the repetition of barbarous outrage.<sup>35</sup>

The norm of reciprocity, and the related practice of reprisal, were the guarantors of some semblance of even-handedness on the battlefield for much of human history.

Prior to World War II, as Tami Davis Biddle notes, the US Air Corps Tactical School staff acknowledged that, in future wars, ‘political considerations will govern, and warfare of terrorization will probably be conducted only as a matter of reprisal’.<sup>36</sup> However, Michael Walzer warns in his classic work that ‘[n]o part of the war convention is so open to abuse, is so openly abused, as the doctrine of reprisals’.<sup>37</sup> During World War II, the belligerents engaged in a seemingly endless cycle of violence and reprisal, making it impossible to identify the precise sequence of reprisal underlying the Allies’ conduct. For instance, in response to British bombing, Germany fired rockets named *Vergeltungswaffen*, or ‘V weapons’, meaning retaliation weapon.<sup>38</sup> This led to further British bombing against Germany in retaliation. Then, Hitler ordered the execution of captured British airmen in response to the British bombing — bombing which was itself retaliation, from the British point of view.<sup>39</sup>

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<sup>31</sup> Ibid 4.

<sup>32</sup> Best (n 18) 168.

<sup>33</sup> Darcy, ‘Retaliation and Reprisal’ (n 17) 879.

<sup>34</sup> Francis Lieber, *Instructions for the Government of Armies of the United States, in the Field* (D Van Nostrand, 1863). These instructions were promulgated as General Orders No 100 by the US Adjutant-General’s Office on 24 April 1863 and became widely known as the ‘Lieber Code’.

<sup>35</sup> Ibid art 27.

<sup>36</sup> Tami Davis Biddle, *Rhetoric and Reality in Air Warfare: The Evolution of British and American Ideas about Strategic Bombing, 1914–1945* (Princeton University Press, 2002) 159 (‘*Rhetoric and Reality*’), quoting Air Corps Tactical School, *International Aerial Regulations* (Training Manual, 1933–4) (AFHRC, Decimal File No 248.101-16) 31. Here, the Air Corps Tactical School were commenting on the *Hague Rules of Air Warfare* (n 2).

<sup>37</sup> Michael Walzer, *Just and Unjust Wars: A Moral Argument with Historical Illustrations* (Basic Books, 5<sup>th</sup> ed, 2015) 207.

<sup>38</sup> AR Albrecht, ‘War Reprisals in the War Crimes Trials and in the Geneva Conventions of 1949’ (1953) 47(4) *American Journal of International Law* 590, 593 n 13; Robert G Moeller, ‘The Bombing War in Germany, 2005–1940: Back to the Future?’ in Yuki Tanaka and Marilyn B Young (eds), *Bombing Civilians: A Twentieth-Century History* (New Press, 2009) 46, 49.

<sup>39</sup> Albrecht (n 38) 593 n 13.

Charles S Maier goes so far as to assert that ‘[r]etribution fuelled the air war as much as did strategy’.<sup>40</sup> Negative reciprocity arguably played an attenuated role in the bombing of Dresden. In the official British history of the air war, Sir Charles Webster and Noble Frankland offer the compelling conclusion that Dresden was ‘the climax of the night area offensive’.<sup>41</sup> Webster and Frankland describe the bombing campaign as

the crowning achievement in the ... development of a principle of bombing which the Royal Air Force had initially adopted, as a retaliatory measure, in the attack on Mannheim of December 1940, and to which the greater part of the Bomber Command effort had subsequently always been devoted.<sup>42</sup>

Colonel (and later US Supreme Court Justice) Lewis Powell Jr would reflect that ‘after the Germans had blitzed English cities by indiscriminate fire bombing at night, the British felt free to retaliate in the same way’.<sup>43</sup> The British, due to German bombing of their homeland, would necessarily engage in a different calculus of reciprocity than the Americans. Peter W Gray notes ‘the British public (and its press) demanded retribution in kind’ for German attacks.<sup>44</sup> Indeed, as a British Home Intelligence report for 27 August 1940 mentions,

[t]here is a definite and noticeable increase in the demand for recriminatory measures and some anger at reports that our aircraft have returned with their bombs from Germany. ... There is quite a strong demand for retaliation on civilians. At the same time, in our judgment, there is yet no great anger against the Germans.<sup>45</sup>

The norm of reciprocity and beliefs in the legitimacy of reprisal profoundly shaped Allied attitudes towards the war. Ronald Schaffer provides a pithy summary of the opinions of key Allied leaders, which reveal the norm of reciprocity, or motive of reprisal, in some form: General Dwight Eisenhower ‘would do anything to bring a speedy end to the conflict’; Army Chief of Staff General George Marshall wanted to use bombing ‘to show the Germans fleeing to Munich that their situation was hopeless’; Assistant Secretary of War for Air Robert Lovett ‘felt the war should be painful and unforgettable to German civilians’; General Ira Eaker believed that ‘the entire German nation was the enemy’; and Franklin Roosevelt, ‘recalling what had happened after the First World War, believed the German people must be compelled this time to recognize their defeat and accept responsibility for the horrors their country had inflicted on the world’.<sup>46</sup> As Michael Sherry notes in his formidable critique of Allied

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<sup>40</sup> Charles S Maier, ‘Targeting the City: Debates and Silences about the Aerial Bombing of World War II’ (2005) 87(859) *International Review of the Red Cross* 429, 440.

<sup>41</sup> Sir Charles Webster and Noble Frankland, *The Strategic Air Offensive against Germany: 1939–1945* (Her Majesty’s Stationery Office, 1961) vol 3, 109.

<sup>42</sup> *Ibid.*

<sup>43</sup> Diane T Putney (ed), *ULTRA and the Army Air Forces in World War II: An Interview with Associate Justice of the US Supreme Court Lewis F Powell, Jr* (Office of Air Force History, 1987) 56.

<sup>44</sup> Gray, ‘The Gloves Will Have to Come Off’ (n 4) 32.

<sup>45</sup> Paul Addison and Jeremy A Crang (eds), *Listening to Britain: Home Intelligence Reports on Britain’s Finest Hour, May to September 1940* (Vintage Books, 2011) 368.

<sup>46</sup> Ronald Schaffer, *Wings of Judgment: American Bombing in World War II* (Oxford University Press, 1985) 106 (‘*Wings of Judgment*’).

bombing, ‘retribution was, to its proponents, a moral as well as political imperative’.<sup>47</sup>

### B *Limited Reprisal, Unlimited Escalation*

On the eve of World War II, there were restrictions in principle on the scope of reprisal: as understood then, reprisal was required to be proportional in response to the preceding violation.<sup>48</sup> The parameters of proportionality, however, could expand to the limits of reciprocity: ‘the doctrine of reprisals developed’, observes Andrew D Mitchell, ‘in a time when duties under international law were owed to another State and based almost exclusively on notions of reciprocity’.<sup>49</sup> ‘Modern treaties’, Theodor Meron points out, have ‘reduced legitimate reprisals to those against armed forces’.<sup>50</sup> Yet, prior to the 1949 *Geneva Conventions*, the law of reprisal was ill-defined and permissive.<sup>51</sup> ‘The excesses of the second World War’ demonstrated that ‘the whole body of the laws of war ... were seriously threatened by the new and wide use of reprisals or the pretext of reprisals’.<sup>52</sup> According to the *History of the United Nations War Crimes Commission and the Development of the Laws of War*, published in 1948, reprisals were one of the factors that limited ‘the effectiveness of the rules of war’ during World War II.<sup>53</sup> As Rogers observes, ‘[s]tate practice in the Second World War’ was characterised by, among other factors, the doctrine of belligerent reprisal.<sup>54</sup>

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<sup>47</sup> Michael S Sherry, *The Rise of American Air Power: The Creation of Armageddon* (Yale University Press, 1987) 141.

<sup>48</sup> See *La responsabilité de l’Allemagne à raison des dommages causés dans les colonies portugaises du Sud de l’Afrique* [Responsibility of Germany for Damage Caused in the Portuguese Colonies in the South of Africa] (*Portugal v Germany*) (*Sentence sur le principe de la responsabilité*) [Sentence on the Principle of Responsibility] (1928) 2 RIAA 1013, discussed in William W Bishop, *International Law: Cases and Materials* (Little Brown, 2<sup>nd</sup> ed, 1962) 747.

<sup>49</sup> Andrew D Mitchell, ‘Does One Illegality Merit Another? The Law of Belligerent Reprisals in International Law’ (2001) 170(1) *Military Law Review* 155, 175.

<sup>50</sup> Theodor Meron, ‘The Humanization of Humanitarian Law’ (2000) 94(2) *American Journal of International Law* 239, 249.

<sup>51</sup> See generally Albrecht (n 38). ‘[T]he [post-World War II] trials have transformed the previously sketchy rules on reprisals into a more comprehensive and elaborate system of control’: at 590.

<sup>52</sup> *Ibid* 591.

<sup>53</sup> United Nations War Crimes Commission, *History of the United Nations War Crimes Commission and the Development of the Laws of War* (His Majesty’s Stationery Office, 1948) 29.

<sup>54</sup> Rogers (n 23) 17–18.

Critical to understanding aerial bombing in World War II is the fact that reprisals against civilians were not prohibited;<sup>55</sup> in fact, reprisals against civilians were authorised by customary international law.<sup>56</sup> The widespread practice of states during World War II showed that reprisals against civilians were considered justified at the time.<sup>57</sup> According to Darcy, '[i]t is doubtful that a customary rule prohibiting belligerent reprisals against civilian populations in both international and internal armed conflicts existed' even as late as 1970.<sup>58</sup> Reprisal was curtailed and condemned after World War II,<sup>59</sup> but the law and norms *post bellum* were not the law of war during World War II. The specific principles embodied in today's civilian protections were not binding during World War II, nor were those principles put into practice by states during the crucible of world war, and for good reason: it would have been totally inconsistent with prevailing social norms and international law for the belligerents to refrain from reprisal during World War II.

Distinctions between reciprocity and reprisal illustrate the permissive laws of war in existence during World War II. Watts asserts that 'the reach of reciprocity is limited to the rule breached or repudiated'.<sup>60</sup> In other words, '[n]egative reciprocity does not authorize suspension or termination of unrelated or even collateral legal norms'.<sup>61</sup> Reprisal, on the other hand, 'may take the form of breach of an entirely separate or unrelated legal provision'.<sup>62</sup> Even if the Allied bombing is interpreted as indiscriminate, it finds legal justification within the parameters of

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<sup>55</sup> Before and throughout World War II, there was 'uncertainty, for instance, as to whether aerial bombardment of a civilian population could be justified as a reprisal': Frits Kalshoven and Liesbeth Zegveld, *Constraints on the Waging of War: An Introduction to International Humanitarian Law* (International Committee of the Red Cross, 4<sup>th</sup> ed, 2001) 76. Not even the 1949 *Geneva Conventions* prohibited reprisal against 'civilians and civilian objects in enemy, non-protected territory': Mitchell (n 49) 164. See generally *Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field*, opened for signature 12 August 1949, 75 UNTS 31 (entered into force 21 October 1950); *Geneva Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of the Armed Forces at Sea*, opened for signature 12 August 1949, 75 UNTS 85 (entered into force 21 October 1950); *Geneva Convention Relative to the Treatment of Prisoners of War*, opened for signature 12 August 1949, 75 UNTS 135 (entered into force 21 October 1950); *Geneva Convention Relative to the Protection of Civilian Persons in Time of War*, opened for signature 12 August 1949, 75 UNTS 135 (entered into force 21 October 1950).

<sup>56</sup> 'Under customary international law, members of the enemy civilian population are legitimate objects of reprisals': AR Thomas and James C Duncan (eds), *Annotated Supplement to the Commander's Handbook on the Law of Naval Operations* (Naval War College, 1999) 338 n 36.

<sup>57</sup> Rogers (n 23) 17–18.

<sup>58</sup> Shane Darcy, 'The Evolution of the Law of Belligerent Reprisals' (2003) 175 (March) *Military Law Review* 184, 229.

<sup>59</sup> See *Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I)*, opened for signature 8 June 1977, 1125 UNTS 3 (entered into force 7 December 1978) art 51(6) ('*Additional Protocol I*'). *Additional Protocol I* art 51(6) prohibited reprisals against civilians. The US has not ratified art 51(6). The US position is that, by limiting the right of reprisal, the US could not effectively respond to an enemy's intentional violation of the *Geneva Conventions*. Britain, France, Germany and Italy ratified *Additional Protocol I*, but 'reserved the right to retaliate against the civilian population of any nation egregiously violating noncombatant immunity': Michael L Gross, *Moral Dilemmas of Modern War: Torture, Assassination, and Blackmail in an Age of Asymmetric Conflict* (Cambridge University Press, 2010) 192.

<sup>60</sup> Watts (n 10) 385.

<sup>61</sup> *Ibid.*

<sup>62</sup> *Ibid.*

either reciprocity or reprisal. The Germans breached the rule prohibiting indiscriminate bombing of civilians, and the Allies suspended the identical rule. Watts further asserts that ‘negative reciprocity and reprisal differ most significantly in their respective effects on the underlying legal rule’.<sup>63</sup> Reprisal has a temporal limit: ‘international law authorizes reprisals only while the offending state persists in breach’.<sup>64</sup> If we view the Allied bombing as being justified by reprisal, then the Allied bombing would be justified during the period of time that Germany persisted in breaching the prohibition on indiscriminate bombing. If we view the Allied bombing as being justified by reciprocity, the effect on the rule is different. ‘Negative reciprocity’, unlike reprisal, ‘suspends or terminates the legal obligation altogether’.<sup>65</sup> Again, under either a reciprocity or reprisal rationale, the Allied bombing finds full justification.

The Allied military legal rules allowed reprisal: the official 1940 American *Rules of Land Warfare*, echoing the Lieber Code, stated that ‘commanding officers must assume responsibility for retaliative measures when an unscrupulous enemy leaves no other recourse against the repetition of barbarous outrages’.<sup>66</sup> The rules also required that reprisals be used ‘only as an unavoidable last resort to induce the enemy to desist from illegitimate practices’.<sup>67</sup> Likewise, in the British *Manual of Military Law*, reprisals were ‘by custom admissible as an indispensable means of securing legitimate warfare’.<sup>68</sup> During the wartime period, the Allies view of the law was that ‘[t]here is in fact no limit in international law on the choice of instruments of reprisals’, and ‘reprisals need not conform to the offenses complained of’ in terms of ‘the objects of reprisals as well as to the instruments used in carrying them out’.<sup>69</sup> The British and American rules required that reprisals not be excessive in relation to the enemy’s violations.<sup>70</sup> Proportionality, in principle, provided a limitation to the extent of reprisal. That limitation would be challenged many times over through the course of the war, as part of an iterative escalation of destructive force fuelled by reciprocity.

This escalation was itself driven by an array of wartime pressures. Prior to World War II, the haunting ghosts of Allied losses during World War I motivated

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<sup>63</sup> Ibid.

<sup>64</sup> Ibid.

<sup>65</sup> Ibid.

<sup>66</sup> War Department, *Rules of Land Warfare* (Field Manual 27-10, 1 October 1940) para 358(b) <[https://www.loc.gov/rr/frd/Military\\_Law/pdf/rules\\_warfare-1940.pdf](https://www.loc.gov/rr/frd/Military_Law/pdf/rules_warfare-1940.pdf)>, archived at <<https://perma.cc/DE4D-TQYZ>> (*Rules of Land Warfare*).

<sup>67</sup> Ibid. See also War Office (UK), *Manual of Military Law* (His Majesty’s Stationery Office, 6<sup>th</sup> ed, 1914) ch XIV para 454 (*British Military Manual*), quoted in United Nations War Crimes Commission (ed), *Law Reports of Trials of War Criminals* (His Majesty’s Stationery Office, 1947–49) vol 8, 83–4 (‘Reprisals are an extreme measure because in most cases they inflict suffering upon innocent individuals. In this, however, their coercive force exists, and they are indispensable as a last resource.’).

<sup>68</sup> *British Military Manual* (n 67) ch XIV para 452, quoted in *Law Reports of Trials of War Criminals* (n 67) vol 5, 38.

<sup>69</sup> Albrecht (n 38) 600.

<sup>70</sup> *Rules of Land Warfare* (n 66) para 358(e). ‘Acts done by way of reprisals must not, however, be excessive and must not exceed the degree of violation committed by the enemy’: *British Military Manual* (n 67) ch XIV para 459, quoted in *Law Reports of Trials of War Criminals* (n 67) vol 8, 5–6. Customary law requires that reprisals adhere ‘to the principle of proportionality’: Darcy, ‘The Evolution of the Law of Belligerent Reprisals’ (n 58) 194.

the development of air power doctrine.<sup>71</sup> During World War II, devastating losses among Allied airmen drove the bombers higher in altitude, decreasing the already limited precision of bombing.<sup>72</sup> As the conflict wore on, the mounting toll of Allied casualties on the ground and in the air,<sup>73</sup> the determination to undermine Nazi industrial strength,<sup>74</sup> the effort to assist the Russian advance<sup>75</sup> and the passionate desire to win the war,<sup>76</sup> all drove strategic decisions with corresponding tactical consequences. Aerial bombing took an awful toll on Germany's military capacities, as well as Germans who were not involved in the war effort.<sup>77</sup> Reciprocity, the norm that ideally creates a counterbalance to violations of law, ultimately prompted a perpetual cycle of reprisal.

As Darcy observes, 'one of the unfortunate traits of belligerent reprisals' is that 'they have the tendency to lead to further reprisals and an escalating level of violence and law-breaking'.<sup>78</sup> Without any codified or principled limit on the cycle of reprisals, the belligerents followed the logic of the conflict — each opposing side considered every air raid a moral affront, and each side responded accordingly. In the cultural milieu of World War II, reciprocity and the kindred mechanism of reprisal shaped the boundaries of statutory and customary law governing aerial bombing. Even if there had been some form of multilateral obligation concerning aerial bombing in existence at the beginning of World War II, there was a firm legal basis to conclude that German breaches of that obligation could be lawfully met by a similar Allied response, or reprisal.

As the following sections will show, many nations viewed the norm of reciprocity in light of the realities of early 20<sup>th</sup> century military conflict. There was tension between the norm of reciprocity and efforts to codify limitations on bombing. Limitations on bombing could undermine the fundamental ability of a nation to respond to what the 1940 American *Rules of Land Warfare* called 'the repetition of barbarous outrages'.<sup>79</sup> The result is that it would prove very difficult for nations to reach international agreement to restrict aerial bombing prior to World War II.

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<sup>71</sup> Sherry (n 47) 53.

<sup>72</sup> See W Hays Parks, "'Precision" and "Area" Bombing: Who Did Which, and When?' (1995) 18(1) *Journal of Strategic Studies* 145, 148.

<sup>73</sup> Daniel T Kuehl, 'Ethics and Air Power in World War II: The British Bombing of German Cities' (1999) 40(2) *Technology and Culture* 448, 449.

<sup>74</sup> See Frederick Taylor, *Dresden: Tuesday 13 February 1945* (Bloomsbury, 2004) 169–90; Sebastian Cox, 'The Dresden Raids: Why and How' in Paul Addison and Jeremy A Crang (eds), *Firestorm: The Bombing of Dresden 1945* (Pimlico, 2006) 18, 19 ('Dresden').

<sup>75</sup> Joint History Office (ed), *The Octagon Conference: September 1944* (United States Government Printing Office, 2017) 51 <<https://www.jcs.mil/Portals/36/Documents/History/WWII/Octagon3.pdf>>, archived at <<https://perma.cc/2G5T-LXX6>>; John E Fagg, 'The Climax of Strategic Operations' in Wesley Frank Craven and James Lea Cate (eds), *The Army Air Forces in World War II* (Office of Air Force History, 1983) vol 3, 715, 724–6.

<sup>76</sup> Schaffer, *Wings of Judgment* (n 46) 106.

<sup>77</sup> Overy, *Bombing War* (n 3) 477.

<sup>78</sup> Darcy, 'The Evolution of the Law of Belligerent Reprisals' (n 58) 190.

<sup>79</sup> *Rules of Land Warfare* (n 66) para 358(b).

### III THE LEGALITY OF AERIAL BOMBING PRIOR TO WORLD WAR II

At the dawn of World War I, scholars and humanitarians had promising ideas about how to further humanise warfare, building upon the significant developments in the law of war that began in the mid-19<sup>th</sup> century.<sup>80</sup> Novel and disturbing innovations in aerial bombardment during World War I spurred earnest attempts to codify restrictions on aerial bombing. In World War I, Germany's use of Zeppelins to attack 'factories, armories, and docks' stunned the British public, and rudimentary bomber raids 'shook Britain's civilian morale on several occasions, causing public panics'.<sup>81</sup> The British planned to retaliate with 'massive air attacks, some involving poison gas' aimed 'to destroy German morale' as Jeffrey Legro describes it,<sup>82</sup> but the German military defeat in 1918 overtook those plans. Aerial bombing in World War I was violent and devastating to civilians, but the new technology appealed to the interests of many major powers.<sup>83</sup>

In the years between World War I and World War II, according to Paul J Goda, the law of aerial bombing remained 'an indistinct body of international law'.<sup>84</sup> Prior to World War II, there were many entirely unsuccessful attempts to codify limitations on aerial bombing. These attempts were unsuccessful for two main reasons. First, when the major powers saw that the proposed limitations were not reciprocal, they refused to bind themselves to one-sided limitations. Secondly, where major powers sought to develop emerging aerial bombing technology, those powers had little interest in inhibiting promising new means of warfare, or national defence. The following section describes the fruitless efforts to codify restrictions on aerial bombardment prior to World War II.

#### A First Hague Peace Conference, 1899

The First Hague Peace Conference produced the *Declaration Prohibiting Launching of Projectiles and Explosives from Balloons* ('Declaration IV'),<sup>85</sup> whereby the parties agreed 'to prohibit, for a term of five years, the launching of projectiles and explosives from balloons, or by other new methods of similar nature'.<sup>86</sup> This prohibition applied to the contracting powers, but was limited to only five years. As Michael N Schmitt recently noted, 'the five-year timeframe indicated an unwillingness to shoulder permanent prohibitions, at least not until the states had a better sense of the opportunities aerial platforms might offer'.<sup>87</sup>

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<sup>80</sup> See, eg, Best (n 18) 217.

<sup>81</sup> Jeffrey W Legro, *Cooperation under Fire: Anglo-German Restraint during World War II* (Cornell University Press, 1995) 96–7.

<sup>82</sup> *Ibid* 97.

<sup>83</sup> See, eg, Sherry (n 47) 21, 53.

<sup>84</sup> Paul J Goda, 'The Protection of Civilians from Bombardment by Aircraft: The Ineffectiveness of the International Law of War' (1966) 33 *Military Law Review* 93, 94.

<sup>85</sup> *Declaration Prohibiting Launching of Projectiles and Explosives from Balloons*, signed 29 July 1899, 32 Stat 1839 (entered into force 4 September 1900) ('Declaration IV'). See also R Bierzanek, '1923 Hague Rules for Aerial Warfare' in N Ronzitti (ed), *The Law of Naval Warfare: A Collection of Agreements and Documents with Commentaries* (Martinus Nijhoff Publishers, 1988) 381, 396.

<sup>86</sup> *Ibid*.

<sup>87</sup> Michael N Schmitt, 'Air Warfare' in Andrew Clapman and Paola Gaeta (eds), *The Oxford Handbook of International Law in Armed Conflict* (Oxford University Press, 2014) 118, 120.

In addition to the short-lived declaration, the First Hague Peace Conference ultimately produced the 1899 *Hague Conventions*, including the *Convention with Respect to the Laws and Customs of War on Land* ('1899 Convention').<sup>88</sup> The annex to the 1899 Convention contained *Regulations respecting the Laws and Customs of War on Land*, art 25 of which read: 'The attack or bombardment of towns, villages, habitations or buildings which are not defended, is prohibited.'<sup>89</sup> The imprecision of this language would soon undermine the applicability of art 25.

#### B Second Hague Peace Conference, 1907

*Declaration IV*, which prohibited projectiles dropped from the air, expired five years later. However, its contents were replaced by the *Declaration Prohibiting the Discharge of Projectiles and Explosives from Balloons* ('*Declaration XIV*'), which was adopted in 1907 at the Second Hague Peace Conference.<sup>90</sup> *Declaration XIV* was 'to be binding till the end of the (projected) Third Conference'.<sup>91</sup> 'Ten nations signed this declaration, but the United States and Great Britain alone of the Great Powers have ratified it', wrote Paul Williams in 1929.<sup>92</sup> Furthermore, a third peace conference never occurred.<sup>93</sup> The final proof of *Declaration XIV*'s irrelevance is that it 'contained an "all participation" clause by which the instrument only applied during conflicts in which all the belligerents were party to it'.<sup>94</sup> This clause was one of many expressions, in law and practice, of the norm of reciprocity. 'Austria-Hungary, France, Germany, Italy, Japan, and Russia never became parties, and the United States announced in 1942 that it would no longer abide by its terms.'<sup>95</sup> According to Congressional research on the eve of World War II, '[i]t was impossible to obtain agreement to reaffirmation of the prohibition [in *Declaration IV* and *Declaration XIV*] against aerial bombardment'.<sup>96</sup> In 1942, the United States War Department (predecessor of the Department of Defense) stated unequivocally that *Declaration XIV* 'is not binding and will not be observed'.<sup>97</sup> This remained the understanding throughout the war. In 1945, US Army Judge Advocate General's Corps ('JAG Corps') officer Lester Nurick wrote that *Declaration XIV* 'has been declared by the United States not to be binding in this war'.<sup>98</sup>

<sup>88</sup> *Convention with Respect to the Laws and Customs of War on Land*, signed 29 July 1899, 32 Stat 1803 (entered into force 4 September 1900) ('1899 Convention').

<sup>89</sup> *Ibid* annex ('*Regulations respecting the Laws and Customs of War on Land*') art 25.

<sup>90</sup> *Declaration Prohibiting the Discharge of Projectiles and Explosives from Balloons*, signed 18 October 1907, 36 Stat 2439 (entered into force 27 November 1909) ('*Declaration XIV*').

<sup>91</sup> Bierzanek (n 85) 396; *ibid*.

<sup>92</sup> Paul Whitcomb Williams, 'Legitimate Targets in Aërial Bombardment' (1929) 23(3) *American Journal of International Law* 570, 572, discussing *Declaration XIV* (n 90).

<sup>93</sup> Schmitt (n 87) 120.

<sup>94</sup> *Ibid* 121.

<sup>95</sup> *Ibid* 120–1, discussing *Declaration XIV* (n 90).

<sup>96</sup> CE Noyes, 'Aerial Bombardment of Civilian Populations' (1938) 2 *Editorial Research Reports* <<http://library.cqpress.com/cqresearcher/cqresrre1938081100>>, archived at <<https://perma.cc/9PF4-S9MR>>. See also Schmitt (n 87) 120.

<sup>97</sup> *National Defence*, 32 CFR § 211.2 (Supp 1943).

<sup>98</sup> Lester Nurick, 'The Distinction between Combatant and Noncombatant in the Law of War' (1945) 39(4) *American Journal of International Law* 680, 690.

Scholars concur that *Declaration XIV* was not binding during World War II.<sup>99</sup> Heinz Marcus Hanke concludes that *Declaration XIV* ‘could not be effectively renewed’.<sup>100</sup> Bierzanek suggests that, ‘[f]rom the strictly legal point of view it can be argued that [*Declaration XIV*] is still binding today, there having been no *terminus ad quem* in so far as the Third Conference was never convened’.<sup>101</sup> However, as Bierzanek notes, this interpretation would lead to an absurdity, in that,

[h]ad the provisions of the Declaration continued to be binding, the conclusion would be that all use of aircraft to bombard either military or civilian objects during [the 20<sup>th</sup>] century has to be considered a violation of the international law of warfare.<sup>102</sup>

Bierzanek ultimately concludes that ‘[m]ost international lawyers agree that prohibition of bombardment as formulated in the Declarations of 1899 and 1907 is not a binding norm of international law’.<sup>103</sup>

The Second Hague Peace Conference produced the 1907 *Hague Conventions*, which included the *Convention respecting the Laws and Customs of War on Land* (‘1907 Convention’),<sup>104</sup> an almost exact reproduction of the *1899 Convention*.<sup>105</sup> The annex to the *1907 Convention* also contained the *Regulations respecting the Laws and Customs of War on Land* (‘1907 Regulations’).<sup>106</sup> ‘With an eye to what might soon become possible in the air’,<sup>107</sup> art 25 of the *1907 Regulations* added key language to the *1899 Convention* prohibition on bombardment of undefended places by including the phrase ‘by whatever means’: ‘The attack or bombardment, *by whatever means*, of towns, villages, dwellings, or buildings which are undefended is prohibited.’<sup>108</sup> According to Schmitt, the addition of the words ‘by whatever means’ signified that aerial bombardment was to be prohibited.<sup>109</sup> According to Bierzanek, some international lawyers believe that ‘[a]rticle 25 of the *Regulations respecting the laws and customs of war on land* adopted in 1907 are applicable to aerial bombardment’, while another interpretation is that art 25 ‘is not applicable to bombing behind the fighting lines’.<sup>110</sup> On its face, art 25 only covers ‘undefended’ places. As Nurick pointed out in 1945, even assuming that art 25 was binding, ‘there was no rule to determine what constituted a “defended” place within its meaning’.<sup>111</sup> Hanke concludes that,

<sup>99</sup> See, eg, Heinz Marcus Hanke, ‘The 1923 Hague Rules of Air Warfare: A Contribution to the Development of International Law Protecting Civilians from Air Attack’ (1993) 33(292) *International Review of the Red Cross* 12; Bierzanek (n 85) 396–7.

<sup>100</sup> Hanke (n 99) 13.

<sup>101</sup> Bierzanek (n 85) 396.

<sup>102</sup> *Ibid.*

<sup>103</sup> *Ibid.* 397.

<sup>104</sup> *Convention respecting the Laws and Customs of War on Land*, signed 18 October 1907, 36 Stat 2277 (entered into force 26 January 1910) (‘1907 Convention’). See Schmitt (n 87) 121.

<sup>105</sup> See *1899 Convention* (n 88).

<sup>106</sup> *1907 Convention* (n 104) annex (‘*Regulations respecting the Laws and Customs of War on Land*’) (‘1907 Regulations’).

<sup>107</sup> Best (n 18) 205. In quoting the *1907 Regulations* (n 106), Best used the phrase ‘by whatsoever means’ (emphasis omitted).

<sup>108</sup> *1907 Regulations* (n 106) art 25 (emphasis added).

<sup>109</sup> Schmitt (n 87) 121.

<sup>110</sup> Bierzanek (n 85) 397.

<sup>111</sup> Nurick (n 98) 690.

[b]y the time the First World War ended, ... the law of air warfare had virtually lost its sole codified basis: the prohibition on dropping explosives from aircraft had become invalid and Article 25's field of application had turned out to be extremely narrow.<sup>112</sup>

More importantly, the principle of reciprocity fatally limited art 25. As was recognised by a Congressional report in 1938, the 'Hague agreements were inoperative during the [First] World War because they do not apply unless they have been ratified by all parties to any armed conflict'.<sup>113</sup>

During World War I, then-innovative German bombers raided London, causing frightening amounts of death and damage.<sup>114</sup> As Biddle observes, '[t]he public outrage that resulted prompted the creation of an independent Royal Air Force (RAF) designed to defend the British homeland, and to launch reprisal raids against the Germans'.<sup>115</sup> The British and Americans were busy planning aerial bombing against Germany when World War I came to an end.<sup>116</sup> The nascent potential of air power would not develop simultaneously with restrictions on the use of air power.

### C *Hague Rules of Air Warfare, 1923*

After World War I, the major powers each attempted to balance two conflicting goals: the desire to limit civilian suffering caused by aerial bombardment and the desire to maximise the military advantages of air power. As Bierzanek points out, 'the awareness of the importance of these new weapons was in fact one of the most serious barriers to agreement on the regulation of aerial warfare'.<sup>117</sup> With the best of intentions, the 1921–22 Washington Conference on the Limitation of Armament<sup>118</sup> ended with France, Italy, Japan, the UK and the US unanimously approving a resolution that a commission of jurists should gather at The Hague to explore the issue further.<sup>119</sup> The 1921–22 Washington Conference could not reach an agreement on limiting aircraft, 'but did appoint a Commission of Jurists to examine legal issues associated with air operations'.<sup>120</sup> That Commission issued what became known as the *Hague Rules of Air Warfare* ('HRAW').<sup>121</sup>

Experts from the Commission of Jurists, representing an erudite cross section of the major powers, met from late 1922 through early 1923 and proposed elaborate rules for aerial bombardment. Prior to World War II, these HRAW were

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<sup>112</sup> Hanke (n 99) 14.

<sup>113</sup> Noyes (n 96). Only after the war would this stark example of reciprocity come into general disfavour. The Nuremberg International Military Tribunal 'rejected the [*si omnes* or all participation] clause as a defense to crimes based on violations of the [*Hague Regulations*]: Watts (n 10) 402.

<sup>114</sup> See, eg, Mark Clapson, *The Blitz Companion: Aerial Warfare, Civilians and the City since 1911* (University of Westminster Press, 2019) 17–19.

<sup>115</sup> Biddle, 'Air Power' (n 2) 145.

<sup>116</sup> *Ibid* 146.

<sup>117</sup> Bierzanek (n 85) 398.

<sup>118</sup> Schmitt (n 87) 121.

<sup>119</sup> Hamilton DeSaussure, 'The Laws of Air Warfare: Are There Any?' (1971) 5(3) *International Lawyer* 527, 531.

<sup>120</sup> Schmitt (n 87) 121.

<sup>121</sup> *Ibid* 121–2. See *Hague Rules of Air Warfare* (n 2).

‘the only authoritative attempt to set down concisely the rules for air combat’.<sup>122</sup> The *HRAW* were proposed but never ratified, ‘even by the parties to the Conference’.<sup>123</sup> At the cusp of World War II, it was acknowledged that ‘these rules for the conduct of aerial warfare, drafted at The Hague in 1923 and signed by all the delegates present, have not been ratified by a single country’.<sup>124</sup> Schmitt notes that, over the subsequent decades, much of the *HRAW* became customary international law.<sup>125</sup> However, the *HRAW* were not considered reflective of customary law during World War II.<sup>126</sup> The Hague Commission of Jurists did not produce agreements concerning aerial warfare that were binding during World War II. ‘Not one State, not even those represented on the Commission itself, signed any such agreement; not even a conference to discuss the *Hague Rules of Air Warfare* was arranged.’<sup>127</sup>

This is not to say that the *HRAW*, and similar earlier efforts, had no effect on the development of today’s enhanced legal standards for aerial bombardment. The *HRAW* influenced the thinking behind the creation of the important 1977 *Additional Protocols* to the 1949 *Geneva Conventions*.<sup>128</sup> For example, art 22 of the *HRAW* was ‘an early version of the principle of distinction’.<sup>129</sup> Article 22 read: ‘air bombardment for the purpose of terrorizing the civil population or destroying or damaging private property without military character or injuring non-combatants, is forbidden’.<sup>130</sup>

Additionally, *HRAW* art 24(1) provided ‘humanitarian law’s first definition of “military objectives”’.<sup>131</sup> The *HRAW* defined military objectives as ‘an objective whereof the total or partial destruction would constitute an obvious military

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<sup>122</sup> DeSaussure (n 119) 531.

<sup>123</sup> Ibid.

<sup>124</sup> Noyes (n 96).

<sup>125</sup> Schmitt (n 87) 122, citing *Hague Rules of Air Warfare* (n 2).

<sup>126</sup> The following excerpt of a letter from J Fred Buzhardt, General Counsel of the Department of Defense, is illustrative of this point:

In the application of the laws of war, it is important that there be a general understanding in the world community as to what shall be legitimate military objectives which may be attacked by air bombardment under the limitations imposed by treaty or by customary international law. Attempts to limit the effects of attacks in an unrealistic manner, by definition or otherwise, solely to the essential war making potential of enemy States have not been successful. For example, such attempts as the 1923 *Hague Rules of Air Warfare*, proposed by an International Commission of Jurists, ... [was] not accepted by States and therefore do not reflect the laws of war either as customary international law or as adopted by treaty.

Letter from J Fred Buzhardt, General Counsel of the Department of Defense to Senator Edward Kennedy, 22 September 1972, reproduced in Arthur W Rovine, ‘Contemporary Practice of the United States Relating to International Law’ (1973) 67(1) *American Journal of International Law* 118, 123.

<sup>127</sup> Hanke (n 99) 19.

<sup>128</sup> Ibid 24; Bierzanek (n 85) 403.

<sup>129</sup> Schmitt (n 87) 122.

<sup>130</sup> *Hague Rules of Air Warfare* (n 2) art 22. This principle emerged in *Additional Protocol I* (n 59) art 48, which states that ‘the Parties to the conflict shall at all times distinguish between the civilian population and combatants and between civilian objects and military objectives’. ‘The civilian population as such, as well as individual civilians, shall not be the object of attack’: at art 51(2).

<sup>131</sup> Schmitt (n 87) 122.

advantage for the belligerent'.<sup>132</sup> The *HRAW* also provided a list of military objectives, which included 'manufacturing plants constituting important and well-known centres for the production of arms, ammunition or characterized military supplies, lines of communication or of transport which are used for military purposes'.<sup>133</sup> However, '[t]he large majority' of contemporary commentators 'considered the list to be unusable' given that 'the list did not include many objects that had certainly been considered legitimate objectives during the First World War'.<sup>134</sup> Nonetheless, the *HRAW* displayed a humanising tendency. Addressing terror bombing, *HRAW* art 22 prohibited aerial 'bombardment for the purpose of terrorizing the civil population'.<sup>135</sup>

On the other hand, certain aspects of the *HRAW* reflected the broad latitude that was assumed to be appropriate for aerial bombing, especially with regard to proportionality. Article 24(4) gave belligerents immense discretion to bomb 'cities' containing sufficiently important military targets;<sup>136</sup> a criterion easily met within the calculations of Allied war planners:

In the immediate vicinity of the operations of the land forces, the bombardment of cities, towns, villages, habitations and buildings is legitimate, provided there is a reasonable presumption that the military concentration is important enough to justify the bombardment, taking into account the danger to which the civil population will thus be exposed ...<sup>137</sup>

The contrast between pre-war law and the post-war *Geneva Conventions* forms a vivid point of comparison between two vastly different legal regimes concerning aerial bombing.<sup>138</sup>

The *HRAW* arts 22 and 24(1), on distinction and military objectives, respectively, are now 'codified in Articles 51 and 52 of the 1977 *Additional Protocol I* to the 1949 *Geneva Conventions*'.<sup>139</sup> But these articles were not the law

<sup>132</sup> *Hague Rules of Air Warfare* (n 2) art 24(1). '[M]ilitary 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, in the circumstances ruling at the time, offers a definite military advantage': *Additional Protocol I* (n 59) art 52(2).

<sup>133</sup> *Hague Rules of Air Warfare* (n 2) art 24(2).

<sup>134</sup> Hanke (n 99) 29–30.

<sup>135</sup> *Hague Rules of Air Warfare* (n 2) art 22. Similarly, *Additional Protocol I* (n 59) art 51(2) prohibits '[a]cts or threats of violence the primary purpose of which is to spread terror among the civilian population'.

<sup>136</sup> *Hague Rules of Air Warfare* (n 2) art 24(4).

<sup>137</sup> *Ibid.* *Additional Protocol I* (n 59) arts 51(4), (5), bearing the mark of World War II, shifted the presumption against the bombing of cities or localities containing 'separated and distinct military objectives' in a way that treats them as a 'single military objective', thus prohibiting indiscriminate attacks and formulating the rule of proportionality.

<sup>138</sup> The International Committee of the Red Cross' Commentary on *Additional Protocol I* explains the connection between the practices of World War II and the strictures of the *Additional Protocols*. Indiscriminate bombing

includes area bombardment, sometimes known as carpet bombing or saturation bombing. ... There were many examples of such bombing during the Second World War, and also during some more recent conflicts. Such types of attack have given rise to strong public criticism in many countries ...

Yves Sandoz, Christophe Swinarski and Bruno Zimmermann (eds), *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (International Committee of the Red Cross, 1987) 624 [1968].

<sup>139</sup> Schmitt (n 87) 122.

during World War II. The *HRAW* ‘were generally recognized as an authoritative soft law pronouncement, much of which undoubtedly became customary law over the ensuing decades’, according to Schmitt.<sup>140</sup> Soft law, however, did not constitute binding obligations during World War II.<sup>141</sup> The view from 1945 was that the detailed and prescient *HRAW* ‘was never converted into an international convention’.<sup>142</sup> It is, Goda asserts, a historical fact that the ‘*Rules of Warfare for Aircraft at the Hague* ... were never ratified’.<sup>143</sup> Bierzanek wrote: ‘The Hague Rules were not ratified, and are not binding rules of international law.’<sup>144</sup> One reason the rules were not ratified was that ‘governments were reluctant to assume legal obligations’ concerning aerial warfare given the emerging potential power of those methods.<sup>145</sup> Hanke notes that, after the unsuccessful outcome of the Commission, ‘[i]t was claimed that their adoption would have restricted the use of aircraft far too much for the governments’ liking and the Allies had come to see aircraft as a very promising weapon’.<sup>146</sup> According to JM Spaight, a former Principal Assistant Secretary of the British Air Ministry, as far as pre-World War II development of restrictions on aerial bombing went, ‘[n]othing was done, and the omission was, in part at least, the result of a determination that nothing should be done’.<sup>147</sup>

Legro notes that the Hague ‘rules were never ratified because of disagreements over the definitions of important terms, such as “military target”’.<sup>148</sup> Disagreement over definitions reflected a dispute over the criteria for military objectives:

Was a factory with civilians producing parts for airplanes a legitimate target? Was it acceptable to bomb troop barracks surrounded by hospitals and schools? Each state seemed to have a different way of differentiating civilian from combatant, safe zone from battle area, legitimate from illegitimate.<sup>149</sup>

This state of disagreement prevented any fixed consensus on the law of aerial bombardment from emerging. Legal scholars regularly commented on the void that existed in the law of aerial bombardment. MW Royse wrote in 1928:

With the preparations going on almost universally in aerial warfare, it is hard to believe that an international social sanction exists as yet against aerial bombardment. It cannot reasonably be affirmed to-day that it is wrongful or illegal to bombard a military objective, fairly regarded as such, by all available means of attack; nor does a military objective lose that character merely because it is situated in the midst of a crowded city remote from the immediate zone of land operations.<sup>150</sup>

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<sup>140</sup> Ibid.

<sup>141</sup> Watts states that soft law ‘falls short of international law in the formal sense’: Watts (n 10) 375.

<sup>142</sup> Nurick (n 98) 691.

<sup>143</sup> Goda (n 84) 96.

<sup>144</sup> Bierzanek (n 85) 402.

<sup>145</sup> Ibid.

<sup>146</sup> Hanke (n 99) 19.

<sup>147</sup> JM Spaight, *Bombing Vindicated* (Geoffrey Bles, 1944) 19.

<sup>148</sup> Legro (n 81) 98.

<sup>149</sup> Ibid 100.

<sup>150</sup> MW Royse, *Aerial Bombardment and the International Regulation of Warfare* (Harold Vinal, 1928) 241.

Congressional research in 1938 pointed out that, '[e]ven if the rules drawn up by the [HRAW] Commission of Jurists in 1923 were universally accepted, they would allow enough latitude in the definition of military objectives to render questionable their deterrent effect'.<sup>151</sup>

The definition of 'indiscriminate' attack posed similar problems for the development of aerial bombing restrictions.<sup>152</sup> 'Though this word soon found its way into the vocabulary of the law of war, it was formally defined only later in the 1977 *Protocol I* additional to the *Geneva Conventions*'.<sup>153</sup> Protections for civilians were particularly weak during the period of the world wars, as Best describes. During the world wars,

the number of sentences in the Conventions [concerning safeguards] devoted to civilians was small and relatively negligible compared with the number concerning soldiers, ... which partly explains why civilians emerged from these thirty bad years as the category of human beings most in need of protection in war.<sup>154</sup>

'How far customary law on air and artillery bombardment protected civilians up through the Second World War is revealing and regrettable', as Jordan L Paust laments.<sup>155</sup> Biddle's conclusion about the HRAW is equally bleak: 'as no state was yet fully prepared to commit itself to such general constraints on a largely untested weapons system, the air rules were never adopted by any nation and thus must be viewed as a legal and political failure'.<sup>156</sup> If the HRAW established clear legal standards, it would not have been necessary to continue attempting to promulgate legal standards for aerial bombardment, yet such attempts continued.<sup>157</sup> Legro writes, '[s]tatesmen made considerable efforts in the interwar years both to reduce air armaments and to regulate conflict by agreeing on rules and restrictions'.<sup>158</sup> Yet, '[n]o agreement on aerial bombing had been accepted between World War I and World War II'.<sup>159</sup> Best describes pre-World War II proposals for the regulation of aerial bombing.<sup>160</sup> 'But', he notes, 'none of these and other such expected advances were quickly to be achieved'.<sup>161</sup> Legro pointed out that efforts to restrict aerial warfare did not overcome the various states' strategic interests in cultivating aerial weapons.<sup>162</sup> Rather than reaching international agreement to limit the impact of aerial bombing, prior to World War II, many states instead strove to preserve their power to employ massive force via aerial bombing.

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<sup>151</sup> Noyes (n 96).

<sup>152</sup> 'Prior to the war, attempts to provide for discrimination through legal codification were not successful': Biddle, 'Air Power' (n 2) 140.

<sup>153</sup> Hanke (n 99) 24, citing *Additional Protocol I* (n 59) arts 51(4)–(5).

<sup>154</sup> Best (n 18) 220–1.

<sup>155</sup> Jordan J Paust, 'My Lai and Vietnam: Norms, Myths and Leader Responsibility' (1972) 57 *Military Law Review* 99, 148.

<sup>156</sup> Biddle, 'Air Power' (n 2) 148.

<sup>157</sup> Bierzanek (n 85) 403.

<sup>158</sup> Legro (n 81) 94.

<sup>159</sup> *Ibid* 99.

<sup>160</sup> Best (n 18) 217.

<sup>161</sup> *Ibid*.

<sup>162</sup> Legro (n 81) 100.

#### IV THE EVOLUTION OF RESTRICTIONS ON AERIAL BOMBARDMENT DURING WORLD WAR II

Participants in and planners of the World War II Allied bombing campaign were fully aware of the ill-formed law of war, as it related to aerial bombing. One particularly revealing source on the law of aerial bombardment during World War II was Captain Lester Nurick, an American JAG Corps officer who had served in the Tanks Corps.<sup>163</sup> Nurick wrote:

Efforts have been made by convention to restrict aerial bombardment, but without success; there are no conventional rules in effect with respect thereto and there are few established customary rules which can be said to be obligatory upon belligerents in the conduct of air warfare.<sup>164</sup>

The 1944 British *Manual of Air Force Law* merely mentioned air warfare in a footnote, pointing out that there was no agreement on air warfare rules.<sup>165</sup> Air Chief Marshal Sir Arthur Harris, who led British Bomber Command in the later years of the war, also pointed out this absence: ‘in this matter of the use of aircraft in war there is, it so happens, no international law at all’.<sup>166</sup>

Harris was the personification of certain prevalent British character traits that were shared with the Allied nations; Harris ‘provided the sharp end of the country’s resolve to see the war through’.<sup>167</sup> Referring to the *HRAW*, Harris, with his usual flourish, claimed, ‘[t]he so-called Hague rules are not internationally binding in so far as they were never internationally accepted, they were in fact violently opposed’.<sup>168</sup>

British Secretary of State for Foreign Affairs Anthony Eden, speaking before the House of Commons in February 1938, took up ‘the question as to whether there is any definite rule of international law regarding the bombing of civilians from the air’.<sup>169</sup> ‘At present there is one only, and that is that direct, deliberate and intentional bombing of non-combatants, as such, is illegal. ... Beyond that no definite rules have ever been evolved.’<sup>170</sup> Eden added, ‘[i]n the last war, when the air weapon came first into general use, there was no convention, nor has one been entered into at any time since’.<sup>171</sup> The German air force seemed to share this understanding. According to Legro, ‘[t]he Luftwaffe’s doctrinal regulations issued in 1935 and 1940 maintained that attacks intended to terrorize the civilian population were to be avoided except in retaliation’.<sup>172</sup>

In June 1938, Prime Minister Neville Chamberlain acknowledged in the House of Commons that there was ‘no international code of law with respect to aerial

<sup>163</sup> Peter D Trooboff, ‘In Memoriam: Lester Nurick’ (2015) 109 *American Society of International Law Proceedings* 401, 401.

<sup>164</sup> Nurick (n 98) 690.

<sup>165</sup> DeSaussure (n 119) 531, citing Air Ministry, *Manual of Air Force Law* (Her Majesty’s Stationery Office, 1939–44) vol 2.

<sup>166</sup> Sir Arthur Harris, *Bomber Offensive* (Pen & Sword Military Classics, 2005) 177.

<sup>167</sup> Christopher H Sterling, ‘Marriage of Convenience: Churchill and “Bomber” Harris’ (2013) 157 (Winter) *Finest Hour: The Journal of Winston Churchill* 38, 38.

<sup>168</sup> Hanke (n 99) 33 n 37, quoting Sir Arthur Harris.

<sup>169</sup> United Kingdom, *Parliamentary Debates*, House of Commons, 2 February 1938, vol 331, col 339 (Anthony Eden, Secretary of State for Foreign Affairs).

<sup>170</sup> *Ibid.*

<sup>171</sup> *Ibid.*

<sup>172</sup> Legro (n 81) 104.

warfare which is the subject of general agreement'.<sup>173</sup> Chamberlain nevertheless provided the following assessment of the state of the law: 'I think we may say that there are, at any rate, three rules of international law or three principles of international law which are as applicable to warfare from the air as they are to war at sea or on land.'<sup>174</sup> The Prime Minister stated in the House of Commons:

In the first place, it is against international law to bomb civilians as such and to make deliberate attacks upon civilian populations. ... In the second place, targets which are aimed at from the air must be legitimate military objectives and must be capable of identification. In the third place, reasonable care must be taken in attacking those military objectives so that by carelessness a civilian population in the neighbourhood is not bombed.<sup>175</sup>

'State practice in the Second World War', Rogers notes, 'seemed to undermine this clear view of customary law'.<sup>176</sup> Importantly, as Rogers suggests, '[w]hether there existed a customary rule prohibiting indiscriminate attacks is a debatable question. Probably only blind attacks were prohibited under customary law since they would have violated the principle of distinction.'<sup>177</sup> The Prime Minister's guidance, which Gray described as 'unequivocal', was delivered before Britain witnessed the German bombing of Warsaw and Rotterdam, or suffered the bombings of Coventry and London.<sup>178</sup> The crucial point in understanding the state of the law during World War II is that, from the beginning, Allied policy was conditioned upon German reciprocity. Germany would soon undermine this condition with zeal, with ultimately devastating consequences for the German people.

An American Congressional research report in August of 1938 lamented: '[d]iplomats of the world have failed almost completely to write any international convention or agreement which might call a halt to the menace of bombs dropped on civilians from airplanes' while 'efforts directed toward the limitation of air armaments have met with no success'.<sup>179</sup> Any effort to retroactively superimpose modern standards onto the pre-war legal landscape must be tempered by the general and consistent practice of states, which was to build their aerial arsenals, reject restrictions on aerial bombardment, and adhere to the norm of reciprocity. In 1938, Congressional research posited that '[a]ll of the major powers are actively engaged in building up their air forces, with special emphasis on bombers, and the technical performance of bombing planes is still being rapidly improved'.<sup>180</sup> Still, in February 1939, the British Chiefs of Staff stated that initiating air attacks against Germany was not part of British policy.<sup>181</sup>

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<sup>173</sup> United Kingdom, *Parliamentary Debates*, House of Commons, 21 June 1938, vol 337, col 936 (Neville Chamberlain, Prime Minister).

<sup>174</sup> *Ibid* col 937.

<sup>175</sup> *Ibid* col 937–8.

<sup>176</sup> Rogers (n 23) 17.

<sup>177</sup> *Ibid* 27.

<sup>178</sup> Peter W Gray, 'Dresden 1945: Just Another Raid?' (2001) 4(1) *Air Power Review* 1, 10 ('*Dresden 1945*').

<sup>179</sup> Noyes (n 96).

<sup>180</sup> *Ibid*.

<sup>181</sup> Donald Cameron Watt, 'Restraints on War in the Air before 1945' in Michael Howard (ed), *Restraints on War: Studies in the Limitation of Armed Conflict* (Oxford University Press, 1979) 57, 74.

A *President Roosevelt's Plea for Reciprocal Restraint — 1 September 1939*

Immediately before the outbreak of World War II, US President Franklin D Roosevelt addressed the belligerent nations in an

urgent appeal to every government which may be engaged in hostilities publicly to affirm its determination that its armed forces shall in no event, and under no circumstances, undertake the bombardment from the air of civilian populations or of unfortified cities, upon the understanding that these same rules of warfare will be scrupulously observed by all of their opponents.<sup>182</sup>

The prohibition on intentionally bombing non-combatants was a rule conditioned upon reciprocity.<sup>183</sup> All parties to the conflict during World War II understood this well.<sup>184</sup> Reprisal could lawfully follow any belligerent's bombardment of civilians, which was the legal ramification of the norm of reciprocity — negative reciprocity specifically.<sup>185</sup> As noted above,<sup>186</sup> reprisal was coextensive with reciprocity; reciprocity provided an extremely broad scope to reprisal, and that was the prevailing view of the law of war.

Directly from President Roosevelt, in his message dated 1 September 1939, we see the crucial condition to the prohibition on civilian bombardment: reciprocity.<sup>187</sup> The rule against bombing civilians was purely conditional, and as soon as one belligerent targeted civilians, the rule was understood to be suspended with no further elaboration. This is not to say that Allied policy was to target civilians; it was not. Rather, the condition of reciprocity is absolutely critical to understanding the legal and ethical dimensions of aerial bombing. Roosevelt's appeal was expressly conditioned on reciprocity. As detailed above, this condition was universally understood by all belligerents during that time to be a natural corollary of any agreed-upon obligation respecting the law of war. Violation of conditions of this sort justified reprisal under the norm of reciprocity.

Much commentary on World War II aerial bombing omits the condition of reciprocity so essential to Roosevelt's appeal. For instance, the Public Broadcasting Service ('PBS') *American Experience* documentary, 'The Bombing of Germany', begins by selectively quoting Roosevelt's appeal, with narration and captions that read *verbatim*: 'under no circumstances undertake the bombardment from the air of civilian populations'.<sup>188</sup> The PBS documentary selectively omitted the explicit condition of reciprocity, which fundamentally alters the meaning of

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<sup>182</sup> Telegram from Cordell Hull, United States Secretary of State, to Joseph P Kennedy Sr, United States Ambassador to the United Kingdom, 1 September 1939 ('Telegram from US Secretary of State to the Ambassador in the UK on 1 September 1939'), reproduced in United States Department of State, *Foreign Relations of the United States: Diplomatic Papers 1939* (United States Government Printing Office, 1939) vol 1, 542 ('*Diplomatic Papers 1939*').

<sup>183</sup> See, eg, Rogers (n 23) 131.

<sup>184</sup> See above n 182 and accompanying text; below nn 189–194 and accompanying text.

<sup>185</sup> Robbie Sabel, 'The Legality of Reciprocity in the War against Terrorism' (2010) 43(1–2) *Case Western Reserve Journal of International Law* 473, 477.

<sup>186</sup> See above nn 49–52 and accompanying text.

<sup>187</sup> See Telegram from US Secretary of State to the Ambassador in the UK on 1 September 1939 (n 182), reproduced in *Diplomatic Papers 1939* (n 182) 542.

<sup>188</sup> 'The Bombing of Germany' (n 11). The gross manipulation of punctuation in PBS's captioning here is noteworthy. In the documentary film and transcript of the documentary, PBS includes a full stop just before the closing quotation mark, thus wrongly implying that Roosevelt's full sentence ended at the word 'populations'.

Roosevelt's appeal. By omitting the crucial condition of reciprocity, which was vital to the law of war at that time, such accounts are misleading. We cannot appreciate the way just war was conceived of in the past without taking the norm of reciprocity into account.

On 1 September 1939, Roosevelt addressed the belligerent nations and the governments of Germany, Poland, France and Britain responded. Their replies provide authoritative and stark expressions of the state of the law concerning aerial bombardment at that time.

In response to Roosevelt's appeal, the German Chancellor, Adolph Hitler, conveyed that Roosevelt's view 'corresponds completely with [his] own point of view and has been advocated by [him] before'.<sup>189</sup> Hitler noted that 'the German air force had received the order to restrict its operations to military objectives'.<sup>190</sup> As Roosevelt did with respect to the US, Hitler made German adherence to the principle of civilian immunity conditional on the fact 'that opposing air forces adhere to the same rule'.<sup>191</sup>

Likewise, on 1 September 1939, Poland responded to Roosevelt's appeal by stating that Poland entirely agreed with the principles laid out by Roosevelt, but reported that, earlier that very morning, Poland was 'the object of unprovoked aggression by German forces' and that '[t]he reported losses in civilian population render it doubtful as to whether the opposing side is respecting the rules to which the President refers'.<sup>192</sup>

The French Foreign Office offered eloquent endorsement of Roosevelt's appeal for civilian immunity, but concluded:

It goes without saying that the French Government reserves the right to have recourse to any action which it might consider appropriate, if the adversary should not observe the restrictions to which the French Government itself has subjected the operations of its air forces.<sup>193</sup>

For their part, the British Secretary of State conveyed a similar conditional commitment 'to confine bombardment to strictly military objectives upon the understanding that those same rules will be scrupulously observed by all their opponents'.<sup>194</sup> The Secretary of State used the exact same conditional language expressed by Roosevelt to lay out the British position on civilian immunity; namely, that civilian immunity depended upon Germany refraining from civilian bombardment.

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<sup>189</sup> Telegram from Alexander Comstock Kirk, United States Chargé d'affaires to Germany, to Cordell Hull, United States Secretary of State, 1 September 1939, reproduced *Diplomatic Papers 1939* (n 182) 543.

<sup>190</sup> *Ibid.*

<sup>191</sup> *Ibid.*

<sup>192</sup> Telegram from Jerzy Potocki, Polish Ambassador to the United States, to Cordell Hull, United States Secretary of State, 1 September 1939, reproduced in *Diplomatic Papers 1939* (n 182) 545.

<sup>193</sup> Telegram from William Christian Bullitt Jr, United States Ambassador to France, to Cordell Hull, United States Secretary of State, 1 September 1939, reproduced in *Diplomatic Papers 1939* (n 182) 545.

<sup>194</sup> Telegram from Philip Kerr, British Ambassador to the United States, to Cordell Hull, United States Secretary of State, 1 September 1939, reproduced in *Diplomatic Papers 1939* (n 182) 544.

Later cables sent that very day — 1 September 1939, the date we now know as the start of World War II — show the tragic unfolding of the German attack on Poland.<sup>195</sup> Those aware of Poland's experience must shudder at the thought of the suffering it would endure in the ensuing years. As US Ambassador Joseph Kennedy reported, '[t]he Poles say that what is really making it impossible for them to hold out is the constant bombardment from the entire German Air Force'.<sup>196</sup> Thus, blatant disregard for humanitarian principles — particularly civilian immunity from aerial bombardment — enabled the initial Nazi military success. 'German aircraft bombed and strafed road traffic, terrorizing and killing fleeing civilians', as Schaffer points out.<sup>197</sup> The US Ambassador to Poland, Anthony Biddle, noted in 1939:

I find it difficult in many cases to ascribe the barbaric aerial bombardment by German planes to anything short of deliberate intention to terrorize the civilian population and to reduce the number of child bearing Poles irrespective of category.<sup>198</sup>

The Nazi regime used aerial bombardment to devastating effect during their march across Europe.<sup>199</sup>

In none of these diplomatic communications was there even a remote suggestion that there was an applicable rule of law imposing an absolute legal prohibition against collateral damage. Even the prohibition against targeting civilians was subject to qualification; the major powers all emphatically reserved the right to reprisal under the norm of reciprocity.<sup>200</sup> Furthermore, the norm of reciprocity was woven into the cultural fabric of the Western nations.

On the eve of World War II, according to Rogers, 'it was forbidden to drop bombs on undefended towns or villages'; yet, 'apart from this there were no rules in place affecting aerial bombardment on the outbreak of war in 1939'.<sup>201</sup> The prohibition on bombing civilians was implicitly and explicitly agreed upon by the belligerent parties, as demonstrated by the remarks of British Secretary of State for Foreign Affairs Anthony Eden<sup>202</sup> and Prime Minister Neville Chamberlain<sup>203</sup> before the House of Commons, as well as by Luftwaffe doctrine.<sup>204</sup> The prohibition on bombing civilians was further reinforced in the diplomatic cables

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<sup>195</sup> See MBB Biskupski, *Hollywood's War with Poland, 1939–1945* (University Press of Kentucky, 2010) 45.

<sup>196</sup> Telegram from Joseph P Kennedy Sr, United States Ambassador to the United Kingdom, to Cordell Hull, United States Secretary of State, 12 September 1939, reproduced in *Diplomatic Papers 1939* (n 182) 551.

<sup>197</sup> Ronald Schaffer, 'The Bombing Campaigns in World War II: The European Theater' in Yuki Tanaka and Marilyn B Young (eds), *Bombing Civilians: A Twentieth-Century History* (New Press, 2009) 30, 32 ('The Bombing Campaigns in World War II').

<sup>198</sup> Telegram from Franklin Mott Gunther, United States Minister in Romania, to Cordell Hull, United States Secretary of State, 16 September 1939, reproduced in *Diplomatic Papers 1939* (n 182) 555.

<sup>199</sup> See Clapson (n 114) 77.

<sup>200</sup> See above nn 182, 189–194 and accompanying text.

<sup>201</sup> Rogers (n 23) 131.

<sup>202</sup> United Kingdom, *Parliamentary Debates*, House of Commons, 2 February 1938, vol 331, col 339.

<sup>203</sup> See United Kingdom, *Parliamentary Debates*, House of Commons, 21 June 1938, vol 337, col 937.

<sup>204</sup> Legro (n 81) 104.

exchanged immediately before the outbreak of war.<sup>205</sup> Beyond this rudimentary requirement, however, few restrictions limited the scope of aerial bombing. For instance, Rogers observes that, until the 1977 *Additional Protocol I*, ‘there was no specific treaty provision dealing with the duty to take care to restrict the incidental damage caused by attacks’.<sup>206</sup> Moreover, each of the belligerents made plain that the condition of reciprocity applied to this prohibition.

At the beginning of World War II, the prohibition against bombing civilians was subject to an overarching, vital condition: reciprocity.<sup>207</sup> The intentional bombardment of civilians was unlawful. Yet, during the course of the war the parties’ actions, understood through the norm of reciprocity, would render the prohibition largely moot. Influential works from the post-Vietnam era would characterise the Allied bombing campaign as ‘evil’ and an ‘aerial holocaust’.<sup>208</sup> In short, even if morale bombing intentionally targeted civilians as such, to the degree that the Allies targeted civilians, this targeting was justified as belligerent reprisal on the basis of reciprocity. The doctrine of belligerent reprisal was an accepted part of the law of war during World War II.<sup>209</sup> The legal and moral validity of belligerent reprisal must be at the crux of any ethical consideration of aerial bombing during World War II. To the degree that the Allies targeted military objectives, ‘there was no specific treaty provision’, as Rogers noted, ‘dealing with the duty to take care to restrict the incidental damage’ caused by aerial attacks.<sup>210</sup>

Consistent with the sociocultural background of norms, and then-existing law, Chief of Air Staff Newall telegraphed a subordinate shortly after Germany bombed Poland, stating, ‘[o]wing to German action in Poland, we are no longer bound by restrictions under the instructions governing naval and air bombardment’.<sup>211</sup> With an appreciation for the crisis caused by Nazi advances across Europe, one begins to understand why Allied leaders held fast to the norm of reciprocity: the principle was the only guarantor of a fighting chance at survival in the face of an enemy who disregarded important humanitarian principles. Gray asserts that, ‘[i]n efforts to have some real effect on the German war machine, the march towards unrestricted area bombing was inevitable’.<sup>212</sup>

‘At the start of the Second World War, Britain and Germany did agree verbally to restraint [in aerial bombing]. But this last-minute accord raised, at a minimum, questions of sincerity’, according to Legro.<sup>213</sup> As Legro notes, ‘[t]he ad hoc last-minute appeal by Roosevelt was the only vestige of official authority restricting

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<sup>205</sup> See above nn 182, 189–194 and accompanying text.

<sup>206</sup> Rogers (n 23) 125, discussing *Additional Protocol I* (n 59).

<sup>207</sup> Ibid 131.

<sup>208</sup> See, eg, Sherry (n 47) 254, referring to the ‘evil of the American bombing’ and the resulting ‘aerial holocaust’ of World War II. President Franklin D Roosevelt made known that ‘attacks aimed at terrorizing enemy civilians were acceptable to the commander in chief’ and that ‘[h]is ideas paralleled the views of General Arnold and other American advocates of airborne terror’: Schaffer, *Wings of Judgment* (n 46) 89.

<sup>209</sup> Rogers (n 23) 351.

<sup>210</sup> Ibid 125.

<sup>211</sup> Peter Gray, *Air Warfare: History, Theory and Practice* (Bloomsbury, 2016) 100, citing Telegram from Sir Cyril Newall, Chief of the Air Staff, to Air Marshall Sir Arthur Barratt, 16 October 1939 (Enclosure 14A, AIR 2/4474).

<sup>212</sup> Gray, ‘The Gloves Will Have to Come Off’ (n 4) 27.

<sup>213</sup> Legro (n 81) 99.

bombing’.<sup>214</sup> The German position on the rules of aerial bombing was demonstrated by the Luftwaffe, in the nations Germany invaded. The Luftwaffe ‘terrorized the civilian population with great brutality and destroyed civilian objects from the first day of the Second World War’.<sup>215</sup> Overy forcefully claims that ‘it was the British who ended the international embargo agreed in September [1939]’ by bombing ‘industrial and transport targets’ in a Rhineland city ‘[o]n the night of 11–12 May [1940]’.<sup>216</sup> To the contrary, it is a matter of historical fact that by 11 May 1940 (when Overy claims that the British ‘ended the international embargo’),<sup>217</sup> Germany had already bombed Warsaw (September 1939),<sup>218</sup> in addition to Scapa Flow, Scotland (March 1940),<sup>219</sup> as well as Belgium and Norway during the blitzkrieg (9 April – 10 May 1940).<sup>220</sup> Moreover, deaths caused by German bombing must be added to deaths caused by other forms of Nazi violence, to include shelling by artillery.

### B Norms in the Context of Burgeoning International Conflict

The British people inculcated the norm of reciprocity within a distinct historical context, characterised by intensifying international conflict, and eventually total war. Hugh Trevor-Roper wrote that ‘the British people’ were ‘united in pacifism in 1936’, but by 1939 they would go ‘united into war’.<sup>221</sup> In 1939, ‘[t]he British people resolved to defy Hitler’, according to AJP Taylor, ‘though they lacked the strength to undo his work’.<sup>222</sup> Poland surrendered to Nazi Germany on 27 September 1939.<sup>223</sup> Denmark and Norway were invaded on 9 April 1940.<sup>224</sup> Denmark surrendered that day.<sup>225</sup> On 10 May 1940, Germany invaded Belgium, France, Luxembourg and the Netherlands.<sup>226</sup> The German bombing of Rotterdam

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<sup>214</sup> Ibid 100.

<sup>215</sup> Bierzanek (n 85) 403.

<sup>216</sup> Overy, *Bombing War* (n 3) 239.

<sup>217</sup> Ibid.

<sup>218</sup> Overy observes that ‘[o]n 25 September there was extensive incendiary bombing and heavy damage to the centre of Warsaw in an attack which dropped some 632 tonnes of bombs, the largest air attack made by any air force until then’: *ibid* 62.

<sup>219</sup> Ibid 248.

<sup>220</sup> Jack Adams, *The Doomed Expedition: The Norwegian Campaign of 1940* (Leo Cooper, 1989) 35 (describing the bombing of civilian towns in Norway in April 1940). See also MW Fodor, ‘The Blitzkrieg in the Low Countries’ (1940) 19(1) *Foreign Affairs* 193, 197–200 (describing the effect of German bombers in Belgium on 9 May 1940).

<sup>221</sup> HR Trevor-Roper, ‘AJP Taylor, Hitler, and the War’ in EM Robertson (ed), *The Origins of the Second World War: Historical Interpretations* (St Martin’s Press, 1971) 83, 83.

<sup>222</sup> AJP Taylor, *The Origins of the Second World War* (Simon & Schuster, 1996) 278.

<sup>223</sup> See Jeremy Black, *World War Two: A Military History* (Routledge, 2003) 37.

<sup>224</sup> Olav Riste, ‘Intelligence and the “Mindset”: The German Invasion of Norway in 1940’ (2007) 22(4) *Intelligence and National Security* 521, 521; Richard Petrow, *The Bitter Years: The Invasion and Occupation of Denmark and Norway April 1940 – May 1945* (William Morrow, 1974) 46–7.

<sup>225</sup> Petrow (n 224) 49.

<sup>226</sup> Andrew Roberts, *The Storm of War: A New History of the Second World War* (Allen Lane, 2009) 54–5; Michael Brecher and Jonathan Wilkenfeld, *A Study of Crisis* (University of Michigan Press, 1997) 395.

on 14 May 1940 led the Netherlands to surrender the following day.<sup>227</sup> Britain stood without the US against the onslaught of Nazi military power — the same power that crushed Belgium, Denmark, France, Luxembourg, the Netherlands, Norway and Poland.<sup>228</sup>

From 26 May to 4 June 1940, the German air force strafed and bombed evacuating British soldiers on the beaches of Dunkirk, as they waited to cross from France back to England.<sup>229</sup> As Royal Air Force scholar Peter Gray noted, ‘[a]fter Dunkirk, and for the next three years, [bombing] became the only feasible method by which Britain could strike back at Germany’.<sup>230</sup>

‘The opening up of the war in the West’, stated a 31 May 1940 British War Cabinet policy record, ‘has of necessity forced us to adopt a much wider interpretation of the term “military objective” than that contained in’ the then-existing rules.<sup>231</sup> This record contained recommendations to change the rules of engagement for aerial bombing.<sup>232</sup> The recommendations included profoundly consequential revisions in language to reflect the changing nature of the conflict, which would have far-reaching effects. Immediately prior to the war, instructions were that ‘[o]nly ... “purely military objectives in the narrowest sense of the word” may be bombarded from the sea or air’.<sup>233</sup> The proposed revisions referred to ‘military objectives’ and pointed out that ‘the term “military” is used in its widest sense’.<sup>234</sup> The pre-World War II instructions stated: ‘It must be possible to distinguish and identify the objectives in question.’<sup>235</sup> The proposed revision removed the requirement that it be possible to ‘distinguish’ the objective, requiring only that ‘[i]t must be possible to identify the objective’.<sup>236</sup> The proposed revision also dramatically altered instructions regarding civilian casualties. Each version of the instructions included specified ‘general principles’ to guide bombardment. The contrast between the two versions is telling.

<sup>227</sup> Thilo Marauhn and Stefan Kirchner, ‘Target Area Bombing’ in Natalino Ronzitti and Gabriella Venturini (eds), *The Law of Air Warfare: Contemporary Issues* (Eleven International Publishing, 2006) 87, 88; Bernard Wasserstein, *Barbarism and Civilization: A History of Europe in Our Time* (Oxford University Press, 2007) 388.

<sup>228</sup> Jonathan Wright, *Germany and the Origins of the Second World War* (Palgrave Macmillan, 2007) 146.

<sup>229</sup> See, eg, Hugh Sebag-Montefiore, *Dunkirk: Fight to the Last Man* (Harvard University Press, 2006) 392–3.

<sup>230</sup> Gray, ‘Dresden 1945’ (n 178) 3.

<sup>231</sup> War Cabinet (UK), *Bombardment Policy: Report by the Chiefs of Staff Committee* (Report WP (40) 186, 31 May 1940) [2] <<http://filestore.nationalarchives.gov.uk/pdfs/small/cab-66-8-wp-40-186-16.pdf>>, archived at <<https://perma.cc/GHS8-EP4P>> (‘Bombardment Policy’).

<sup>232</sup> Ibid annex II (‘Proposed Revised Instructions by His Majesty’s Government to Govern the Conduct of All Forms of Bombardment’) (‘Proposed Revised Instructions’).

<sup>233</sup> *Bombardment Policy* (n 231) annex I (‘Instructions by His Majesty’s Government to Govern the Conduct of All Forms of Bombardment’) art 3 (‘Instructions Issued Prior to War’).

<sup>234</sup> *Proposed Revised Instructions* (n 232) art 4.

<sup>235</sup> *Instructions Issued Prior to War* (n 233) art 4(b).

<sup>236</sup> *Proposed Revised Instructions* (n 232) art 4(b).

*Instructions Issued Prior to War*

Bombardment must be carried out in such a way that there is reasonable expectation that damage will be confined to the objective and that civilian populations in the neighbourhood are not bombarded through negligence.

Thus it is clearly illegal to bombard a populated area in the hope of hitting a legitimate target which is known to be in the area, but which cannot be precisely located and identified.<sup>237</sup>

As the requirement for precision gradually diluted, German civilians faced increasingly terrible risks. The previous instructions stated that military storage areas were purely military objectives, but clarified, '[t]his does not authorise attack on factories',<sup>239</sup> while the proposed revision explicitly authorised attack on 'factories and other establishments engaged in the manufacture, assembly or repair of military material, equipment or supplies'.<sup>240</sup>

Throughout the war, British military leaders altered the scope of restrictions in reciprocity to the nature and severity of Luftwaffe bombing.<sup>241</sup> The scope of restrictions was a separate matter from the designation of targets and bombing priorities. To truly understand the Allied bombing campaign, one must trace the interacting influence of two separate factors: military decision-making and norms. Bombing priorities shifted on the basis of tactical and strategic considerations.<sup>242</sup> The scope of restrictions, on the other hand, responded to norms, and norms were applied in light of enemy conduct, as of 1940.

During the Battle of Britain, beginning in July 1940, German bombers initially attacked British military targets during the day, but by September, '[t]he failure of the daylight offensive' led the Germans to reassess their strategy and turn 'to a night bombing offensive'.<sup>243</sup> When this bombing did not force a British surrender, the Nazi regime adjusted tactics and indiscriminately bombed British cities. From 7 September 1940 until May 1941, the British endured what would become known as 'the Blitz'.<sup>244</sup> The Blitz was characterised by area bombing of numerous British

*Proposed Revised Instructions*

The attack must be made with reasonable care to avoid undue loss of civil life in the vicinity of the target.<sup>238</sup>

<sup>237</sup> *Instructions Issued Prior to War* (n 233) art 4(c).

<sup>238</sup> *Proposed Revised Instructions* (n 232) art 3(c).

<sup>239</sup> *Instructions Issued Prior to War* (n 233) art 3(e).

<sup>240</sup> *Proposed Revised Instructions* (n 232) art 4(d).

<sup>241</sup> See *Bombardment Policy* (n 231) [2]. See also below n 261 and accompanying text.

<sup>242</sup> See, eg, Joint History Office (ed) (n 75) 5, 8, 50–1.

<sup>243</sup> Williamson Murray, 'Strategy for Defeat: The Luftwaffe, 1933–1945' (Research Report, Airpower Research Institute, Air University, January 1983) 54.

<sup>244</sup> Clapson (n 114) 38–40. See, eg, Edgar Jones et al, 'Public Panic and Morale: Second World War Civilian Responses Re-examined in the Light of the Current Anti-Terrorist Campaign' (2006) 9(1) *Journal of Risk Research* 57, 60–2.

cities.<sup>245</sup> The Blitz killed over 40,000 Londoners.<sup>246</sup> A US Army Air Force radio operator, Richard Daughtry, was stationed in England during the Blitz. Daughtry recalled: ‘How those people in England stood it I’ll never know. They were tough ... I wonder if we could stand that in this country. Questionable, isn’t it?’<sup>247</sup>

During the Blitz, German bombing was deliberately calculated to cause maximum destruction to buildings and residential areas.<sup>248</sup> The bombing of Coventry, a relatively small town, in November 1940 stood out for its ferocity and indiscriminate destruction: German bombers attacked military targets in Coventry with no regard for the heavy concentration of civilian dwellings or historic places, like the Coventry Cathedral.<sup>249</sup> Over 500 British people were killed in Coventry by incendiary bombs in November 1940.<sup>250</sup>

Reflecting on the Allied bombing, distinguished German writer Thomas Mann said: ‘I think of Coventry and have no objection to the lesson that everything must be paid for.’<sup>251</sup> Coventry was symbolic of many British towns that were indiscriminately bombed by the Germans. The Germans, in Mann’s words, ‘paid for’ Coventry when Allied bombers attacked military objectives in German cities. The ‘lesson that everything must be paid for’ is a graphic illustration of the principle of reciprocity. For many of those who fought in World War II, reciprocity was a powerful psychological motivation. This is not to say that the intent, or precise aim to be achieved, of the bombing campaign was to reciprocate German aggression. Reciprocity helps explain how the bombing campaign could be viewed as lawful, but reciprocity does not explain bomber tactics or strategy. As one British veteran recounted his experience: ‘I was at home in Coventry in autumn 1940 and I remember the night a landmine came down and demolished a part of our house.’<sup>252</sup> He ‘looked forward to the prospect of dropping bombs on Germany

<sup>245</sup> See, eg, Clapson (n 114) 44: ‘By late September, the nightly bombing had also transitioned far beyond East London to include Central and West London, large tracts of inner South London, and incursions into the further-flung suburbs of the capital city.’

<sup>246</sup> Simon Wessely, ‘The London Attacks: Aftermath’ (2005) 353(6) *New England Journal of Medicine* 548, 550.

<sup>247</sup> Interview with Richard L Daughtry (Sherman Hayes, World War II Veterans Oral History Preservation Project, 27 May 2004) <<https://library.uncw.edu/capefearww2/voices/DAUGHTRYRICHARD425.html>>, archived at <<https://perma.cc/F6B3-USKR>>.

<sup>248</sup> According to Clapson, ‘the Nazis sought to degrade and destroy the entire industrial and military capacity of their enemy. Poor people in the provincial cities would also bear the brunt of the bombing most heavily’: Clapson (n 114) 49. The German intention was to bomb ‘the British capital to disrupt its infrastructure, to reduce iconic buildings to rubble, and undermine civilian morale’: at 39. Moreover, ‘[d]isruption to everyday life was another key intention of the Luftwaffe’: at 45.

<sup>249</sup> Clapson asserts that

[o]f all the provincial cities bombed by the Nazis, Coventry was the first to suffer the almost complete annihilation of its city centre. ... The city’s beautiful mediaeval cathedral lay in ruins, and remains so today, an iconic reminder of the sacrilegious destruction of places of worship during air raids.

Ibid 52.

<sup>250</sup> Sir Martin Gilbert, ‘History Detectives: Coventry’ (2008–09) 141 *Finest Hour: Journal of Winston Churchill* 32, 32.

<sup>251</sup> Tony Joel, *The Dresden Firebombing: Memory and the Politics of Commemorating Destruction* (LB Tauris, 2013) 51, quoting Thomas Mann.

<sup>252</sup> Royal Airforce Historical Society, *Reaping the Whirlwind* (Bracknell Paper No 4, 26 March 1993) 63.

with the greatest enthusiasm'.<sup>253</sup> When it came to attitudes towards bombing the Germans, '[t]he feeling was that they had started it, and whatever we could do to them, they'd deserved it'.<sup>254</sup> This concept of deservingness means more than mere revenge; it is an expression of the moral intuition underlying the norm of reciprocity. That norm heavily influenced Allied views toward the use of force.

In response to the incendiary bombing of Coventry, British bombers attacked Mannheim using incendiary bombs in December 1940 as a retaliatory measure.<sup>255</sup> Later during the war, this method of bombing would be refined and amplified by the Allies when they bombed targets within German cities.<sup>256</sup> After the Blitz of 1940–41, while British civilians were bombed in their homes, America remained ostensibly neutral, at least until the *Lend-Lease Act*<sup>257</sup> and then the Japanese attack on Pearl Harbor.<sup>258</sup>

### C Timeless Norm, New Bombardment Policy — 29 October 1942

After the US entered the war, one of the most important official documents on Allied bombing policy would be the 'Bombardment Policy' issued by the Air Ministry in London, dated 29 October 1942.<sup>259</sup> The policy set forth rules for bombing in friendly nations that had become enemy-occupied territory, and separate rules for bombing in 'German, Italian and Japanese territory'.<sup>260</sup> In friendly nations occupied by Axis powers, significant restrictions on aerial bombing were in effect. However, within Germany, Italy and Japan, a different set of rules applied.

'Consequent upon the enemy's adoption of a campaign of unrestricted air warfare, the Cabinet have authorised a bombing policy which includes the attack of enemy morale.'<sup>261</sup> The detailed restrictions on bombing in friendly nations did 'not, therefore, apply in [the British] conduct of air warfare against German, Italian and Japanese territory, except that the provisions of Red Cross Conventions [were] to continue to be observed'.<sup>262</sup> This was a legal manifestation of the norm of reciprocity, and the norm found expression in Sir Arthur Harris's remark: 'The Nazis entered this war under the rather childish delusion that they were going to bomb everybody else and nobody was going to bomb them. ... They sowed the wind and now they are going to reap the whirlwind.'<sup>263</sup> Harris was implicitly

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<sup>253</sup> Ibid.

<sup>254</sup> Ibid.

<sup>255</sup> Webster and Frankland (n 41) 109.

<sup>256</sup> Uta Hohn, 'The Bomber's Baedeker: Target Book for Strategic Bombing in the Economic Warfare against German Towns 1943–45' (1994) 34(2) *GeoJournal* 213, 219.

<sup>257</sup> Office of the Historian (US), 'Lend-Lease and Military Aid to the Allies in the Early Years of World War II', *Milestones: 1937–1945* (Web Page) <<https://history.state.gov/milestones/1937-1945/lend-lease>>, archived at <<https://perma.cc/XNV8-KKW6>>.

<sup>258</sup> Michael Sturma, *Surface and Destroy: The Submarine Gun War in the Pacific* (University Press of Kentucky, 2011) 11.

<sup>259</sup> Letter from Air Vice-Marshal JC Slessor, Assistant Chief of Air Staff (Policy), to Air Officers Commanding, 29 October 1942, CS15803/ASP1 (AIR 2/7757, The National Archives).

<sup>260</sup> Ibid para 2.

<sup>261</sup> Ibid.

<sup>262</sup> Ibid.

<sup>263</sup> 'The Bombing of Germany' (n 11), quoting Sir Arthur Harris.

describing reciprocity, which is critical to understanding the legal and ethical dimension of the aerial bombing campaign.

Reciprocity is not a purely legal formula; it is a moral formulation with cultural norms at the core, which influenced the development and interpretation of law. The norm of reciprocity has a vital function in restoring social stability, when expressed as an informal punishment after obligations are violated.<sup>264</sup> Reciprocity also served as an interpretive aid in conceptualising military necessity and distinction.

During World War II, the principles of military necessity and distinction were in tension to a degree perhaps unseen in warfare up until that time, or since. General Henry ‘Hap’ Arnold, head of the United States Army Air Forces, captured the tension in 1943, telling his staff privately that ‘this is a brutal war and ... the way to stop the killing of civilians is to cause so much damage and destruction and death that the civilians will demand that their government cease fighting’.<sup>265</sup> At the same time, Arnold said, ‘[t]his doesn’t mean that we are making civilians or civilian institutions a war objective, but we cannot “pull our punches” because some of them may get killed’.<sup>266</sup> During World War II, the belligerents accused each other, quite unpersuasively, of violating the laws of war on aerial bombing. ‘[I]rrespective of the direct bombing of civilian populations during World War II by both sides, the parties to the conflict characterized the [HRAW] as reflective of customary law and accused their opponents of violations’.<sup>267</sup> Such claims were surely ‘lawfare’, because the same nations that accused one another of violating customary international law were themselves the authors of the legal void that existed.<sup>268</sup> The legal void was due to their own refusal to be obligated by aerial bombing rules.

Amorphous pre-war legal standards were weakened even further by the pressures of war and reprisal. Nurick, a JAG Corps officer with experience training World War II tank crews,<sup>269</sup> wrote: ‘On the difficult question of what constitutes a legitimate military objective there is no general agreement.’<sup>270</sup> Furthermore, ‘on the important question of whether and to what extent noncombatants may constitute a military objective there is considerable conflict’.<sup>271</sup> ‘There is conflict, too’, he continued, ‘on the legality of aerial bombardment for the purpose of affecting civilian morale and disrupting normal civilian pursuits’.<sup>272</sup> In fact,

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<sup>264</sup> Hein FM Lodewijkx, ‘Reciprocity, Norm of’ in William A Darity Jr (ed), *International Encyclopedia of the Social Sciences* (Macmillan Reference USA, 2<sup>nd</sup> ed, 2008) vol 7, 107:

The norm has important social functions in ongoing relationships. It increases social stability in social groups or systems, and it structures and maintains the social relationships ... Reciprocity thus calls for positive reactions to favorable treatment and for negative reactions to unfavorable treatment.

<sup>265</sup> Conrad C Crane, ‘Evolution of US Strategic Bombing of Urban Areas’ (1987) 50(1) *Historian* 14, 23, quoting Letter from Thomas J Hanley Jr to Personnel, Assistant Chiefs of Air Staff, 30 April 1943 (File 385, Box 114, Henry Harley Arnold Papers, Library of Congress).

<sup>266</sup> *Ibid.*

<sup>267</sup> Schmitt (n 87) 123.

<sup>268</sup> Charles J Dunlap Jr, ‘Does Lawfare Need an Apologia?’ (2010) 43(1–2) *Case Western Reserve Journal of International Law* 121.

<sup>269</sup> Trooboff (n 163) 401.

<sup>270</sup> Nurick (n 98) 693.

<sup>271</sup> *Ibid* 692.

<sup>272</sup> *Ibid* 694.

‘[t]here is dispute on practically every question which has been raised concerning the legality of various aspects of aerial bombardment’.<sup>273</sup>

The devastating effect of Allied bombers reached its full potential in 1944 when the Allies achieved air superiority over the skies of Europe after years of war.<sup>274</sup> Because of a technological improvement in fuel tanks, fighter airplanes could escort Allied bombers all the way to their targets within Germany and protect the bombers from German fighters.<sup>275</sup> The P-51 Mustang<sup>276</sup> could travel ‘475 miles into Germany; when it finally came on stream in significant numbers in spring 1944 its range, with new tanks, could take it further than Berlin and even as far as Vienna’.<sup>277</sup> By neutralising the threat of German fighters, more Allied bombers could attack their targets and do so more frequently, with fewer losses. The Allied fighter escorts ‘transformed Allied fortunes in the spring of 1944’.<sup>278</sup>

Still, bombing through cloud cover, from high altitudes, made precision very difficult, and distinction elusive.<sup>279</sup> Raids intended to specifically target marshalling yards would frequently have the effect of a city area raid.<sup>280</sup> There were grounds for ethical objections by some Allied leaders, and those objections were voiced by respected figures. General Carl Spaatz, who commanded the US strategic bombing campaign, stated the following to Arnold in 1944: ‘There is no doubt in my mind that the RAF want very much to have the US Air Forces tarred with the morale bombing aftermath which we feel will be terrific.’<sup>281</sup> General Ira Eaker, one of the central leaders of the US Army Air Force, told Spaatz in January 1945, ‘we should never allow the history of this war to convict us of throwing the strategic bomber at the man in the street’.<sup>282</sup> A small number of American air crews voiced the opinion that the bombing of cities, like Berlin, amounted to ‘spite bombing’.<sup>283</sup> They were in the minority; the majority of Americans supported the bombing effort.<sup>284</sup>

Conrad C Crane writes: ‘Sanctions restricting the bombing of civilians eroded as the war entered its complex final phases, and pressure increased for the Allies to achieve their stated aim of winning the war “as decisively and speedily as

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<sup>273</sup> Ibid 695.

<sup>274</sup> Kenneth P Werrell, ‘The Strategic Bombing of Germany in World War II: Costs and Accomplishments’ (1986) 73(3) *Journal of American History* 702, 706.

<sup>275</sup> Alfred Goldberg, ‘The Ninth Air Force’ in Wesley Frank Craven and James Lea Cate (eds), *The Army Air Forces in World War II* (Office of Air Force History, 1983) vol 3, 107, 129, 131–2.

<sup>276</sup> This aircraft was memorably depicted in film: *Empire of the Sun* (Amblin Entertainment, 1987) 1:52:28–1:55:02.

<sup>277</sup> Overy, *Bombing War* (n 3) 359.

<sup>278</sup> Taylor, *Dresden* (n 74) 317.

<sup>279</sup> See Parks (n 72) 151; DeSaussure (n 119) 544.

<sup>280</sup> Parks (n 72) 154.

<sup>281</sup> Personal Diary of Carl Spaatz, 27 August 1944 (Box 15, Carl Spaatz Papers, Library of Congress), quoted in Crane (n 265) 24.

<sup>282</sup> Personal Diary of Carl Spaatz, 1 January 1945 (Box 20, Carl Spaatz Papers, Library of Congress), quoted in Crane (n 265) 30.

<sup>283</sup> Crane (n 265) 28.

<sup>284</sup> ‘Polls taken during the war showed that an overwhelming majority of Americans favoured the strategic bombing campaigns against Germany and Japan’: Ward Thomas, *The Ethics of Destruction: Norms and Force in International Relations* (Cornell University Press, 2001) 135.

possible.”<sup>285</sup> Ending the war quickly was a moral imperative; a humanitarian consideration weighing in favour of overwhelming force.<sup>286</sup> The same nations who lost the flower of their youth in World War I were sustaining horrid losses again. In Warsaw, as many as 250,000 Poles were killed in the Fall uprising of 1944.<sup>287</sup>

In late 1944, the German Ardennes offensive, or Battle of the Bulge, proved that the seemingly dying German war machine could still exact a terrible toll.<sup>288</sup> According to JD Morelock, ‘American losses in the Ardennes offensive represented nearly 10 percent of total US losses for all of World War II’.<sup>289</sup> This is a staggering figure considering that this was a two-front war waged over the course of four years. The losses in the Ardennes occurred at the hands of the ostensibly defeated German military. Adolph Hitler fancied himself a grand military strategist, and whatever his judgment about military matters may have been, he was certainly not going to surrender.<sup>290</sup>

After years of war, the Allies rendered German air defences ‘wholly inadequate’ by the Summer of 1944.<sup>291</sup> This essentially allowed the Allies to bomb all of Germany at will, in the same manner that Germany once bombed the cities of Rotterdam and Poland, and had tried to bomb the British in London, Coventry and elsewhere.<sup>292</sup> While planning to target key military industries and infrastructure, a number of motives drove British bombing, including retribution, vengeance, self-preservation and sheer frustration.<sup>293</sup> Like any consequential policy enacted at a strategic level, a range of priorities and attitudes shaped bombing policy. Strategic rationales influenced policy, as did norms, including reciprocity. Adding to the Allies’ calculations of reciprocity, in 1944, Germany began launching ‘V weapons’, which were large rockets fired upon England without pretence of accuracy, killing over 7,900 Britons from rocket attacks alone in 1944.<sup>294</sup> The toll of indiscriminate V weapon attacks was severe, as the following table shows.

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<sup>285</sup> Crane (n 265) 38.

<sup>286</sup> ‘Once the British army was directly engaged with the German army in Western Europe, it was imperative to win the war as quickly as possible, or risk the loss of another generation of British manhood, as in World War I’: Kuehl (n 73) 449.

<sup>287</sup> John E Fagg, ‘The Strategic Bomber Strikes Ahead’ in Wesley Frank Craven and James Lea Cate (eds), *The Army Air Forces in World War II* (Office of Air Force History, 1983) vol 3, 278, 317.

<sup>288</sup> See, eg, Taylor, *Dresden* (n 74) 171–2; Cox (n 74) 19.

<sup>289</sup> JD Morelock, *Generals of the Ardennes: American Leadership in the Battle of the Bulge* (National Defense University Press, 1994) 29 n 1.

<sup>290</sup> See, eg, Taylor, *Dresden* (n 74) 403, noting that ‘Germany insisted on prolonging the battle long after defeat was inevitable (and therefore continued to bring retribution on itself)’.

<sup>291</sup> Tami Davis Biddle, ‘Dresden 1945: Reality, History, and Memory’ (2008) 72(2) *Journal of Military History* 413, 421 (‘Dresden 1945’).

<sup>292</sup> Overy, *Bombing War* (n 3) 359.

<sup>293</sup> See Cox (n 74) 19; John C Jeffries Jr, *Justice Lewis F Powell, Jr* (Charles Scribner’s Sons, 1994) 102; *Reaping the Whirlwind* (n 252) 63.

<sup>294</sup> Jones et al (n 244) 63. V-2 rocket attacks were one reason why Britons were ‘disinclined to question Allied bombing policy’: Tami Davis Biddle, ‘Wartime Reactions’ in Paul Addison and Jeremy A Crang (eds), *Firestorm: The Bombing of Dresden 1945* (Pimlico, 2006) 96, 113.

Table 1: British Casualties Caused by German Bombing from 1940–45<sup>295</sup>

Year	Deaths	Serious Injuries
1940	23,767	30,529
1941	20,885	21,841
1942	3,236	4,150
1943	2,372	3,450
1944	8,475	21,989
1945	1,860	4,223

The spike in casualties in 1944 was largely due to the indiscriminate V weapon attacks.<sup>296</sup> The Ardennes offensive and V weapon attacks left the Allies, as Sebastian Cox puts it, ‘infected with a renewed foreboding that the war was by no means a foregone conclusion’.<sup>297</sup> There was another, more direct justification for bombing raids on German cities in the east: in 1944, the Allies began to plan and conduct strategic bombing in German cities in support of the Russian advance.<sup>298</sup>

The official American government policy towards the end of the war, as described by Wesley Frank Craven and James Lea Cate, emphasised the Russian campaign in eastern Germany: ‘The Americans were not bombing cities indiscriminately, but attacking transportation facilities inside cities in missions which the Russians had requested and seemed to appreciate.’<sup>299</sup> That historical contingency, together with years of egregious attacks on British civilians, and ongoing targeting of German industrial capacity, were part of the historical context preceding the Dresden raid.

Bombing became — for the British especially — the preferred means of countering the Nazi war machine. After losing so many civilians and soldiers to German attacks, the British were not inclined to risk the lives of British airmen by adopting more precise methods of warfare, which had proven terribly costly to British airmen. There were ‘sections of public opinion in Britain’ opposed to or sceptical of area bombing, and ‘the more apparent it became that in the majority of its major area attacks, Bomber Command was, in fact, aiming at the centres of the residential areas, the more pronounced the protests became’.<sup>300</sup> The protests, however, did not represent the prevailing sentiment.<sup>301</sup> The year 1944 would witness intense and sustained Allied bombing, reaching an apex with the raid on Dresden and other German cities in early 1945.

<sup>295</sup> ‘The Bombing of Britain 1940–1945 Exhibition’ (Centre for the Study of War, State and Society, University of Exeter) 32 <[https://humanities.exeter.ac.uk/media/universityofexeter/collegeofhumanities/history/researchcentres/centreforthehistoryofwarstateandsociety/bombing/THE\\_BOMBING\\_OF\\_BRITAIN.pdf](https://humanities.exeter.ac.uk/media/universityofexeter/collegeofhumanities/history/researchcentres/centreforthehistoryofwarstateandsociety/bombing/THE_BOMBING_OF_BRITAIN.pdf)>, archived at <<https://perma.cc/99C3-UCG6>>.

<sup>296</sup> *Ibid.*

<sup>297</sup> Cox (n 74) 19.

<sup>298</sup> Joint History Office (ed) (n 75) 51.

<sup>299</sup> Fagg, ‘The Climax of Strategic Operations’ (n 75) 726.

<sup>300</sup> Webster and Frankland (n 41) 114.

<sup>301</sup> See Thomas (n 284) 135.

D *The Dresden Raid — 13–15 February 1945*

In February 1945, the war threatened to continue at least for the rest of the year, and supporting the Russian advance from the east was a military imperative for the Allied cause.<sup>302</sup> The overwhelming weight of historical evidence shows that the intent of the Allied bombing of Dresden was to support the Russian advance, and target Nazi military industries and communications or transportation infrastructure.<sup>303</sup> Dresden, along with other eastern German cities, was a key transportation hub for German military reinforcements against the Russians.<sup>304</sup> If the Russian advance did not succeed, the result would be prolonged war.<sup>305</sup> In addition, Dresden contained numerous war industries.<sup>306</sup> As Cox concludes, attacking these targets ‘was a legitimate and sensible purpose in the context of the time’.<sup>307</sup> In a conversation that essentially sealed Dresden’s fate, Winston Churchill reportedly demanded to know what plans were in place for ‘basting the Germans in their retreat from Breslau [Poland]’.<sup>308</sup>

From a strategic and tactical perspective, the Dresden raid on 13–15 February 1945 was similar to countless other bombing missions in intent.<sup>309</sup> In consequence, it was far more lethal than most, owing to a striking confluence of factors: clear weather, steady wind, the near-total absence of German anti-aircraft defences and German fighter planes were unable to deter the Allied bombers because the Luftwaffe had been decimated by years of Allied bombing.<sup>310</sup> The bombing of Dresden caused somewhere between 25,000 and 35,000 German deaths.<sup>311</sup> Biddle, among many other modern historians, concludes that ‘[a] sense of urgency, and a numbing and wearing down of moral sensibilities’ led to the Dresden bombing.<sup>312</sup> Yet, writes British historian Jeremy A Crang, for ‘the handful of Dresden Jews who emerged from the smoking ruins and survived the war, the raids were an act of divine intervention’, and ‘[l]ike avenging angels the Allied bombers arrived over Dresden that night’.<sup>313</sup> If retroactive application of modern standards to condemn the Allied bombing campaign is a legitimate scholarly enterprise, then there should likewise be a fair reconsideration of the justification for the bombing campaign. Newly found records add to our knowledge of the valid military

<sup>302</sup> Among Allied military leaders, ‘the need to support the Russian January offensive in order to shorten the war became the primary and quite genuine military purpose behind the [Dresden] attacks’: Cox (n 74) 58.

<sup>303</sup> See Taylor, *Dresden* (n 74) 169–90; Cox (n 74) 57; Biddle, ‘Dresden 1945’ (n 291) 425, noting that Dresden ‘was at the junction of three trunk routes of the Reich’s railway system’. See also Biddle, ‘Air Power’ (n 2) 259 n 51, noting that ‘there is little evidence that the Americans conceived of Dresden as a terror raid. It was another attack on marshaling yards, designed to disrupt German communications, only it happened to fall on the heels of a particularly devastating RAF incendiary raid on a city full of refugees’.

<sup>304</sup> See Cox (n 74) 57.

<sup>305</sup> Biddle, ‘Wartime Reactions’ (n 294) 120.

<sup>306</sup> Cox (n 74) 54–8.

<sup>307</sup> *Ibid* 58 (emphasis in original).

<sup>308</sup> Webster and Frankland (n 41) 101.

<sup>309</sup> Biddle, ‘Dresden 1945’ (n 291) 414.

<sup>310</sup> *Ibid* 421–2.

<sup>311</sup> *Ibid* 424.

<sup>312</sup> Biddle, ‘Wartime Reactions’ (n 294) 122.

<sup>313</sup> Jeremy A Crang, ‘Victor Klemperer’s Dresden’ in Paul Addison and Jeremy A Crang (eds), *Firestorm: The Bombing of Dresden 1945* (Pimlico, 2006) 78, 78.

objectives in Dresden. For example, the Dresdner Bank provided financing for the construction of the Auschwitz camp, and loaned over 47 million Reichsmarks to the SS.<sup>314</sup> This fact must hold some weight in measuring the justness of the Allied bombing as we look back upon history.

A few weeks after the Dresden attack, an American intelligence officer, Colonel Lewis F Powell Jr, wrote of the ‘blind bombing conditions’ and the ‘widespread destruction inevitably resulting’:<sup>315</sup> ‘Personally, I consider this very fortunate indeed as the German people are being taught for the first time in modern history what it means to have war on their own soil.’<sup>316</sup> Colonel Powell was the head of the Operational Intelligence Division of the US Strategic Air Forces (‘USSTAF’).<sup>317</sup> Together with the British Royal Air Force, USSTAF commanded the air war over Europe. Colonel Powell would later sit as a Justice on the Supreme Court of the United States.<sup>318</sup>

By the end of the war, German bombers killed 60,000 British civilians.<sup>319</sup> The Allies killed approximately 353,000 Germans in their bombing campaign.<sup>320</sup> Allied bombing tactics eventually came to resemble the German bombing once condemned by the Allies themselves in September of 1939: in 1945, Nurick wrote that the Allies ‘have adopted as a policy the devastation of large industrial areas’.<sup>321</sup> In fact, the explicit policy of Allied bombardment took on the very rhetoric once used to describe the early German bombing. In 1939, the Polish Ambassador observed, ‘[i]t is evident that the [German bombing] is aimed at the paralyzing and disruption of normal life of the civilian population’.<sup>322</sup> But what made Allied bombing different? It has been suggested that the Allied bombing was

intended to devastate the city area itself and thereby choke communications within the city and disrupt the normal civilian life upon which the larger communications activities and the manufacturing enterprises of the city depended.<sup>323</sup>

These were the very same objectives once condemned by the Polish ambassador when describing the German bombing.<sup>324</sup>

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<sup>314</sup> Mark Landler, ‘Report Details Dresdner Bank’s Wartime Financing of a Death Camp’, *The New York Times* (New York, 18 February 2006) C3.

<sup>315</sup> Jeffries (n 293) 102.

<sup>316</sup> *Ibid.*

<sup>317</sup> Larry D Welch, ‘Foreword’ in Diane T Putney (ed), *ULTRA and the Army Air Forces in World War II: An Interview with Associate Justice of the US Supreme Court Lewis F Powell, Jr* (Office of Air Force History, 1987) v, v.

<sup>318</sup> *Ibid.*

<sup>319</sup> Alan Kramer, *Dynamic of Destruction: Culture and Mass Killing in the First World War* (Oxford University Press, 2007) 335.

<sup>320</sup> ‘[T]he figure of 353,000 [Germans killed] gives an approximate scale consistent with the evidence’: Overy, *Bombing War* (n 3) 477.

<sup>321</sup> Nurick (n 98) 695.

<sup>322</sup> Telegram from Jerzy Potocki, Polish Ambassador to the United States, to Cordell Hull, United States Secretary of State, 15 September 1939 (‘Telegram from Polish Ambassador on 15 September 1939’), reproduced in *Diplomatic Papers 1939* (n 182) 553.

<sup>323</sup> USAF Historical Division, Research Studies Institute, Air University, ‘Historical Analysis of the 14–15 February 1945 Bombings of Dresden’ (Research Report, 1945) 18, archived at <<https://perma.cc/6RM4-RHEU>>.

<sup>324</sup> Telegram from Polish Ambassador on 15 September 1939 (n 322), reproduced in *Diplomatic Papers 1939* (n 182) 553.

After World War II, it would have been untenable to claim that the Allied bombing campaign violated the law of war because no law prevented the bombing campaign. No German officers were tried for aerial bombing-related war crimes, indicating that the Allies either wished to avoid charges of hypocrisy, or the Allies realised that there was no enforceable prohibition against aerial bombing.<sup>325</sup>

Allied public opinion supported the use of force to defeat the Nazis, and the Allies were physically able to do so using well-protected bombers later in the war.<sup>326</sup> From the standpoint of Allied leaders, and the people they represented, if an advantage in firepower could be leveraged to save American and British lives, that advantage was to be maximised.<sup>327</sup> At the end of World War II, the people of the Allied nations would have had no reason to believe that their nations' armed forces violated rules against aerial bombardment.

Vital law of war questions remained unanswered throughout the war, including the scope of military objectives and what specific protections applied to non-combatants near military objectives. According to Rogers, '[t]he credibility of the concept of civilian immunity was stretched by the bombing techniques of the Second World War and steps had to be taken subsequently to reinforce that principle by making indiscriminate attacks unlawful'.<sup>328</sup> Best, one of the foremost analysts of the then-existing legal order, asserted that few meaningful limits were placed on modern, industrialised warfare 'until two world wars had revealed with cruel clarity how much there was in twentieth-century total war that could militate against the law's working'.<sup>329</sup> World War II proved that there were gaps in the law of war, and '[t]hose gaps were found to be great and painful'.<sup>330</sup>

## V CHALLENGING OVERY'S CHRONOLOGICAL ACCOUNT OF WHO INITIATED INDISCRIMINATE AERIAL BOMBING IN WORLD WAR II

Which nation initiated aerial bombing? This discrete factual question is central to public discussion of the ethical legitimacy and legal justification of the Allied bombing campaign. For that reason, it is crucial to ascertain the historical facts about the iterative sequence of aerial bombing at the start of World War II. Overy boldly argued that the British initiated indiscriminate bombing against Germany '[o]n the night of 11–12 May [1940]'.<sup>331</sup> Overy's work led directly to claims such as 'Hitler didn't start indiscriminate bombings — Churchill did',<sup>332</sup> to take the title of one review of Overy's book in *The Spectator*.<sup>333</sup>

<sup>325</sup> DeSaussure (n 119) 544; Richard Overy, 'The Post-War Debate' in Paul Addison and Jeremy A Crang (eds), *Firestorm: The Bombing of Dresden 1945* (Pimlico, 2006) 123, 124–5.

<sup>326</sup> Tami Davis Biddle, 'Bombing by the Square Yard: Sir Arthur Harris at War, 1942–1945' (1999) 21(3) *International History Review* 626, 626, 641.

<sup>327</sup> JBA Bailey, *Field Artillery and Firepower* (Military Press, 1989) 195.

<sup>328</sup> Rogers (n 23) 20.

<sup>329</sup> Best (n 18) 217.

<sup>330</sup> *Ibid.*

<sup>331</sup> Overy, *Bombing War* (n 3) 239.

<sup>332</sup> Tobias Grey, 'Hitler Didn't Start Indiscriminate Bombings — Churchill Did: Bombing in Europe was Never a Winning Strategy, Says Richard Overy in The Bombing War', *The Spectator* (online, 25 October 2013) <<https://www.spectator.co.uk/2013/10/the-bombing-war-by-richard-overy-review/>>, archived at <<https://perma.cc/7F25-B9AX>>.

<sup>333</sup> *Ibid.*

Overy laments that ‘very soon [during World War II] the argument that Germany started the bombing became the standard version, both among the wider public and in the RAF, and it has remained firmly rooted in the British public mind ever since’.<sup>334</sup> Yet, it is an interpretive sleight of hand to assert that the British initiated indiscriminate bombing. In fact, Overy’s book itself provides factual premises that undermine the conclusion that the British initiated indiscriminate bombing. The fundamental flaw in Overy’s argument is that it completely omits the German bombing prior to 11 May 1940, which included: first, the ‘extensive incendiary bombing’ of Warsaw in September 1939;<sup>335</sup> secondly, the March 1940 German bombing of the British Royal Navy base at Scapa Flow, Scotland, which resulted in the first British civilian death of the war when German bombing struck a nearby cottage;<sup>336</sup> and, thirdly, the blitzkrieg invasion — including aerial bombing — of many Western European nations between 9 April and 10 May 1940.<sup>337</sup>

The first belligerent to use aerial bombing against civilian areas in World War II was Germany, during the invasion of Poland in 1939. The German air force began bombing Poland on 1 September 1939.<sup>338</sup> This was, according to Schaffer, ‘an exception to the no-first-use policy’ to which the Western nations had agreed.<sup>339</sup> In an effort to achieve quick victory, on 25 September 1939, the German air force launched the largest bombing attack unleashed by any side up until that time, constituting an indiscriminate terror attack on Warsaw.<sup>340</sup> ‘On 25 September there was extensive incendiary bombing and heavy damage to the centre of Warsaw’, Overy acknowledges.<sup>341</sup>

As British military leaders immediately understood after the invasion of Poland, German bombing violated the norm of reciprocity. On 15 September 1939, the Director of Plans on the Air Staff, Air Commodore John Slessor, asserted that Germany’s bombardment in Poland waived British restrictions on bombing urban factories and oil plants.<sup>342</sup> In October 1939, Sir Cyril Newall, Chief of the Air Staff,

told the commander of the Advanced Air Striking Force in France that because of German action in Poland, ‘we are no longer bound by restrictions under the instructions governing naval and air bombardment ... Our action is now governed entirely by expediency’.<sup>343</sup>

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<sup>334</sup> Overy, *Bombing War* (n 3) 249.

<sup>335</sup> *Ibid* 62.

<sup>336</sup> *Ibid* 248.

<sup>337</sup> See nn 224–226 and accompanying text.

<sup>338</sup> Overy, *Bombing War* (n 3) 61.

<sup>339</sup> Schaffer, ‘The Bombing Campaigns in World War II’ (n 197) 32.

<sup>340</sup> James S Corum, ‘The Luftwaffe’s Campaigns in Poland and the West 1939–1940: A Case Study of Handling Innovation in Wartime’ (2013) 1(1) *Security and Defence Quarterly* 158, 173–4.

<sup>341</sup> Overy, *Bombing War* (n 3) 62.

<sup>342</sup> Horst Boog, ‘The Beginnings of the Strategic Bombing War by the Royal Air Force, the German Air Defence, and American Preparations for Air War Up to the End of 1941’ in Militärgeschichtliches Forschungsamt (ed), *Germany and the Second World War* (Clarendon Press, 2001) vol 6, 492, 493.

<sup>343</sup> Overy, *Bombing War* (n 3) 248.

As Overy acknowledges, both sides, ‘at first’, in the pre-1940 period, ‘stuck to their pledge not to attack targets in each other’s cities where civilians were at risk (though this did not prevent the German Air Force from killing non-combatants during its operations in Poland)’.<sup>344</sup> With the German blitzkrieg spreading across Europe, the British knew their own security was at stake. The German invasion of Poland also proved that the British could not count on German adherence to any agreements concerning aerial bombing, or any other agreements for that matter. In this context of emerging conflict, a German aerial attack resulted in England’s first civilian casualty of the war:

When a German raid on the Royal Navy base at Scapa Flow in March 1940 killed a nearby cottager (the first [British] civilian casualty of the war), Churchill angrily berated the Air Ministry for not giving it maximum publicity as the likely start of ‘deliberate horror raids on civilians’, for which the Germans would carry the blame.<sup>345</sup>

Despite the German bombing of Warsaw, Scapa Flow and each of the Western European nations subject to blitzkrieg, Overy inexplicably asserts:

In the end it was the British who ended the international embargo agreed in September [1939]. On the night of 11–12 May [1940], two days after the German invasion in western Europe, 37 medium and light bombers attacked industrial and transport targets in the Rhineland city of München Gladbach (now Mönchengladbach), killing four people, including an Englishwoman who happened to live there.<sup>346</sup>

The only ‘international embargo’ of September 1939 were the conditional agreements made in a response to President Roosevelt’s appeal, that belligerent

armed forces shall in no event, and under no circumstances, undertake the bombardment from the air of civilian populations or of unfortified cities, upon the understanding that these same rules of warfare will be scrupulously observed by all of their opponents.<sup>347</sup>

This was an agreement to follow rules if the adversary followed the same rules. Overy’s characterisation of this conditional agreement as an ‘embargo’<sup>348</sup> is misleading in that regard. This was a conditional agreement, whose terms only applied when all parties to the agreement adhered to the stated norm.<sup>349</sup> To call this exchange of conditional agreements an ‘international embargo’ expects far too much of this hasty set of diplomatic messages. Overy is mistaken in asserting that the British ended the ‘international embargo’ on 11–12 May 1940; the Germans first violated the conditional agreement by bombing Warsaw, Scapa Flow as well as Norway and Belgium during the blitzkrieg.<sup>350</sup>

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<sup>344</sup> Ibid 238.

<sup>345</sup> Ibid 248.

<sup>346</sup> Ibid 239.

<sup>347</sup> Telegram from US Secretary of State to the Ambassador in the UK on 1 September 1939 (n 182), reproduced in *Diplomatic Papers 1939* (n 182) 542.

<sup>348</sup> Overy, *Bombing War* (n 3) 239.

<sup>349</sup> Overy does not refer to, nor is this author aware of, any other similar agreement in September 1939: see *ibid.*

<sup>350</sup> Adams (n 220) 35 (describing bombing of civilian towns in Norway in April 1940); Fodor (n 220) 197–200 (describing effect of German bombers in Belgium on 9 May 1940).

Overy is in the odd position of acknowledging that the conditional agreements of September 1939 were only valid if Germany adhered to those agreements, and that '[n]one of these expressions of goodwill was legally binding in international law',<sup>351</sup> yet, mere pages later, he re-characterises the September 1939 agreements as an 'international embargo'.<sup>352</sup>

Overy further writes:

One of the first issues discussed by Churchill's new War Cabinet on 12 May [1940] was the virtue of initiating what was described as 'unrestricted air warfare'. It was agreed that the RAF should no longer be bound by any moral or legal scruples to abstain from bombing; Germany's wartime actions, Churchill claimed, had already given the Allies 'ample justification' for retaliation.<sup>353</sup>

The 'wartime actions' Churchill referred to included the indiscriminate German bombing of Poland and bombing throughout the blitzkrieg. Biddle, for instance, writes that, '[i]n the spring of 1940', it was the case that 'many felt that the Germans had bombed Warsaw and Rotterdam indiscriminately'.<sup>354</sup> Thus, Overy should not find fault with the common British notion that Germany initiated indiscriminate bombing.

Moreover, Overy himself describes the condition of reciprocity that was integral to bombing norms of the time. 'The assumption in all the discussions about restricting bombing was that it had force only so long as the enemy observed the same limitation, and in this sense Poland played an important part in paving the way for British action.'<sup>355</sup> Even though Overy concedes that obligations were conditioned upon reciprocity, he inaccurately implies that these obligations still stood as of summertime, 1940:

What was judged to be illegal in August 1939 had to be presented as legitimate when it was undertaken in the summer of 1940. Most explanations for the start of the British campaign have assumed that it was a response to the German bombing of Rotterdam on 14 May [1940], but the first raid, on München Gladbach, had already taken place three days before, while Rotterdam was not mentioned in any of the Cabinet discussions about initiating the bombing of German targets. The decision was taken because of the crisis in the Battle of France, not because of German air raids.<sup>356</sup>

The August 1939 rules that Overy points to are the British *Air Ministry Instructions and Notes on the Rules to Be Observed by the Royal Air Force in War*.<sup>357</sup> As Biddle notes, '[o]n 22 August, instructions were issued to commanders to guide operations in the initial stages of war'.<sup>358</sup> According to Biddle, the rules

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<sup>351</sup> Overy, *Bombing War* (n 3) 237.

<sup>352</sup> *Ibid* 239.

<sup>353</sup> *Ibid* 244.

<sup>354</sup> Biddle, 'Air Power' (n 2) 151.

<sup>355</sup> Overy, *Bombing War* (n 3) 248.

<sup>356</sup> *Ibid* 243.

<sup>357</sup> *Ibid* 238, 722 n 4, citing Air Ministry, *Air Ministry Instructions and Notes on the Rules to be Observed by the Royal Air Force in War* (Instructions, 22 August 1939) (AIR 14/249, The National Archives).

<sup>358</sup> Biddle, *Rhetoric and Reality* (n 36) 182, citing *Air Ministry Instructions and Notes on the Rules to be Observed by the Royal Air Force in War* (n 357) and Letter from AH Self to Air Officer Commanding-in-Chief, Bomber Command, 22 August 1939 (AIR 14/249, The National Archives) ('Covering Letter to the British Instructions of August 1939').

‘were more strict than the Hague Draft Rules’, but ‘they were subject to modification if the enemy commenced indiscriminate bombing’.<sup>359</sup> The instructions stated that only ‘purely military objectives in the narrowest sense of the word’ could be targeted, including railways and roads, but not factories; military factories were not permissible targets yet at this point in time.<sup>360</sup> Overy mentions that

[i]n August 1939 the Air Ministry concluded that attacks on targets difficult to identify through cloud or at night would also be illegal, as would any operation in which the civil population, hospitals, cultural monuments or historic sites were targeted.<sup>361</sup>

However, based upon German bombing, the British government soon saw that Germany had commenced indiscriminate bombing.<sup>362</sup> An Air Ministry directive from 4 June 1940, expanded the definition of military targets to include a wide range of manufacturing targets.<sup>363</sup> Then, on 7 June 1940, the Air Staff ordered that bombs not be ‘dropped blindly and indiscriminately’.<sup>364</sup> As Overy wrote:

The change in priorities [of May 1940] necessitated a revision of the rules on the conduct of air warfare laid down in August 1939, which had made it illegal to attack targets in which civilians might be ‘negligently’ killed. On 4 June 1940 the Air Ministry issued new guidelines for Bomber Command, cancelling the earlier instructions. The intentional killing of civilians was still regarded as a violation of international law, but attacks could be made on military targets ‘in the widest sense’ (factories, shipyards, communications, power supply, oil installations) in which civilian casualties would be unavoidable but should be proportional.<sup>365</sup>

In September 1940, Germans launched the Blitz, which forced the British to further reconsider the boundaries of reciprocity.<sup>366</sup> Thus, Overy also acknowledges: ‘The final restraints were lifted in September and October 1940 after the first German attacks on London, though there had already been growing pressure from Bomber Command to be allowed to bomb less discriminately.’<sup>367</sup>

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<sup>359</sup> Biddle, *Rhetoric and Reality* (n 36) 182, citing Covering Letter to the British Instructions of August 1939 (n 358).

<sup>360</sup> Biddle, *Rhetoric and Reality* (n 36) 182, citing Covering Letter to the British Instructions of August 1939 (n 358). See also Boog (n 342) 493.

<sup>361</sup> Overy, *Bombing War* (n 3) 238.

<sup>362</sup> See Corum (n 340) 173.

<sup>363</sup> Boog (n 342) 501.

<sup>364</sup> *Ibid.*

<sup>365</sup> Overy, *Bombing War* (n 3) 244–5.

<sup>366</sup> *Ibid.* 73.

<sup>367</sup> *Ibid.* 245.

Table 2

Key Dates
25 September 1939 — Germans bomb Warsaw <sup>368</sup>
16 March 1940 — German bombing results in first British civilian death of the war <sup>369</sup>
9 April – 10 May 1940 — German blitzkrieg across Europe <sup>370</sup>
11 May 1940 — Overy names this date as ‘first raid’ by the British <sup>371</sup>
18–19 August 1940 — German bombs fall on London suburbs <sup>372</sup>
19–20 August 1940 — Over 60 German raids across British Isles <sup>373</sup>
25–26 August 1940 — British raids on Berlin <sup>374</sup>
29–30 August 1940 — British raids on Berlin, 10 people killed <sup>375</sup>
31 August 1940 — Hitler gives order to prep for major attack to precede Sea Lion <sup>376</sup>
7 September 1940 — German ‘revenge attack’ against Britain; the official start of the Blitz <sup>377</sup>

Table 3

Campaigns
Battle of Britain — July – October 1940 <sup>378</sup>
The Blitz — 7 September 1940 – May 1941 <sup>379</sup>

To summarise the key facts regarding the initiation of aerial bombardment: by the time Britain bombed the Rhineland city of München Gladbach, on 11–12 May 1940, Germany was already responsible for the terror bombing of Warsaw, the bombing of Scapa Flow as well as Norway and Belgium during the blitzkrieg.<sup>380</sup>

Overy’s position on whether the British or Germans ‘started the [indiscriminate] bombing’<sup>381</sup> is overly narrow. Overy’s narrow chronological focus misses the pertinent question: that is, which power first engaged in aerial bombardment of military targets located among civilian areas? Germany did so in

<sup>368</sup> Ibid 61–2.

<sup>369</sup> Ibid 248.

<sup>370</sup> See above nn 224–226 and accompanying text.

<sup>371</sup> Overy, *Bombing War* (n 3) 84.

<sup>372</sup> Ibid 82.

<sup>373</sup> Ibid.

<sup>374</sup> Ibid 83.

<sup>375</sup> Ibid.

<sup>376</sup> Ibid.

<sup>377</sup> Ibid.

<sup>378</sup> Ibid 73.

<sup>379</sup> Ibid 74–83.

<sup>380</sup> Adams (n 220) 35; Fodor (n 220) 197–200.

<sup>381</sup> Overy, *Bombing War* (n 3) 249.

the course of initiating a war of aggression. Overy's work contains the materials of the undoing of his interpretation of the indiscriminate bombing question.<sup>382</sup>

Confining the question of reciprocity to German and British bombing results in a cramped and distracting inquiry. Recall that Lauterpacht, a prominent theorist behind the emergence of international law, asserted that 'it is impossible to visualize the conduct of hostilities in which one side would be bound by rules of warfare without benefiting from them and the other side would benefit from rules of warfare without being bound by them'.<sup>383</sup> Beginning in September 1939, one side (Germany) was unbound by rules restricting bombardment. In the context of world war, when one power (Germany) has totally subdued others (Poland, France, etc), the subdued powers are no longer capable of reciprocating on their own behalf. Thus, the victorious tyrannical power is immune from reciprocity. In Lauterpacht's terms, Germany was benefiting 'from rules of warfare without being bound by them'.<sup>384</sup> From a moral and military standpoint, this is an untenable position. The function of reciprocity as a social norm and legal principle is to prevent an adversary from gaining an unfair advantage by violating laws or exploiting the other side's restraint.

Overy opines that '[t]he view that German crimes, or potential crimes, made British bombing legitimate was legally dubious, since it amounted to claiming that two wrongs make a right'.<sup>385</sup> This simplistic reduction of the norm of reciprocity gives rise to a common misunderstanding of just war, as that concept stood during World War II. Reciprocity did not signify that two wrongs made a right. Reciprocity means that mutually agreed obligations of restraint are conditioned upon mutual adherence to those obligations. When one side violates the obligation, the other side is released from the obligation. From the Allied perspective, British bombing in response to Germany's wrongs would not be evaluated as a 'wrong', provided that it was proportional. British leaders did not claim that 'two wrongs make a right' — certainly not if we are taking seriously the thoughtful and developed opinions of British leaders on the subject.

## VI CONCLUSION

In considering the historical record, the Allied bomber offensive — including the Dresden raid — was rooted in the widely held norm of reciprocity, and therein laid the legal rationale. The British people of that era would not have accepted the notion that their homeland should suffer the burdens of unrestricted aerial bombing while Germany accrued the benefits of that method. The Allies were not bound by any obligation to bear one-sided commitments to humanitarian principles, at massive loss to British and American lives. Indeed, to do so would have been considered immoral. The bombing campaign was, therefore, in harmony with the cultural norm of reciprocity as well as the legal norm of reciprocity. With the deeply ingrained, culturally defined standard of reciprocity in mind, we should re-evaluate strategic bombing during World War II, seeing the

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<sup>382</sup> Robert Moeller is one of the few modern historians who has seen fit to attribute the beginning of the bombing war to Germany. '[I]t was not the British and Americans but the Germans who initiated the bombing war': Moeller (n 38) 46, 49.

<sup>383</sup> Lauterpacht (n 8) 212.

<sup>384</sup> Ibid.

<sup>385</sup> Overy, *Bombing War* (n 3) 249.

war through the perspective of Allied leaders, service members and citizens. How did Allied leaders, service members and citizens conceive of reciprocity? How did they balance the conflicting values of humanitarianism and self-defence? What is needed is a historical exploration of the norm of reciprocity as a salient component of culture and psychology. Also, a reassessment of the military necessity of bombing Dresden is long overdue.

Additionally, a reassessment of the principles of distinction and proportionality vis-à-vis the bombing campaign is warranted. For instance, what does distinction entail in a total war? When we ask whether the Allied bombing campaign was proportional, what do we suppose the bombing should have been proportional to? Do we mean proportional in relation to Germany's attacks against England? In relation to German attacks against the Allies? In relation to German attacks within the occupied countries? In relation to the Holocaust? What does World War II demonstrate about proportionality and the norm of reciprocity today?

What the historical evidence makes clear is that several international bodies, prior to World War II, were coalescing around restrictions on aerial bombing, but World War II temporarily interrupted these efforts to codify relevant laws of war. Reciprocity drove the Allies to unleash the whirlwind of reprisal. Given all that they sacrificed, the Allies' endeavours warrant, at least, an even-handed account. Of the generation that fought and won World War II, it should be said that they fought a war with fewer laws and more justice.