

The Allied Bombing of German Cities during the Second World War from a Canadian Perspective

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Introduction

“We support the troops” became a trope in Canada, the United States and elsewhere for “support the war” and has resulted in some self-censorship and chilled speech.¹ At the same time, the moral ambiguities of the armed actions of Canada and its allies in a post-Cold War world are clear to many and have received public, media and even legal scrutiny.² This is in marked contrast to Canada’s collective memory of “the good war”, the Second World War. In some countries, including Germany, a “new wave” of professional

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¹⁾ For a dissection of calls to “support the troops” see, Roger Stahl, “Why we ‘support the troops’: Rhetorical Evolutions”, (2009) 12 *Rhetoric and Public Affairs* 553.

²⁾ On legal scrutiny of the armed forces today, see Christopher Waters, “Beyond Lawfare: Juridical Oversight of Western Militaries” (2009) 46 *Alberta Law Review* 885. The Somalia Affair in 1993 (involving the beating to death of a teenaged detainee by Canadian Forces personnel) or the transfer to potential torture of Afghan detainees by Canadian Forces in more recent years have brought criticism.

historians is reconsidering moral ambiguities of the Second World War (to be clear, not attempting to draw moral equivalencies between Axis and Allies).³ Yet criticism of Canadian soldiers, sailors and airmen's roles in the Second World War remains largely taboo in Canada itself. Nowhere is this taboo stronger than with respect to the legality of Canadian participation in British Bomber Command's specific targeting, or "de-housing", of German civilians.

When a documentary questioning the bombing (*The Valour and the Horror*) was aired on the Canadian Broadcasting Corporation (CBC) in 1992, and again when the Canadian War Museum featured a panel entitled "An Enduring Controversy", in 2007, the well-organized veterans' lobby, with the help of many outraged politicians, forced these major public institutions to back down and fall silent. In each kerfuffle, both the usefulness and the morality of bombing civilians was argued at length. Yet in both instances, just as has been the case since area bombardment began in 1942, there was virtually no discussion of the legality of bombing German civilians. It is almost as if the mention of international humanitarian law in the context of Canadian actions smears the reputation of Canada's "greatest generation", and indeed such discussions threaten to undermine Canadians' identity as reluctant but always honourable warriors.

Even in Britain and the United States the controversy surrounding the targeting of civilians in World War II is almost always framed within an ethical, or moral discussion, with no sustained attempt to publicly address the legality of the issue at the time. Thus, in this paper, we first directly address the history of the legality of the aerial bombardment of civilians, from the earliest attempts at legalization, through the inter-war period and into the actual bombing campaigns of the Second World War. We then chart the paucity of discussion of the legality of said bombing both during the war and throughout the Cold War, and finish with the occasional interruptions to the legal silence since 1992 in Canada and elsewhere.

I. Law, History, and the Targeting of Civilians, from the 1880s to 1945

While there were some halting pre-Great War attempts to exclude aviation from the battlefield altogether, first in the form of balloons and later

³) On this "new wave" see Adam Kirsch, "Is World War II Still the 'Good War'?", *New York Times*, 27 May 2011.

airplanes, these were ultimately as unsuccessful as earlier attempts to ban the crossbow. In perhaps the first effort to govern international aerial warfare within the laws of war, in 1880 the Institute of International Law at Oxford promulgated a draft convention (the “Oxford Manual”) on warfare that included balloonists or “aeronauts” in the category of belligerents rather than spies.⁴ In 1899 the First Hague Peace Conference sought to regulate the means of aerial warfare, restricting balloons to reconnaissance by stating: “The contracting powers agree for a term of five years to forbid the discharge of projectiles and explosives from balloons or by other new methods of a similar nature.”⁵ At the 1907 Second Hague Peace Conference (after “heavier than air flight” had been proven possible) the earlier five-year moratorium had expired. While smaller states were willing to extend the ban and specifically include the new aircraft, larger states would not curtail the methods at their disposal.

All the same, the Hague Convention did incorporate the question of aerial bombardment in the notion of bombardment of places by land. Article 25 reads: “The attack or bombardment, by any means whatsoever, of undefended towns, villages, dwellings, or buildings, is forbidden.” The words “by any means whatsoever” were included deliberately to include air attacks.⁶ At first glance this provision would appear to settle the matter of aerial bombardment’s legality, either as codified law or, according to some contemporaries, as declaratory of customary international law.⁷ The provision fell into practical disuse, however, as it was considered that the term “undefended” was rendered meaningless by developments on the ground (the placement of anti-aircraft guns) and in the air (if airplanes could be scrambled to fight over a town, how could the town be said to be undefended?).⁸

This did not end efforts to regulate by analogy to land or maritime warfare however. To take one example, the Institute of International Law in Madrid

⁴) Institute of International Law, “The Oxford Manual of The Laws of War on Land” (Oxford, 1880), Art. 24, available at <www.icrc.org/ihl.nsf>.

⁵) Ministère des affaires étrangères, Conférence Internationale de la paix (The Hague, 18–29 May 1899), part II, 252–253.

⁶) Elbridge Colby, “Aerial Law and War Targets” (1925) 19 *American Journal of International Law* 703.

⁷) Wo-Chiang Lin, “Aeronautical Law in Time of War” (1932) 3 *Journal of Air Law* 79.

⁸) Colby, *supra* note 6, at 707. The treaty also stated that it was binding only between signatories, and not all the major states were parties.

adopted the following principle in 1911: “Air war is allowed, but on the condition that it does not present for the persons or property of the peaceable population greater dangers than land or sea warfare.”⁹ Despite these efforts of jurists to suggest that traditional laws of war could be extended to aerial warfare, at the start of the First World War there was no multilateral treaty specifically on point.

A. *The First World War and the Targeting of Civilians*

The Great War saw the first large scale use of the airplane in modern warfare and with it the awareness that international law on its use was far from adequate. Yet, for the most part, the level of technology from 1914–18 indicated that aerial bombardment of civilians could be a major problem in the *next* war. While some civilians in Freiburg and Karlsruhe fell victim to bombs thrown (literally) from French planes, and although German Zeppelins and later Gotha bombers appeared over London and struck fear into the hearts of thousands, neither these nor any other aerial attacks on cities were anything more than a nuisance to war planners.¹⁰ It is crucial to note however that already long before these aerial bombardments non-combatants had been targeted on a huge scale in this first total war of the twentieth century. During the German invasion of Belgium, the hoary head of guerrilla warfare appeared, at least in the eyes of the jittery German soldiers who seemingly “saw” snipers everywhere.¹¹ The resulting German retaliation against civilians gave much needed ammunition to British propaganda efforts to convince their populace that “the Huns” (and surprisingly, after hundreds of years, not the French) were the enemy. But in terms of truly massive numbers of civilians being targeted in a manner that ran counter to international law, we must turn to that oldest of strategies, the siege, here in its maritime form, the blockade.

Just as the British belief that Prussian army generals would dispense with any laws that got in the way of *Kriegsraison* seemed justified by events in Belgium, so the German confidence that the British Navy would behave

⁹) *Annuaire* (1911) XXIC pp. 105–120.

¹⁰) For a good overview, see Lee Kennett, *The First Air War: 1914–1918*, (New York: Simon & Schuster, 1991).

¹¹) John Horne and Alan Kramer, *German Atrocities, 1914: A History of Denial* (New Haven, 2001).

similarly was confirmed at the outset of the war with the total blockade of German ports.¹² International law had moved away from the idea that starvation, whether by siege or blockade was reasonable, and indeed the 1909 London Declaration excluded food destined for the civilian population as contraband subject to seizure. Britain signed this declaration, but against its clear intent, proceeded to starve the German people and indeed anger neutral countries (such as the United States of America) which attempted and failed to practice their right to trade non-contraband with Germany.¹³ The Germans then declared their right to retaliation with the introduction in 1915 of unrestricted submarine warfare. The problem for the Germans was that, in the eyes of the world, they killed civilians brazenly, suddenly and by sending them to the bottom of the sea, while the British killed them silently and slowly, though in vastly greater numbers: 600 000 German non-combatants died through malnutrition attributed directly to the British blockade.¹⁴

In terms of the radicalization of war, the Rubicon was crossed many times between 1914 and 1918 but for our purposes two things stand out: first, the entire population of a nation was deemed a legitimate strategic target, from munitions workers to infants, and second, a technology, the airplane, was introduced that would one day be able to transform such a strategy from the slow and plodding blockade to the direct and ferocious, via the aerial bombardment of cities. No less a figure than General Jan Smuts saw what was developing, and his Committee on Air Organization and Home Defense issued the following statement in August 1917:

As far as can at present be foreseen there is absolutely no limit to the scale of [air power's] future independent war use. And the day may not be far off when aerial operations with their devastation of enemy lands and destruction

¹²) Geoffrey Best, *Humanity in Warfare*, (New York: Columbia University Press, 1983), p. 249

¹³) See Articles 24(1) and 33 of the Declaration Concerning the Laws of Naval War, 208 Consol. T.S. (1909) 338, available at: <www1.umn.edu/humanrts/instree/1909b.htm>. Although the Declaration was not subsequently ratified, its Preamble recognised it as “correspond[ing] in substance with the generally recognized principles of international law.”

¹⁴) Eric W. Osborne, *Britain's Economic Blockade of Germany, 1914–1919*, (New York: Routledge, 2004). Of course, the sinking of American ships washed away any sympathy from the Americans the Germans had gained via the Blockade.

of industrial and populous centres on a vast scale may become the principal operations of war, to which the older forms of military and naval operations become secondary and subordinate.¹⁵

The path that led to the fateful decision in 1942 to make the area, or indiscriminate, bombing of German cities the main mission of the British Bomber Command, and therefore also of Canadian bombers, can be found in developments near the end of the First World War. Fascinating and tragic, in retrospect, is the little known role of the Royal Naval Air Service (RNAS). This branch had decided that of the two possible future roles for aerial bombardment, precision or area bombing, the former would be of more military use and it thus focused on developing those technologies. Its bomb-aiming equipment and bombing techniques employed against German chemical and oil facilities were well advanced for their time, and they even conducted a post-Great War bombing survey in Germany. All of this, including the postwar survey, was an early and precocious version of what the American Air Force would pursue in World War II. The later British story however is famously different, and is a result of the RNAS being merged into the newly created Royal Air Force (RAF) in April 1918, a branch that under its first Air Marshall, Hugh Trenchard, would make the fateful decision that the RAF alone could win the next war and that it would do so by way of breaking the will of the enemy through area bombardment of its cities.¹⁶ By the time M. W. Roysse's well-received book appeared in 1928, *Aerial Bombardment and the International Regulation of Warfare*, precision bombing had lost favour: "aerial bombs and sighting devices were crude and inaccurate, more or less precluding the effectual destruction of individual objectives."¹⁷ In other words, long before 1939, in the Royal Air Force, and by extension, the Royal Canadian Air Force, indiscriminate area bombing was now the *only* bombing in the ascendant.

¹⁵) Quoted in Best, *supra* note 12, at 270.

¹⁶) Best, *ibid.*, 266–273. British thinking was also paralleled and inspired by foreign thinking about air power, notably by the arguments of the Italian Giulio Douhet, *Command of the Air* (1921), who wrote explicitly about the role of bombing in destroying civilian morale and encouraging people to rise up against their rulers.

¹⁷) Cited in Best, *ibid.*, 266

B. *The Interwar Years: A Growing Recognition of Future War*

The technological and military developments during WWI spurred the demand for regulation. The parties at the Washington Conference of 1922 on the Limitation of Armaments – which included Canada as a member of the British Empire delegation – appointed a Commission of Jurists to prepare rules relating to aerial warfare. The Commission was to consider whether the existing principles of international law sufficed to apply to the methods of warfare introduced and developed since the second Hague Peace Conference of 1907. The Commission, presided over by the leading American international lawyer John Bassett Moore, was composed of representatives of the Great Powers. The Commission met from December 1922 to February 1923 at The Hague and prepared rules of air warfare that broadly corresponded to the then established rules governing land and naval warfare.¹⁸

These rules, which we will call the “the Air Rules” in this paper, included the bedrock law of war principle of distinction between combatants and non-combatants. Article 22 stated: “Any 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.” Furthermore, air bombardments were lawful only when militarily necessary. Article 24 is worth quoting because it was adopted unanimously and because of its specificity in limiting the scope of military necessity:

1. An air bombardment is legitimate only when is [sic] directed against a military objective, i.e. an objective whereof the total or partial destruction would constitute an obvious military advantage for the belligerent;
2. Such bombardment is legitimate only when directed exclusively against the following objectives: military forces, military works, military establishments or depots, 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.

¹⁸) Rules concerning the Control of Wireless Telegraphy in Time of War and Air Warfare. Drafted by a Commission of Jurists at the Hague, December 1922 – February 1923, available at <www.icrc.org/ihl.nsf/FULL/275?OpenDocument>.

3. Any bombardment of cities, towns, villages, habitations and building which are not situated in the immediate vicinity of the operations of the land forces, is forbidden ...

The notion of proportionality to act as a fulcrum between the principles of distinction and humanity on the one hand and military necessity on the other was also included:

4. 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.

Although not adopted in treaty form, the Air Rules were followed by a likeminded draft from the International Law Association the next year¹⁹ and by and large received academic support.²⁰ While there were disagreements on specifics – some found the definition of military objectives too stringent in the face of total war where attacks on factories related to the war effort should be considered legitimate²¹ – it is difficult to find opposition to the main thrust of the Air Rules in terms of deliberate aerial bombardment of civilians. As Rear Admiral William Rodgers, a technical adviser to the American delegation put it:

¹⁹ Intl. Law Association (33d Report 1924). Report of the Aerial Law Committee Part I, 118–120.

²⁰ See for example, J.W. Garner, “Aerial Warfare” (1924) *American Journal of International Law* 81 and P.W. Williams, “Legitimate Targets in Aerial Bombardment” (1929) 23 *American Journal of International Law* 570, though the latter would have redrawn the rules to, among other things, extend the definition of military objective to encompass factories related to the war effort. A very few foresaw and apparently accepted that bombing civilians would be a major role of air power. As J.M. Spaight wrote in *Air Power and War Rights* (London: Longmans Green & Co., 1924) at 12. : “The bombing of civilian objectives will be a primary operation of war carried out in an organized manner and with forces which will make the raids of 1914–1918 appear by comparison spasmodic and feeble...”.

²¹ Frank E. Quinn, “Aerial Bombardment of Civilian and Military Objectives” (1931) 2 *Journal of Air Law* 474.

With regard to the revision of the laws of war from a humanitarian point of view, all nations and all members of each delegation were agreed that it was desirable that the laws of war should be such as to prevent suffering of persons or destruction of private property, except such as was inevitable for the accomplishment of the war objective.²²

It is certainly true that attempts to go beyond the Air Rules – for example by altogether banning bombardment as a means of warfare – failed. The notion however that the intentional targeting of civilians by bombardment was permitted had few backers, either amongst states or publicists. For example, although a British proposal to the 1932–1934 Disarmament Conference that would have prohibited all bombing “except for police purposes in outlying regions” was rejected, there appears to have been little quibble with the following resolution ultimately adopted: “An attack against the civilian population shall be absolutely prohibited.”²³ It is difficult to avoid the conclusion that while there were disagreements over the precise nature of what the rules should be, the notion that indiscriminate bombing of civilians was illegal was a common starting point for both states and publicists, drawn from analogies to existing laws of war. As noted earlier, some contemporaries saw a customary international law norm being clarified and declared.²⁴

Codification efforts aside, there is other evidence of a customary norm, or at least an emerging customary norm, against the intentional targeting of civilians by aerial bombardment. Notably, the League of Nations Assembly (of which Canada was a voting member) in September 1938 unanimously passed a Resolution for Protection of Civilian Populations against Bombing from the Air in Case of War. The Resolution – non-binding but nonetheless constituting evidence of state opinion as to the law – recognized three principles: the illegality of intentionally bombing civilian populations, the notion that attacks must be made against military objectives, and the need

²² W.L. Rodgers, “The Laws of War Concerning Aviation and Radio” (1923) 17 *American Journal of International Law* 629 at 632.

²³ As cited in Howard S. LeRoy, “Limitation of Air Warfare” (1941) 12 *Air Law Review*, at 26. The conference ultimately fell apart when Germany withdrew.

²⁴ See Lin, *supra* note 7. That a “war convention” clearly existed is the argument of both Walzer and, even more so, Garrett. See Michael Walzer, *Just and Unjust Wars* (New York: Basic Books, 1977; 2006 ed.), pp. 44ff., 258; and Stephen A. Garrett, *Ethics and Airpower in World War II: The British Bombing of German Cities* (New York: Palgrave, 1997), 136ff.

for precautions to minimize civilian casualties. While calling for the codification of these principles in treaty form, the Preamble to the Resolution suggests that these activities were already illegal:

Considering that this practice [intentional bombing of civilians], for which there is no military necessity and which, as experience shows, only causes needless suffering, is condemned under the recognised principles of international law ...²⁵

There were also two interwar judicial decisions on point. Dealing with First World War German bombing of civilian property and persons in Bucharest and Salonica, neutral judges on the German Mixed Arbitral Tribunal established by treaty at Versailles held Germany liable for damage on the basis of the rules generally applicable to bombardments in land warfare.²⁶ The Tribunal, citing both the 1907 Hague Regulations and customary international law, stated that:

Att[endu] qu'il est un des principes généralement reconnus par le droit des gens que les belligérants doivent respecter, pour autant que possible, la population civile ainsi que les biens appartenant aux civils.²⁷

To these codification efforts, the League of Nations' Resolution and judicial decisions, we can also add diplomatic correspondence and government statements. For example, in response to the Japanese bombing of Nanjing, US Secretary of State Cordell Hull claimed the following: "This Government

²⁵ "Protection of Civilian Populations Against Bombing From the Air in Case of War", League of Nations Assembly, September 30, 1938, available at: <www.dannen.com/decision/int-law.html#D>. On the question of the contribution of League of Nations' resolutions to the creation of customary international law, see for example, Lazare Kopelmanas, "Custom as a Means of the Creation of International Law" (1937) 18 *British Year Book of International Law* 132, who refers to "certain *voeux* or resolutions of the League of Nations which have by themselves no binding force but which undoubtedly are acts which contribute to a customary rule."

²⁶ *Coenca Brothers v. Germany*, VII *Recueil des décisions des Tribunaux Arbitraux Mixtes* (1927) 683 and *Kiriadolou v. Germany*, X *Recueil des décisions des Tribunaux Arbitraux Mixtes* 100 (1930).

²⁷ *Coenca Brothers, ibid.*, at 687.

holds the view that any general bombing of an extensive area wherein there resides a large populace engaged in peaceful pursuits is unwarranted and contrary to principles of law and of humanity.”²⁸ Responding to the bombing of Guernica, Anthony Eden, the British Foreign Secretary stated in 1938 in the House of Commons that there was one legal principle governing aerial bombardment, namely, “the direct, deliberate and intentional bombing of non-combatants is illegal.”²⁹ Expanding on this view in the House of Commons, Prime Minister Chamberlain cited three relevant rules: first, “it is against international law to bomb civilians as such and to make deliberate attacks on the civilian population”, second, “targets which are identified from the air must be legitimate military objectives and must be capable of identification” and third, “reasonable care must be taken in attacking these military objectives so that by carelessness a civilian population in the neighbourhood is not bombed.”³⁰ In addition to perceived motivations based on ethical, legal and moral grounds, such British statements also reflected the fact that they believed that the Germans had significant air capability and thus a ban on strategic bombing might protect the British.³¹ At the same time, the Germans feared Allied strategic air power, leading Hitler to claim in 1935 and 1938 that area bombing of cities was also illegal. Further, the civilian populations of both sides were equally terrified of the future of air power as is clear from the popular futuristic novels of the period.³²

In Canada, both politicians and the general public were well aware by the late 1930s that aerial bombardment had become a part of modern warfare. The Toronto-based *Globe* followed the events of January 1936 when Italian airplanes bombed Ethiopian villages, and a few months later the news of the bombing of cities in Spain. But it was only in response to the Japanese

²⁸) Bombing of Nanking, Department of State Press Releases, September 25, 1937, 256. Also quoted in *The Globe and Mail*, 23 September 1937.

²⁹) 331 H.C. Deb. (5th ser.) 339 (1938).

³⁰) 337 H.C. Deb. (5th ser.) 937 (1938). On the debates among the British military staff as to the legality of strategic bombing, see Paul Goda, “The Protection of Civilians From Bombardment by Aircraft: The Ineffectiveness of the International Law of War” (1966) 31 *Mil. L. Rev.* 93 at pp. 98–100.

³¹) Baldwin was indeed obsessed by his fear that the German bombers would get through. See Max Hastings, *Bomber Command* (New York: The Dial Press, 1979), p. 44.

³²) See I. F. Clarke, *Voices Prophesying War: Future Wars, 1763–3749* (New York: Oxford University Press, 1993, 2nd ed.).

ultimatum and almost immediate and subsequent bombing of Nanking that *The Globe* went beyond reporting and chose to pass judgment with an editorial: “nothing will cover up the horrors and brutality of “negotiations” conducted by bombing and machine-gunning helpless civilian populations. Refusal to call these massacres by the proper name may save somebody’s face in the records; it may help economic relations to run more smoothly and profitably when they have achieved their purpose. But to the ordinary human being they add up to war, unwarranted, brutal, greedy slaughter.”³³

With such stories in the public eye and the ever growing threat of immanent war with Germany, the topic of aerial bombardment eventually made it into the Canadian House of Parliament, however briefly. In February of 1937 the Liberal government of Prime Minister Mackenzie King introduced a defense bill that included a significant amount to be spent on bombers. J.S. Woodsworth and the members of his socially progressive and anti-militarist political party, the Co-operative Commonwealth Federation (CCF),³⁴ pointed out the hypocrisy of a defense budget allocating funds to a purely offensive weapon. In response to the fear that enemy bombers would one day bomb Canada, the opposition stated that fighter planes and bomb shelters were the best defense. But in an early iteration of Cold War, Mutually Assured Destruction (MAD) thinking, the government responded that the only guarantee against being bombed was to promise massive retaliation. Thus, in order to leave no one in doubt as to what was actually being contemplated by the government, Woodsworth stated: “We are now preparing bombs to drop on defenceless men, women and children, and undoubtedly we may well prepare to have bombs dropped upon us. It seems as if in absolute helplessness we just sit and watch a war come upon us.”³⁵ Major James Coldwell, fellow member and future leader of the CCF,

³³) 21 September 1937.

³⁴) The CCF was the precursor of today’s New Democratic Party, or NDP.

³⁵) House of Commons, House of Commons Debates, 19 February 1937 (Ottawa: Debates H.O.C., 1937), 1069. The British former Prime Minister Baldwin was equally open and on the record about what was being considered, some five years earlier on 10 November 1932 in the British House of Commons: “The only defence is in offence, which means that you have to kill more women and children more quickly than the enemy if you want to save yourselves. I just mention that ... so that people may realize what is waiting for them when the next war comes.” Here again, any such argument that our current discussion about the morality and legality of targeting civilians in the Second World War is somehow anachronistic need

then indicated that Canadians were already well aware of the kind of strategy that Bomber Command would later explicitly pursue: that “aeroplanes were not meant for defensive purposes and that it would be impossible through the use of planes to defend a city from aerial attack. ... I believe the purpose of such an attack would be to strike panic into the hearts of the people so that they would compel whatever government may be in power at the time to sue for peace. This brings me back to the point I made this afternoon, that armaments such as we can provide are simply provocative and would in my opinion invite a potential enemy to strike terror into the hearts of our people.”³⁶ In pleading for funds for bomb shelters in eastern ports, Grant MacNeil (CCF, Vancouver North) again made clear what the strategy would be: “Evidently it is expected we shall engage in measures of retaliation, and drop bombs on innocent women and children in other parts of the world.”³⁷ Woodsworth then closes with reference to an earlier war and what was then thought to be barbaric and illegal, and how now his contemporaries do nothing in the face of the same happening again:

We are given a picture to-day of what will be involved, and if bombs are dropped in other countries it will be on other households, upon women and children as well as men. I can very well recollect, as can many hon. Members, the consternation, the abhorrence, we experienced in the last war when the Germans began using gas. It was a horrible thing, we thought; never would we resort to any such thing. Throughout the world there was an outcry against it. Yet the horror has passed and the use of gas and gas bombs and bombing planes is being accepted as essential in modern warfare. That is the picture to which we must look forward.³⁸

The purpose of this section is not to prove that there was a customary prohibition on the direct targeting of civilians from the air in 1939. Rather, we

only look in the most famous public record of the prewar era, Hansard. Cited in Hastings, *supra* note 31, p. 43.

³⁶ House of Commons, House of Commons Debates, 22 February 1937, (Ottawa: Debates H.O.C., 1937), 1112.

³⁷ House of Commons, House of Commons Debates, 23 February 1937, (Ottawa: Debates H.O.C., 1937), 1151.

³⁸ House of Commons, House of Commons Debates, 23 February 1937, (Ottawa: Debates H.O.C., 1937), 1156.

aim to demonstrate that the issue was a live one in the interwar period. A discussion of the legality of Bomber Command's tactics need not be ahistorical finger-wagging from the twenty-first century. The legal regulation of aerial warfare was not a blank slate in 1939 or even 1914 for that matter. While law played catch-up with technological advances, as it does today, aerial warfare was not considered so unlike its land and maritime equivalents to be beyond the reach of analogous principles from the laws of war. Indeed, as outlined above, there is a reasonable argument to be made – one that was made in the interwar period – that customary international law restricted aerial warfare along similar lines to the regulation of war on land and at sea, including with respect to the deliberate bombing of civilians, before the start of World War II.

C. The Second World War: The Area Bombing of German Civilians

Immediately upon the opening of hostilities in September 1939, both Chamberlain and American president Roosevelt declared that civilians should not be bombed. The aerial bombardment of civilians began on 1 September 1939 with the German attack upon Wieluń, Poland. However, for present purposes we will move immediately to the German assault on the United Kingdom, as retaliation played some role in Bomber Command's actions. Even after the successful *Blitzkrieg* in the West and the wholesale retreat of British forces from the Continent to the Isles, Hitler in the summer of 1940 was still worried about British airpower and was not keen to initiate area bombing of civilians. Thus, it is a great irony that his airforce “accidentally” did so: despite explicit orders not to bomb London, on the night of 24 August 1940 some *Luftwaffe* bombers did so. Possibly acting within the scope of legitimate reprisals as understood at the time – retaliatory acts which would otherwise be unlawful but resorted to solely as a way of forcing the enemy to cease its own violations of the laws of war – the RAF immediately launched several nights of bombing upon Berlin.³⁹ Infuriated, Hitler ended

³⁹) The prevailing view is that reprisals are illegal in the post-Charter era, but see Derek Bowett, “Reprisals Involving Recourse To Armed Force” (1972) 66 *American Journal of International Law* 1.

his self-interested “observance” of the law, and ordered the destruction of London, Coventry and other British cities.⁴⁰

Once the Germans’ bombing of Britain petered out by early 1941, the British largely ceased their retaliatory raids (indiscriminate night bombing of German cities), and focused in 1941 upon precision targets.⁴¹ The ethical and legal debate around strategic bombing in the Second World War revolves around these two concepts: precision versus area bombing. Precision bombing, the deliberate and discriminate targeting of military or industrial targets, usually by day, resulted in both a) far fewer civilian casualties and b) far higher bomber crew casualties (due to the relatively easy anti-aircraft targeting of bombers in daylight). For obvious reasons, precision bombing against military targets is regarded as legal under any definition of the law of warfare. Area bombing, the indiscriminate targeting of cities for the purposes of: a) “de-housing” civilian workers, b) destroying the city’s economy and thus capacity to contribute to the war effort and c) crushing the morale of civilians in general, was almost always carried out at night (thus helping to preserve the bomber crews from lethal anti-aircraft fire). Area bombing is of course highly problematic, both morally and in terms of international law. It is critical to note that very few, if any, legal or moral critics of area bombing are critical of precision bombing: in other words, defenders of Bomber Command who argue that their critics are against strategic bombing *tout court*, are incorrect.⁴² It is the kind of bombing that is under review, not bombing *per se*.⁴³

⁴⁰ Best, *supra* note 12, 276. In any case, as both Hansen and Overy argue, *Luftwaffe* losses had been staggering and thus the switch to city bombing may well have had little to do with the Berlin raids. See Randall Hansen, *Fire and Fury: The Allied Bombing of Germany, 1942–1945* (Toronto: Doubleday, 2008), 18; and R.J. Overy, *The Air War, 1939–1945* (London: Europa, 1980), 34.

⁴¹ Hastings, *supra* note 31, ch. 4.

⁴² For example, Robin Neillands makes the following statement without any citation: “It is increasingly and popularly alleged that Arthur Harris and Bomber Command should not have bombed the German cities *at all*.” We have yet to come across any serious work on this debate that claims that German cities should not have been bombed “*at all*”. Robin Neillands, *The Bomber War: Arthur Harris and the Allied Bomber Offensive 1939–1945* (London: John Murray, 2001), 3.

⁴³ Using the same tactic, i.e., arguing that critics of Bomber Command were against all bombing, defenders of Bomber Command make the seemingly powerful argument that the German armed forces had to commit incredible numbers of fighter planes, anti-aircraft guns,

And it was the kind of bombing to pursue that occupied Bomber Command throughout 1941, while precision bombing was being exclusively practiced. Intercepted German reports made it clear that British night bombing with primitive electronics was not resulting in damage of any significance to the German war effort.⁴⁴ Additionally, the historical context is crucial: Britain stood alone against a German-occupied Europe at this time, and any damage whatsoever caused by strategic bombing was the only device through which Prime Minister Churchill could demonstrate to his desperate population that they could strike back at the Nazi menace, and take retribution (sometimes couched as reprisals) for attacks on British civilians in the Battle of Britain. In this context, in late 1941, Churchill began to push for a switch at Bomber Command to area bombing, and in February 1942 the policy was officially changed.⁴⁵

The period from February 1942 to May 1944 is often seen as understandable in the ethical and legal debate around strategic bombing.⁴⁶ This despite the fact that in the middle of this period, during the last week of July 1943, the fire-bombing of Hamburg and resultant death of more than 40 000

and personnel to defending cities that otherwise would have been used on the conventional frontlines. This is a red herring, as the alternative to area bombing of cities was a complete focus upon widely dispersed oil and transportation precision bombing targets, targets the Germans defended much more dearly than civilians. Had such a focus been made by the RAF, it is reasonable to say that *even more* assets would have been requested from the frontlines. Thus, this common defense of Bomber Command from a military point of view quickly turns into another example of its military un-necessity. Hew Strachan makes the further point that it is rather absurd to applaud the fact that strategic bombing lured 88mm guns away from their role destroying cheaply produced T34 tanks on the Eastern Front in order to shoot down the most expensive products of the entire war: bombers. Hew Strachan, “Strategic Bombing and the Question of Civilian Casualties up to 1945”, in *Firestorm: The Bombing of Dresden 1945*, eds., Paul Addison and Jeremy Crang (London: Pimlico, 2006), 1–17.

⁴⁴ Hastings, *supra* note 31, 121–122.

⁴⁵ Yes, by mid-December 1941 Britain was no longer “alone”, but it was widely believed that it would take a long time before the United States could be helpful in the European Theatre, and that in any case, its initial focus would be the Pacific. Further, Britain was a maritime power, the use of its army as a major instrument of war was not a part of its strategic plans. Finally, as alluded to earlier, it must be said that earlier British precision raids were not all that precise.

⁴⁶ This is by and large the point of view put forward in one of the most famous ethical discussions of bombing in World War II: Walzer, *supra* note 24, ch. 16. Others disagree: Hansen sees Operation Gomorrah as the key date. Hansen, *supra* note 40, 270.

civilians represents for many the worst case of the bombing of civilians during the entire European war. It is also the period from which historians of the United States Army Air Forces (USAAF) base their attempt to appear morally and legally superior to the RAF.⁴⁷ Throughout this period, while Bomber Command focused on the nighttime area bombing of German cities, the USAAF stuck to daytime precision raids with the resultant substantial losses to the US fleet. The American argument was that while what they were doing had immediate and substantial effects on the German military, area bombing's effects were far more nebulous. In fact, although the destruction of Hamburg in July 1943 led key Nazi leaders (notably Albert Speer and Joseph Goebbels) to claim in the immediate aftermath that such a policy would lead to the capitulation of Germany, we know that once the initial terror had passed the Germans were able to adjust remarkably quickly and knew within weeks that they could indeed survive such bombing.⁴⁸ What is crucial, at least if efficacy, or "military necessity," is to be considered in this legal debate, is that throughout the war, intercepted German intelligence made clear that the American destruction of oil and transportation facilities had a vastly greater impact on the fighting ability of the *Wehrmacht* than

⁴⁷ It is in fact a Canadian historian who makes the most recent, powerful and eloquent contrast between the bombing ideologies of the British and the Americans. See Hansen, *supra* note 40. Incredibly, already during the war General Carl Spaatz foresaw what historians would think of his British colleagues' desire, post D-Day, to return to directly targeting civilians. In a memo of 27 August 1944, he wrote: "I personally believe that any deviation from our present policy, even for an exceptional case, will be unfortunate. 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." Cited in Best, *supra* note 12, 364.

⁴⁸ Spencer Dunmore and William Carter, *Reap the Whirlwind: The Untold Story of 6 Group, Canada's Bomber Force of World War II* (Toronto: McClelland & Stewart, 1991), 141–142. After first stating that if the Allies continued to destroy city after city, Germany would have to surrender in weeks, Speer soon changed his mind when he saw how quickly Hamburg was up and running again. Only with the reality of Speer's worst fears, the complete destruction of two cities in immediate succession, Hiroshima and Nagasaki, with the promise of more, would an Axis country surrender due to strategic bombing. Yet even this claim has been challenged with the recent and powerful claim that the Japanese surrendered because of the Soviet declaration of war, and not because of the continued destruction of Japanese cities by unconventional means. See Tsuyoshi Hasegawa, *Racing the Enemy: Stalin, Truman, and the Surrender of Japan* (Cambridge, MA: Harvard University Press, 2005).

any British “de-housing.”⁴⁹ Nevertheless, again, because target acquisition during this period was still relatively primitive, and the lack of long-range fighter protection continued to leave bombers highly vulnerable, the British decision to continue with nighttime area bombing of German cities from 1942 to 1944, for the most part, receives a “pass” from critics. D-Day, however, is the game changer in the moral and legal debate.

Since the Casablanca Conference in 1943, both Churchill and the Chief of Air Staff Portal had been pressuring the head of Bomber Command, Arthur Harris, to gradually shift to more precision bombing, as the intelligence was unavoidably clear about its efficacy versus area bombing. Harris refused, holding to his line that, “panacea targets” be damned, the war would be won by breaking the will of the German people.⁵⁰ Yet, in May 1944 he had no choice but to switch all of his strategic forces to the precision bombing preparation for the 6 June landings at Normandy, as well as the continued support through to the complete Allied breakout from Normandy by August. This brings us to September 1944 and the crucial decision around which there is largely consensus among moral and legal critics of Bomber Command. At that time, Harris was ordered to continue precision bombing because: 1) the Normandy bombing campaign had been an astounding success, admitted by Harris to have been beyond his most optimistic predictions, 2) target acquisition electronics had advanced to the point where precision bombing (even at night) was now highly effective, 3) the Americans had provided long-range fighter escorts to bombing missions with the introduction of the Mustang, 4) the Allies had achieved air superiority in Europe, and 5) intelligence continued to provide solid evidence that precision bombing of oil and transportation severely curtailed the German war machine, and that its continued targeting was the most effective way to win the war as soon as possible.

⁴⁹ Dunmore and Carter, *ibid.*, 330–331. It is at this point that the Canadian historians, Dunmore and Carter, in this otherwise uncritical portrait of 6 Group, have to claim that by October 1944 it was clear to all that the American bombing of oil and transportation was winning the war, but that Harris refused to budge. They then lamely state: “Whether it was necessary or even advisable is still a subject for the polemics of historians.”

⁵⁰ Garrett, *supra* note 14, 18.

Harris refused the order and submitted his resignation. Churchill and Portal ignored the resignation and allowed him to proceed.⁵¹ Bomber Command resumed the area bombing of German cities at an even more ferocious level, and did not stop until 15 April 1945. In these last eight months, more bombs were dropped than in the previous four years combined. In February the historically, legally and morally most famous mission of all was carried out over Dresden. In terms of the legal argument of reprisals the following is worth considering: on 12 March 1945, shortly before Bomber Command ceased operations due to a lack of intact targets, 1108 bombers dropped 4851 tons of bombs on Dortmund. This represents ten percent of the total tonnage of German bombs dropped on Britain in the entire war. The Allies dropped twenty times as many bombs on Germany as vice versa.⁵² And on 16 March, Würzburg was destroyed. This last city had no identifiable military or industrial targets, and indeed was not even defended by the *Luftwaffe* or antiaircraft batteries.⁵³ In terms of the historical context of these last eight months, it is important to note that the Allies knew throughout that they would be victorious; how soon was the only question. Finally, with respect to the area versus precision bombing debate, it is both important and ironic to note that in the only serious setback on the western front, the German counteroffensive in the Ardennes in December 1944, the German attack fell apart not because of the broken will of the civilians on the homefront ... but because the Panzers ran out of gas.⁵⁴

D. *Canada's Involvement in the Bombing*

Arguably Canada's greatest contribution to the Allied war effort in the Second World War was the training of pilots and the provision of aircrews

⁵¹) This episode is nicely detailed in Hansen, *supra* note 40, 209–220, 234–238. See also Garrett, *ibid.*, 56–61.

⁵²) That two of the 1108 bombers were lost on the mission should indicate that Dortmund cannot reasonably be called a “defended” city. From 1940 to 1945, the Germans dropped 74, 172 tons of bombs on the UK, and Britain and the USA dropped 1,996,036 tons of bombs on Europe, mainly of course on German cities. See Overy, *supra* note 40, 120.

⁵³) Garrett, *supra* note 14, x. It was learning of the raid on Würzburg, and the lack of any reason for its targeting other than that it had not yet been destroyed, that led Garrett to pursue the “ethics of airpower” as a theme.

⁵⁴) For an account of the battle, and the lack of petrol, see Max Hastings, *Armageddon: The Battle for Germany, 1944–45* (New York: Knopf, 2004), ch. 8.

to Bomber Command. The British Commonwealth Air Training Program, the largest aviation program in history, had the vast majority of its bases and personnel in Canada. Within this program, Canada trained and provided an enormous amount of the aircrew for the British RAF. Of the six bomber groups in the RAF, the 6th was entirely Canadian. But the numbers went well beyond that: fully 50 000 of the 125 000 members of Bomber Command during the war were Canadian, and by 1944 it is estimated that at least one Canadian was amongst the crew of seven of every bomber in the British Fleet.⁵⁵ Of course Canadians in British bomber groups flew on British ordered missions, but it is also the case that 6 Group received its missions from British Bomber Command and exercised no independence in target selection. We do not know if there was any discussion among Canadian legal advisors at the time as to whether or not Canadian bomber crews should participate in British-ordered area bombing of civilian targets.⁵⁶ Some participants did have reservations, including one Captain McQuiston who, despite being the pilot, always made sure to personally drop the last bomb, “Deep down, I really felt a need to share fully in the responsibility for what we were doing.”⁵⁷ Whatever reservations existed among Canadian aircrews, such empathy for German civilians was completely overshadowed by anxiety over the precariousness of their own existence. Indeed, in McQuiston’s memoir the captain references the immorality in risking the lives of so many Canadian airmen on such unnecessary missions, and alludes to what he saw as the high possibility at the time of mutiny among the crews.⁵⁸

On the homefront, there is little evidence that Canadians questioned the legality of the bombing of civilians. Although the population was not told that civilians were being targeted, public opinion polls directly asked this question of Canadian civilians and the respondents had few qualms with

⁵⁵ Dan McCaffery, *Battlefields in the Air: Canadians in the Allied Bomber Command* (Toronto: James Lormier, 1995), vii.

⁵⁶ Investigating as to whether or not such discussions took place is central to the larger project being undertaken by the authors.

⁵⁷ John H. McQuiston, *Tannoy Calling! The Story of Canadian Airmen Flying Against Nazi Germany* (New York: Vantage, 1990), 82.

⁵⁸ “The High Command must have lived in fear of a general revolt against the slaughter of operational aircrew, and the distasteful tasks we were assigned. No one was proud of the mounting toll of civilian casualties, even if they were German.” McQuiston, *Tannoy Calling!* at 204.

the idea.⁵⁹ Articles in *Saturday Night*, *Canadian Aviation*, and the *Globe and Mail* described the airplanes, the crews, the bombing and the destruction, but there was no discussion of ethics or legality. For one brief moment, the question arose in the Parliament:

Mr. Church [Conservative, Broadview] asks: Has the government made any representations to the government of Great Britain respecting the bombing by Britain of cities and other parts of any territory of the axis powers? If so, what are they, and when were they made?

[Prime Minister] Mr. Mackenzie King responds: No⁶⁰

Very late in the war, the Americans finally agreed to join the RAF in area bombing, most famously over Berlin, Dresden and other targets in early 1945. At the same time they began the area bombing of Japanese cities, a process that would end with the atomic bomb. Yet in Europe, the German army continued to fight to the last man, room to room in the *Reichstag* itself. Arthur Harris' theory that Germany could be beaten through strategic bombing (with explosive and incendiary, but not atomic, bombs) had been proven false. Had it not been for Hiroshima and Nagasaki, the future of such a strategy would have been very much in doubt. As it turned out, however, the quick surrender of Japan after the two atomic explosions ensured that strategic bombing would in fact become the hallmark threat of the ensuing Cold War. Lastly, with regard to the legality of the pre-atomic strategic bombing of Japan, Robert MacNamara later revealed that in the wake of a campaign of fire-bombing Japanese cities and "burn[ing] to death 100 000 civilians in one night", General Curtis LeMay said to him: "If we'd lost the war, we'd all have been prosecuted as war criminals." MacNamara continued:

⁵⁹) On 16 January 1943, Canadians were asked, "Do you approve or disapprove of bombing Germany's civilian population?" 57% approved, 38% disapproved. Less approved of bombing Italians (51%) and more approved of bombing Japanese (62%). French-speaking Canadians were significantly less likely to approve of bombing any of these civilians (47%, 40%, and 46%, respectively). Further, Canadians were asked in 1942 and 1943 if the war could be won by bombing alone (Harris's strategy). They overwhelmingly believed it could not (1942: 59% no, 1943: 64% no.) Cantril, Hadley, ed., *Public Opinion: 1935–1946* (Princeton: Princeton University Press, 1951), 1068–1069.

⁶⁰) House of Commons, House of Commons Debates, 27 November 1940 (Ottawa: Debates H.O.C., 1940), 453.

“I think he’s right. He, and I’d say I, were behaving as war criminals. LeMay recognized that what he was doing would be thought immoral if his side had lost. But what makes it immoral if you lose and not immoral if you win?”⁶¹

II. Victory, Nuremberg and the Cold War: 1945–1990

As shown above, it is at least arguable that indiscriminate bombing of civilians was illegal at the start of the Second World War in 1939. Certainly Allied criticism of German indiscriminate bombing of Warsaw, Rotterdam and Belgrade would not lead to any contrary conclusion. However, the aerial tactics unleashed during the war by the Allies themselves gradually led to juristic backpedalling. J.M. Spaight’s legal apologia for British bombing of German cities in the *British Year Book of International Law* is one of the few British writings on the subject during the war itself (Americans were more prolific on the subject, while Canadians appear to have written nothing). Spaight, a prominent air lawyer, suggested that Chamberlain’s view expressed in 1938 “may still be regarded as holding good in principle” but was impractical.⁶² This impracticality came from the belligerents’ attempts to disguise their own military establishments and the difficulty of hitting these camouflaged or disguised targets with any precision. Spaight also argued that munitions workers and those engaged in transport were combatants and that cities had been transformed by total war into “battle making towns.”⁶³ Leading British politicians were similarly cagey in their public pronouncements. In response to a question posed about the legality of the German V-1 rocket, Churchill replied: “I have said deliberately that that was a subject which raised grave considerations upon which I do not intend to embark. That is

⁶¹ “The Fog of War – 11 Lessons from the Life of Robert S. MacNamara”, directed by Errol Morris (Sony, 2003).

⁶² “Legitimate Objectives in Air Warfare” (1944) 21 *British Year Book of International Law* 161.

⁶³ Spaight, *supra* note 20, at 162. In fairness, there is nuance in Spaight’s argument. He writes on p. 163: “Unfortunately, other civilians who may genuinely claim to be so described live in these centres and suffer” as well. These civilians were not the targets and their deaths were unfortunate byproducts on the attacks against military and quasi-military objectives. Even at the high water mark in defence of the bombing of civilians in terms of legal thinking – and obviously not strategic or tactical thinking – bombing for the purpose of terrorizing the civilian population was formally beyond the pale.

the best way to leave it.”⁶⁴ The Air Rules themselves, while never dismissed in terms of the general principles, began to be seen as the “crest” of naïve pre-war attempts to regulate bombardment.⁶⁵

At Nuremberg in 1945–1946 the legal climb down had become a silence of sorts. Nuremberg of course was a watershed international law moment, when the principle of individual accountability for war crimes, crimes against humanity and crimes against peace were entrenched. At the trials, aerial warfare occasionally arose in the context of examinations and cross-examinations. For example, in the cross-examination of German General Jodl one finds reference to the lynching of downed Allied airmen whom the Germans labeled “terror fliers” for their purportedly illegal attacks on German civilians.⁶⁶ However, the prosecutors did not pursue the legality of indiscriminate bombing at all and in its decisions the Tribunal was essentially silent on aerial war. Even while making explicit references to customary international law to define the crimes of Nazi leadership, and implicit references to natural law, air war was treated as unregulated. Leaving aside air-specific customary international law, there is no reason in principle why the definition of war crimes accepted by the Nuremberg Tribunal – which included “wanton destruction of cities, towns, or villages, or devastation not justified by military necessity”⁶⁷ – could not have included German air attacks on civilian populations, but this avenue was not pursued. In fairness, many other aspects of the actual conduct of hostilities were not pursued and at least on one occasion, for example, with respect to submarine warfare, the decision not to prosecute on the conduct of hostilities themselves was

⁶⁴ Cited in C.P. Phillips, “Air Warfare and Law” (1952) 21 *George Washington Law Review* 332. There were some individuals who criticized the British policy of bombing civilians openly during the war, but these were limited; see for example the Bishop of Chichester’s statements in the House of Lords: 130 H.L. Deb. (5th ser.) 739 (1944).

⁶⁵ See LeRoy, *supra* note 23, 25. It should be noted though, that shortly after the war Oppenheim and Lauterpacht called the rules “an authoritative attempt to clarify and formulate rules of law governing the use of aircraft in war” [Lassa Oppenheim and Hersch Lauterpacht, *International Law*, 7th ed., Vol. 2 (London: Longmans, Green and Co, 1952) at 519].

⁶⁶ *Nuremberg Trial Proceedings*, Vol. 15, 4 June 1946, available at <avalon.law.yale.edu/imt/06-04-46.asp>.

⁶⁷ See the “Nuremberg Principles”: Report of the International Law Commission covering its Second Session, 5 June – 29 July 1950, Document A/1316, available at <www.icrc.org/ihl.nsf/INTRO/390?OpenDocument>.

made in recognition that the Allies were engaged in similar behaviour to their enemies (the *tu quoque* argument).⁶⁸

Nonetheless the silence on the air war is extraordinary, if transparent, from a political viewpoint. Most contemporary writers ignored the issue or non-issue of aerial bombardment at Nuremburg, but some recognized the “realism” of the Tribunal in leaving the issue aside:

To have branded as a crime, when used by the defeated enemy, techniques which the victor not only developed to a pitch undreamed of by that enemy but which were instrumental in the achievement of victory, would have vitiated the justice of the judgment in the eyes of the world ...

said one author.⁶⁹ The Nuremburg neglect of air war was continued at the Tokyo Tribunal, perhaps even less surprisingly than in the European theatre given the US atomic bombing of Hiroshima and Nagasaki.⁷⁰ Indeed, the only known formal prosecution of World War II airmen for bombing civilian targets occurred in Japan in early 1945. A Japanese military commission convicted two surviving American aircrew of a carpet bombing raid on Osaka and Kobe in violation of the 1923 Air Rules, and ordered them executed. American authorities later hanged the Japanese judge.⁷¹

⁶⁸ In its judgement of Admiral Doenitz, the Tribunal said: “In view of all the facts proved and in particular of an order of the British Admiralty announced on the 8th May, 1940, according to which all vessels should be sunk at first sight in the Skagerrak and...that unrestricted submarine warfare was carried on in the Pacific Ocean by the United States...the sentence on Doenitz is not assessed on the ground of his breaches of the international law of submarine warfare.” <avalon.law.yale.edu/imt/juddoeni.asp>.

⁶⁹ C.P. Phillips, “Air Warfare and Law” (1952) 21 *George Washington Law Review* 334.

⁷⁰ Though Justice Pal of India makes brief reference to the atomic and other bombings in a dissenting judgement: Radhabinod B. Pal, *International Military Tribunal for the Far East: Dissident Judgement* (Calcutta: Sanyal, 1953). He states with respect to the Japanese prosecution of “enemy flyers” at page 682, for instance, that “The conscience of mankind revolts not so much against the punishment meted out to the ruthless bomber as against his ruthless form of bombing.” See generally Yuki Tanaka, “The Atomic Bombing, the Tokyo Tribunal and the *Shimoda* Case: Lessons for Anti-Nuclear Legal Movements” in Y. Tanaka, T. McCormack and G. Simpson, eds., *Beyond Victor’s Justice? The Tokyo War Crimes Trial Revisited* (Leiden: Martinus Nijhoff, 2011) at 294.

⁷¹ See Robert W. Miller, “War Crimes Trials at Yokohama” (1949) 15 *Brooklyn Law Review* 191.

The Cold War period initially led to wholesale disparagement of interwar efforts to regulate air bombardment. These earlier initiatives were derided as naïve, as creating no law at all or creating putative legal norms that were roundly rejected by all sides as impractical during war itself. For example, the decisions of the Mixed Arbitral Tribunals on First World War German bombings were dismissed as unimportant.⁷² Gradually, however, as the Cold War wore on this view of the legality of the bombings was challenged. Authors began to claim that there was no reason, in theory or practice, why the regulation of aerial warfare should ever have been considered less restrictive than other forms of warfare. This general point was accompanied by a rehabilitation of the inter-war attempts to specifically regulate aerial warfare, notably the Air Rules and the decisions of the Mixed Arbitral Tribunals, both of which were considered to be evidence of customary international law. Furthermore, not only was the illegality of the bombings considered but the tentative use of the war crimes label emerged. As one author put it: “It is difficult to contest the judgement that Dresden ... [was a] war crime, tolerable in respect only because its malignancy pales in comparison to Dachau, Auschwitz and Treblinka.”⁷³

Why the rehabilitation of the law regulating aerial warfare during this period? There were at least two reasons, beyond the clarity that comes when the dust has literally settled, that led to this reflection and reconsideration. Not surprisingly given widespread angst over nuclear war, the use and legality of atomic weaponry received sustained attention; especially in the United States, writers increasingly began debating the legality of the use of nuclear weapons against Japan in World War II and their potential use in the Cold War, no doubt spurred on by the prospect of their potential use against American cities and civilians. American authors even began referring to the post-war Japanese case of *Ryuichi Shimoda et al. v. the State*⁷⁴ as judicial authority for the proposition that indiscriminate aerial

⁷² See Georg Schwarzenberger, “The Law of Air Warfare and the Trend towards Total War” (1959) *American University Law Review* 7. Schwarzenberger himself was arguing, at 10, that the Cold War nuclear threat made the arbitral decisions more relevant than ever.

⁷³ T. Taylor, *Nuremberg and Vietnam: An American Tragedy* (1970) at 143.

⁷⁴ (1964) 8 *Japanese Annual of International Law* 212.

bombardment – with nuclear or conventional weapons – is illegal.⁷⁵ In that case Japanese plaintiffs sought damages from their government for failing to seek compensation from the United States of America for damage to civilians caused by the nuclear attacks on Hiroshima and Nagasaki. While it has been argued that the focus on the atomic bombs actually allowed attention to be drawn away from the “morally unambiguous” conventional bombings by the Allies in the Second World War,⁷⁶ there was at least some intellectual spillover as evidenced by the dual use of the *Shimoda* case noted above. Second, the effectiveness of Allied strategic bombings in World War II as well as by the United States in Vietnam was successfully impugned.⁷⁷ This military argument had legal implications according to some. As one author put it in 1975: “[T]he illegality of attacks aimed at the morale of either ‘quasi combatants’ or noncombatants should no longer be questioned because the military advantage accruing from such attacks has proven to be either minimal or nonexistent.”⁷⁸ In other words, if bombing was not necessary under military logic it could be considered nothing other than wanton attack on non-combatants. It would be inaccurate to overstate this trend towards challenging strategic bombing, as there were many writers in the early 1970s who either asserted that the Second World War bombings were legal according to the law at the time or that there never had been real rules regarding aerial bombardment to defy in the first place. But that there was a gradual trend towards reappraisal of strategic bombing within the United States and the United Kingdom – at least among scholars – seems clear enough.⁷⁹ Nonetheless, no similar trend appears to emerge in Canadian

⁷⁵ See for example, Steven P. Gibb, “The Applicability of the Laws of Land Warfare to U.S. Army Aviation” (1976) 73 *Military Law Review* 59.

⁷⁶ Charles S. Maier, “Targeting the City: Debates and Silences about the aerial bombing of World War II (2005) 87 *International Review of the Red Cross* 442 writes: “Hiroshima and Nagasaki can be questioned and discussed, but the conventional air war remains beyond widespread popular re-evaluation.”

⁷⁷ Crucial to any arguments against the effectiveness of the bombing in Germany was the United States Strategic Bombing Survey. The Survey was later published as: David MacIsaac, ed., *The United States Strategic Bombing Survey*, Ten Volumes, (New York: Garland Press, 1976).

⁷⁸ Burrus M. Carnahan, “The Law of Air Bombardment in Its Historical Context” (1975) 17 *Air Force Law Review* 50.

⁷⁹ See for example, Hamilton DeSaussure, “The Laws of Air Warfare: Are There Any?” (1970) 12 *United States Air Force JAG Law Review* 242.

legal scholarship during the Cold War. A singular exception to this is an article by Lieutenant Colonel William Fenrick, then a JAG officer in the Canadian Forces, who in an exploration of the proportionality principle (crudely put, the fulcrum between the notion of military necessity and the notion of excessive civilian harm) suggests that both sides in World War II paid it little heed.⁸⁰

Fenrick was writing in the context of the First Additional Protocol to the 1949 Geneva Conventions, adopted in 1977.⁸¹ Protocol I unequivocally makes clear that the deliberate targeting of civilians in international armed conflict is prohibited and that harm to civilians cannot be disproportionate to the military advantage gained. Canada – along with many other countries it should be said – did not ratify the Protocol until 1990, when the Cold War was over. The Protocol now has 170 state parties and most of its provisions are considered to be reflective of customary international law, even by the United States, which has signed but not ratified the Protocol.⁸² The question of whether aerial warfare is subject to “positive law” is now answered definitively. However, the contours of this positive law remain both liberally interpreted, by air forces in terms of “military necessity,” and controversial, as demonstrated by NATO bombings on Yugoslav “dual use” targets in 1999⁸³ and collateral civilian deaths in Afghanistan and Libya in the twenty-first century. This controversy and debate continues to exist in the shadow of the World War II bombings.

Legal apologies for the World War II bombings remain plentiful. These are sometimes in the vein of avoiding ahistoricism. For example, one oft-cited legal scholar, Hays Parks, references the extra-legal “tempo of the times” in

⁸⁰) “The Rule of Proportionality and Protocol 1 in Conventional Warfare” (1982) 98 *Military Law Review* 91.

⁸¹) Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977.

⁸²) The distinction rule was recently affirmed as a matter of customary law by the Program on Humanitarian Policy and Conflict Research’s *Manual on International Law Applicable to Air and Missile Warfare* (Boston: Program on Humanitarian Policy and Conflict Research at Harvard University, 2009), 10. On the abiding influence of the Air Rules to our understanding of contemporary law, see the commentary (at p. 1) to the *Manual*. The *Manual* and its commentary are available online at: <www.ihlresearch.org/amw/manual/>.

⁸³) *Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia* (The Hague, June 13, 2000).

World War II as partial justification for civilian bombings.⁸⁴ Others continue to suggest the inevitability of cities as targets – whether during the Second World War or today. The clear trend among British and American legal scholars, however, is towards reevaluating the World War II bombings, even if this trend has not fully entered mainstream popular consciousness of the good war.⁸⁵ But why the silence in Canada?

While these developments in international law were evolving throughout the Cold War at the popular and academic levels, and the tug of war between silence and discussion was being played out early in the United Kingdom, in Canada the topic was ignored. The initial “silence” in the UK involved the wholesale distancing of the British government from the bombing by deliberately failing to create a separate campaign medal for the crews of Bomber Command. It was due to this snub that Arthur “Bomber” Harris refused a peerage and moved to South Africa.⁸⁶ But the silence was truly broken in the UK at, of all places, the very top when in 1961 the official history of the “Strategic Air Offensive” was published. In addition to raising the issue of the morality of the bombing and the hazy legality of the practice by 1939, the overall effectiveness of area bombing on the German war economy was questioned.⁸⁷ In 1963, one of the two authors, Noble Frankland, gave a series of lectures in which he clearly stated that precision bombing should have been exclusively pursued from the autumn of 1944, and that while overall the campaign was moral, Dresden was “overbombed”.⁸⁸ Thus, from an

⁸⁴ W. Hays Parks, “Air War and the Law of War” (1990) 32 *Air Force Law Review* 1. Matthew C. Waxman, “Siegecraft and Surrender: The Law and Strategy of Cities as Targets” (1998) 39 *Vanderbilt Journal of International Law* 353.

⁸⁵ See Maier, *supra* note 76. At least one scholar engaging in serious investigation has simply refused to pass judgement: Ian Henderson, “The Firebombing of Tokyo and Other Japanese Cities” in Tanaka et al., *supra* note 70, 320.

⁸⁶ His account of the war appeared as *Bomber Offensive* (London: Greenhill Books, 1947). For a recent and thorough account of Harris, see Henry Probert, “*Bomber* Harris: His Life and Times” (London: Greenhill Books, 2006). The discussion as to why he did not receive a peerage immediately after the war due to his insistence that his crews receive a campaign medal, can be found at pp. 346–351.

⁸⁷ Charles Webster and Noble Frankland, *The Strategic Air Offensive Against Germany 1939–1945*, 3 volumes (London: Her Majesty’s Stationery Service, 1961), vol. 1, 14–16 and vol. 3, 288.

⁸⁸ Noble Frankland, *The Bombing Offensive Against Germany: Outlines and Perspectives* (London: Faber and Faber, 1965), 103, 114.

early date, it has been fair game in the UK to question and publicly discuss the legality and morality of the Allied bombing of German civilians in the Second World War. Meanwhile, nothing could be further from the truth in Canada. An exhaustive search of Canadian major newspapers, magazines and the CBC television archives from 1942 to 1992 has produced no discussion of the bombing beyond the hagiography of the bomber crews.⁸⁹ The first fissures in this block of silence appeared only after the end of the Cold War and Canada's ratification of the First Additional Protocol to the 1949 Geneva Conventions. During the bombing of Baghdad in 1991, several newspapers carried interviews with German survivors of Allied bombing, asking them what it was like.⁹⁰ In 1991, a still patriotic account of 6 Group appeared that at least raised the question of the utility (though not legality) of the Bombing.⁹¹ A year later though, the silence was briefly but loudly shattered.

III. Attempts to Break the Silence: 1992–2007

Canadian silence over the morality (and to a very small extent, the legality) of bombing in the Second World War finally ended in January 1992, and in a rather spectacular fashion, when Brian and Terence McKenna, well-known producers at the CBC, began airing their three-part documentary entitled *The Valour and the Horror*. The premise of the series was that Canadian soldiers in the Second World War had been manipulated and exploited by various masters. In the second episode, “Death by Moonlight”, bomber crews were depicted as the victims of an immoral Arthur Harris who ordered them to murder innocent German women and children night after night. At one point in the documentary, Canadian veterans meet German civilian victims of the Hamburg bombing. Although the creators, Brian and Terence McKenna, believed their film would elicit sympathy for the “victimized” veterans, the political representatives of the Canadian veteran community (hereafter, for simplicity's sake, “the veterans”) were outraged that the film portrayed Canadian aircrew as partaking in immoral actions,

⁸⁹) The details of what discussions do exist will be the subject of a future article by the authors. Additionally, Canadian discussions of the targeting of civilians in Vietnam, as well as the morality of MAD will be discussed.

⁹⁰) See for example, “WW2 bombing victims sympathize with Iraqi civilians”, *Ottawa Citizen*, 19 February 1991.

⁹¹) Dunmore and Carter, *supra* note 48.

and the producers were charged with inferring that veterans were in fact war criminals. First, the CBC Ombudsman investigated the series and released a report condemning the producers for some historical inaccuracies. No less than the Senate of Canada then became involved, setting up a subcommittee and calling witnesses. This subcommittee also sided with the veterans' perspective, stating that the series had been unfair.⁹²

Throughout these proceedings, while “morality” was constantly invoked, “legality” also made an appearance. The veterans formed the Bomber Harris Trust and sued the CBC for defamation in a class action proceeding. While the veterans insisted they were not trying to chill free speech, the courts, they said, were a last resort for setting the record straight in light of what was seen as the media establishment's distortion of historical reality: “In this battle between the relatively powerless and victimized David – the veterans – and the Goliath of entrenched media power, the only ‘level playing field’ in sight is that provided by the courts of this country.”⁹³ The case was dismissed on the basis that the film's criticisms were of the British High Command and Bomber Harris and not Canadian veterans (and certainly none of the Canadian veterans as individuals). However, in dismissing the action a form of judicial notice appears to have been taken of the “official” version of Canada's participation. The courts made several declarative statements about Canada's participation in the aerial bombing. For example, at the Court of Appeal Justice Grange wrote: “There can be nothing wrong with the air crew obeying lawful orders and participating in acts of war that were neither war crimes nor crimes against humanity as defined in our courts . . .”⁹⁴ Justice Abella added:

There is nothing whatever in the film or book that does anything to diminish the perception that the aircrews of Bomber Command were heroic beyond imagining, and prepared to make whatever sacrifices were necessary to assist in the Allied effort against Nazi Germany. Nor is there anything in the film

⁹² The best account of the affair is Graham Carr, “Rules of Engagement: Public History and the Drama of Legitimation,” *Canadian Historical Review* 86 (2005): 317–354.

⁹³ Bomber Harris Trust, *A Battle for Truth: Canadian Aircrews Sue the CBC Over Death by Moonlight: Bomber Command* (Toronto: Ramsay Business Systems, 1994) at xcii.

⁹⁴ *Elliott v. Canadian Broadcasting Corp.* (1993), 16 O.R. (3d) 677, aff'd (1995), 125 D.L.R.(4th) 534 (Ont. C.A.) at para. 25.

that diminishes a clear understanding that the reason for the war and for all the strategies developed was to avoid a cataclysmic defeat by Nazi Germany.⁹⁵

Now, the judges also admit to questions of moral ambiguity being legitimately opened by the documentary's producers, but their judgement adopts a patriotic perspective on the bombing campaign without a genuine inquiry as to the state of the law in the 1940s. This appears to be the only reported case in Canada that deals with Canada's role in the bombing in any capacity.

Not long after the *Valour and the Horror* episode, the triumphalism of the veterans' lobby and their allies had the wind removed from their sails by a rather unexpected adversary. Some thirty-three years after the British account, the Canadian official history of the Royal Canadian Airforce during the Second World War was published in 1994. Over the previous two years, apologists for the Bombing had continually claimed that targeting civilians was never an objective of Bomber Command and that the Bombing had severely curtailed German production and helped end the war. Historians who disagreed, they argued, were leftwing, pacifist, and had an axe to grind with all things military.⁹⁶ Thus, the shock was great when the official history claimed, among many similar examples, that civilians and not industry were deliberately targeted in Hamburg and that extra incendiaries were included to purposely create the operation's codename: Gomorrah.⁹⁷ Further, the official history argued that only a lack of raw materials truly hurt German production, not bombing, though a precision targeting campaign against oil would have been highly effective.⁹⁸ Any gloating over the earlier defeat of the CBC and the McKenna brothers was quickly over, and silence again swept the land.⁹⁹

⁹⁵ *Ibid.* at para. 11.

⁹⁶ "Like charges of elitism and political correctness, the epithet 'biased revisionists' was animated by the right-wing discourse of the culture wars and wielded to de-legitimize the filmmakers and their 'coterie of avant-garde left-wing flacks.'" Carr, *supra* note 92, 340–341, quote at 341.

⁹⁷ Brereton Greenhous, Stephen J. Harris, William C. Johnston and William G.P. Rowling, *The Crucible of War, 1939–1945. The Official History of The Royal Canadian Air Force*, Volume 3 (Toronto: University of Toronto Press, 1994), 693.

⁹⁸ *Ibid.*, 865–866.

⁹⁹ In fact, the head of the veterans' lobby, Clifford Chadderton, retracted his request for an inquiry into the CBC affair after reading the Official History. See Tim Cook, *Clio's Warriors*:

Between 1992 and 2007, outside of Canada there were intriguing ebbs and flows in the public appetite for discussion of the Bombing. In the United States, a development rather akin to what was seen in Canada took place. In 1994 the Smithsonian Institution attempted to mount an exhibition of the Enola Gay with panels that at least “discussed” the decision to drop the atomic bomb. Famously, veterans and conservative politicians mounted a campaign that resulted in the permanent shelving of the idea.¹⁰⁰ In Germany, developments have taken a recent and surprising turn. Out of a sense of not wanting to appear to be victims of the war they started, as well as their desire to acknowledge the unique horror of the Holocaust, Germans have long maintained a public silence around both the rape of German women in the East at the end of the war, and the Allied Bombing of German cities. Once the high incidence of sexual assault during the Bosnian War became widely known during the mid-nineties, open discussion of the victim status of German women in the Second World War began. It was not long after that the public discussion of the Bombing began.¹⁰¹ First, in 1999 W.G. Sebald asked why it was that in postwar German literature, despite the ubiquitous presence of rubble, the bombing rarely appeared.¹⁰² Then, much more controversially, Jörg Friedrich wrote a history of the bombing, *The Fire*, that made subliminal links between the burning cellars of Hamburg and the crematoria of Auschwitz.¹⁰³ Finally, in the country that has always been the

Canadian Historians and the Writing of the World Wars, (Vancouver: University of British Columbia Press, 2006), 230.

¹⁰⁰) For an excellent account, see Mike Wallace, “The Battle of the Enola Gay,” in Mike Wallace, ed., *Mickey Mouse History and Other Essays on American Memory* (Philadelphia: Temple University Press, 1996), 269–318.

¹⁰¹) At the national level. At the local level, in cities like Hamburg and Dresden, annual memorializations of the bombing have always been a part of public ritual. See Malte Thiessen, “Gedenken an ‘Operation Gomorrha’. Zur Erinnerungskultur des Bombenkrieges von 1945 bis heute” *Zeitschrift für Geschichtswissenschaft* 53, (2005), 46–61. See also Robert G. Moeller, “On the History of Man-made Destruction: Loss, Death, Memory, and Germany in the Bombing War” *History Workshop Journal* 61 (1) (2006) 103–134; Gilad Margalit, *Guilt, Suffering and Memory: Germany Remembers Its Dead of World War II*, trans. Haim Watzman (Bloomington: Indiana University Press, 2010).

¹⁰²) *Luftkrieg und Literatur*, (Munich: Hanser, 1999). This work appeared in English as, W.G. Sebald, *On the Natural History of Destruction* (London: Hamish Hamilton, 2003).

¹⁰³) Jörg Friedrich, *Der Brand, Deutschland im Bombenkrieg 1940–1945* (Munich: Propyläen Verlag, 2002). This appeared in English as, Jörg Friedrich, *The Fire: The Bombing of Germany*,

most open about the controversy, no less than one of Britain's most famous (and controversial) historians has recently claimed that the high altitude at which the bombers flew was "the practical difference between incinerating women and children from thousands of feet in the air and herding them into gas chambers ... Allied bombing was as indiscriminate as Nazi racial policy was meticulously discriminating."¹⁰⁴ Despite such rhetoric, Niall Ferguson crucially points out that while ethnic extermination was a political end in and of itself for the Nazis, such was not the case for the Allies.¹⁰⁵ Yet, in Canada, the discussion only appeared in such places as David Bashow's extensive operational history of 6 Group (2005), where after first attempting to describe Dresden as a crucial and thus necessary military target, he claims that since both sides bombed civilians "international legal nuances with respect to bombing became hardly worth considering."¹⁰⁶

Despite the British having had decades of open debate about Bomber Command, and now that even the Germans have broken their silence on the topic, one would expect that Canada would at last be ready for an open, reasonable and instructive debate on something so obviously controversial and, well, open to debate. This was not to be. The Canadian War Museum in Ottawa, the nation's premier public institution devoted to military history, opened at a new location in 2005, with new permanent galleries. The gallery devoted to the Second World War contained a section entitled "Bombing to Win", and at the end of the very positive depiction of the heroic aircrew and their many achievements, there was a panel entitled "An Enduring Controversy". Alongside three photographs of destroyed German cities (one of Hamburg with visible corpses) appeared the following text:

The value and morality of the strategic bomber offensive against Germany remains bitterly contested. Bomber Command's aim was to crush civilian morale and force Germany to surrender by destroying its cities and industrial

1940–1945, translated by Allison Brown (New York: Columbia University Press, 2006). A fuller discussion of the German silence about the bombing compared to the Canadian silence will be the subject of a future article by the authors.

¹⁰⁴ Niall Ferguson, *The War of the World: History's Age of Hatred* (London: Allen Lane, 2006), 571

¹⁰⁵ *Ibid.*, 558–571.

¹⁰⁶ David L. Bashow, *No Prouder Place: Canadians and the Bomber Command Experience 1939–1945* (St. Catharines, ON: Vanwell, 2005), 392

installations. Although Bomber Command and American attacks left 600,000 Germans dead and more than five million homeless, the raids resulted in only small reductions in German war production until late in the war.

The veterans, though now fewer in number and with relatively less power than 1992, still managed to create a serious public backlash against what they again saw as a publicly funded institution¹⁰⁷ insinuating that veterans were war criminals.

Again a Senate Subcommittee was held, again historians and various other experts were called upon, and again the Senate sided with the veterans' version of history. But this victory was not nearly as complete as in 1992, as this time total historical silence was not the result. The text, cited above, was edited and considerably increased in size in order to narrow how openly a museum visitor might think about morality, and indeed law, and war. Yet the panel remains.¹⁰⁸ Fascinatingly, although some veterans continued to claim that they were being labeled "war criminals," any discussion of law and warfare in the 2007 debate was now virtually extinct. In fact, the Subcommittee hearings had very little to say about the "facts" in the display, and instead virtually all participants accepted the reality of what happened and focused on the "tone" of the text. The museum officials went out of their way

¹⁰⁷) Interestingly, both federal institutions, the museum and earlier the CBC, fell under the purview of the Minister for Canadian Heritage, formerly Minister for Communications.

¹⁰⁸) The panel is now entitled "The Bombing Campaign", as opposed to "An Enduring Controversy", and the new text reads: "The strategic bombing campaign against Germany, an important part of the Allied effort that achieved victory, remains a source of controversy today. Strategic bombing enjoyed wide public and political support as a symbol of Allied resolve and a response to German aggression. In its first years, the air offensive achieved few of its objectives and suffered heavy losses. Advances in technology and tactics, combined with Allied successes on other fronts, led to improved results. By war's end, Allied bombers had razed portions of every major city in Germany and damaged many other targets, including oil facilities and transportation networks. The attacks blunted Germany's economic and military potential, and drew scarce resources into air defence, damage repair, and the protection of critical industries. Allied aircrew conducted this grueling offensive with great courage against heavy odds. It required vast material and industrial efforts and claimed over 80,000 Allied lives, including more than 10,000 Canadians. While the campaign contributed greatly to enemy war weariness, German society did not collapse despite 600,000 dead and more than five million left homeless. Industrial output fell substantially, but not until late in the war. The effectiveness and the morality of bombing heavily-populated areas in war continue to be debated."

to claim that while the “morality” of the entire endeavour was questioned both at the time and ever since, they in no way wanted to imply that there was anything illegal about an ultimately futile campaign to crush civilian morale by deliberately killing 600 000 non-combatants.¹⁰⁹ This last, rather lame *mea non culpa* was unquestioned by Senate members unwilling to go anywhere near such a highly charged issue. All sides made sure, once again, to completely ignore the very real question of legality. And in a parting blow to any move on the legal front, in David Bashow’s testimony on the final day, he stated the seemingly unassailable “fact” that,

While it is true that moral issues have generated considerable debate with respect to the bombing campaign, even leading German authorities have acknowledged that the area bombing policy, conducted as it was during the Second World War, was entirely legal. In fact, it has only been fully legislated against since 1977 in the wake of the Vietnam War, when Protocol I expressly forbade deliberate military attacks upon civilians.¹¹⁰

In other words, as of the time of writing, while the historical silence surrounding Bomber Command has been broken with the revised but still standing panel in the permanent Second World War Exhibit at the Canadian War Museum, the legal silence is as deafening as ever.¹¹¹

¹⁰⁹) All three days of subcommittee hearings are available online at <www.parl.gc.ca/Content/SEN/Committee/391/vete/05cv-e.htm?comm_id=79&Language=E&Parl=39&Ses=1>. The museum officials spoke on 2 May 2007.

¹¹⁰) *Ibid.*, 16 May 2007. Here again, as in his book, Bashow is referencing an incredibly unreliable source: German legal staff officer to the wartime *Luftwaffe*, Eberhard Spetzlar, who, after defeat and denazification, helpfully told his occupiers who had allowed him to “rehabilitate” as a law professor in the 1950s, that in his opinion, the Allies had done nothing wrong during the war. Cited in Bashow, *supra* note 106, 476.

¹¹¹) On the academic front however, vociferous voices were being heard: in a 2008 issue of the *Queen’s Quarterly*, Professors Robert Bothwell, Randall Hansen and Margaret MacMillan protested the retreat of the Museum, and Hansen published a national bestseller, *Fire and Fury*, which condemned area bombing. While important, indeed crucial interventions, for our purposes it is important to point out that both continue to focus on the morality or ethics of bombing, and have little to say about legality. See, Robert Bothwell, Randall Hansen and Margaret MacMillan, “Controversy, Commemoration & Capitulation: the Canadian War Museum & Bomber Command” *Queen’s Quarterly* 115 (2008) 367–87; and Hansen, *supra* note 40.

IV. Remaining Questions

In this article we have not suggested that there was a clear legal prohibition on the direct targeting of civilians from the air at the start of World War II. We have, however, suggested that the issue was a live one in the interwar period and that there is good reason to suggest that the rule of distinction established for land and maritime warfare extended to aerial bombardment at that time. Having laid out the history of the legality of targeting civilians in the lead up to the Second World War, Canada's participation in the bombing of German civilians, and finally Canada's denial that anything morally or legally problematic might have taken place – and in any case, should not be discussed – we are left with a series of questions to be pursued. What lies at the root of Canadian legal, political and social structures that requires silence on this issue? Is the self-identification of the little innocent brother to big siblings (United Kingdom, United States of America) so deep that admitting any greyness will so shatter the national psyche as to cause irreparable harm? By comparison, why is Canada's colonial parent, the UK, so much more comfortable discussing possible national black eyes? Is it the recognition in a postcolonial world of so many injustices during the reign of the British Empire that this is just one of many? Or does Canada's reticence stem from simple admiration for the bravery and sacrifice of young aircrew? Does this long history of self-imposed national reticence around international legalities of warfare extend into current realities, such as Canada's participation in the global "war on terror"? The British historian Sir Michael Howard likens the ability to discuss possible mistakes in otherwise "good wars" to the maturity of a society. Only children, he claims, are unable to deal with the complexities of any national history.¹¹²

¹¹² Michael Howard, *The Causes of War and Other Essays* (Cambridge, MA: Harvard University Press, 1983) at 190: "Such disillusion is a necessary part of growing up in and belonging to an adult society; and a good definition of the difference between a Western liberal society and a totalitarian one – whether it is Communist, Fascist, or Catholic authoritarian – is that in the former the government treats its citizens as responsible adults and in the latter it cannot."