

1926

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Recommended Citation

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LAWS OF AERIAL WARFARE

BY ELBRIDGE COLBY*

MODERN concepts of the law of hostile occupation reach back to precedents and precepts emanating from a distant past. So likewise do methods of punishing violations of accepted rules of land warfare. On such subjects as these we are on fairly familiar ground where conventional prescription and accumulating usages lead from the past to the present and yield some indication of what the future may be. At times the formalities of accepted international law may be some degree in advance of practice. At other times continued usages over even extended periods may be more lenient than the strict requirements of doctrine. For example, at the commencement of the Spanish-American War, our government announced that it would not resort to privateering, although we persisted in regarding it as still a right under international law.¹ Since international law is largely based upon custom, prevalent custom is more likely to evidence the real change than are tangible documents. No more striking example of this effect of growing sentiment upon law can be cited than the successive pronouncements of John Marshall regarding the status of enemy property on land in time of war.² In 1796 he appeared for the state of Virginia in the case of *Ware v. Hylton*³ and argued that by the law of nations confiscation was justifiable. In 1814, deciding the case of *Brown v. United States*⁴ from the bench of the Supreme Court, he declared that though the old rigid rule would allow confiscation, prevailing current practice forbade and no nation could sanction confiscation "without obloquy." In the *Percheman Case*,⁵ twenty years later, he announced that the confiscation of private property was contrary to the modern usage of nations "which has become law."

*Captain of Infantry, United States Army, Ft. Benning, Ga.¹U. S. Foreign Relations, 1898, pp. 774, 984.²7 Moore, Digest 310-13.³*Ware v. Hylton*, (1796) 3 Dall. (U.S.) 199, 1 L. Ed. 568.⁴*Brown v. United States*, (1814) 8 Cranch (U.S.) 110, 3 L. Ed. 504.⁵*United States v. Percheman*, (1833) 7 Pet. (U.S.) 51, 8 L. Ed. 596.

This conception of a gradually growing, practical sort of international law is of particular importance when we approach the subject of aerial warfare. The airplane and the airship are relatively recent articles. In effective and useful form they date practically from the twentieth century. There is no body of aerial law to which we can resort for precedents and principles. There is not even any consistent body of usage, antedating the World War, to which we can turn, at least no body of usage covering any considerable period of time or any wide range and variety of instances. Although in some respects an airplane is not much unlike a ship at sea, it cannot carry much contraband. It cannot stand by in mid-air and submit to visit and search. If captured it is not readily brought in. If it transgresses in mid-air, and resists arrest, it can only be destroyed. Some have attempted to apply land law to the atmosphere. They have cited common law cases concerning overhanging trees, concerning shots fired across a field, concerning boundary lines which run vertically into the earth and determine mineral rights.⁶ They have tried to build up a law of the air by analogy, and they continually met discrepancies due to changed conditions. Military uses of aircraft, they tried to fix similarly by analogy. It was felt that perhaps rules as to naval bombardments of coastal towns, or rules regarding sieges and land bombardments, might be applied to armed aviators. It was felt, also, that there might be applied to the roving airplane the rule of war that agents sent behind hostile lines should be considered as spies. The Prussians in 1870-1871 even made a threat to this effect, though they did not carry it out. A contrary principle prevented, and assured that all uniformed aviators had the lawful rights of belligerents. And yet, all of these confused discussions really arrived at no conclusion. Law on the subject was really non-existent, principally because of lack of custom. There was some practice, but it yielded little worth.

Let us, however, survey the practice of military aviation and get the facts of usage before us before proceeding further.

I. PRACTICE OF THE PAST

We find balloons used at Fleurus in 1794 as an effective aid to Jourdain, informing him of enemy movements.⁷ We hear

⁶Hazeltine, *Law of the Air* 66, Kuhn, *Beginnings of an Aerial Law*, 4 *Am. J. Int. L.* 122-128.

⁷*Manual of Air Force Law* (British), 1922, p. 13, 1 Raleigh, *The War in the Air* 147

of Napoleon learning of Austrian changes in position and using the information so effectively as to aid materially in gaining his victory.⁸ Then, during the American Civil War, balloons were used extensively and advantageously for observation and reconnaissance.⁹ By an ascension on August 10, 1861 at Fortress Monroe, General Butler was provided with diagrams of Confederate camps in the vicinity.¹⁰ In the same year a balloonist located Confederate batteries on Clarke's Hill and Munson Hill and proved of use to General McClellan elsewhere in the spring of 1862.¹¹ Commodore Foote used a balloon during his attack on Island No. 10 on the Mississippi early in 1862.¹² During the final months of the same year, General Burnside employed balloons for observation at Fredericksburg, flying one directly over his headquarters, and has been criticized for depending upon it too much instead of upon his cavalry for reconnaissance.¹³ In May, 1863, two balloons accompanied the Army of the Potomac at the battle of Chancellorsville.¹⁴ These were all captive balloons used exclusively for observation and the securing of information.¹⁵ On one or two occasions the balloons were allowed to drift freely, and fortunately were retrieved. But the question of bombarding or bombing seems never to have come up. The

⁸Kuhn, *Beginnings of an Aerial Law*, in 4 Am. J. Int. L. 122-28.

⁹An extensive report on many operations by the Chief Aeronaut of the Union forces, appears in 3 *Rebellion Records*, ser. 3, pp. 252-319. It has been recently said. "In the American Civil War, where the Federals derived some advantage from their use, balloons were criticized and ridiculed more than they were feared." (1 Raleigh, *The War in the Air* 147.) *Contra*, General Longstreet has spoken of balloons as among the "advantages" enjoyed by the Union troops, and has declared the Confederates were "longing for balloons that poverty denied" them. Longstreet, *From Manassas to Appomattox* 60; Longstreet, in 2 *Battles and Leaders of the Civil War*, Grant-Lee edition, p. 513. And General Alexander has stated: "I have never understood why the enemy abandoned the use of military balloons early in 1863, after having used them extensively up to that time. Even if the observers never saw anything, they would have been worth all they cost for the annoyance and delays they caused us in trying to keep our movements out of their sight."

¹⁰2 *Battles and Leaders of the Civil War*, Grant-Lee edition, p. 194; Woodhouse, *Textbook of Aerial Law* 131.

¹¹3 *Rebellion Records*, ser. 3, 260; McClellan, *Report of the Army of the Potomac* 203 (telegram to the president from Cold Harbor, May 25, 1862). The same general said he was "greatly indebted" to his aeronaut for "valuable information." (*Ibid.*, p. 76.)

¹²3 *Rebellion Records*, ser. 3, p. 269.

¹³1 Steele, *American Campaigns* 305.

¹⁴25 *Rebellion Records*, ser. 1, pp. 277, 288, 289, 292, 324, 336-341, 353-356, 361, 409.

¹⁵See account by Professor T. C. S. Lowe, in 8 *Photographic History of the Civil War*, pp. 369-382.

balloons gave the generals each his bird's-eye view. They merely increased the elevation of the conventional hilltop upon which commanders were always supposed to set up their headquarters during an engagement.

The next military use of a balloon was at Santiago in 1898.¹⁶ The Spanish forces used none, and the Americans but one, and that badly. It made but two ascensions, both solely for purposes of observation, and, though one useful bit of information was discovered by its occupants, the location of a balloon above a road on which advancing troops were crowded, drew enemy fire upon that portion of the jungle and upon those troops, who were otherwise concealed and not likely to have been fired upon.¹⁷ In the Anglo-Boer War, at Paardeberg, a captive balloon gave the first "detailed and accurate information concerning the Boer position,"¹⁸ and at Magersfontein ascertained the location of a Boer laager and supplies far in the rear and enabled a howitzer battery to open effective fire at 2,400 yards,¹⁹ so it is not surprising to find it stated in an operations order that "the balloon section will march with the howitzer battery."²⁰ Their role was no longer merely that of general reconnaissance. Balloons were beginning to be used for specific observation, direction, and perhaps even adjustment of artillery fire. Their military effectiveness was increasing. But as yet there had been no use of aircraft for the bombing of enemy positions. Their mobility was not sufficiently controllable. The dirigible was still a frail experimental thing. The airplane was in its infancy.

A British general officer has said that it was at the East Anglia maneuvers of 1912 that the British air service first exer-

¹⁶I purposely omit the balloons that flew from Paris in 1871, because neither their methods nor their purposes were distinctly military.

¹⁷Benton, *International Law and Diplomacy of the Spanish-American War*, pp. 151-152, 1 Steele, *American Campaigns*, pp. 605-606; 2 Sargent, *Campaign of Santiago de Cuba*, pp. 113, 152, Shafter, *Santiago Campaign in The American Spanish War*, by the War Leaders, p. 188; McClelland, *The Santiago Campaign*, in *The Infantry Journal*, Sept. 1922, p. 291, Report of the Major-General-Commanding the Army for 1898, pp. 164, 165. Similar casualties to troops from shots aimed at a balloon caused similar exasperation during the Boer War. 2 Callwell, *Stray Recollections*, pp. 84-85.

¹⁸German General Staff, *The War in South Africa*, tr. W. H. H. Waters, p. 204. One was also used for reconnaissance at Ladysmith. (Blake, *A West Pointer with the Boers* 77).

¹⁹German General Staff, *The War in South Africa*, tr. W. H. H. Waters, p. 107, 1 Raleigh, *The War in the Air* 154. A Boer officer regretted the advantage this gave the British. (Blake, *A West Pointer with the Boers* 140.)

²⁰German General Staff, *The War in South Africa*, tr. Du Cane, p. 262.

cised any considerable influence on operations.²¹ And it was not until 1912, when the Turks were campaigning in Tripoli, that the airplane had begun to assume a sufficiently definite status and certainty of performance so bombing could be carried on by aircraft. Then the first bombs were dropped.²² Observation and even the direction of artillery fire are but aids to combat. Dropping explosives is combat itself. The airplane finally became a belligerent in fact as well as in legal phraseology.

II. DISCUSSION PRIOR TO 1914

Yet, even before that, the imaginations of the lawyers had gone ahead. At the Hague Conference of 1899 a five-year prohibition was adopted regarding the dropping of bombs from balloons;²³ and in 1907 certain powers agreed to prohibit "the discharge of projectiles and explosives from balloons or by other new methods of a similar nature."²⁴ This agreement was signed by only ten nations, of whom the United States and Great Britain are the only great powers that have ratified. It may therefore be said to be "of comparatively little value."²⁵ There was, however, another definite step taken in 1907 at the Hague which seemed to cover a good deal of the ground. Article 25 of Hague Convention IV, regarding the bombardment of places on land, was made to read:

The attack or bombardment, by any means whatsoever, of undefended towns, villages, dwellings, or buildings, is forbidden.²⁶ The words "by any means whatsoever" were deliberately inserted in this sentence, after considerable discussion, with the specific intention of making air attacks illegal.²⁷ Sentiment of that time seemed quite settled on the point. General Davis remarked in July of 1908 that the launching of projectiles from the air might have been proposed but never really had been seriously considered

²¹ 2 Callwell, *Stray Recollections* 247.

²² *Aerial Bombardment Manual*, U. S. Army, Part 1, p. 8; Abbott, *The Holy War in Tripoli*, pp. 290-294. The airplanes operating into Mexico with the Pershing expedition of 1916 principally carried messages and mails, but were at any rate so utterly inadequate for any military purposes as to raise no question. (Hearings on War Expenditures, House Committee, United States Congress, 1921, ser. 2, vol. 1, pp. 4, 5, 265.)

²³ 2 Scott, *The Hague Peace Conferences of 1899 and 1907*, p. 524.

²⁴ *Hague Declaration XIV*, 1907.

²⁵ *Rules of Land Warfare*, U. S. Army, 1914, p. 56, par. 175.

²⁶ *Hague Convention IV*, 1907, article 25.

²⁷ *Hazeltine, Law of the Air*, 122, Holland, *Letters upon War and Neutrality*, 3rd ed., pp. 67-68; Garner, *Proposed Rules for Aerial War*, in 18 *Am. J. Int. L.* 56.

by any responsible belligerent.²⁸ Yet the increasing efficiency of aircraft of all sorts, the improved lifting power of airplanes and the imagined potentiality of the Zeppelins under construction and test, soon set the publicists worrying about the matter again. In 1908 Professor T. E. Holland soundly pointed out that "this article is not to be taken to prevent the use of any means for the destruction of buildings for military reasons."²⁹ In 1910 Oppenheim tried to extend the operation of the article, saying

"It is not sufficient reason for bombardment that a town contains supplies of value to the enemy, or railway establishments, telegraphs, or bridges."³⁰ Then came Hazeltime in 1911, believing "that the very presence of anti-aircraft guns makes a town defended and therefore subject to attack from the air."³¹

This was a far cry from the wishes of the Russian delegates at the Hague in 1899 who had tried without success to get a permanent prohibition on the dropping of any explosives or projectiles from the air.³²

In the spring of 1914, shortly before the assassin's bullet at Serajevo aroused the nations of the world against one another in the fiercest struggle of all time, the subject was discussed in a very lively fashion. On the one hand was Andrew Carnegie writing a personal letter to a distinguished aeronaut of New York to propose an absolute prohibition on aerial bombing.³³ On the other hand was the authority of such a man as Holland, declaring in April, 1914, that "London itself" would unquestionably be included among the "defended" localities,³⁴ and yet trusting that the city "may be enabled so to act at once in case of danger as wholly to forfeit such claim as it may in ordinary times possess to be considered an 'undefended' town." He even concludes with the exhortation "Let us not for a moment neglect our preparation of vertical firing guns and defensive airplanes."³⁵

The crux of the whole matter lay in that single word "defend-

²⁸Davis, *Launching of Projectiles from Balloons*, in 2 *Am. J. Int. L.* 528.

²⁹Holland, *War on Land*, 1908, art. 80, note.

³⁰Oppenheim, *Land Warfare*, 1910, art. 118, *Manual of Military Law (British)*, 1914, p. 253.

³¹Hazeltime, *Law of the Air* 123.

³²*Ibid.*, p. 117.

³³Woodhouse, *Textbook of Aerial Laws* 149.

³⁴Holland, *Letters on War and Neutrality*, 3rd ed., p. 67.

³⁵It is to be noted that the first and only time Bagdad was bombed from the air after its capture by the British, the occupying forces had long had "a system of defense worked out, and anti-aircraft guns were situated at various points to coöperate with the searchlights of the gunboats." Tonnant, *In the Clouds Above Bagdad* 249.

ed." Of course a fort is defended. So is a fortified town. So is a town surrounded by detached forts placed at some distance therefrom, as were those at Liège, Belfort, and Verdun.³⁶ This is reasonable and logical. The town is actually and geographically, as well as legally, on the battlefield. But places are also even considered defended if they be occupied by a military force, though the soldiers be merely in transit.³⁷ This likewise is logical, for the very bases of modern strategy and tactics make the enemy army the proper objective of the commander of troops. He must seek them out and destroy their tactical existence and utility wherever they may be. He does not seek to take an empty town; but he does desire to strike the army, which should not shield itself behind a civilian population. Can a great center of population be considered undefended if it contains barracks, bodies of troops, and military stores? Can a town which contains workshops and warehouses of great value in the conduct of the war, claim immunity simply because it is not surrounded by a circle of distant forts?³⁸ Can a city claim immunity in spite of the fact that it contains "important government offices from which orders relating to the war are issued"³⁹—especially when we remember that, though Napoleon may have conquered Europe from a gray traveling coach, command in modern times is absolutely dependent upon the home organization in the home war office and naval center? Can we raise still another and more difficult question and say that defense against air is one thing and defense against land and water forces another? Can a city provided with merely land defenses be said to be defended against the air?⁴⁰ Can a city without forts and with only inconsequential troops, be said to be "defended" if it has a few anti-aircraft guns? Or suppose it has merely a protective fringe of captive balloons with suspended nets to entangle a flying enemy? Or suppose it has no mechanical means of protection and defense at all, but is considered protected because a group of planes at a distant aerodrome is assigned to counter-attack any enemy which may venture within the area in

³⁶Rules of Land Warfare, U. S. Army, 1914, p. 67, par. 214, Manual of Military Law (British), 1914, p. 253, par. 123.

³⁷Rules of Land Warfare, U. S. Army, 1914, p. 67, par. 214; Manual of Military Law (British), 1914, p. 253, par. 119.

³⁸Oppenheim, Land Warfare, par. 123; Manual of Military Law (British), 1914, p. 253, par. 123.

³⁹2 Westlake, International Law 77.

⁴⁰Garner, Proposed Rules for the Regulation of Aerial Warfare, in 18 Am. J. Int. L. 70. This point of view was informally advanced by others prior to 1914. Mr. Garner, writing in 1924, expresses it in order to condemn "defense" as a criterion.

which the city lies? These are all problems of importance in connection with the right to bomb any particular town, in connection with the definition of "defended" and of "undefended." The changing character of the theory on the point before the World War demonstrated quite clearly the fact that it was mostly theory, and nothing more. There had not yet been developed any body of practice from which a doctrine could be built in accord with facts and circumstances.

In view of some of the ideas that were spread broadcast by partisan propagandists during that struggle, condemning the Zepelin raids on London, it is interesting, nevertheless, to read what one Englishman said on the subject just before hostilities commenced. The last word on the subject uttered just before the facts of conflict replaced theories and speculations, came from the pen of Mr. J. M. Spaight in June of 1914. Already author of one book concerning war rights on land, he risked his reputation as an international publicist on the following analysis of the situation, which—needless to say—was not very widely quoted in Britain between 1914 and 1918

"London, it is hardly necessary to point out, contains within its vast area some of the possible targets of attack referred to [in article 2 of the Convention on Naval Bombardments, i. e., '*Ateliers et installations propres à être utilisés pour les besoins de la flotte ou de l'armée ennemies.*'] If the rules of the Naval Convention apply (as they probably will) to air bombardment, then I can see nothing in International Law to prevent an hostile aircraft from dropping bombs on Chelsea, Wellington, Albany, or Knightsbridge Barracks, or on the Clothing Factory or Depot at Pimlico, or on Euston, King's Cross, Waterloo, and other great railway termini. Many commercial undertakings which hold orders for the War Department or Admiralty, would be liable for bombardment also. So, probably, would be the War Office and Admiralty, and the headquarters of the Eastern Command and the London District. The various Territorial Force headquarters all over London also appear legitimate objects of attack.

"If it is argued that, for humanitarian reasons, a belligerent (a naval commander, at any rate) would refrain from exercising his right of bombarding a great commercial city, one has merely to point to the events of recent military history to refute such a plea. Not only have the commanders of besieging forces shown themselves indifferent to the loss and suffering caused by their cannonade to the civil populations of *defended* cities, as the terrible bombardments of Strassburg, where 10,000 people were made homeless, and of other cities in 1870, prove; but there are cases in which *undefended* cities have been grievously damaged by shells, directed against government stores therein. Genitschi and

Taganrog were bombarded in the Crimean War because they refused to surrender such stores, and very great damage was done to private property in both cities. Indeed, the Naval Convention makes it clear that an assailant is justified in hardening his heart against any feelings of sympathy with non-combatant residents in cities containing military depots and stores which he is entitled to destroy. The sufferings of these residents are but an unfortunate incident of the execution of an approved act of hostilities and complaint is useless. International law enjoins respect for the lives and property of pacific citizens in war time, but it recognizes that war is war and that non-combatants may have to suffer when they or their property are unlucky enough to be near a scene of operations or military stores and plant which the enemy has a clear war right to destroy."⁴¹

This was the state of the theory, then, when the World War broke out, and broke out—it will be remembered—with the German government saying its declaration against France was justified by the fact that French military aviators had been dropping bombs on the railway between Karlsruhe and Nuremberg.⁴²

III. THE COMING OF THE WORLD WAR

"The art of war," remarked von Moltke, "consists in adapting the means at hand to the end in view." Here was a new means. Airplanes and airships had been developed to a degree that indicated they were reasonably dependable. Should this means be neglected at a moment of national effort? How should it be used to aid in bringing a favorable end to the national crisis? Of course, the airplane was not neglected, but was rather used in a large variety of ways. In recording and scrutinizing those uses, we may discover some indication as to its possible future use. Precept was lacking, or else insufficient. The World War itself developed a tremendous body of usage and habituated an enormous military population to that usage. Nor does there seem much possibility of concluding that in the future aircraft will be used much differently, or less, than in the past, even though that be only a very immediate past. Major G. H. Scott declared:

"Owing to the incentive of the war the airship has been brought to that state of development where it may justly be said

⁴¹Spaight, *Aircraft in War*, pp. 20-21.

⁴²The Kaiser's marginal note to one of Lichnowsky's memoranda, "German War Documents," in *International Conciliation*, May, 1920, p. 50; German ambassador's letter to Viviani demanding his passports, August 3, 1914. The allegation was officially denied by the French, and in a public letter by Richard Gottheil. (Woodhouse, *Textbook of Aerial Laws*, pp. 143-145; French "Yellow Book" documents no. 147, 148; *The New York Times*, November 3, 1916.)

to take its place amongst the useful inventions of the world. Like all other engineering achievements which have reached such a stage, there can be no question of it standing still; it is certain great efforts will be made to establish it as a means of long-distance transport, and to utilize it for defense purposes."⁴³

The airplane has come to stay. It has a greater future, probably, than any other modern invention now used in war. Its use in future war depends upon a compromise between its undoubted effectiveness and the repressive power of international comity. Its use in future war depends upon its use in the war just passed, and upon general international conceptions as to what war is and what it ought to be. These must be considered in turn, and each in detail.

Most of the tales of airplane bombing reported during the recent conflict came out of the mouths of the belligerents. They were either accounts of the awful things the enemy had done to non-combatants or else fine heroic narratives of splendid raids by friendly fliers who never harmed nor hurt any but military personnel and never damaged any but military objectives. Such were the general charges brought by a noted American authority on jurisprudence during the conflict, who said that Germany had "bombarded from aircraft places undefended and containing no constructions of military importance"⁴⁴ and even hinting that the Germans themselves condemned the Germanic aerial activities.⁴⁵ Such was the point of view maintained even after the conflict in what was put forth as sober history, which nevertheless used such phrases as these

"An unexpected phase of the war was afforded by the bombing by German airplanes on August 4, 1914, of Luneville, an 'open' town. This was a foretaste of the indiscriminate bombing of undefended places by the enemy."⁴⁶

But language like this, even post bellum language like this, does not entirely carry conviction after one has read the remarks of that elderly gentleman with a cynical pen but a sound mind, Mr. C. E. Montague.⁴⁷ But was this "phase" so "unexpected" after all? The remarks of Mr. Holland already mentioned and those of Mr. Spaight already cited, remarks made prior to the war, remarks

⁴³Proceedings, Second Air Conference, British Parliamentary Papers, 1922, (Cd.) 1619, pp. 71-72.

⁴⁴Smith, *Militarism and Statecraft* 172.

⁴⁵*Ibid.*, p. 196.

⁴⁶Turner, *The Struggle in the Air* 29.

⁴⁷Montague, *Disenchantment*, (1922). Also by the same author: *Fiery Particles*, (1923).

which warned Londoners what they might expect, remarks that were soundly based and yet utterly unheeded—show that to persons not obsessed with a blind and confident nationalistic patriotism, or with a mild and short-sighted vision of impractical pacifism, the events which took place were not so unexpected as a public press working in the interests of propaganda tried to make people believe.

- IV. GERMAN PRACTICES

Early in the war the Germans raided Paris, apparently aiming their attacks at the Eiffel Tower—then being used as a wireless station—and at the Gares du Nord and St. Lazare; and in March, 1915, attacking Calais they killed some railway employees and refugees who were in the trains under bombardment.⁴⁸ They bombed Salonica by airplane on December 30, 1915 and by Zeppelin on February 1, 1916, when that city was practically an armed camp and clearing point of troops for the Macedonian front.⁴⁹ On August 25, 1914, a Zeppelin dropped bombs on Antwerp.⁵⁰ And the dates of these incidents are worth noticing. Antwerp at that time was, strictly speaking, a "defended place," and was being put more and more in a state of defense with the aid of British naval guns and detachments.⁵¹ Salonica was then the retreat of the British and French who had retired from Southern Serbia and the Vardar Valley, and contained military stores, personnel, and headquarters of no mean proportions.⁵² Then there was the instance of the bombing of London by Zeppelins on October 13, 1915 when certain "warehouses" were destroyed, and on January 31, 1916, when "several factories" were struck.⁵³ Also the incident of December, 1915, when "the King and Queen of Belgium narrowly escaped death from a bomb launched by a German aviator while they were leaving a church in a Belgian village inhabited only by fishermen."⁵⁴ These things our own press told us. It was announced by the British on August 22, 1916, that all the Zeppelin raids in England to that date had resulted in the deaths of about 1,350 persons of whom only about 50 were soldiers,⁵⁵

⁴⁸ 1 Garner, *International Law and the World War* 460.

⁴⁹ Villari, *The Macedonian Campaign*, pp. 31, 32.

⁵⁰ 1 Garner, *International Law and the World War* 459.

⁵¹ 1 *The Times* (London) *History of the War*, p. 428, vol. 2, p. 81.

⁵² Villari, *The Macedonian Campaign*, pp. 28-29. Price, *Story of the Salonica Army* 57, 2 Buchan, *History of the Great War*, pp. 376-378.

⁵³ 1 Garner, *International Law and the Great War* 461.

⁵⁴ *Ibid.*, p. 459.

⁵⁵ *Ibid.*, p. 461.

though no data were given concerning the number of these that were munitions workers. There were of course countless other raids, and countless other deaths and destructions by aerial bombs. The Zeppelin was a thing of terror. Many innocent persons were killed. But military damage was done! That is what we must remember.

I speak not in defense of the Germans as such. My sentiments and such service as I rendered in the war were on the other side, and still are. Nevertheless, I cannot avoid the obvious fact that, writing in the English language as I do, I write for the perusal of persons who have mostly been unconsciously over-dieted on anti-Teutonic propaganda. Many innocent persons are killed in all wars. I feel that the Allied press spoke loudly and continuously of the harm done non-combatants in these instances for reasons which are too apparent to go into here—and for similar reasons remained silent under the censorship as to the military damage done to those factories making supplies for the men at the front, as to the military prominence and importance to his own army of such a splendid uniformed figure as that of the King of the Belgians. In the heat of the moment and the turmoil of indignation we are inclined to forget these things. I believe that when the Zeppelins attacked London they were attacking the center of resistance of the British Empire. I believe that when they headed for the Midland districts they were aiming to cripple the economic activity and industrial resources of the kingdom. In the conventions dealing with warfare there is a prohibition against the bombardment of public institutions, of libraries, and art treasures. Yet I personally saw newly raised portions of "Kitchener's Mob" drilling in the square behind and within one hundred yards of the British Museum. And a little over a year later, I saw holes made by Zeppelin bombs in the pavement less than a hundred yards from that very spot and from the Museum. Had those bombs struck those raw troops, it would have been a legitimate act of war. Had those bombs struck the Museum, what an outcry would have been raised! What protests would have been penned! What reprisals would have been resorted to! And yet, what would you? That was the way the war was conducted. That was where British troops were drilled, perhaps where circumstances made it necessary for them to be drilled. That was the way the Germans acted against an enemy army, even though only an army in the making which was later to face them on the flats of Flanders and the slopes of Artois. And again supposing the

troops struck or imagined struck were not raw recruits, but that priceless thing in war, trained soldiers on a short leave out of the trenches or effective convalescents soon to return to fill the front in France. Were they not also combatant personnel, even though they idly thronged the sidewalks of Piccadilly and Shaftsbury Avenue in hordes, and for the moment carried swagger sticks instead of weapons?

V. ALLIED PRACTICES

On the side of the Allies, also, airplanes did not confine their activities merely to securing information for the benefit of high command as they had in past wars. For example, Sir John French's dispatch covering events from February to April, 1915, said:

"In addition to the work of reconnaissance and observation of artillery fire, the Royal Flying Corps was charged with the special duty of hampering the enemy's movements by destroying various points in his communications. The railways at Menin, Courtrai, Don, and Douai, were attacked; and it is known that very extensive damage was effected at certain of these places. Part of a troop train was hit by a bomb, a wireless installation near Lille is believed to have been effectually destroyed, and a house in which the enemy had installed one of his headquarters was set on fire."⁵⁶ Even further into enemy territory, the allied aviators carried and dropped their loads. During the same period, a British machine "dropped five bombs on the station at Haltingen and dropped more bombs on the junction of the line for Bale and Freiburg."⁵⁷ During the following year the work continued. On November 10, 1916, a bombing expedition of planes visited "the little township" of Vaulx-Vracourt "well over the German lines north-east of Bethune" and "dropped their bombs on the military points they had set out to damage."⁵⁸ In 1917, British airmen dropped twelve 112-pound bombs on the factory at Duren,⁵⁹ and others visited Constantinople and dropped bombs on the Turkish war office, which, in the words of the Turkish communiqué, "was not destroyed."⁶⁰ In 1918 we hear of them bombing a town "which held large numbers of the enemy" and doing damage to "a great enemy war factory."⁶¹ Down in the Mesopotamian valley the Flying Corps

⁵⁶Turner, *The Struggle in the Air* 164.

⁵⁷*Ibid.*, p. 165.

⁵⁸*Ibid.*, p. 77.

⁵⁹*Ibid.*, p. 179.

⁶⁰*Ibid.*, p. 181.

⁶¹*Ibid.*, p. 182.

was active, attacking tents, troops in column, and important bridges, and also—for example—on March 24, 1918, flying over the town of Ana and “bombing and machine gunning among the houses.”⁶² Up on the Western front in 1918 the work went on. Raids were made on “factories and sidings at Saarbrücken” on July 3rd, upon “the station at Karlsruhe on August 11th, and also upon Frankfurt on August 12th where “most of the bombs burst in the town east of the goods station.”⁶³ On the night of August 25-26, 1918, over two tons of bombs were dropped at Mannheim during a raid on the buildings of the Badische Anilin Soda Fabrik works.⁶⁴ On October 18, 1918, British aviators did great damage in Kaiserslautern, blowing up, among other buildings, an American-owned factory

Nor were the French operations conducted differently. On October 30, 1914 they bombed “the headquarters of the Duke of Wurtemberg, near Dixmude, and did a lot of damage to buildings and motor cars.”⁶⁵ In the spring of 1915 “one of their airplanes threw five bombs on the German headquarters. The projectiles all fell on the buildings in which the Imperial Staff was installed at Mezières-Charlesville. They also bombarded the station of Freiberg, in Breisgau. Finally, a squadron of fifteen machines dropped bombs with complete success on the German military buildings of Ostend.” “The French frequently sent bombing parties to the Rhine, notably on June 15th [1915] when they penetrated as far as Ludwigshafen, and damaged important factories [and] on July 26th, raided a Rhine manufacturing center.”⁶⁶ From down in the Levant we hear news of French bombardments of petroleum depots and German consulates along the Syrian coast far from the Dardanelles where the real action was going on and in one case of a French hydroplane which actually dropped a bomb pat on the head of a Turkish gendarme who ridiculously and futilely had discharged his piece at it.⁶⁷ Later French airmen proceeded against Essen, and Munich, and the blast furnaces at Burbach.⁶⁸ “In the spring and summer of 1918, it was an everyday affair to bomb the towns, factories and lines of com-

⁶²Tennant, *In the Clouds above Bagdad*, pp. 63, 76, 86, 279.

⁶³Turner, *The Struggle in the Air*, 183.

⁶⁴*Ibid.*, p. 184.

⁶⁵*Ibid.*, p. 161.

⁶⁶*Ibid.*, pp. 165, 166.

⁶⁷Einstein, *Inside Constantinople during the Dardanelles Expedition* 146.

⁶⁸Turner, *The Struggle in the Air*, pp. 169, 170.

munication of the Rhine valley as well as the important military objectives out of gun range."⁶⁹

The United States entered the war late, ill-prepared and unprovided with air personnel or material. Yet our forces furnished many instances for consideration; and the very fact of the lateness of the entry and our rapid acceptance of existing conditions may indicate the effect of war time practice upon armies to be raised in the future and the possible programs that may be devised for aerial military training. When we started training our aviators, there was a distinct course for bombers. About the first of January, 1918, General Pershing cabled over advices to the effect that fliers should be trained in the ratio of five pursuit aviators, three observers, and two bombers;⁷⁰ and by May, 1918, there were under instruction 223 students in bombing pilotage and 185 in bomb dropping.⁷¹ When these got overseas, this is what they did,—quite apparently different from Santiago.

On June 12, 1918, the first raid by an American bombing squadron took place, executed by five planes, which dropped eighty bombs, one of which struck a warehouse at the station in Dommary-Baroncourt, northwest of Metz, and the others "laid a perfect circle of smoke about the railway junction."⁷² During the battle of Champagne in July, Americans went out at night with the French and British to attack the important highways along which Germans were moving troops and munitions, each machine emptying its guns into the lines of wagons and into the fields to which the Germans fled.⁷³ And so it went. In the first two weeks of August, 5,300 kilograms of bombs were dropped by the Americans.⁷⁴ "In the four days from September 12 to 16, American aviators . . . made a thousand raids on railroad junctions, ammunition depots, and other centers, and dropped seventy-five tons of explosives."⁷⁵ John D. Ryan reported on October 16, 1918, that "the United States De Havilland planes were in general use for observation and day bombing in both the St. Mihiel and Argonne attacks."⁷⁶

Our most important work during the entire conflict was, undoubtedly in the Meuse-Argonne offensive. It was a continu-

⁶⁹Aerial Bombardment Manual, U. S. Army, (1920), Part 1, p. 8.

⁷⁰Sweetser, *The American Air Service* 117.

⁷¹*Ibid.*, p. 123.

⁷²*Ibid.*, pp. 319-20.

⁷³*Ibid.*, p. 325.

⁷⁴*Ibid.*, p. 326.

⁷⁵*Ibid.*, p. 327.

⁷⁶*Ibid.*, p. 247.

ous drain upon our men, material, and methods. It was the most critical and the hugest task ever assigned to an American Army. From this time on to the closing of hostilities, our bombing aviators were constantly active, as was everyone else who wore our uniform. Following is a record of their achievements:

"The pursuit planes engaged in a bombing expedition, dropping bombs on the towns of Romagne, Cunel, and at other points immediately in rear of the enemy's front line."⁷⁷

"Bombing planes successfully raided Grandpre and Marcq. They dropped 1600 kilos of bombs on Grandpre and 1600 kilos on Marcq. At Grandpre four bursts were observed. At Marcq, bursts were observed above a railroad shed and caused a fire in the town."⁷⁸

"Our bombing squadron successfully bombed Bantheville, dropping 1240 kilos of bombs on the railroad tracks and town."⁷⁹

"Our bombing planes dropped a considerable amount of bombs on St. Juvin and Corney."⁸⁰

"Eleven planes of the Day Bombing Squadron carried out a raid shortly before noon and dropped 1½ ton of bombs on Grandpre. Eight groups of bursts were observed on the town and four on the railroad tracks."⁸¹

"In the afternoon bombing planes bombed Landres and Doulecon."⁸²

"Our bombing planes successfully bombed Bantheville and Doulecon."⁸³

"In the course of the day the first day bombardment group raided Dun-sur-Meuse, Milly-devant-Dun, and Villers-devant-Dun, dropping a total of 6,400 bombs with good effect."⁸⁴

"Bombing units bombed Bayonville, Buzancy, and Remonville, dropping a total of 4½ tons on these towns."⁸⁵

"Our bombing units dropped over five tons of explosives with good results on Sivry-les-Buzancy, Bois de la Folie, and Bois de Barricourt."⁸⁶

"Our bombing units dropped 3½ tons of explosives on Briquenouy."⁸⁷

"During the night, in spite of unfavorable weather, our bombing aviators attacked the enemy's most active railway stations and [18 tons of] explosives were dropped, with very good results, on

⁷⁷G. H. Q., A. E. F., Summary of Air Information, September 30, 1918.

⁷⁸*Ibid.*, October 1, 1918.

⁷⁹*Ibid.*, October 3, 1918.

⁸⁰*Ibid.*, October 4, 1918.

⁸¹*Ibid.*, October 5, 1918.

⁸²*Ibid.*, October 7, 1918.

⁸³*Ibid.*, October 8, 1918.

⁸⁴*Ibid.*, October 12, 1918.

⁸⁵*Ibid.*, October 20, 1918, Sweetser, *The American Air Service*, p. 329.

⁸⁶G. H. Q., A. E. F., Summary of Air Information, October 25, 1918.

⁸⁷*Ibid.*, October 28, 1918.

the junctions of Givet, Mezieres, Hirson, Vervins, Montcornet, and Launois."⁸⁸

"Bombing planes dropped 1400 kilograms of bombs on Raucourt and Mouzen."⁸⁹

At the same time, the enemy was not desisting. St. Mihiel was repeatedly bombed while in American hands.⁹⁰ So were Bantheville and St. Juvin,⁹¹ Reicourt and Dombasle,⁹² Rampont, Larmarche, and St. Benoit,⁹³ Montfaucon and Ligny-en-Barrois,⁹⁴ Nantillois, Baulny, Exermont, Fleville, Bar-le-Duc, and Pont-a-Mousson,⁹⁵ as well as "machine guns and roads near the front line"⁹⁶ and "front and rear areas west of the Meuse."⁹⁷

VI. WORLD WAR EFFECTS

This is evidence. It is not final. It is not complete. But it is sufficiently complete. Like the wound of *Mercutio*, it is "neither so broad as a church door, nor so deep as a well; but 'twill serve." On all hands aerial bombing was resorted to by all of the belligerents. There were accusations and counter-accusations of improprieties. There were reprisals and counter-reprisals. It is hard to distinguish at this time what acts were then considered legitimate reprisals and what illegitimate acts. It is hard to tell whether perfectly proper intentions of damaging purely military elements might have through inaccuracy or mistake caused other damage and been condemned by the opposing belligerent as unlawful, and so become the cause of retaliatory measures of the same sort and then of further and further retaliations. For example, take the attitude of the Russian government in declaring that it would treat as outlaws aviators who bombed undefended towns.⁹⁸ Their action in such a case would depend upon their own definition of the word "defended"—about which, as we have seen, there was such a controversy in England early in 1914. Then there would be reclamations and reprisals. Witness the words of Mr. Holland, written in May, 1917.

"The controversy as to the legitimacy of the recent attack upon Freiburg tends to stray into irrelevancies. If the attack

⁸⁸*Ibid.*, October 31, 1918.

⁸⁹*Ibid.*, November 6, 1918.

⁹⁰ *Ibid.*, September 21, 29, and October 13, 1918.

⁹¹*Ibid.*, October 11, 1918.

⁹²*Ibid.*, October 7, 1918.

⁹³*Ibid.*, October 13, 1918.

⁹⁴*Ibid.*, October 24, 1918.

⁹⁵*Ibid.*, October 26, 1918.

⁹⁶*Ibid.*, October 26, 1918.

⁹⁷*Ibid.*, October 11, 1918.

⁹⁸Woodhouse, *Textbook of Aerial Law* 132; Coleman Phillipson's *Wheaton*, p. 479; Phillipson, *International Law and the Great War* 259.

was made upon barracks or troop trains, no one would surely criticize what is of everyday occurrence, although not unlikely to cause incidentally death or injury to innocent persons. There seems, however, to be no reason for supposing that such military objects were in view, or that our airplanes were instructed to confine their activity, as far as possible, to the attainment of such objects. We must assume, for any useful discussion of the question raised, that the operation was deliberately intended to result in injury to the property and persons of civilian inhabitants, not, of course, by way of vengeance, but by way of reprisal—i. e., with the practical object of inducing the enemy to abstain in the future. Such reprisals . are no violations of international law They are not illegal."⁹⁹

So much for the matter of reprisals here, which is another question entirely under which illegal acts are completely validated by the *tu quoque* argument. The other idea in Holland's remarks leads us on to the next point. War has changed. The danger space has increased. It used to be that three miles was the outside limit of cannon shot, and accordingly three miles was taken as the standard for marginal maritime jurisdiction. This fiction has persisted in international law. It could persist because it was scrutinized principally, until very recently, only in municipal courts of law which determined the causes brought before them in accordance with ancient precepts and time-honored precedents.¹⁰⁰ In war, however, the case is otherwise. All things are tested by the truth of the sword and the equity of the rifle. Opposing generals are little likely to look to legal principles. Said Verdy de Vernois approaching the battlefield of Nachod. "Let history and principles go to the devil, after all, what is the problem?"¹⁰¹ The problem is the problem of administering defeat to the enemy. The armies will fight and the damage they do will extend as far as their weapons will carry. The civilian population must be prepared to suffer harm today from which a hundred years ago they would have been immune. As Samuel Johnson remarked in *Rasselas* "Against an Army sailing through the clouds, neither walls, nor mountains, nor seas could afford any security." Two British machines were out to raid Brussels, then in German hands. They came in sight of a Zeppelin and brought it down. The debris fell upon a convent near Ghent, and killed

⁹⁹Holland, *Letters upon War and Neutrality*, 3rd ed., p. 123.

¹⁰⁰Hall, *International Law*, 4th ed., p. 160; 1 Rivier, *Droit des Gens* 147, 1 Phillimore, *International Law*, 3rd ed., p. 274, Dana's *Wheaton*, sec. 189.

¹⁰¹Foch, *The Principles of War*, tr. Belloc, p. 14.

three nuns.¹⁰² Such are the consequences of war. An airship does not fight on the unpopulated ocean, but in the air where every bullet and every bomb must eventually come to earth. On the first occasion when German flyers were brought down by American aviators aloft in American planes, a French peasant working in his field received a hole in his ear from an American bullet.¹⁰³ It was a consequence of the war. When on the 23rd of January, 1915, German airplanes bombed Dunkirk and succeeded in setting afire a shed on one of the docks, a bomb fell just outside the United States consulate, breaking all the windows and smashing the furniture.¹⁰⁴ It was a consequence of the war. When an American squadron bombed an enemy aerodrome, and covered with machine gun fire and demolished with bombs a chateau close to, or on, the aerodrome grounds, in the belief that it held German military personnel, they were simply carrying out their duty in the war.¹⁰⁵ In order to vitiate as far as possible enemy aerial observation, troops were billeted in towns and private buildings instead of in tents. The towns and buildings so occupied, or reasonably suspected of being so occupied, became fair targets. Thus we have the British bombing Clery-le-Grand, Clery-le-Petit, Coulcon, Briquenay, and Germont, "as well as roads and trenches."¹⁰⁶ Such are the consequences of war as it is fought today. I fail to see any difference—any essential difference save the difference in weapons—between such actions and the shelling of Paris in the Franco-Prussian War,¹⁰⁷ or the incident described by a reserve officer in the Austrian army as follows

"The village of Roswadow on our left was being bombarded by the Russians and from behind the church two of our guns were replying. . . . The Russian guns were pounding the village, which was packed full of troops, but the shells were bursting too high and the cone of bullets usually struck only the roofs and chimneys. Occasionally one came lower and crashed into a house, sending roof and walls flying."¹⁰⁸

An army marching through a town, seeking cover from view in a

¹⁰²Turner, *The Struggle in the Air*, pp. 140-141.

¹⁰³Sweetser, *The American Air Service*, 317.

¹⁰⁴Turner, *The Struggle in the Air* 40.

¹⁰⁵Sweetser, *The American Air Service* 333.

¹⁰⁶G. H. Q., A. E. F., *Summary of Air Information*, November 6, 1918.

¹⁰⁷This shelling was condemned "on account of the misery caused to non-combatants, but at Brussels General Voigts-Rhetz was utterly opposed to admitting the illegality of the practice and there is little reason to suppose a different view will be taken in the future in view of its effectiveness." Bordwell, *Law of War*, pp. 89-90.

¹⁰⁸Taslauanu, *With the Austrian Army in Galicia*, pp. 69-70. The incident related took place on September 9, 1914.

town, quartered in billets in a town, or setting up a headquarters in a town, is not playing a game of tag where it can "touch wood" like a small boy and thereby render itself immune and the town as well. When it is said that private property is not a proper subject for attack, it is not meant that private property becomes sanctuary for the time being whenever a belligerent seeks safety, neither a sanctuary in fact nor a sanctuary in law. The nations of the western world do not wage war in that fashion. In China a single British Army lieutenant may be able to keep in free operation the Peking-Tientsin Railroad, and prevent the native troops fighting their own little civil war, from disturbing civilian traffic or from monopolizing transportation facilities, however urgent may be the "military necessity."¹⁰⁹ But on the battlefields of Europe, military necessity rules, and private wishes, private property, private safety bow before the stern requirements of war. And this is all the more so, and all the more widespread in its application, when we realize that the armies of the present depend for their food, and ammunition, and orders, upon long lines of communication extending far into the rear areas, out of gunshot range, out of big gun range, and into the inhabited towns and thickly populated cities to the rear. They are far in the rear areas though frequently not too far to be outside the cruising range of the aircraft of the present.

VII. THE THEORY OF "DEFENDED PLACES"

Lord Kitchener is said to have remarked that "a plane is equal to a thousand men," and that may be so. But a plane does not contain a thousand men. Airplane raids must necessarily, from the very nature of the machines, be of a different character from the famous cavalry raids by Mosby, and Forrest, and Morgan in the American Civil War. The airplane may have the same objective enemy personnel or supplies or centers deep behind the opposing line of riflemen. But it approaches them differently. It treats them differently. Its object is always destruction and never capture. Imagine the impossibility of such a situation as that hypothetically described by Colonel E. Jackson in the columns of the *London Times* in the spring of 1914

"When is a town 'not defended'?" I presume when it submits without any opposition to the authority of the enemy. . . . I will put an extreme case. The commander of an enemy's war-balloon might arrive over London if unopposed and signal, as a

¹⁰⁹ 76 Current History 828.

matter of courtesy, 'I am going to drop explosives.' We answer, 'You cannot drop explosives, we are not defended.' The commander replies, as it seems to me quite logically, 'Then you surrender. Good. You will now obey orders.'"¹¹⁰

That is not the way it happened in the last war, and that is not the way it will happen in any war in the future, Colonel J. F. C. Fuller and his masked aviators dictating imaginary terms to Parliament to the contrary notwithstanding.¹¹¹ If the town contain any military stores or headquarters or factories at all, it will also contain a certain number of military persons, even though they be "unfit for active duty" or "Home Guard" units. These people will resist the airmen when they land. The town will be defended in one sense of the word and therefore in the other also. The town will also, more than likely, be provided with anti-aircraft guns and with fighting or pursuit planes to drive off such invaders. The town will again be defended. And, being defended, it will be liable to bombardment and attack from the air, within the meaning of the international law regarding "defended" towns.

As a matter of fact it seems to have been practically demonstrated that such a defense is to be ordinarily expected. Military experts in Britain have laid it down that "it is necessary to make provision for the adequate anti-aircraft defense of vulnerable places of first-class importance, such as the Capital, the arsenals, dockyards, and factories which manufacture articles necessary in warfare."¹¹² What this means is made plain when we read the words of General Groves, who has recently remarked:

"In the future war of areas, the only effective defense against aircraft attack will be the aerial counter-offensive."¹¹³

And seconding him is the American assistant secretary of war, who declares:

"The only known defense against aircraft is aircraft."¹¹⁴

There also speaks up another Englishman, this time one who has thought and written on the subject of the law regarding aerial attacks. Mr. Spaight remarks:

"It will be difficult to tell in the future whether a place is defended or not, for defense against air attack will tend to take the form of aerial counter-action rather than of artillery defence,

¹¹⁰The Times (London), April 23, 1914, p. 5a; Spaight, *Aircraft in War* 12.

¹¹¹Fuller, *The Reformation of War* 186.

¹¹²Manual of Anti-Aircraft Defense (British), 1922, p. 2.

¹¹³Quoted in the New York Herald, March 5, 1924.

¹¹⁴Dwight E. Davis, speech at Baltimore, Md., March 18, 1924, U. S. War Department press release.

and a squadron or flight of defending air-craft, perhaps based on some fairly distant aerodrome, may suddenly appear above a town which is entirely open as far as ground defence is concerned, and deny the raiding aircraft access to that town, which cannot then truly be said to be undefended."¹¹⁵

In view of the conditions and tactics of aerial warfare of the present, there is much sense in the doctrine set forth by Mr. Spaight who says that:

"The old broad rule that a defended city may, and that an undefended city may not, be bombarded, is no longer of any practical value."

In his very able article on the subject, the same gentleman goes on to indicate that during the World War the professed practice of the belligerents was—aside from reprisals conducted distinctly as such and therefore of no value to our discussion—to attempt to bomb "points of military importance."¹¹⁶ He demonstrates this prevailing doctrine quite clearly. And since it is true that "at the close of any war, we find an accepted practice governing conduct"¹¹⁷ and that this conduct is finally after the conclusion of a peace formulated by jurists into a general code for the world at large, we may deem it reasonable that the principle of the military objective will be the governing factor in new laws. It is the old sequence of custom making law in international wars. The Mexican War of 1846-1848 was responsible for the final definition of the military commission. The Crimean War saw the institution of permitting enemy ships to sail from port to their home coasts unmolested. The American Civil War had been waging two years before the Lieber Instructions were issued in 1863. The Franco-Prussian War was responsible for the discussions at Brussels and for the rules relative to bombardment, military occupation, and franc tireurs laid down at the Hague in 1899. The Spanish American War marked the final disappearance of privateering which was still ostensibly legal at that time. And the World War has been responsible for the very inclusive gas and submarine treaty of Washington, and for the new code for radio and aircraft recently drawn. This new code adopts the practice of the World War in regard to "military objective" and defines it more or less closely. The new code says that in the theatre of operations

¹¹⁵Spaight, *Air Bombardment in British Year Book of International Law*, 1923-1924, p. 22.

¹¹⁶Spaight, *Air Bombardment in British Year Book of International Law*, 1923-1924, pp. 23-25.

¹¹⁷Rodgers, *Laws of War Concerning Aviation and Radio*, 17 *Am. J. of Int. L.* 638.

bombing is generally permissible and that in rear areas bombing is permissible if directed exclusively at points of military importance.¹¹⁸ The defense or lack of defense of a place is, quite properly, laid aside as archaic and unsuited to aerial raiding.¹¹⁹ The new criterion is the military importance of the area being bombed.

VIII. THE THEORY OF "MILITARY OBJECTIVES"

Suppose we assume then that this will be the permanent criterion of the future, which it is very likely to be, because it is in accord both with current practice and with sound strategic and tactical common sense. A belligerent will not wish to risk his planes and pilots, expend his gasoline, or waste his munitions on any objectives except those of military importance. That will be the view of the military man on whatever General Staff he may happen to serve. That was the view of at least one German aeroplane commander who raided London:

"We proceed, coolly and calmly, passing over the suburbs, for it is in the center that we must hit. We regard nothing but that object, . . . the Tower, Liverpool Street Station, the Bank of England, ships on the Thames."¹²⁰

And the predominance of the "military objective" theory over the "defense" theory is made all the more plain when some objects are spoken of as particularly desirable targets and objectives, simply on account of their comparative lack of defense:

"In the back areas a train is completely at the mercy of a low-flying machine. . . . The railways are undefended, with the exception of the large junctions, and behind some parts of the front; at any rate there is no very formidable anti-aircraft defense at those."¹²¹

The British point of view on this subject of "military objective" is indicated by their statement that an overwhelming attack on the Capital, arsenals, dockyards, and factories which manufacture articles necessary in warfare "might paralyse temporarily the fighting efficiency of the armies in the field."¹²² The point of view of the

¹¹⁸In view of this we cannot accept as true the following statement of the fact in a British instruction manual. "Attack from the air by a hostile power . . . may be made upon . . . important cities and other vulnerable points at home and abroad, the defenses of which might be of a permanent nature" (Manual of Anti-Aircraft Defense (British), 1922, p. 1.) The final clause is misleading and unsound.

¹¹⁹Garner, Proposed Rules for the Regulation of Aerial Warfare in 18 Am. J. of Int. L. 56.

¹²⁰Turner, *The Struggle in the Air*, pp. 157-158.

¹²¹Aerial Bombardment Manual, U. S. Army (1920), Part 3, p. 36.

¹²²Manual of Anti-Aircraft Defense (British), 1922, p. 2.

United States Air Service is perhaps indicated in the following passage.

"Next should be attacked the ammunition and supply depots back of the lines, the rest camps, and finally the factories and lines of communications, bridgeheads, etc., in the far interior, and such other points the destruction of which would embarrass seriously the enemy organization."¹²³

Or perhaps the conception of the United States Air Service is indicated by some peacetime maneuvers held by the Air Service, in which "an enemy" raiding unit of five bombers visited the city of Washington, bombing "the White House, Treasury, Navy Yard, War College, the Capitol, and other important government structures" and was opposed by a defending fleet of six "friendly" planes, scouting and fighting.¹²⁴

In the Field Service Regulations of the United States Army,¹²⁵ the functions of the air service are stated to include observation and reconnaissance, and the bombing of hostile rear installations, lines of communications, sources of supply, and industrial centers. Explicitly, the Regulations state:

"It flies deep into hostile territory and obtains and verifies information. . . In large operations the air service is employed in bombing hostile rear installations, such as depots, dumps, troop shelters, lines of communication, bridges, tunnels, defiles, command posts, railroad stations, sources of supply and industrial centers. Supply and industrial centers are bombed in order to reduce the production and to interrupt the forwarding of supplies to the hostile troops. Other bombing operations are conducted in order to destroy the enemy's morale, thereby reducing the efficiency and fighting power of the enemy's military forces and the support furnished by the civilian population. It is essential that all such operations have a direct and important bearing upon the military situation, especially that efforts are not wasted in non-essential undertakings."

Omitting for a moment the bearing on morale mentioned in the next to the last sentence of the passage just quoted, and assuming that the objectives are all purely military in character, and that the purposes are solely to damage and destroy military installations, we have—before we go any further—to deal with the question of unintentional harm done to non-combatants, that is occasional and accidental harm, not that deliberate harm which the new code is quick to condemn when it outlaws—for the few

¹²³Aerial Bombardment Manual, U. S. Army (1920), Part 1, p. 7.

¹²⁴The New York Times, November 16, 1922.

¹²⁵Training Regulations No. 15-70, U. S. Army (1922), par. 13.

nations which signed it, but have not yet all ratified it—the “indiscriminate bombing” of civilians.

Aerial bombing is one way of doing the job, not an extremely accurate way, but a way nevertheless that can be adopted when other ways are not open. Of course, if you wished to demolish a railway culvert and cripple train movements of great importance to the enemy’s big guns and heavy stores, you might do as one British plane did in Mesopotamia in 1917: take along a pair of Engineer officers with explosives, land them, and attempt the job that way. Yet, in future cases, as in that, the incident is more than likely to turn out an unsuccessful attempt only.¹²⁶ The more usual task would be to try the task entirely from the air. And the results would likely be equal to those of the British raid on Frankfurt on August 12, 1918, where “most of the bombs burst in the town east of the goods station” at which they were aimed.¹²⁷ Or perhaps those of the American raid of July 17, 1918 in conjunction with the Italians, who had desired to bomb the Austrian naval base at Pola by day with greater accuracy than they had been able to secure at night. An American flyer reported:

“We went over our objective one by one and dropped our bombs without being molested. . . . When I turned away, I could see bursts of fire on the center of the city, one on the arsenal, and one on a torpedo boat in the harbor.”¹²⁸

There are few instances where an aerial bomber has not thought he hit his mark. There are still fewer where the home government would be willing to admit that he had missed his military mark and done damage to non-combatant persons or property. Here are two accounts of a single raid. A British Admiralty dispatch of November 24, 1914 said:

“A flight of airplanes flew from French territory to the Zeppelin airship factory at Friedrichshafen . . . and launched their bombs according to instructions. They report positively that all the bombs reached their objective, and that serious damage was done to the Zeppelin factory”

The Berlin *Lokalanzeiger* gave the following account:

“One of the airplanes glided down to within 1000 feet of the airship shed, and dropped bombs, but without doing any damage. The airplane’s petrol tank was pierced, and the pilot forced to land

¹²⁶Tennant, *In the Clouds above Bagdad*, pp. 96-97.

¹²⁷Turner, *The Struggle in the Air* 183.

¹²⁸Sweetser, *The American Air Service* 336.

¹²⁹Turner, *The Struggle in the Air* 163. Similar variant belligerent interpretations of the effect of airplane bombing arose when that mode of fighting first began, during the Italian campaign in Tripoli. Abbott, *The Holy War in Tripoli* 291.

in the Zeppelin yard near the shed. . The other machine dropped bombs near the town and the station, and damaged three houses. He then came over the Zeppelin works, and threw bombs without causing damage."¹²⁰

Allowances must be made for the censorship, and for the propaganda motives behind the phrasing and facts in each separate communiqué. Yet perhaps there is something else. Perhaps the flyer who did return to England reported inaccurately, though honestly. Perhaps he thought the factory was damaged. Perhaps the bombs which hit the houses really seemed to him to hit only the military objective.^{129a} The fact remains that nearby houses are likely to be hit in raids such as this. Is the military object to be accomplished essential? Then the raid will take place, harm or no harm to unoffending houses or humans.

(To be continued)

^{129a}"During the World War extravagant tales of havoc done to enemy cities and installations were often brought back, in good faith, no doubt, by some of our aviators, but investigation after the Armistice failed, in the majority of cases, to verify the correctness of such reports." (Report of General J. J. Pershing, Chief of Staff, 1924.)