

*Paper Outline*

**D-Day, Collateral Damage, and the 1923 Hague Draft Rules of Aerial Warfare**

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Draft Paper

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*I. Introduction*

This paper examines the question of whether the adoption of the 1923 Hague Draft Rules of Aerial Warfare as binding international law might have changed the outcome of the D-Day invasion during World War II. The delegates to The Hague conference proposed a severe restriction on the use of air power in urban areas, but the rules were never adopted as international law.

Two decades later, the international community's failure to adopt the 1923 Hague Draft Rules had a significant impact on the D-Day invasion. On June 6, 1944, the Allies mounted the largest amphibious operation in history as 150,000 troops stormed the Normandy beaches of Nazi-occupied France. The landings succeeded in no small part because of the Allied air forces, which mounted a massive interdiction campaign to prevent the German army from rushing to the French coastline and destroying the Normandy beachhead. Operation Overlord, the code name for the D-Day invasion, marked a major turning point in the war, accelerating the collapse of Nazi Germany, which surrendered 11 months later. As the historian Ian Kershaw has observed, Operation Overlord marked "the beginning of the end for the Third Reich."<sup>2</sup>

The D-Day air campaign, however, came at a severe cost for French and Belgian civilians. At least 12,000—and possibly more than 25,000—French and Belgian civilians died as unintended casualties of the Allied bombing campaign. Although the Allied air strikes clearly played a critical role in interdicting the German army, it was by no means clear that the vast scale of the bombing was necessary. Whether the interdiction objectives could have been achieved by a more modest—and less destructive—air campaign was an open question at the time and remains so for many historians today.

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<sup>2</sup> IAN KERSHAW, *THE END: THE DEFIANCE AND DESTRUCTION OF HITLER'S GERMANY, 1944-45* (2011), at 17.

One of the principal reasons why the Allies implemented a massive area bombing campaign against French and Belgian rail centers was because international law did not provide clear guidance regarding air warfare. But it might have had the 1923 Hague Draft Rules of Aerial Warfare been adopted as binding international law. The Draft Rules prohibited area bombing in urban areas, which is precisely what the Allies engaged in during the D-Day air campaign. Had the Rules been in effect in 1944, the Allied air campaign in support of the D-Day operation may well have been much more modest in nature. But would the reduction in collateral damage have come at the cost of jeopardizing the invasion's success? The story of The Hague Draft Rules and the controversy over the D-Day air campaign demonstrates the unique challenges and inherent complexity of the effort to use international law to protect civilian populations during wartime.

## II. *The 1923 Hague Draft Rules*

The First World War ushered in the era of aerial bombing. During the four-year conflict, the German air force bombed London and cities across southern England, and the British and French air forces bombed cities across Germany.<sup>3</sup> In one particularly notorious episode, a German bomb aimed for the Liverpool Street Station in central London missed its target and hit an elementary school, killing 18 children.<sup>4</sup> During World War I, the stated purpose of urban air strikes was usually to attack railway stations used for troop transportation,<sup>5</sup> but an ulterior motive was to terrorize the civilian population.<sup>6</sup>

After the war, there was general agreement in the international community that the laws of war should be amended to account for the unique risk posed by air attacks on cities, a problem unheard of before the invention of the airplane in the early 1900s.<sup>7</sup> Under customary international law, the battlefield extended as far as the range of artillery reached, and the burden rested on civilians to evacuate themselves from areas of ground combat.<sup>8</sup> But military aircraft

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<sup>3</sup> THOMAS FEGAN, *THE 'BABY KILLERS': GERMAN AIR RAIDS ON BRITAIN IN THE FIRST WORLD WAR* (2002), at 78-82; RAYMOND H. FREDETTE, *THE SKY ON FIRE: THE FIRST BATTLE OF BRITAIN 1917-1918 AND THE BIRTH OF THE ROYAL AIR FORCE* (1991), at 262; ANDREW P. HYDE, *THE FIRST BLITZ: THE GERMAN BOMBER CAMPAIGN AGAINST BRITAIN IN THE FIRST WORLD WAR* (2002) at 1-181; TERENCE H. O'BRIEN, *CIVIL DEFENCE* (1955), at 7-12.

<sup>4</sup> FREDETTE, *THE SKY ON FIRE*, at 53, 58, 62; HYDE, *THE FIRST BLITZ*, at 134-142, 184; NIGEL STEEL AND PETER HART, *TUMULT IN THE CLOUDS: THE BRITISH EXPERIENCE OF THE WAR IN THE AIR, 1914-1918* (1997), at 263-65.

<sup>5</sup> JAMES SPAIGHT, *AIR POWER AND WAR RIGHTS* (1924), at 229. After the war James Spaight proposed defining railway stations as "military objectives" only if used "almost exclusively for troop or munition transportation." See *id.*

<sup>6</sup> Richard H. Wyman, *The First Rules of Air Warfare*, 35 *Air University Review* 94, 112 (March-April 1984).

<sup>7</sup> DOCUMENTS ON THE LAWS OF WAR (eds. Adam Roberts and Richard Guelff, 3<sup>rd</sup> ed. 2000) at 139-40; Lester H. Brune, *An Effort to Regulate Aerial Bombing: The Hague Commission of Jurists, 1922-1923*, 29 *Aerospace Historian* 183 (Fall 1982); Richard H. Wyman, *The First Rules of Air Warfare*, 35 *Air University Review* 94, 97 (March-April 1984).

<sup>8</sup> W. Hays Parks, *Air War and the Law of War*, 32 *Air Force Law Review* 1, 31-32 (1990) ("The historic distinction of noncombatant immunity had been tied to the range of artillery; anything within artillery range was regarded as part of the battlefield and at risk.").

extended the range of artillery—and the reach of bombardment—to cities located far beyond the front lines, thus placing civilians at risk of collateral damage like never before.<sup>9</sup>

Accordingly, in December 1922, a commission of international jurists convened at The Hague to propose laws of war to govern “new methods of attack or defence,” including in particular aerial warfare.<sup>10</sup> The Commission of Jurists included legal scholars and judges from the Netherlands, the United States, the United Kingdom, France, Japan, and Italy.<sup>11</sup> It also included a large number of military advisers and technical experts with battlefield experience and practical knowledge.<sup>12</sup>

The American Ambassador John Bassett Moore served as the commission’s chair.<sup>13</sup> A judge on the International Court of Justice at The Hague, Moore was an exceptionally well regarded attorney who possessed considerable influence with his fellow commission members.<sup>14</sup> But Moore headed a divided American delegation, as the United States Army and Navy sharply disagreed on the subject of aerial warfare.<sup>15</sup> The Army supported an international ban on terror bombing, but otherwise it advocated few restrictions on air strikes.<sup>16</sup> The Navy, in contrast, viewed air warfare with suspicion because the Army controlled both the budget and the operations of the American air force.<sup>17</sup> At The Hague conference, the Navy would ultimately exercise more influence than the Army because Ambassador Moore relied particularly heavily on the advice of Rear Admiral W. L. Rodgers, former president of the United States Naval War College.<sup>18</sup>

When the conference began, the most controversial topic was how to regulate air attacks launched in close proximity to non-combatant populations. Ambassador Moore emphasized that a principal goal of the conference was to prevent the “indiscriminate launching of bombs and projectiles on the non-combatant populations of towns and cities . . . outside the actual theater of military operations.”<sup>19</sup> At the same time, Moore and his fellow delegates recognized that aircraft constituted a “potent engine of war” that would play an increasingly important role on the

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<sup>9</sup> Id. at 32 (“The battlefield was extended by the industrialization of nation-states and by a capacity for attack of military objects beyond artillery range”).

<sup>10</sup> JOHN BASSETT MOORE, *INTERNATIONAL LAW AND SOME CURRENT ILLUSIONS AND OTHER ESSAYS* (1924), at 182-84; *DOCUMENTS ON THE LAWS OF WAR*, at 139-40; Parks, 32 *Air Force Law Review* at 25; Frank E. Quindry, *Aerial Bombardment of Civilian and Military Objectives*, 2 *The Journal of Air Law* 474, 486 (1931); James W. Garner, “International Regulation of Air Warfare,” 3 *Air Law Review* 103, 107 (1932).

<sup>11</sup> MOORE, *INTERNATIONAL LAW*, at 182-84; *DOCUMENTS ON THE LAWS OF WAR*, at 140; Parks, 32 *Air Force Law Review* at 27; Brune, 29 *Aerospace Historian* at 184.

<sup>12</sup> Wyman, *The First Rules of Air Warfare*, 35 *Air University Review* at 97; Garner, 3 *Air Law Review* at 108.

<sup>13</sup> *DOCUMENTS ON THE LAWS OF WAR*, at 140; Parks, 32 *Air Force Law Review* at 25; Brune, 29 *Aerospace Historian* at 183.

<sup>14</sup> Brune, 29 *Aerospace Historian* at 183 (Moore “received praise from fellow delegates as the person most responsible for reconciling differences among the delegates”).

<sup>15</sup> Parks, 32 *Air Force Law Review* at 25-26; Brune, 29 *Aerospace Historian* at 183-4.

<sup>16</sup> Brune, 29 *Aerospace Historian* at 184.

<sup>17</sup> Parks, 32 *Air Force Law Review* at 25-7.

<sup>18</sup> Id. at 25.

<sup>19</sup> MOORE, *INTERNATIONAL LAW*, at 240.

modern battlefield.<sup>20</sup> The principal challenge before the delegates, therefore, was developing viable regulations that would protect non-combatants while acknowledging the reality that a complete ban on air strikes would never be honored by future combatants.

After two months of deliberation, the commission members unanimously approved the 1923 Hague Draft Rules of Aerial Warfare,<sup>21</sup> which proposed a dramatic expansion in the legal protections afforded to non-combatants during air attacks. Consisting of 62 detailed articles,<sup>22</sup> The Hague Draft Rules attempted to protect non-combatants in four principal respects: 1.) by banning indiscriminate air attacks in urban areas, 2.) by prohibiting terror bombing in all cases, 3.) by limiting the lawful objects of air attack to only those targets of obvious and direct military value, and 4.) by requiring combatants to conduct a proportionality analysis before launching air strikes on urban battlefields.<sup>23</sup>

Two articles were particularly critical. The first was Article 22, which provided that: “Aerial bombardment for the purpose of terrorizing the civilian population, of destroying or damaging private property not of military character, or of injuring non-combatants is prohibited.”<sup>24</sup> The article thus applied land warfare’s customary prohibition on the intentional targeting of non-combatants to air warfare, but further expanded it to include a ban on the use of air strikes for waging psychological warfare.<sup>25</sup>

The second was Article 24, which included a bold new series of restrictions on air forces. Section 2 of Article 24 provided that aerial bombardment was “legitimate” only if

“directed exclusively at . . . military forces; military works; military establishments or depots; factories constituting important and well-known centres engaged in the manufacture of arms, ammunition, or distinctively military supplies; lines of communication or transportation used for military purposes.”<sup>26</sup>

Interestingly, the delegates discussed including railway stations on the list of permissible targets, but decided to leave them off the list after concluding that “[o]rdinarily a railway station as such

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<sup>20</sup> Id.

<sup>21</sup> Parks, 32 Air Force Law Review at 27; DOCUMENTS ON THE LAWS OF WAR (eds. Adam Roberts and Richard Guelff, 3<sup>rd</sup> ed. 2000) at 140.

<sup>22</sup> DOCUMENTS ON THE LAWS OF WAR, at 141-153.

<sup>23</sup> Wyman, *The First Rules of Air Warfare*, 35 Air University Review at 98.

<sup>24</sup> DOCUMENTS ON THE LAWS OF WAR, at 144.

<sup>25</sup> Garner, “International Regulation of Air Warfare,” 3 Air Law Review at 114 (“The civilized world is in accord that a belligerent ought not to direct his attacks against the civil population who take no part directly or indirectly in the operations of the war . . . and all the existing conventional and customary rules of land warfare are based on this principle. There is no reason for admitting a different principle for aerial warfare, and however much the old distinction between the situation of the military and civil populations . . . may have been undermined during the World War, there is no reason to assume that the world is ready to go to the length of totally abandoning the distinction mentioned and of recognizing the legitimacy of war directed against both classes of the population equally.”).

<sup>26</sup> DOCUMENTS ON THE LAWS OF WAR, at 145.

possesses no military value whatever and its use is distinctively non-military in war as well as in peace.”<sup>27</sup>

Other provisions in Article 24 went even further in regulating the use of air power. Article 24(4) expressly required air commanders to minimize collateral damage on urban battlefields. To that end, Section 4 announced that air strikes on urban battlefields were permissible only so long as “there exists a reasonable presumption that the military concentration is sufficiently important to justify such bombardment, having regard to the danger thus caused to the civilian population.”<sup>28</sup> Commanders and pilots would thus have to engage in a proportionality analysis before conducting air strikes.

Most important of all, Article 24(3) largely banned—albeit somewhat ambiguously—air attacks on cities located far from the frontlines. Section 3 declared that the aerial “bombardment of cities, towns, villages, dwellings or buildings not in the immediate neighborhood of the operations of land forces is prohibited.”<sup>29</sup> The idea of banning urban air strikes outside the ground combat zone originated with a proposal by delegates from the Netherlands and Japan.<sup>30</sup> By its plain terms, the provision seemed to put cities behind the frontlines completely off limits to air attacks.

However, the very next sentence in Section 3 qualified the ban. It stated that when legitimate military objectives were “so situated”—i.e. located in urban areas “not in the immediate” area of ground operations—then “aircraft must abstain from the bombardment” if the military targets “cannot be bombarded without the indiscriminate bombardment of the civilian population.”<sup>31</sup> The section’s text thus created an ambiguity: Did it categorically prohibit bombing targets in cities outside the vicinity of the frontlines, or did it only ban area bombing in such cities?

The ambiguity resulted from a disagreement among the delegates. As Ambassador Moore later explained, all the delegates sought to ban air attacks on “great masses of civilian population” and to limit the targets of aerial assaults to “particular objects” the destruction of which “would bring some distinct military advantage to the belligerent.”<sup>32</sup> But, he diplomatically noted, “[t]he delegations differed as to the path by which they would attain their object.”<sup>33</sup> The tension between the two sentences in 24(3) reflected those differences.

Nevertheless, apart from some textual inconsistencies and ambiguities, the Draft Rules represented an unprecedented effort to restrict air attacks on urban targets, particularly in cities

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<sup>27</sup> MOORE, INTERNATIONAL LAW, at 198-99.

<sup>28</sup> DOCUMENTS ON THE LAWS OF WAR, at 145.

<sup>29</sup> Id.

<sup>30</sup> MOORE, INTERNATIONAL LAW, at 196.

<sup>31</sup> DOCUMENTS ON THE LAWS OF WAR, at 145.

<sup>32</sup> MOORE, INTERNATIONAL LAW, at 196.

<sup>33</sup> Id.

beyond the front lines and outside the theater of ground operations.<sup>34</sup> The Hague Draft Rules thus proposed to outlaw the types of urban aerial assaults routinely launched during World War I, such as the bombing of the Liverpool Street Station in London and similar attacks on railway centers.

### III. *The Failure of the Draft Rules*

Despite the general public's widespread fear of air attacks, and the renowned nature of the delegates who authored the Draft Rules, the international community failed to adopt the proposed air warfare rules.<sup>35</sup> The reason was because the governments of leading European nations strongly objected to them.<sup>36</sup> Shortly after the conference, the French and Dutch governments identified various technical problems with the text of the Draft Rules, and the British government argued that more analysis of air warfare needed to be conducted before new international laws should be adopted.<sup>37</sup> The European opposition would prove fatal to the Draft Rules.

The list of military objectives in Article 24(2) attracted particular criticism because it excluded many industrial objects critical to war efforts, such as electrical systems and oil refineries.<sup>38</sup> Such targets had been attacked by all sides during World War I<sup>39</sup> and most European governments believed that a narrow definition of "military objectives" would not deter expansive air attacks in future wars. As the Chief of the British Imperial General Staff G.F. Milne warned, the term "military objectives" could not be defined with precision because it was context-dependent.<sup>40</sup> He cited as an example the fact that "when an enemy is concentrating for an attack, the dislocation of his railways and other means of communication may produce results which will influence the course of the war far more than will the bombardment of some of his munitions factories."<sup>41</sup>

A particularly significant blow came from experienced pilots, who asserted that the Draft Rules overstated the accuracy of aerial bombing. For example, the American attorney and military aviator Frank Quindry pointed out that under the pressure of combat, it was unrealistic to expect pilots to exercise cool judgment in distinguishing combatants from non-combatants.<sup>42</sup>

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<sup>34</sup> Elbridge Colby, *Aerial Law and War Targets*, 19 *American Journal of International Law* 702, 714 (1925).

<sup>35</sup> DOCUMENTS ON THE LAWS OF WAR, at 140; Parks, 32 *Air Force Law Review* at 31, 35.

<sup>36</sup> DOCUMENTS ON THE LAWS OF WAR, at 140; Parks, 32 *Air Force Law Review* at 35 ("the European nations were more cautious owing to their distrust of and proximity to one another").

<sup>37</sup> Brune, 29 *Aerospace Historian* at 184; Wyman, 35 *Air University Review* at 100; Garner, "International Regulation of Air Warfare," 3 *Air Law Review* at 109.

<sup>38</sup> Wyman, 35 *Air University Review* at 99; Quindry, 2 *The Journal of Air Law* at 489-90.

<sup>39</sup> Parks, 32 *Air Force Law Review* at 33; SPAIGHT, *AIR POWER AND WAR RIGHTS*, at 233-35.

<sup>40</sup> "Note by the Chief of the Imperial General Staff for the Chiefs of Staff Sub-Committee on the memorandum by the Chief of the Air Staff," 16 May 1928, Appendix 2 (ii) (hereinafter "Note by the Chief of the Imperial General Staff"), in CHARLES WEBSTER AND NOBLE FRANKLAND, *THE STRATEGIC AIR OFFENSIVE AGAINST GERMANY, 1939-1945* (vol. IV, 1961), at 78; Parks, 32 *Air Force Law Review* at 33.

<sup>41</sup> "Note by the Chief of the Imperial General Staff," at 78; Parks, 32 *Air Force Law Review* at 33.

<sup>42</sup> Quindry, 2 *The Journal of Air Law* at 490; Parks, 32 *Air Force Law Review* at 34 fn 131.

“The pilot of the bombardment plane will be too much absorbed in maneuvering for position, and will usually be in the gravest of danger from enemy aircraft and anti-aircraft machinery,” Quindry explained. “In a fight, particularly when his life is in danger and killing is the order of things, a man is not his normal self.”<sup>43</sup> Adding to the targeting problems was the fact that pilots flew at high altitudes over cities to avoid anti-aircraft and often preferred nighttime air raids, which concealed their aircraft but also reduced bombing accuracy.<sup>44</sup> Consequently, the British delegate James Spaight saw the Draft Rules as detached from military realities, overpromising what the law could actually deliver. Combatants, he observed, “may endeavour—at first, at any rate—to attack military objectives only, but it is impossible, at the height at which raids by day are necessarily carried out, to confine the effect of the bombing to a particular building. Before long, even that pretence will be abandoned.”<sup>45</sup> Even lawful targets attacked at low altitude in broad daylight would still result in many aerial bombing errors.<sup>46</sup> For instance, in 1927 a U.S. Army Air Corps test of the accuracy of bridge bombing by experienced pilots flying at 6,000 feet resulted in only 27 percent of the bombs striking their target.<sup>47</sup> “[T]he conclusion is obvious,” Quindry asserted, “that anyone or anything within the immediate vicinity of a bombardment objective will be in imminent danger of destruction.”<sup>48</sup>

Scholars warned that by attempting to place too many legal restrictions on air warfare, the proposed Hague Rules would ultimately impose no restrictions at all.<sup>49</sup> The problem, Professor James W. Garner explained, was that each pilot “must determine . . . with little opportunity for investigation and verification whether a particular object falls within the category of ‘military objectives.’”<sup>50</sup> Enforcement of the requirement that pilots confine their attacks exclusively to military objects, Garner concluded, “will in many cases be tantamount to an absolute prohibition of all bombardment.”<sup>51</sup> As he explained, “How . . . can an aviator who flies over a city at great height, especially during the night, when all lights are extinguished . . . identify the persons and things which he is permitted to bombard? How can he distinguish between the military forces and civil population . . . or between railway lines used for military purposes and those which are not?”<sup>52</sup> He predicted that most aviators “will interpret broadly their rights and consider whatever damage may result to the civil population from their bombarding operations as being merely incidental to the accomplishment of a military advantage, and

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<sup>43</sup> Quindry, 2 *The Journal of Air Law* at 490.

<sup>44</sup> *Id.* at 498-99.

<sup>45</sup> SPAIGHT, *AIR POWER AND WAR RIGHTS*, at 259.

<sup>46</sup> Quindry, 2 *The Journal of Air Law* at 500-01.

<sup>47</sup> *Id.*

<sup>48</sup> *Id.* at 501.

<sup>49</sup> J.W. Garner, *Proposed Rules for the Regulation of Aerial Warfare*, 18 *American Journal of International Law* 56, 74 (1924) (“The rules proposed by the commission undoubtedly leave a large discretionary power to aviators. To a much larger degree than in land and naval warfare they are made the judges of the legitimacy of their attacks.”).

<sup>50</sup> *Id.*

<sup>51</sup> J.W. Garner, *International Regulation of Air Warfare*, 3 *Air Law Review* 103, 118 (1932).

<sup>52</sup> *Id.*

therefore justifiable.”<sup>53</sup> He concluded, therefore, that in practical application “the rules proposed may not prove to be a very effective limitation” on aerial bombardment.<sup>54</sup>

Military experts were also deeply troubled by how easily the Draft Rules could be manipulated by defending forces, a development that would ultimately lead attackers to disregard the Rules entirely. By severely restricting air strikes outside the theater of ground operations, and by making the issue of collateral damage the sole responsibility of the attacker, the Draft Rules would encourage combatants to place key military assets in civilian areas, using the non-combatant population as cover.<sup>55</sup> For example, in the view of Air Marshal Trenchard, the Draft Rules encouraged a belligerent “to secure complete immunity for his war manufactures and depots merely by locating them in a large city, which would, in effect, become neutral territory.”<sup>56</sup> Combatants with modern air forces at their disposal, he emphasized, “would never accept” such a state of affairs.<sup>57</sup> “Let there be no mistake about it,” James Spaight warned, “the cities will be bombed, whatever rule is laid down.”<sup>58</sup>

Ultimately, only the American and Japanese governments supported the adoption of The Hague Draft Rules as binding international law.<sup>59</sup> The reason was probably the fact that geography made air warfare seem more theoretical than practical to the American and Japanese governments. Located thousands of miles away from Europe, where most air forces were located, the United States and Japan viewed the notion of projecting air power across oceans to bomb distant cities as a remote possibility in the 1920s. Imposing legal restrictions on air warfare therefore did not seem to deprive the Japanese or the Americans of a serious military option, while embracing such restrictions gave both countries the moral high ground in international diplomacy. Indeed, the proposed rules received a highly favorable response from the public and the international press corps,<sup>60</sup> which thus gave the Japanese and the Americans an opportunity to bask in positive international coverage without actually compromising their militaries’ effectiveness.

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<sup>53</sup> Id. at 124.

<sup>54</sup> Id.

<sup>55</sup> Parks, 32 Air Force Law Review at 28 (the blanket prohibition on attacks in cities away from battlefields “assumes that a lawful target situated in a populated area should be protected from attack. Such a rule would invite mischief on the part of a defender, who could resolve target vulnerability problems simply by constructing high-value targets in populated areas, or encouraging urban growth around preexisting targets.”), and 28-9 (“The second error was the assumption that responsibility for avoidance of collateral civilian casualties or damage to civilian objects should be shifted to the attacker. It is a shared obligation of the attacker, defender, and the civilian population.”).

<sup>56</sup> “Memorandum by the Chief of the Air Staff and comments by his colleagues,” May 1928, Appendix 2(i), in WEBSTER AND FRANKLAND, *THE STRATEGIC AIR OFFENSIVE AGAINST GERMANY*, vol. IV, at 73; Parks, 32 Air Force Law Review at 35.

<sup>57</sup> “Memorandum by the Chief of the Air Staff and comments by his colleagues,” at 73; Parks, 32 Air Force Law Review at 35.

<sup>58</sup> SPAIGHT, *AIR POWER AND WAR RIGHTS*, at 259.

<sup>59</sup> Brune, 29 Aerospace Historian at 185; Wyman, *The First Rules of Air Warfare*, 35 Air University Review at 100.

<sup>60</sup> Wyman, 35 Air University Review at 100, 101 (“the rules . . . were favorably received by the public”).



Perhaps most important of all, the American delegation privately knew that the European governments would never agree to serious restrictions on air power.<sup>61</sup> As Major Richard Wyman observed, “no nation wished to restrict its future options, especially if other powers used the regulation to gain an advantage.”<sup>62</sup> The French and Italians made no secret of the fact that they embraced the idea of using air power not only for defensive purposes but also for projecting power and attacking enemies.<sup>63</sup> In the 1920s and 1930s, airpower seemed to offer a potential deterrent to aggressors. For example, in the case of the Netherlands, which had experienced many ground invasions during its long history, the development of a robust air force offered the Dutch at least a theoretical deterrent, particularly against neighboring Germany. Similarly, the British government decided that an effective counterpunch—rather than international law—provided the best protection for British civilians.<sup>64</sup> Although the British feared that air power would undermine the defensive advantages they enjoyed as an island nation, the British government nevertheless concluded that it could accept no significant limits on its own ability to use airpower offensively.<sup>65</sup> As G.F. Milne, Chief of the Imperial Staff, explained, the British Isles “are especially vulnerable” to aerial bombardment, and it was “beyond all doubt that our enemies will exploit their advantage over us in this respect and will thus force us to conform and to counter their attacks in kind.”<sup>66</sup> The simple reality was, as the historian Lester Brune explained, “the European nations most likely to benefit from international regulation [of aerial warfare] distrusted each other too greatly to adopt limits for using new technology in warfare.”<sup>67</sup>

The United States also eventually abandoned its support for the Draft Rules. The United States Navy, which had originally supported the new restrictions on air warfare, changed its position in the mid-1920s when the Navy’s first aircraft carriers—the *Langley*, the *Lexington*, and the *Saratoga*—put to sea, reflecting a new focus on naval aviation as a linchpin of America’s maritime defense strategy.<sup>68</sup> Ultimately, President Calvin Coolidge never even attempted to secure the Senate’s consent to the treaty’s ratification.<sup>69</sup> By the 1930s, a sense of fatalism about air power became widespread on both sides of the Atlantic. Writing in 1931, Frank Quindry opined that even if the Draft Rules became law, combatants would inevitably embrace area

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<sup>61</sup> Id. at 100 (describing a report from Navy Secretary Edwin Denby that “one of the powers represented at the commission did not consider regulation necessary and might be “willing to permit the work . . . to be forgotten.”)

<sup>62</sup> Wyman, 35 *Air University Review* at 100.

<sup>63</sup> Brune, 29 *Aerospace Historian* at 184.

<sup>64</sup> O’BRIEN, *CIVIL DEFENCE*, at 18 (“The Air Staff had given emphatic expression to the view that, whatever defence measures might be adopted, the determining factor in defeating air attack would be the strength of the counterattack carried out by Britain’s bombing aircraft against the enemy in his own country. The committee reported their agreement with this view; and their conclusion that the Rules of Aerial Warfare, drafted by a Commission of Jurists at The Hague in the winter of 1922-23 provided no appreciable protection for a civil population against air attack.”).

<sup>65</sup> Brune, 29 *Aerospace Historian* at 184-5.

<sup>66</sup> WEBSTER AND FRANKLAND, *THE STRATEGIC AIR OFFENSIVE AGAINST GERMANY*, vol. IV, at 76.

<sup>67</sup> Brune, 29 *Aerospace Historian* at 185.

<sup>68</sup> ROGER E. BILSTEIN, *FLIGHT PATTERNS: TRENDS OF AERONAUTICAL DEVELOPMENT IN THE UNITED STATES, 1918-1929* (1983), at 24-25; Parks, 32 *Air Force Law Review* at 35.

<sup>69</sup> Brune, 29 *Aerospace Historian* at 184.

bombing of cities.<sup>70</sup> He predicted that “on the basis of self-preservation alone,” future combatants would bomb factories and industries to undermine the enemy’s economy, and “no nation will refrain from attacking such objectives merely because they are surrounded by [the] enemy civilian population. This will make indiscriminate bombing inevitable.”<sup>71</sup>

Consequently, on the eve of World War II, no international treaty provided clear guidance regarding the legality of air strikes on urban areas.<sup>72</sup> Writing in 1936, Professor Garner observed that the “law of war” was “in a somewhat chaotic state, and when the next great war comes, if unhappily it does come—it will have to be carried on in large measure without rules that have been agreed upon, or with rules which have not been settled and as to the meaning of which there has been no general agreement.”<sup>73</sup> Most ominous of all, Vice Admiral Rodgers, who had served as Ambassador Moore’s top military adviser during The Hague Conference, warned in a 1939 law review article that “[t]he extensive use of airplanes in bombing cities and noncombatants is not likely to be controlled by pre-war agreements. . . . The incidental presence of private property and noncombatants will confer no immunity on property capable of aiding the national resistance.”<sup>74</sup> World War II would prove that point many times over.

#### IV. *The D-Day Air Campaign*

The failure of The Hague Draft Rules to attain the status of international law did not prevent last minute efforts to restrain the use of air power during World War II. On September 1, 1939, the day that the Second World War began, President Franklin Roosevelt issued a public statement calling on each warring power to publicly “affirm its determination that its armed forces shall in no event, and under no circumstances, undertake the bombardment from the air of civilian populations or of unfortified cities, upon the understanding that these same rules of warfare will be scrupulously observed by all of their opponents.”<sup>75</sup>

Roosevelt’s appeal had no effect. World War II saw aerial bombing of cities on a massive scale, beginning in September 1939 with the German air and artillery assault on the Polish capital of Warsaw, an attack that killed 40,000 people.<sup>76</sup> The destruction of cities through air power became commonplace during the war, culminating in August 1945 with the American

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<sup>70</sup> Quindry, *Aerial Bombardment of Civilian and Military Objectives*, 2 *The Journal of Air Law* at 489-90.

<sup>71</sup> *Id.* at 490.

<sup>72</sup> J.W. Garner, *The Outlook for the Law of War and of Neutrality*, 22 *Transactions of the Grotius Society* 1, 6 (1936) (observing that “there is practically no conventional International Law” regulating air warfare).

<sup>73</sup> *Id.*

<sup>74</sup> W.L. Rodgers, *Future International Laws of War*, 33 *American Journal of International Law* 441, 450 (1939).

<sup>75</sup> Statement of President Franklin D. Roosevelt, *An Appeal to Great Britain, France, Italy, Germany, and Poland to Refrain from Air Bombing of Civilians*, September 1, 1939, at <http://www.presidency.ucsb.edu/ws/?pid=15797>.

<sup>76</sup> HALIK KOCHANSKI, *THE EAGLE UNBOWED: POLAND AND THE POLES IN THE SECOND WORLD WAR* (2012), at 81-83.

atomic bomb attacks on Hiroshima and Nagasaki, which killed more than 100,000 Japanese civilians.<sup>77</sup>

The story of aerial bombing in World War II far exceeds the scope of this study. Instead, the remainder of this paper addresses an aspect of World War II bombing that has particular relevance to the 1923 Hague Draft Rules as well as modern controversies over the use of air power: the massive collateral damage in France and Belgium that resulted from the D-Day air campaign.

During the planning stages of Operation Overlord, it was clear to the Allied high command that airpower would play a crucial role in preventing the German army from defeating the D-Day landings. But the critical question was *how* to use airpower to interdict the Germans? In the months before June 6, 1944, the date of the D-Day landings, a fierce debate erupted within the Allied high command over the scale and nature of the D-Day air campaign.<sup>78</sup> The debate involved two competing plans: the first calling for a vast area bombing campaign targeting rail yards across France and Belgium, and the second calling for a much more limited series of precision strikes on bridges and other interdiction targets in the Normandy area.<sup>79</sup>

The first plan was known somewhat generically as the “transportation plan,” but was in fact a railway-focused plan that involved a massive air onslaught against rail centers and the sprawling marshalling yards that surrounded them.<sup>80</sup> To attain its objectives, the rail plan required heavy bombers to be redirected from attacking German oil and industrial facilities and deployed instead against rail centers in France and Belgium.<sup>81</sup> The rail plan was developed by Solly Zuckerman, an adviser to the Royal Air Force, who had developed a similar plan for the Allied invasion of Italy in 1943.<sup>82</sup> Zuckerman claimed that by using strategic bombers to attack 76 rail centers in France and Belgium the Allies would paralyze the rail transportation system in northwest Europe and thus prevent the German army from reaching the Normandy coastline

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<sup>77</sup> DAVID M. KENNEDY, *FREEDOM FROM FEAR: THE AMERICAN PEOPLE IN DEPRESSION AND WAR, 1929-1945* (1999), at 849-50.

<sup>78</sup> W.W. ROSTOW, *PRE-INVASION BOMBING STRATEGY: GENERAL EISENHOWER’S DECISION OF MARCH 25, 1944* (1981), at 3-14.

<sup>79</sup> See Anthony J. Gaughan, *Collateral Damage and the Laws of War: D-Day as a Case Study*, 55 *American Journal of Legal History* 229, 249-66 (2015); RICHARD G. DAVIS, *CARL A. SPAATZ AND THE AIR WAR IN EUROPE* (1993), at 352.

<sup>80</sup> ROSTOW, *PRE-INVASION BOMBING STRATEGY*, at 3-14; JOHN J. SULLIVAN, *OVERLORD’S EAGLES: OPERATIONS OF THE UNITED STATES ARMY AIR FORCES IN THE INVASION OF NORMANDY IN WORLD WAR II* (1997), at 69-71.

<sup>81</sup> ROSTOW, *PRE-INVASION BOMBING STRATEGY*, at 4; MAX HASTINGS, *BOMBER COMMAND* (1999), at 353, 354; HORST BOOG, GERHARD KREBS, AND DETLEF VOGEL, *GERMANY AND THE SECOND WORLD WAR: VOLUME VII—THE STRATEGIC AIR WAR IN EUROPE AND THE WAR IN THE WEST AND EAST ASIA 1943-1944/5* (2006, English translation), at 556.

<sup>82</sup> SOLLY ZUCKERMAN, *FROM APES TO WARLORDS* (1978), at 197-8, 209-11, 406-7; SULLIVAN, *OVERLORD’S EAGLES*, AT 69-70; ROSTOW, *PRE-INVASION BOMBING STRATEGY*, at 7-14; CLAUDIA BALDOLI AND ANDREW KNAPP, *FORGOTTEN BLITZES: FRANCE AND ITALY UNDER ALLIED AIR ATTACK, 1940-1945* (2012), at 27.

during the D-Day invasion.<sup>83</sup> But because the rail centers and marshalling yards were centrally located in cities and towns, the rail plan advocates conceded that it would come at a heavy cost in civilian lives, with estimated non-combatant casualties in the tens of thousands.<sup>84</sup>

The competing plan was known as the “bridge plan.” It called for tactical air strikes on bridges, transportation junctions, ammunition and fuel depots, and open stretches of rail line in northern France.<sup>85</sup> Because it only required fighters and dive bombers to execute, the bridge plan freed the strategic air forces to bomb German oil facilities, thus further undermining the Wehrmacht’s transportation capabilities.<sup>86</sup> Crucially, by using tactical aircraft flying at low altitude against small targets, the bridge plan put French and Belgian civilians at far less risk than the rail center attacks.<sup>87</sup> The bridge plan’s proponents thus contended that their proposed strategy would achieve the goal of interdicting the German army without causing the massive loss of life that would inevitably result from the rail plan.<sup>88</sup>

Had the 1923 Hague Draft Rules been adopted, the railway attacks would clearly have been unlawful. The rail center plan violated the Draft Rules in at least two respects. First, the marshalling yards were located in cities far from the frontlines, which meant that attacking them contravened the first sentence of Article 24(3), which prohibited “bombardment of cities, towns, villages, dwellings or buildings not in the immediate neighborhood of the operations of land forces.” Second, the use of heavy bombers—flying at high altitude and armed with gravity-guided (i.e. dumb) bombs—to bombard the rail centers was by definition a form of area bombing, not targeted bombing. Indeed, as the historian Rick Atkinson has explained, bombing rail yards “amounted to emptying bomb bays over city centers.”<sup>89</sup> The rail attacks thus contravened the second sentence of Section 3, which prohibited attacks on military targets in urban areas outside the frontlines that “cannot be bombarded without the indiscriminate bombardment of the civilian population.”<sup>90</sup> In addition, the text and drafting history of the Draft Rules indicated that the delegates intended to prohibit attacks on civilian rail centers when not in

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<sup>83</sup> ZUCKERMAN, FROM APES TO WARLORDS, at 232; ROSTOW, PRE-INVASION BOMBING STRATEGY, at 14.

<sup>84</sup> CARLO D’ESTE, EISENHOWER: A SOLDIER’S LIFE (2002), at 497, 498; SULLIVAN, OVERLORD’S EAGLES, at 71; ROSTOW, PRE-INVASION BOMBING STRATEGY, at 4; DONALD L. MILLER, MASTERS OF THE AIR: AMERICA’S BOMBER BOYS WHO FOUGHT THE AIR WAR AGAINST NAZI GERMANY (2006), at 287; GORDON A. HARRISON, THE EUROPEAN THEATER OF OPERATIONS: CROSS-CHANNEL ATTACK (1951), at 222.

<sup>85</sup> ROSTOW, PRE-INVASION BOMBING STRATEGY, at 41-2; SULLIVAN, OVERLORD’S EAGLES, at 69-70; DAVIS, CARL A. SPAATZ, at 347.

<sup>86</sup> ROSTOW, PRE-INVASION BOMBING STRATEGY, at 42.

<sup>87</sup> SULLIVAN, OVERLORD’S EAGLES, at 70-1, 76-7.

<sup>88</sup> *Id.* at 70-1.

<sup>89</sup> RICK ATKINSON, THE GUNS AT LAST LIGHT: THE WAR IN WESTERN EUROPE, 1944-1945 (2013), at 357.

<sup>90</sup> DOCUMENTS ON THE LAWS OF WAR, at 145.

active and current use by the enemy's military forces.<sup>91</sup> The D-Day air campaign, in contrast, involved destroying rail centers *before* they could be used by the German army.

But since the Draft Rules were never adopted as international law, they posed no impediment to the rail attacks. With the law silent on the issue,<sup>92</sup> historical precedent supported bombing railway centers. During the First World War, the combatants had bombed rail stations near the frontlines as well in cities far removed from the battlefield.<sup>93</sup> The German air raid on Liverpool Street Station in the heart of London was one of the most famous examples of the war.<sup>94</sup> The warring governments not only directed air raids on railway stations but even awarded medals to the pilots who succeeded. For example, the British government posthumously awarded the Victoria Cross to a pilot who died bombing a railway station in Courtrai, Belgium, where 40,000 German troops had concentrated to be transported for an attack on British forces.<sup>95</sup>

With no clear legal restraint imposed on the Allied air forces by international law, the Allies ultimately adopted both the rail plan and the bridge plan. Accordingly, during the period before D-Day, the Allied air forces dropped 4,400 tons of bombs on bridges, fuel depots, and roads, and about 71,000 tons of bombs on rail centers in France and Belgium.<sup>96</sup> As the historian Donald Miller has noted, the bomb tonnage dropped on French and Belgian railways exceeded many times over the explosive power of the atomic bomb dropped on Hiroshima,<sup>97</sup> which was approximately the equivalent of 15,000 tons of explosives.<sup>98</sup>

There is no question that the air campaign ultimately succeeded in preventing the German army from defeating the landing forces at Normandy. The Allied bombing attacks destroyed bridges and rail centers across Northwest Europe and severely restricted transportation lines from

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<sup>91</sup> Indeed, the delegates intentionally left railway stations off the list of legitimate targets because the rail centers were primarily civilian in nature. See MOORE, INTERNATIONAL LAW AND SOME CURRENT ILLUSIONS AND OTHER ESSAYS, at 198-99 (“[o]rdinarily a railway station as such possesses no military value whatever and its use is distinctively non-military in war as well as in peace.”).

<sup>92</sup> BALDOLI AND KNAPP, FORGOTTEN BLITZES, at 252 (“No generally agreed body of international law governed aerial warfare in 1939”).

<sup>93</sup> SPAIGHT, AIR POWER AND WAR RIGHTS, at 229.

<sup>94</sup> SPAIGHT, AIR POWER AND WAR RIGHTS, at 229; FREDETTE, THE SKY ON FIRE, at 53, 58, 62; HYDE, THE FIRST BLITZ, at 134-142, 184; NIGEL STEEL AND PETER HART, TUMULT IN THE CLOUDS: THE BRITISH EXPERIENCE OF THE WAR IN THE AIR, 1914-1918 (1997), at 263-65.

<sup>95</sup> SPAIGHT, AIR POWER AND WAR RIGHTS, at 229.

<sup>96</sup> WESLEY FRANK CRAVEN AND JAMES LEA CATE, Eds., THE ARMY AIR FORCES IN WORLD WAR II: EUROPE: ARGUMENT TO V-E DAY: JANUARY 1944 TO MAY 1945 (Vol. III, 1951), at 160; HASTINGS, BOMBER COMMAND, at 355-356, 357; BOOG, KREBS, AND VOGEL, GERMANY AND THE SECOND WORLD WAR, at 557; FORREST C. POGUE, THE EUROPEAN THEATER OF OPERATIONS: THE SUPREME COMMAND (1954), at 132.

<sup>97</sup> DONALD L. MILLER, MASTERS OF THE AIR: AMERICA'S BOMBER BOYS WHO FOUGHT THE AIR WAR AGAINST NAZI GERMANY (2006), at 291.

<sup>98</sup> ERIC SCHLOSSER, COMMAND AND CONTROL: NUCLEAR WEAPONS, THE DAMASCUS ACCIDENT, AND THE ILLUSION OF SAFETY (2014), at 507 n.53-54 (“According to the most recent study at Los Alamos, the yield of the Hiroshima bomb was 15 kilotons, with a 20 percent margin of error”).

Cologne, Germany to the Bay of Biscay on France's northwest coast.<sup>99</sup> In all, Allied bombs reduced rail traffic by 70% in France and Belgium.<sup>100</sup> Moreover, tactical air strikes destroyed so many bridges on the Seine River that traffic of all kinds virtually came to a halt between Paris and the English Channel.<sup>101</sup> The Allied air onslaught staggered the German army, which failed to stop the Allied ground forces from pouring ashore at Normandy in massive numbers.<sup>102</sup> In the weeks following D-Day, over two million Allied troops would use the Normandy beachhead as their entry point into France.<sup>103</sup> Allied airpower, particularly the strafing attacks of tactical aircraft, proved so dominant that for the remainder of the war in western Europe, the German army could not move safely in daylight hours.<sup>104</sup> As a German tank commander fighting in Normandy explained: "The Allies have total air supremacy. They bomb and shoot at anything that moves, even single vehicles and persons . . . The feeling of being powerless against the enemy's aircraft . . . has a paralyzing effect."<sup>105</sup> Captured German officers universally cited Allied air power as the reason for D-Day's success.<sup>106</sup>

But the air campaign also had devastating results for the civilian population in France and Belgium. The attacks, especially on the rail centers, inevitably saw thousands of bombs miss their targets and strike residential areas.<sup>107</sup> Most historical studies estimate that at least 12,000 French and Belgian civilians died as a result of the D-Day air campaign,<sup>108</sup> but recent studies suggest that the total fatalities may have been much higher. A 2012 study by Claudia Baldoli and Andrew Knapp concluded that 16,000 French civilians died in just 90 days of Allied bombing

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<sup>99</sup> JOSEPH JONES, *THE POLITICS OF TRANSPORT IN TWENTIETH CENTURY FRANCE* (1984), at 153; SULLIVAN, *OVERLORD'S EAGLES*, at 1; BOOG, KREBS, AND VOGEL, *GERMANY AND THE SECOND WORLD WAR*, at 557; MARY LOUISE ROBERTS, *WHAT SOLDIERS DO: SEX AND THE AMERICAN GI IN WORLD WAR II FRANCE* (2013), at 21-22 (in order to not "betray the location of the Allied landings, bombing occurred over all of France, with the targeting of bridges, roads, and railways as well as oil depots and other German installations"); RANDALL HANSEN, *FIRE AND FURY: THE ALLIED BOMBING OF GERMANY, 1942-1945* (2009), at 188.

<sup>100</sup> BOOG, KREBS, AND VOGEL, *GERMANY AND THE SECOND WORLD WAR*, at 557.

<sup>101</sup> MORISON, *INVASION OF FRANCE AND GERMANY*, at 38; CRAVEN AND CATE, *ARMY AIR FORCES IN WORLD WAR II*, at 159 ("The Germans . . . made desperate attempts to repair their shattered bridges, but strafing made it difficult and demoralizing work, and even when reconstruction was successful, the Allies would promptly bomb again").

<sup>102</sup> BOOG, KREBS, AND VOGEL, *GERMANY AND THE SECOND WORLD WAR*, at 598; HASTINGS, *BOMBER COMMAND*, at 355-357.

<sup>103</sup> D'ESTE, *EISENHOWER*, at 564; RICHARD J. EVANS, *THE THIRD REICH AT WAR* (2009), at 624.

<sup>104</sup> BOOG, KREBS, AND VOGEL, *GERMANY AND THE SECOND WORLD WAR*, at 598.

<sup>105</sup> HANSEN, *FIRE AND FURY*, at 188.

<sup>106</sup> MILLER, *MASTERS OF THE AIR*, at 291-292 (Field Marshal Wilhelm Keitel observed that "[n]obody can ever prove to me that we could not have repelled the invasion had not the superiority of the enemy air force in bombers and fighters made it impossible to throw these [German] divisions in the fight.").

<sup>107</sup> RICHARD OVERY, *BOMBERS AND THE BOMBED: ALLIED AIR WAR OVER EUROPE, 1940-1945* (2013), at 391 ("For the four weeks before D-Day a furious crescendo of bombing descended on the French railway system and the unfortunate housing that surrounded its nodal points").

<sup>108</sup> RONALD SCHAFFER, *WINGS OF JUDGMENT: AMERICAN BOMBING IN WORLD WAR II* (1988), at 42-43; HASTINGS, *BOMBER COMMAND*, at 353; GARRETT, *ETHICS AND AIRPOWER*, at 154; MILLER, *MASTERS OF THE AIR*, at 291 ("And these high-altitude attacks on yards located in heavily populated urban areas killed an estimated 12,000 French and Belgian civilians"); WINSTON S. CHURCHILL, *THE SECOND WORLD WAR: CLOSING THE RING* (vol. 5, 1951), at 528.

between March and May 1944.<sup>109</sup> Furthermore, a 2013 study by Richard Overy found that if the computation of civilian dead includes casualties during the full month of June 1944—when the Allies waged a ferocious battle to break out of the Normandy beachhead—a total of 25,266 French civilians died as a consequence of the D-Day air campaign.<sup>110</sup>

#### V. *If The Hague Rules Had Been Adopted*

The crucial question, therefore, is whether the adoption of the Hague Draft Rules as binding law would have threatened the success of the D-Day landings. Counterfactual history is of course impossible to establish with any degree of certainty. Nevertheless, a few tentative conclusions seem reasonable to draw in light of the historical evidence.

First, had the 1923 Draft Rules been adopted as international law, and if they had been observed by the Allies, thousands of French and Belgian lives would undoubtedly have been saved. The reason is because the rail center attacks accounted for the overwhelming majority of civilian fatalities. Nearly 95% of bomb tonnage dropped on France and Belgium as part of the D-Day air campaign was directed at rail centers.<sup>111</sup> Thus, if the Allies had confined themselves to targeted strikes on bridges and fuel depots, and entirely refrained from area bombing of marshalling yards, French and Belgian civilian casualties would have been only a small fraction of the actual casualties incurred in the spring of 1944.

Second, the D-Day invasion may very well have succeeded even without the rail center attacks.<sup>112</sup> A post-invasion study by the U.S. Air Force determined that the bridge plan *alone* prevented the German army from reaching Normandy.<sup>113</sup> Other American military studies found that, at a minimum, the bridge attacks proved more effective than the rail attacks in undermining the German army's mobility,<sup>114</sup> a view shared by General Carl Spaatz and General Hap Arnold, two of the top commanders in the American air force.<sup>115</sup> An Army Air Force evaluation board underscored the point by declaring that “[t]he pre-D-day attacks against French rail centers were not necessary, and the 70,000 tons involved could have been devoted to alternative targets.”<sup>116</sup> Many historians have agreed with those conclusions. For example, in his 2006 study of the D-Day invasion, the historian Donald Miller concluded that the “[p]ostwar studies of pre-invasion bombing suggest that the bridge-busting campaign by the low-flying fighter-bombers

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<sup>109</sup> BALDOLI AND KNAPP, FORGOTTEN BLITZES, at 30.

<sup>110</sup> See, e.g., OVERY, BOMBERS AND THE BOMBED, at 391-92;

<sup>111</sup> CRAVEN AND CATE, THE ARMY AIR FORCES IN WORLD WAR II, vol. III, at 160.

<sup>112</sup> HAYWOOD S. HANSELL, JR., THE AIR PLAN THAT DEFEATED HITLER (1972), at 189 (arguing that the bridge attacks proved militarily “more effective on later examination” than the rail center bombings.); CRAVEN AND CATE, ARMY AIR FORCES IN WORLD WAR II, vol. III, at 156 (“Perhaps the decisive phase of the long transportation program was the brilliantly successful interdiction campaign against bridges”); HASTINGS, BOMBER COMMAND, at 357.

<sup>113</sup> CRAVEN AND CATE, ARMY AIR FORCES IN WORLD WAR II, vol. III, at 161; HASTINGS, BOMBER COMMAND, at 357.

<sup>114</sup> Id. at 161.

<sup>115</sup> Id.

<sup>116</sup> Id. at 161-162.

was more successful in impeding German troop movements than the destruction of French rail centers” by long-range, high-altitude bomber aircraft.<sup>117</sup> Similarly, historical works by John Sullivan, Richard Overy, Max Hastings, and Haywood Hansell, Jr. all reached the same basic conclusion that the bridge attacks played the key role in interdicting the German army.<sup>118</sup> Consequently, it is entirely possible that the adoption of The Hague Draft Rules might have saved thousands of civilian lives without compromising the success of the Normandy landings.

However, there is also a distinct possibility that the Allies would have unleashed the rail center attacks even if the Draft Rules had been adopted as international law. General Dwight Eisenhower, the supreme Allied commander, passionately supported the rail plan.<sup>119</sup> During the Overlord planning, he viewed the bridge plan with skepticism, doubting that the tactical air forces could destroy enough bridges in the narrow window before D-Day,<sup>120</sup> especially in light of forecasts calling for bad weather and low visibility in Normandy in the late spring of 1944. He concluded that only the destruction of “marshalling yards and other key points in the railway system” would “disorganize the railways” to such an extent that German traffic across northern Europe would come to a halt.<sup>121</sup> Eisenhower insisted that the rail attacks would result in “the virtual destruction of critical points on the main roads and railroads leading into” Normandy, and thus constituted “a critical feature of the battle plan.”<sup>122</sup> When British Prime Minister Winston Churchill questioned the necessity of the rail plan, Eisenhower emphatically responded that “casualties to civilian personnel are inherent in any plan for the full use of Air power to prepare for our assault. . . . Railway Centers have always been recognized as legitimate military targets, and attack on them is clearly obvious to the general population as a strictly military operation.”<sup>123</sup> Critically, President Franklin Roosevelt fully supported Eisenhower, observing that “[h]owever regrettable the attendant loss of civilian lives is, I am not prepared to impose from this distance any restriction on military action by the responsible commanders that in their opinion might militate against the success of ‘Overlord’ or cause additional loss of life to our Allied forces of invasion.”<sup>124</sup> In light of Overlord’s immense importance as well as the pervasive

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<sup>117</sup> MILLER, *MASTERS OF THE AIR*, at 291.

<sup>118</sup> See SULLIVAN, *OVERLORD’S EAGLES*, at xiv, 179; OVERY, *BOMBERS AND THE BOMBED*, at 399; HASTINGS, *BOMBER COMMAND*, at 357; HANSELL, JR., *THE AIR PLAN THAT DEFEATED HITLER*, at 189.

<sup>119</sup> D’ESTE, *EISENHOWER*, at 498 (Eisenhower argued that the Transportation Plan was necessary because “there is no other way in which this tremendous air force can help us, during the preparatory phase, to get ashore and stay there.”); SULLIVAN, *OVERLORD’S EAGLES*, at 1.

<sup>120</sup> CRAVEN AND CATE, *ARMY AIR FORCES IN WORLD WAR II*, vol. III, at 157.

<sup>121</sup> WEBSTER AND FRANKLAND, *STRATEGIC AIR OFFENSIVE AGAINST GERMANY*, at 38.

<sup>122</sup> DWIGHT D. EISENHOWER, *CRUSADE IN EUROPE* (1961), at 246.

<sup>123</sup> Dwight Eisenhower to Winston Spencer Churchill, May 2, 1944, in *THE PAPERS OF DWIGHT DAVID EISENHOWER: THE WAR YEARS* vol. III (Alfred Chandler, ed., 1970), at 1842-43; EISENHOWER, *CRUSADE IN EUROPE*, at 248.

<sup>124</sup> Franklin D. Roosevelt to Winston S. Churchill, May 11, 1944, in *CHURCHILL & ROOSEVELT: THE COMPLETE CORRESPONDENCE: ALLIANCE DECLINING, FEBRUARY 1944—APRIL 1945* (Warren F. Kimball, vol. III, 1984), at 127; CHURCHILL, *CLOSING THE RING*, at 530.



disregard of international law during World War II, a very real possibility exists that the Allies might simply have ignored The Hague Draft Rules and bombed the rail centers anyway.

It must also be emphasized that many historians believe the rail attacks played a vital role in Overlord's success. For example, in a 1957 study, the historian Samuel Eliot Morison contended that "[t]he widespread misgivings about the transportation plan were completely unwarranted" and the Allied bombing campaign "brought immediate and spectacular results."<sup>125</sup> Likewise, in 1983 the historian Carlo D'Este asserted that the bridge and rail bombings "decimated the French rail and road networks into Normandy" and therefore constituted "the single most important factor" in the Allied success on D-Day.<sup>126</sup> In a 1988 study, Alfred Mierzejewski found that the rail center attacks had a major impact on German military traffic in France, cutting it by two-thirds.<sup>127</sup> Some recent studies have reached similar conclusions. In a 2002 study, Tammi Davis Biddle observed that "[t]he attacks on French transportation did much to undermine the Germans' ability to take advantage of interior lines of communication on the continent."<sup>128</sup> In a 2004 book on D-Day, John McManus argued that the railway plan "isolated Normandy on the eve of the invasion and prevented the Germans from sending large-scale reinforcements quickly to the battle area."<sup>129</sup> He thus asserted that "[t]he verdict of history should be clear. The [Transportation] plan accomplished exactly what it intended to do."<sup>130</sup> The most detailed defense of the rail attacks is a 1994 study by Eduard Mark.<sup>131</sup> He contended that if the Allies had relied exclusively on bridge attacks across along the Seine and Loire rivers, they would have inadvertently alerted the Germans to the Allies' intention to land at Normandy.<sup>132</sup> Accordingly, Mark concluded that relying primarily on bridge attacks "might have spelled disaster for OVERLORD."<sup>133</sup> If those historians are right, then the adoption of The Hague Draft Rules might have led to Allied defeat in World War II, a chilling prospect to contemplate.

## VI. Conclusion

The dispute over the D-Day air campaign demonstrates why it is so difficult to use international law as a means of reducing collateral damage. Commanders operate in the fog of war, and the inherently chaotic nature of battle usually leaves a highly ambiguous and contradictory evidentiary record. Accordingly, despite nearly 75 years of historical analysis of

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<sup>125</sup> SAMUEL ELIOT MORISON, *INVASION OF FRANCE AND GERMANY, 1944-1945* (1957), at 38.

<sup>126</sup> CARLO D'ESTE, *DECISION IN NORMANDY* (1983), at 147.

<sup>127</sup> ALFRED C. MIERZEJEWSKI, *THE COLLAPSE OF THE GERMAN WAR ECONOMY, 1944-1945* (1988), at 100 ("Of the 100 supply trains from Germany needed by the armies in France each day, by May an average of only thirty-two actually arrived.").

<sup>128</sup> TAMI DAVIS BIDDLE, *RHETORIC AND REALITY IN AIR WARFARE: THE EVOLUTION OF BRITISH AND AMERICAN IDEAS ABOUT STRATEGIC BOMBING, 1914-1945* (2002), at 236-237.

<sup>129</sup> JOHN C. MCMANUS, *THE AMERICANS AT D-DAY: THE AMERICAN EXPERIENCE AT THE NORMANDY INVASION* (2004), at 66, 83.

<sup>130</sup> *Id.*, at 83.

<sup>131</sup> EDUARD MARK, *AERIAL INTERDICTION: AIR POWER AND THE LAND BATTLE IN THREE AMERICAN WARS* (1994), at 211-257.

<sup>132</sup> *Id.* at 256-257.

<sup>133</sup> *Id.* at 257.

the D-Day air campaign, one cannot reach a definitive conclusion regarding the impact that the adoption of The Hague Draft Rules as binding law would have had on the Normandy invasion. That fact speaks volumes about why it is so difficult to draft laws of war that protect non-combatants from collateral damage without in the process severely impairing the efficacy of military operations.

Nevertheless, significant progress has indeed been made in some areas since World War II. For example, under the modern laws of war—as embodied in the 1977 Additional Protocols of the Geneva Conventions—the particular bombing tactics used in the rail center attacks would clearly be unlawful as a form of indiscriminate warfare. Although dropping unguided bombs from 10,000 feet over a densely populated city was routine practice in World War II, it is not permissible under the law of armed conflict as it stands today. But at the same rate, it is also still true that the unresolved legal dynamics of the D-Day debate closely resemble those of modern military controversies. In the age of global positioning satellites and laser-guided munitions, it is a troubling fact that ambiguities continue to plague the law of armed conflict. Indeed, legal controversies over the use of air power remain omnipresent, such as the recent controversial air campaigns in Syria,<sup>134</sup> Yemen,<sup>135</sup> and Afghanistan.<sup>136</sup>

In the end, therefore, the fundamental law of war question that haunts twenty-first century battlefields is the same one that The Hague conference struggled to deal with nearly a century ago: At what point does collateral damage become disproportionate to the military necessity of an attack? There was no clear answer to that question during the D-Day air campaign and there still is no clear answer today. However that question is answered in the future, history suggests that the effort to apply international law to the battlefield should be guided by a spirit of pragmatism, and not by uncompromising idealism. As James Spaight, a British delegate at The Hague Conference, observed, “One must remember the atmosphere in which war is waged, so different from that of the jurist’s study or the council-chamber of peace.” Those who advocate restrictions on air power, he advised, must propose a “practical and acceptable solution” to the “terrible problem of air attack upon centres of population,” a solution capable of withstanding “the acid test of actual war.”<sup>137</sup>

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<sup>134</sup> Nick Cumming-Bruce, *U.N. Panel Links Russia to Potential War Crime in Syria*, N.Y. TIMES (March 6, 2018), <https://www.nytimes.com/2018/03/06/world/middleeast/syria-russia-un-war-crimes.html>.

<sup>135</sup> Waleed Alhariri and Alex Moorehead, *U.N. Panel of Experts Finds “Widespread Violations” of International Law in Yemen*, JUST SECURITY (Feb. 28, 2017), <https://www.justsecurity.org/38225/u-n-panel-experts-finds-widespread-violations-international-law-yemen/>

<sup>136</sup> Michele Kelemen, *Was Kunduz Attack A War Crime? Legal Analysts Say It’s Difficult To Prove*, NPR (Oct. 6, 2015), <https://www.npr.org/sections/parallels/2015/10/06/446109292/was-kunduz-attack-a-war-crime-legal-analysts-say-its-difficult-to-prove>.

<sup>137</sup> SPAIGHT, AIR POWER AND WAR RIGHTS, at 259.