The 1923 Hague Rules of Air Warfare

A CONTRIBUTION TO THE DEVELOPMENT OF INTERNATIONAL LAW PROTECTING CIVILIANS FROM AIR ATTACK*

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Historical events since 1939 and the only partially completed codification of the law of air warfare have made it one of the most controversial areas of the law of war. Though Protocol I additional to the Geneva Conventions does contain provisions governing air warfare, it has not yet assumed its due significance owing to the hesitancy shown in ratifying it. All the more importance must therefore be attributed to the historical development of such rules.¹

Compared with ground and naval forces, the aircraft is a relatively new weapon; it was first taken into account by the Hague Peace Conference of 1899, which adopted a declaration prohibiting any aerial

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* The original text of this article was published in the May-June 1991 German-language issue of the International Review of the Red Cross (No. 3, pp. 139-172).

¹ Though many articles and theses have been written about the history of the law of air warfare with particular attention to the protection of the civilian population, few of them can be said to constitute a comprehensive study of the subject. In fact, an ever diminishing amount has been published about this problem, especially in recent years. M.V. Royse's Aerial Bombardment and the International Regulation of Warfare, Vinal, New York, 1928, remains a 'classic' in this area. Another important work is E. Spetzler's Luftkrieg und Menschlichkeit, Musterschmidt, Göttingen, 1956. Air Power and War Rights, the oft-praised book by J.M. Spaight, third edition, Longmans, Green & Co., London, 1947, tends to assume the role of apologist. This, combined with a large number of erroneous quotations, limits its usefulness. The literature used in researching the present article is listed in the appended selective bibliography. Only occasionally, therefore, do the footnotes refer to them and then only by means of a brief quotation.
bombardment for a period of five years.\(^2\) At the Second Conference in 1907, this prohibition had meanwhile become the object of lengthy debate and could not be effectively renewed.\(^3\) Instead, a few words were inserted into Article 25 of the Hague Regulations respecting the Laws and Customs of War on Land so that the same provision governing artillery bombardment and other attacks by land forces would also apply to aerial bombardment.

The First World War showed that aircraft could be used not only for reconnaissance but also much more effectively as weapons in their own right to attack areas, especially the enemy’s residential and industrial areas far behind the front, that had hitherto been inaccessible to land or naval forces. It was precisely this independence from ground forces that made it obvious by the end of the conflict in 1918 that any attempt to apply the law of war thus far codified to air warfare was doomed to failure. Article 25 of the above-mentioned Hague Regulations on land warfare had previously been regarded as adequate, but it was now apparent, if only because of its wording and internal logic, that it could be implemented only in cases where a place under ground attack resisted occupation; the idea was that in such a case, it should be permissible for a town to be bombarded in order to break the resistance. This, however, was practicable only at the front, in the immediate range of ground forces. But aircraft could operate independently behind the lines, though they were not able to take and hold territory. Article 25 thus lost its significance.\(^4\) This did not mean, however, that air warfare behind the front — or “strategic bombing” as it was soon to be called — had no restrictions. A solution to the problem was found by analogy, as naval forces were in a similar position: as a rule they were equally unable to send forces to occupy an enemy locality on the coast. As it was not possible to neutralize important objectives in this way, Article 2 of the Hague Convention No. IX of 1907 on naval bombardments in time of war allowed naval forces to fire on certain objects even when the locality concerned was not defended. Such objects were “military works, military or naval establishments, depots of arms or war material, workshops or plants which could be utilized for the needs of the


\(^3\) By the end of the First World War this declaration had lost its validity through disuse.

hostile fleet or army, and the ships of war in the harbour”. Legal doctrine thereupon developed the concept of “military objectives”.

This concept took a long time to find its way into military parlance concerning strategic bombing. Generally speaking, it was possible to observe a steady shift, for bombardment to be permissible under international law, from the requirement that a locality be defended to that of the presence of a military objective. By the time the First World War ended, therefore, the law of air warfare had virtually lost its sole codified basis: the prohibition on dropping explosives from aircraft had become invalid and Article 25’s field of application had turned out to be extremely narrow. It has been replaced by the very imprecise principle of the “military objective”.

The Washington Conference of 1921/1922

The victorious powers soon realized that this situation was untenable in the long run. Therefore, when the President of the United States invited the governments of Great Britain, France, Italy and Japan to a disarmament conference in Washington in August 1921, the law of air warfare and its further development were on the agenda.

And indeed, draft treaties were put forward by both the British and the Americans. But the many new weapons that had appeared during the recent war made negotiations at the Conference more difficult than expected. Because of the course taken by the war, priority was given to consideration of submarine warfare and the use of both poison gas and mines, and agreement was therefore limited to a treaty, signed by the five participating States on 6 February 1922, prohibiting attacks by submarines against merchant shipping and the use of poisonous gases and analogous liquids.

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5 Garner, op. cit. (fn 4), p. 470, and, in particular, Hanke, H.M., Luftkrieg und Zivilbevölkerung der kriegsvölkerrechtliche Schutz der Zivilbevölkerung gegen Luftbombardements von den Anfängen bis zum Ausbruch des Zweiten Weltkrieges (Annexes), P. Lang, Frankfurt/M.-Bern-New York-Paris, 1991, pp. 46 ff.; on the other hand, see thorough study by K.H. Kunzmann (pp. 172 ff.) who opposes the idea that there was a steady shift to the requirement of a military objective.

6 Concerning the significance of this principle in the development of customary international law in the First World War, see Hanke (bibl.) pp. 42 ff.

7 Concerning these drafts, see Hanke (bibl.) pp. 60 ff. and, in particular, his quotation of them in Annex B.

The Hague Commission of Jurists

When it became clear that the Conference was not going to deal with rules for air warfare, it adopted a resolution, on 4 February 1922, to set up an international commission of jurists to address the matter.

The Commission consisted of delegations from all five States and was mandated to discuss whether the existing law of war adequately covered new developments in weapons technology and, if not, what changes should be made.

The Commission met from 11 December 1922 to 12 February 1923 in The Hague. In addition to the five States present at the Washington Conference, it meanwhile also included a delegation from the Netherlands. Each delegation consisted of one or two legal experts backed up by a large number of military experts, diplomats and other government officials. At its first meeting, the American Judge John Basset Moore was elected the Commission’s chairman and its terms of reference were set. Moore pointed out that the States attending the Washington Conference had agreed that the Commission should, in spite of the general wording of its mandate, concentrate on the law of air warfare and the military use of radiotelegraphy. It was made clear from the very beginning that the Commission had not been set up to adopt an international treaty but only to clarify the questions raised; the Commission’s findings could then be used by the States as the basis for a treaty. There were no illusions as to the difficulty involved in this task, especially as experts in international law had since the end of the war come increasingly to believe that it was useless to try to establish legal rules for the conduct of war, and perhaps even dangerous, as making war more humane might also make it more likely. The Commission’s members opposed this view and maintained that the need to ensure further development of international law — even if this could be done only one small step at a time — should take precedence over pure idealism and the prevailing scepticism.

As proposals had already been submitted to the Commission on the use of aircraft and wireless telegraphy in war, it was decided that sub-commissions, working on the basis of those proposals, should be set up to deal with the questions at issue. Subsequent developments in the

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9 For the exact list of Commission members, see ibid., pp. 5 ff. and J.B. Moore (bibliography) pp. 182 ff. All subsequent quotations may be found in those two fundamental works.
law of war rendered the resulting rules on radiotelegraphy largely meaningless.

One of the proposals on the law of air warfare came from the United States and the other from Britain; they were both slightly amended versions of the draft provisions that had been put forward at the Washington Conference but not discussed there. As their content was much the same, the Commission decided to debate the American proposal and to take up the British proposal only where it differed from the American one.

All controversies were referred to the appropriate sub-commission, which was set up on 21 December.

The sub-commission was asked to draw up a single draft text and to present it to the Commission on 22 January. A draft provision proposed by the Italian delegation for the protection from aerial attack of important cultural monuments was added to the existing text. When neither sub-commission had completed its work by the deadline, the meeting was postponed. The radiotelegraphy sub-commission submitted its draft on 2 February, the air-warfare sub-commission on 5 February. Debate on the latter lasted until 17 February. Although the Commission accepted most of the draft provisions without a great deal of discussion, there were two contentious issues: the use of aircraft to halt and search neutral ships (which the Commission was never able satisfactorily to settle and which therefore never appeared in the rules of air warfare) and rules for aerial bombardment. In the second instance, only Moore’s personal intervention as chairman enabled wording to be found that was acceptable to all.

The text of the Hague Rules of Air Warfare that the Commission adopted and signed on 19 February 1923 contained 62 articles divided into the following sections: Classification and Marks [for the identification of aircraft] (Arts. 1-10), General Principles (Arts. 11-12), Belligerents (Arts. 13-17), Hostilities (Arts. 18-21), Bombardment (Arts. 22-26), Espionage (Arts. 27-29), Military Authority over Enemy and Neutral Aircraft and Persons on Board (Arts. 30-38), Belligerent Duties towards Neutral States and Neutral Duties towards Belligerent States (Arts. 39-48), Visit and Search, Capture and

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CHAPTER IV
BOMBARDMENT

Art. 22 [Bombardment for the purpose of terror]

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.

Art. 23 [Requisitions and contributions]

Aerial bombardment for the purpose of enforcing compliance with requisitions in kind or payment of contributions in money is prohibited.

Art. 24 [Military objectives]

(1) Aerial bombardment is legitimate only when directed at a military objective, that is to say, an object of which the destruction or injury would constitute a distinct military advantage to the belligerent.

(2) Such bombardment is legitimate only when directed exclusively at the following objectives: 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.

(3) The bombardment of cities, towns, villages, dwellings or buildings not in the immediate neighbourhood of the operations of land forces is prohibited. In cases where the objectives specified in paragraph (2) are so situated, that they cannot be bombarded without the indiscriminate bombardment of the civilian population, the aircraft must abstain from bombardment.


The text annotated with the Commission’s commentary may be found in 32 AJIL 1938 (Suppl.), pp. 12 ff.; text with commentary by the Commission: Guerre aérienne, p. 242 ff. (in French); Rivista di Diritto Internazionale 1923, p. 55 ff. (in French).
(4) In the immediate neighbourhood of the operations of land forces, the bombardment of cities, towns, villages, dwellings or buildings is legitimate provided that 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.

(5) A belligerent state is liable to pay compensation for injuries to person or to property caused by the violation by any of its officers or forces of the provisions of this article.

Art. 25 [Protected objects]

In bombardment by aircraft, all necessary steps must be taken by the commander to spare as far as possible buildings dedicated to public worship, art, science, or charitable purposes, historic monuments, hospital ships, hospitals and other places where the sick and wounded are collected, provided such buildings, objects and places are not at the time used for military purposes. Such buildings, objects and places must by day be indicated by marks visible to aircraft. The use of marks to indicate other buildings, objects or places than those specified above is to be deemed an act of perfidy. The marks used as aforesaid shall be in the case of buildings protected under the Geneva Convention the red cross on a white ground, and in the case of other protected buildings a large rectangular panel divided diagonally into two pointed triangular portions, one black and the other white.

A belligerent who desires to secure by night the protection for the hospitals and other privileged buildings above mentioned must take the necessary measures to render the special signs referred to sufficiently visible.

Art. 26 [Historical monuments]

The following special rules are adopted for the purpose of enabling states to obtain more efficient protection for important historic monuments situated within their territory, provided that they are willing to refrain from the use of such monuments and a surrounding zone for military purposes, and to accept a special régime for their inspection.

(1) A state shall be entitled, if it sees fit, to establish a zone of protection round such monuments situated in its territory. Such zones shall in time of war enjoy immunity from bombardment.

(2) The monuments round which a zone is to be established shall be notified to other Powers in peace time through the diplomatic channel; the notification shall also indicate the limits of the zones. The notification may not be withdrawn in time of war.

(3) The zone of protection may include, in addition to the area actually occupied by the monument or group of monuments, an outer zone, not
exceeding 500 metres in width, measured from the circumference of the said area.

(4) Marks clearly visible from aircraft either by day or by night will be employed for the purpose of ensuring the identification by belligerent airmen of the limits of the zones.

(5) The marks on the monuments themselves will be those defined in Article 25. The marks employed for indicating the surrounding zones will be fixed by each state adopting the provisions of this article, and will be notified to other Powers at the same time as the monuments and zones are notified.

(6) Any abusive use of the marks indicating the zones referred to in paragraph 5 will be regarded as an act of perfidy.

(7) A state adopting the provisions of this article must abstain from using the monument and the surrounding zone for military purposes, or for the benefit in any way whatever of its military organization, or from committing within such monument or zone any act with a military purpose in view.

(8) An inspection committee consisting of three neutral representatives accredited to the state adopting the provisions of this article, or their delegates, shall be appointed for the purpose of ensuring that no violation is committed of the provisions of paragraph 7. One of the members of the committee of inspection shall be the representative (or his delegate) of the state to which has been entrusted the interests of the opposing belligerent."

The Commission was fully aware that these rules would not be perennial. In fact it pointed out in its report to the States that, once the rules had been adopted by the governments, it would certainly be necessary sooner or later to revise and adapt them to changing conditions. It was probably thinking of Art. 24, para. 2, the list of military objectives that was later to become so controversial. In the end, however, nothing happened at all. Not one State, not even those represented on the Commission itself, signed any such agreement; not even a conference to discuss the Hague Rules of Air Warfare was arranged. Little is known about the reasons for this but there has been much speculation, mostly centred on the provisions governing aerial bombardment which were usually misinterpreted as being too strict. It was claimed that their adoption would have restricted the use of aircraft far too much for the governments’ liking12 and the Allies had come to see aircraft as a very promising weapon. While certain people

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sincerely regretted this failure to adopt an international treaty, and others responded that it was simply too early for a set of rules as progressive as the Hague Rules,13 the critics of the law of war took it as renewed confirmation for their opinion of ius in bello; namely that the Rules of Air Warfare were merely another example of the delusion that it was possible for people sitting around a conference table to dream up rules that would make war more humane.14 And the fact that the States would have none of it showed once again how far removed such rules were from reality.

Nor was there any shortage of attempts to blame individual States for this missed opportunity: France, some said, had refused to sign the Hague Rules on Air Warfare because it considered the existing rules for land and naval warfare as sufficient to cover air warfare as well.15 Others claimed that the Anglo-Americans were already so geared to air warfare that they could not accept restrictions on it.16 However that may be, there can be little doubt that many factors conspired to ensure that the Air Warfare Rules never got beyond the draft stage. Prominent among those factors was probably an unwillingness by the various States to compromise, as well as excessive faith in the possibility of safeguarding peace through international arbitration and the League of Nations.17

Interpreting the Hague Rules of Air Warfare

The Hague Rules of Air Warfare in many ways represented a new departure, especially as regards aerial bombardment. For the first time,
the significance of air warfare in the First World War was recognized and its effect on international law was reflected in the form of specific rules.

The most important innovation of the Rules of Air Warfare was doubtless the discarding of the requirement that a locality must be defended if bombardment of it was to be legitimate. All the members of the Commission were aware that Article 25 of the Hague Regulations on land warfare had lost all utility in air warfare, especially behind the front. In accordance with the legal doctrine that stemmed from Article 2 of the 1907 Hague Convention No. IX, Article 24 of the Air Warfare Rules linked the legitimacy of air attack to the presence of military objectives. To define what constituted such objectives turned out to be a considerable problem for the Commission. There were basically two ways of giving a conceptual definition. The first involved an abstract paraphrase which, like many vague legal concepts, required a specific interpretation to apply it to a specific case. The second was the possibility of making an exhaustive (exclusive) or non-exhaustive list of legitimate targets. Article 24 of the Hague Rules of Air Warfare combined both possibilities: paragraph 1 offered an abstract definition of a military objective while paragraph 2 gave an exhaustive list thereof. This solution, which has remained controversial to this day, was the culmination of a long and difficult process.

Article 33 of the draft text submitted by the United States at the Washington Conference was still designed to prohibit the bombing of undefended localities. This provision was modified before the Commission of Jurists met into a general prohibition of air attacks on populated areas as such situated behind the lines. On the other hand, certain objects could be bombarded wherever they were located. Article 34 contained an exhaustive list of these but no abstract definition. The British draft contained no list but stated in Article 35 simply that an attack could be directed only at a military objective. It offered no definition of this.

The differing views on this matter led to discord within the subcommission. The Commission’s basic attitude was that it was useless
to issue casuistic prohibitions without at the same time offering simple explanations of what was prohibited. All delegations further agreed that air attacks should be allowed only against objectives whose destruction would provide at least some advantage for the attacker. The Netherlands and Japan — States which at that time had no air forces to speak of — advocated the adoption of the tightest possible restrictions. In particular, they called for an absolute prohibition on the aerial bombardment of cities and towns behind the front, regardless of what they contained.

The American and British representatives responded to these demands by once again revising their proposals. The American proposal retained the form of an exhaustive list while the British now gave an abstract definition of a military objective by stipulating that its destruction or neutralization must constitute a distinct advantage. To this was appended an exhaustive list which did not differ in any significant way from the American list. The British delegation emphasized the importance it attached to this abstract definition, which it considered indispensable for rules governing air attacks. However, when none of the proposals met with general acceptance, France attempted to bring about a compromise solution and suggested a definition composed of both abstract description and a non-exhaustive list of examples. This too was in vain and the problem finally had to be referred back to the plenary Commission.

Back in the Commission, the Italian representatives submitted a draft text containing a very brief exhaustive list of instances in which attack would be legitimate. Largely because of its very restrictive formulation, in this and in other respects, this proposal also failed to meet with general acceptance. By 12 February, shortly before the Commission was to finish its deliberations, no agreement on aerial bombardment had yet been reached and the chairman, Moore, tabled a new text, a final attempt which consisted of an abstract definition followed by an exhaustive list of legitimate objectives for air attack. Disagreement once again arose, whereupon Moore made an urgent appeal to reason, calling on the members of the Commission to put aside their squabbling over details and to remember the supreme principle of the law of war: the distinction between combatants and non-combatants. Protection of the latter, he pointed out, must be at least as important as protection of inanimate objects. In the end, after several superficial amendments, Moore’s draft was unanimously adopted as Article 24, paras. 1 and 2.

The circumstances in which this provision was drawn up make its interpretation a simple matter, especially as regards para. 1: an air
attack may be directed exclusively against a military objective, i.e. the attacker’s intention must be to destroy the military object alone. The question of intention is in fact decisive in interpreting any such rule. Moreover, the possibility of subsumption was limited to the concept of “military objective”. Not every object could therefore be considered a military objective — only those whose destruction would constitute a military advantage. This advantage must be clearly apparent, i.e. it must not simply consist of a few minor advantages. Moreover, the destruction of the object in question must represent a conditio sine qua non for military success (advantage), although actual ultimate success is not required. But there must at least be a real possibility of success. Lastly, the object attacked must belong to one of the categories listed in paragraph 2. Unfortunately, these categories lend themselves to widely divergent interpretations and, as the future of the Air Warfare Rules was to show, repeatedly came in for severe general criticism.

Experience in the First World War had already shown that aircraft could operate far beyond the area in which opposing ground troops met face to face. This ability explains why Article 25 of the 1907 Hague Regulations on land warfare failed with regard to so-called strategic bombing. The work of the Hague Commission of Jurists was based on the assumption that conditions at the front itself would be different from those in the erstwhile “peaceful” areas in the rear. Consistent with this conception, therefore, was the fact that the resulting provisions applied different standards to different areas. Article 33 of the American proposal had already drawn a distinction between the combat zone and the rear (attacks against towns in the former were not prohibited). As pointed out above, the Netherlands and Japanese delegations wanted aerial bombardment in the rear to be generally prohibited. The Italian delegation also was in favour of two sets of rules for air attacks, one for attacks at the front and another for those in the rear. The reasoning behind this view was that any building at the front that was at all suitable would be used for military purposes, and that it was when an attempt was being made to take a town or village that house-to-house fighting usually took place. Since the civilian inhabitants in almost all cases had then already been evacuated or had fled (and even where this was not the case they must surely have been aware that it would be extremely dangerous to remain), it followed that military necessity had to be recognized at least to the extent that less strict limits were placed on attacks near the front than on those carried out far behind the lines where the civilian population would be taken by surprise. For this reason the Hague Rules of Air Warfare, in paragraphs 3 and 4 of Article 24, lay down
different rules depending on the geographical position of the objective in relation to the front.

The problem lies in knowing where the combat zone ends and the rear begins. Article 24 speaks of “the immediate neighbourhood of the operations of land forces”. Does this mean the area in which fighting is actually taking place? What about the staging areas near the front? This question still arouses controversy today. Neither the official records of the Commission of Jurists nor other material from its deliberations show whether a more precise definition was discussed. The initial American proposal spoke of the area of combat and later proposals contained the phrase “the immediate neighbourhood of the operations of land forces” which was ultimately adopted. Where actual fighting is concerned, it could be asked whether artillery should be included in “operations of land forces”. If so, the area of combat would extend to the range of the artillery, which at the time was already 20 to 30 kilometres. But that would seem to stretch the principle too far. It would seem more reasonable to apply the criterion provided by Article 25 of the 1907 Hague Regulations on land warfare and equate the combat zone with the defended area, i.e. that in which the advance of ground forces meets substantial and direct resistance, including the use of hand-held firearms and heavy automatic weapons as well as artillery in its usual role of direct fire support.

The prohibition of “indiscriminate” attack (Air Warfare Rules, second sentence of Article 24, para. 3) proved even more problematical. The text offers no precise definition of “indiscriminate”. Though this word soon found its way into the vocabulary of the law of war, it was formally defined only later in the 1977 Protocol I additional to the Geneva Conventions (Article 51, paras. 4 and 5). For lack of a firm definition, the word “indiscriminate” has frequently been misinterpreted. For the same reason, it has often been criticized as unrealistic, especially in connection with the words at the end of the sentence in which it appears: “... the aircraft must abstain from bombardment”. This has usually been interpreted as meaning that an attack is prohibited if there is even only the possibility of the civilian population being harmed. As we shall see, the following material leads to an entirely different conclusion.

The term “indiscriminate bombing” had already been used on occasion during the First World War. In a British Air Ministry memorandum of 26 August 1919, the Chief of Air Staff referred to an expert legal opinion expressed by the Committee of Imperial Defence. The said Committee felt that the indiscriminate bombing of a civilian population without attempting to attack military objectives should be
regarded as illegal. The significance attached to intent was already emerging. During the deliberations of the sub-commission in The Hague over three years later, the British delegation submitted a draft which, besides giving an abstract definition of a military objective, also stipulated that an attack on a legitimate objective must never be allowed to degenerate into the general bombing of cities or towns; it must always be directed exclusively against the military objective itself (paras. 1 and 4). Here again, the emphasis is on intent. The Italian draft of 8 February 1923 (para. 1), and even more clearly the American draft of 12 February 1923, also made clear that bombing cannot be legal unless only the legitimate target is intended to be hit. In paragraph 1 it states that the attack must not include the bombing without distinction of the civilian population, but must be directed solely against military objectives.

The words “bombing without distinction” were replaced in the final draft by “indiscriminate bombing”, though this did not change the meaning.

From all this it follows that the key to a definition must lie in the attacker’s intentions. The intention of harming — for whatever purpose — the civilian population cannot be meant here, since “bombardment for the purpose of terrorizing the civilian population” is already expressly prohibited by Article 22 of the Air Warfare Rules. To subsume it under “indiscriminate bombardment” (Art. 24) would thus be tautological. And, as the initial British proposal made very clear, unintentional harm to civilian lives and property during an otherwise legal attack could not be included under the heading “indiscriminate” either.

The Commission also had the realism to see that an overly severe restriction would have no chance of being accepted by the military powers. There therefore remains only one kind of intention that could be covered by the prohibition of indiscriminate bombing: dolus eventualis, or conditional intent, i.e. an attack on a military objective in a populated area would be illegal above all if the attacker thought it very likely that the population would be harmed but did not care. Thus, a distinction was drawn between indiscriminate bombing and conscious negligence, which was not to be regarded as illegal. An attack’s

20 PRO AIR 5/192, 1 A, p. 2.
22 Ibid., p. 101: “1° le bombardement aérien n’est licite que lorsqu’il est dirigé exclusivement contre les objectifs suivants: ... ”.
23 Ibid., p. 121.
legality therefore has to be assessed on the basis of the attacker's intention: in a case of conscious negligence, the attacker realizes that harm might be done to the civilian population but hopes that his preparations are sufficient for the effect of the attack to be confined to the legitimate objective. Article 24, para. 3 was designed to prohibit "general" bombing or, as it is known today, carpet bombing, in which the attack, though directed at a number of military objectives, is carried out in such a way that civilians living between those objectives are bound to be hit as well, this being a matter of no concern to the attacker. What distinguishes such attacks as these from direct attacks on the civilian population as prohibited by Article 22 is the fact that in the case of indiscriminate bombing the attacker is not actually trying to harm the civilian population, as opposed to terror bombing or attacks on an entire urban area as such.

The rule against indiscriminate attack was absolute. Conscious negligence, on the other hand, was governed by the so-called proportionality principle, the principle that a balance must be struck between military requirements and the protection of the civilian population. In other words an attack could not be carried out when the attacker, though hoping that no harm would be done to the civilian population, realized that if any such harm did occur, it would be out of all proportion to the significance of the military objective. This rule was intended to oblige the attacker or the commanding officer to weigh carefully beforehand the possible effects of bombardment near a populated area. Unfortunately, the proportionality principle was not expressly mentioned in paragraph 3. This is the only explanation for the widely held view later on that the absolute prohibition also applied to conscious negligence. This view was partly based on the Commission's final report which stated that Art. 24 had been strongly influenced by the Italian proposal of 8 February 1923. That text had indeed contained an absolute prohibition of all attacks behind the lines if any danger at all existed of harm to the civilian population. But the Italian text did not employ the term "indiscriminate" which, after all, would have been inconsistent with an absolute prohibition. However, the Commission inserted the term and diverged in other ways too from the wording of the Italian draft. If Art. 24, para. 3 of

24 Ibid., p. 101: "2° ... Au cas où des objectifs qui peuvent être soumis au bombardement ... se trouvent à proximité de villes, de villages ou d'habitations civiles quelconques, le bombardement n'en pourra être effectué qu'à la condition qu'aucun dommage ne soit subi par la population civile. 

Au cas où cette condition ne pourrait être respectée de façon absolue, l'aéronef devra s'abstenir du bombardement".

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the Air Warfare Rules had been drawn up with the same intention as the Italian proposal, the Commission would have demonstrated this by taking over its unmistakable formulation. This assumption is reinforced by the fact that every other proposal had included the proportionality principle, regardless of whether attacks took place in the combat zone or behind the lines.

The acceptance of a division of the theatre of war into two parts meant that — probably unintentionally — proportionality was mentioned only in the provision dealing with attack in the combat zone. Paragraph 4, unlike paragraph 3, allowed indiscriminate attack and thus *dolus eventualis* where ground forces were engaged. This rule was based on the assumption that in such situations any object can be used for military purposes and therefore constitutes a legitimate target. However, the same objects can simultaneously be used by civilians. A house, for example, can be lived in by civilians while artillery spotters sit on the roof. To avoid an insoluble conflict between protection of civilians and military interests, the former was limited in favour of the latter. Intentional attacks on civilians and their property, on the other hand, remained prohibited. In essence, Art. 24, para. 4 of the Air Warfare Rules was nothing more than an application to “tactical” air war of Art. 25 of the Hague Regulations governing land warfare.

The provision in Art. 25 of the Air Warfare Rules protecting cultural objects and hospitals followed much the same line: it took over the rules applicable to land and naval warfare (Art. 27 of the Hague Regulations governing land warfare; Art. 5 of the Hague Convention No. IX) and adapted them to the conditions of air warfare.

More interesting are the comprehensive provisions of Art. 26, which was included in the draft at the instigation of the Italian delegation. The large number of historical and artistic monuments in Italy made that country particularly concerned to ensure effective protection for such objects. The Italians wanted to enable States to provide special protection for their historical monuments through appropriate agreements reached in peacetime. The idea of setting up protective zones around monuments was completely new. Such zones were to be spared from attack on condition that no object within them was used for military purposes and that no act was committed within them with a military purpose in view. A radius of 500 metres around the protected object was chosen because it was not possible in air warfare to limit with precision the effect of the weapons used; it was therefore necessary to establish an easily identifiable area, with the monument in the middle, to ensure effective protection. The Commission decided to require that notification of the protected monuments and the
surrounding zones be made in time of peace so that the adversary would not be able to circumvent his obligation to spare them by refusing to accept such notification in wartime. Another innovation was the provision to set up an inspection committee (para. 8). This body, which was to consist of three representatives of neutral States who must be accredited to the State claiming the protection of Art. 26, would have the task of verifying that nothing was done within the protective zone that could serve a military purpose. The sub-committee felt that this meant prohibiting the use of any productive capacity or railway installations within the zone that were capable of supporting the war effort.

The Commission was, of course, aware that a number of places had such a wealth of cultural treasures (Venice and Florence were mentioned as examples) that the various protective zones would overlap and so create a virtually continuous area over the entire town or city. But since the implementation of Art. 26 was optional, it was decided to leave it to the State on whose territory such towns and cities were located to decide whether or not to forego any military use of them whatsoever in order to protect their monuments. The symbol laid down in Art. 25 and Art. 26 to mark protected monuments was the same as that specified by Art. 5 of Hague Convention No. IX, i.e. a rectangle divided diagonally into two triangles, one black and one white.

The influence of the Hague Rules of Air Warfare on the study of international law

Though they never achieved the status of an actual treaty, the Air Warfare Rules nevertheless soon became a key tool in the study of international law between the wars. No research into the law of air warfare was complete without them. The fact that they had been drawn up by an official Commission of legal and military experts, which had done so at the request and under the seal of approval of major world powers, ensured that they received attention far and wide. Opinion about them ranged from complete rejection as useless and unrealistic to their recognition as generally accepted law. Some authors saw them as an indication of already established customary law; others used them as a standard by which to judge specific cases; still others praised them as the most successful attempt so far at a comprehensive codification and as a useful basis for future treaties. Yet almost all
these authors have one thing in common: they omitted to give the reasons for reaching their respective conclusions.

When not debating the value of the Air Warfare Rules as a whole, scholars concentrated on the provisions concerning aerial bombardment, not least because occasion to do so was given with ever-increasing frequency from 1932 onward. The opinions that formed about the individual articles were so uniform that it is possible to speak of a “prevailing view”. Thus the prohibition of direct attacks on the civilian population in the form of terror bombing, as worded in Art. 22, was soon generally accepted and is upheld to this day.25

Article 23 goes much further than the analogous rules for naval warfare. Under Arts. 3 and 4 of 1907 Hague Convention No. IX, the bombardment even of undefended localities was permitted if they declined to comply with requisitions of the supplies necessary for the use of the naval forces. The prohibition of aerial bombardment to enforce such compliance has its origin in the American proposal; the intention was probably to prevent the requisition of goods from being used as a pretext for illegal attack. On the whole, however, little understanding was shown for this provision. There were, it is true, no specific objections, but the practical significance of such a rule was doubtful and, in fact, such cases never arose in either of the World Wars.

An interesting pattern emerged in the discussion over Art. 24. As was to be expected, it focused on the definition of “military objective”. While the abstract paraphrase was accepted as usable by all but a few,26 criticism was mostly directed against the exhaustive list in paragraph 2. Some found unacceptable the whole idea of a definition that consisted of a list of permissible targets. Others criticized the fact that the list was exhaustive and thus exclusive, saying that only an enumeration of examples could provide a useful definition.27 The large

25 Even the otherwise so pessimistic Lauterpacht, “The problem of the revision of the law of war”, op.cit., p. 369, reaffirmed that terror bombing was prohibited. On the distinction between civilians and combatants (problem of the “quasi combatant”), see Hanke, op.cit., pp. 107 ff.


27 For example Meyer, op.cit., p. 83; Rosenblad, op.cit., p. 90; M. Sibert, expert opinion in La protection des populations civiles contre les bombardements,
majority, however, considered the list to be unusable. Firstly, it was pointed out, the list did not include many objects that had certainly been considered legitimate objectives during the First World War. These included, in particular, power stations, waterworks, mines, blast furnaces and other installations for the extraction and processing of raw materials. Moreover, it was felt that the description of the other targets was very unclear: what was to be understood by “important and well-known centres” and how could it be known whether lines of communication or transportation were being used for military purposes? In short, the rejection of the list was as general as the acceptance of the abstract definition of a military objective.

Things were even more complicated with paragraph 3. The wording of the provision prohibiting indiscriminate bombardment led, as already noted, to frequent misunderstandings. Many authors were obviously puzzled by the concepts used. Because the prohibition was erroneously interpreted as constituting an absolute ban if the civilian population ran even the slightest risk of harm, it was widely rejected as impracticable and much too strict. Since at the time carpet bombing was still in its infancy, no direct link could be made between the prohibition and its field of application. Another thirty years were to pass before the true meaning of paragraph 3 was taken up again in the light of events during the Second World War. This nevertheless had no effect on the widespread acceptance of the idea that there should be two theatres of war — the combat zone around the actual front, and the area in the rear — to which different rules should apply. The logic behind this differentiation was understandable, especially as the prevailing tendency, in spite of the tremendous progress in military flying, was still to think in two dimensions — the ground forces dictated events, for only they could occupy enemy territory, whereas the air forces either had to support them or operate independently, i.e. with a “strategic” mission. In each of these two cases circumstances were fundamentally different. However, it was also recognized that the civilian population remaining in the area of the front should at least benefit from the protection of the proportionality principle.


Not only individual scholars but also well-known organizations swung into line with the Hague Air Warfare Rules and largely incorporated them into their own proposals.

The International Law Association had already drawn up a brief draft set of rules at its 1922 Conference in Buenos Aires. Two years later in Stockholm, this draft was drastically altered to bring it into line with the Air Warfare Rules. In the Association's new draft convention, the list of military objectives and the prohibition of indiscriminate bombardment, of terror bombing and of enforcing money contributions and requisitions in kind were taken almost word for word from the Air Warfare Rules. The ILA's 1938 Amsterdam draft also contained similar provisions, but had otherwise departed from the Rules under the influence of the British policy of appeasement. For example, its definition of a military objective consisted of only a brief, exhaustive list that would probably have had no hope of being applied in practice. However, in its prohibition of both terror bombing and indiscriminate attack, it too was largely in agreement with the Air Warfare Rules.

While the idea of setting up safety zones with immunity from attack around protected objects first appeared in Art. 36 of the Air Warfare Rules, it was thanks to the International Congress of Military Medicine and Pharmacy that the idea of setting up such zones specifically to protect the civilian population first took clear shape. In the course of a Congress convened in 1934 in Monaco by Prince Louis II of Monaco, a draft convention was formulated. Its first section provided for the creation by each belligerent of special "sanitary cities and localities" that would be protected from attack and provide medical care. Notification of these towns could be made already in peacetime (Art. 3); they could not be used for any military purpose (Art. 2) and had to be open for inspection by an independent commission of control (Art. 5 f.). No military units were allowed to come within a zone of 500 metres surrounding such localities (Art. 8, sub-para. 1). The fourth section of the draft convention contained provisions on aerial bombardment. However, apart from a brief exhaustive

29 See Hanke, op.cit., pp. 58 ff.
32 The text may be found in Deltenre, op.cit., pp. 850 ff.; A. de Lapradelle/J. Voncken/F. Dehousse, *La reconstruction du droit de la guerre*, Bruylant, Brussels, 1936, pp. 61 ff.; further to this subject see R. Clémens, *Le projet de Monaco: Le droit et la guerre. Villes sanitaires et villes de sécurité. Assistance sanitaire internationale*, Recueil Sirey, Paris, 1937; it is also reproduced in part in Hanke, op.cit., Annex B.
list of military objectives, they were confined to stipulating that when
attacking such objectives in large cities, the means of attack must be
chosen and employed in such a manner as not to extend their effects
beyond a radius of 500 metres from the objective (Art. 4). This 500-
metre-rule was doubtless based on the same considerations as lay
behind paragraph 3 of Art. 26 of the Air Warfare Rules.

At the 1935 Congress in Brussels, it was decided to entrust the
International Red Cross with further action on the subject of safety
zones. The ICRC was, however, unable to bring about a treaty
providing for them, nor was a detailed draft drawn up. Later, during
the Second World War, the ICRC did try to have special zones estab-
lished for vulnerable sections of the civilian population, but in vain. It
was not until 1949 and the adoption of the Fourth Geneva Convention
that the possibility of such protection was laid down (Arts. 14 and 15)
in an international treaty.

Unfortunately, the Hague Rules of Air Warfare had no direct influ-
ence on the Disarmament Conference held in Geneva under League of
Nations auspices from 1932 to 1934. Only the British Air Ministry
asked its government to urge general ratification of them. The British
hoped that by adopting a treaty that took account of military impera-
tives, they would prevent the adoption of unrealistically idealistic agree-
ments of the type being peddled at the conference. The texts put
forward there proposed everything from simply prohibiting aerial
bombardment to internationalizing civil aviation and even called for the
total abolition of air warfare. British military officials therefore warned
against the adoption of restrictions that, they felt, would be disregarded
in wartime.

The influence of the Hague Rules of Air Warfare on
military thinking

There is a general tendency to believe that the military has suspi-
ciously rejected any attempt to restrict its use of the weapons at its

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33 Further to the disarmament conference see A. Henderson, Preliminary Report

34 Note of 7 July 1932 (PRO AIR 8/155): “The Air Ministry consequently
advocate the adoption of the Hague Rules”. Extracts from relevant documents appear in
Hanke, op.cit., Annex B.

35 Memorandum from the Committee of Imperial Defence, entitled “The
restriction of air warfare”, of 1 March 1938, p. 4: “For this reason, there would be
great dangers for this country in any international agreement to impose restrictions on
air action which could, in the event, be easily violated” (PRO AIR 8/155).
disposal. It is therefore all the more surprising to discover that the Air Warfare Rules had a substantially greater influence than was previously assumed, both on the orders issued and the way those orders were represented politically to the outside world. In Great Britain in particular the Rules were repeatedly discussed at great length. Although some of their provisions were the object of ongoing criticism (for example the Air Ministry never managed to warm to the division of the theatre of war into two parts, nor to the wording of the list in Art. 24, para. 2), the RAF chiefs of staff were prepared at least to accept the Hague Rules of Air Warfare as the basis for a new code of conduct.36 A note sent to the Chief of Air Staff on 18 June 1936 warned against disparaging the Rules. After all, it was pointed out, the Air Ministry had repeatedly recommended ratification by the British Government and this had even been approved by the Cabinet. In the end, it had only been French opposition to them that had caused the government to drop the idea of ratification.

During the 1935/36 war in Abyssinia, the British Government declared that it would apply the relevant provisions (Art. 39 ff.) of the Air Warfare Rules37 where the neutrality of colonial airspace was concerned although, and precisely because, these provisions were stricter than the previous rules of international law. The Committee of Imperial Defence issued a secret memorandum on 1 March 1938 in which it stated that the Hague Rules provided sufficient basis for a revision of the law of air warfare; specifically, it was possible to accept as they stood the prohibition of terror bombing (Art. 22), the contents of Art. 23, the abstract definition of a military objective in Art. 24, para. 1 and the provisions for the protection of cultural monuments in Arts. 25 and 26; only the list in Art. 24, para. 2 would have to be made more precise. In addition, the memorandum went on, it would be necessary to rectify the misleading wording of paragraph 3. Not only should the indiscriminate bombing of civilians be prohibited, but the attacker should be required to use every means at his disposal to ensure that the attack was limited to the military objec-

36 For example, the note of 14 October 1932 (PRO AIR 8/141): "... but that in any case His Majesty's Government should state that they were prepared to accept as a basis for further elaboration the rules for air bombardment contained in the Hague Draft of 1922-1923".

37 Otto von Nostitz-Wallwitz, "Das Kriegsrecht im Italienisch-Abessinischen Krieg", ZddRV 1936, p. 720; Arthur T. Harris, later famous as head of the RAF's Bomber Command, raged against this decision by the British Government as early as 18 June 1936: "The so-called Hague rules are not internationally binding in so far as they were never internationally accepted, they were in fact violently opposed" (PRO AIR 8/155).
tive. Paragraph 4 was also accepted, because it had sufficient loopholes to prevent it from becoming all too restrictive in the event of war. These rules were to be supplemented above all with provision for the setting up of safety zones for the protection of the civilian population. 38

Even after war had broken out, the Hague Rules of Air Warfare retained their influence in the Air Ministry. On 22 August 1939, Instructions Governing Naval and Air Bombardment were issued to the RAF. 39 British Staff planning called for rigorous restraint in aerial attack, at least in the early stages of the war when Bomber Command did not yet possess the strike capacity necessary for a strategic offensive against Germany. 40 The instructions were accordingly very strict. This was in addition to the politically motivated restrictions laid down by Prime Minister Chamberlain and banning any attack in which there might be a danger of bombs falling on German territory.

After giving a detailed list of purely military objectives, the instructions on aerial bombardment corresponded virtually word for word to a statement by Chamberlain to the House of Commons on 21 June 1938, in which he had said that the intentional bombardment of civilian populations was illegal; objectives must be legitimate military objectives and identifiable as such; in addition, all precautions must be taken in an attack to ensure that civilian populations were not bombarded through negligence. He reaffirmed the principle that terror bombing was illegal since it did not even have any military justification. 41 These instructions were in fact stricter than the Hague Rules, which were nevertheless to be applied if the said instructions were relaxed. 42 The abstract definition of a military objective in Art. 24, para. 1 was incorporated as applicable law into military planning. 43 Most of the prohibitions were stricter than the Hague Rules of Air

38 PRO AIR 8/155: part of text included in Hanke, *op.cit.*, Annex B.
39 PRO AIR 8/283; see Hanke, *op.cit.*, Annex B.
40 *Ibid.*, covering letter from the Air Ministry: “The Council desire to emphasise that these instructions do not necessarily represent the policy that would be pursued by His Majesty’s Government throughout a war”.
41 At Britain’s instigation, this statement was adopted virtually word for word by the League of Nations in the form of a resolution on 30 September 1938. Text: Schindler/Toman, *op.cit.*, pp. 153 ff.
42 Art. 12 of the “Instructions” and their covering letter, *op.cit*.
43 Plans for attack on German war industry in relation to international law as represented by the basic principles of war and the Draft Hague Rules of Air Warfare, p. 5 (PRO AIR 8/283): “... they are in fact covered by the principles set out in Article 24/(1), ... This statement is the more weighty, since it has the warrant of international law. ...”, text in Hanke, *op.cit.*, Annex B.

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Warfare: in addition not only were intentional attacks on the civilian population banned, but also their bombardment through negligence. Here, for the first time, an indirect reference was made to carpet bombing which, though meant to destroy military targets, by its very nature would also affect the civilian population. Specific reference was made to the proportionality principle and its applicability. As the war went on, these rules were gradually relaxed to the point where they had become totally obsolete.

The situation was much the same in the German air force. On 30 September 1939, the Commander-in-Chief of the Luftwaffe sent Instructions Governing Aerial Warfare, which had first been issued on 20 July of the same year, to legal advisers and military courts in order to lay down fundamental rules for the conduct of the air force towards the enemy and neutral States. The instructions consisted of 31 points. Their provisions governing tactics closely followed the Hague Rules. Point 20 stated that aerial attack was allowed only against “militarily important objectives”; it intentionally avoided listing such objects but defined them as being “important to the adversary’s war effort”. Point 22 strictly prohibited attacks that were “intended to terrorize the civilian population, harm non-combatants or destroy or damage objects of no military importance”. The attached commentary stated that, despite the illegality of terror bombing, the war situation might make it necessary. In this case, the order for such attacks could come only from the Commander-in-Chief of the Luftwaffe. Otherwise, the civilian population must not be affected through carelessness, even during an attack on a legitimate objective (Point 24). In view of these alignments with the principles first established in the Hague Rules of Air Warfare, it comes as no surprise that there were even closer similarities: Point 23 was a literal translation of Art. 23 of the Air Warfare Rules, and Point 26 was a detailed reflection of their

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44 Instructions Governing Naval and Air Bombardment, Art. 9(a).
45 Ibid., Art. 9(c).
46 Ibid.: “Thus it is clearly illegal to bombard a populated area in the hope of hitting a legitimate target which is known to be in the area, but which cannot be precisely located and identified”.
47 Ibid., Art. 10.
48 BA/MA (Bundesarchiv/Militärarchiv, Freiburg/Br.), RW 5/v. 336; see Hanke, op.cit., Annex B.
49 Germany having withdrawn from the League of Nations in 1933, it is startling to note that Point 24 contained a virtually word-for-word translation of Art. 1, para. 3 of the League of Nations resolution of 30 September 1938 (see fn. 41): “Any attack on legitimate military objectives must be carried out in such a way that civilian populations in the neighbourhood are not bombed through negligence”.

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Art. 24, para. 4. The protection of special objects as set out in Point 25 was a mixture of Art. 25 of the Hague Rules of Air Warfare and Art. 27 of the Hague Regulations on land warfare. But all these restrictive instructions must not be allowed to divert attention from the fact that they were observed only in the opening stages of the war.

Nor were the Italian or Japanese air forces unaffected by the Hague Rules of Air Warfare. Italy claimed to have incorporated them in its instructions on aerial warfare in 1938, and after the Sino-Japanese conflict had flared up again the previous year, Japan declared on 26 August 1938 that its air force had thus far observed the Hague Rules and that it would continue to consider them binding.\(^50\)

Only in the United States does it seem that the Hague Rules had had no impact on military planners. It is true that the US Government had said that it was prepared to ratify the Rules,\(^51\) (and, indeed, in 1926 the Rules and the official report of the legal commission were included in the Air Service Information Circular entitled *International Aerial Regulations* and issued by the Chief of Air Service),\(^52\) but that was as far as the Hague Rules of Air Warfare were incorporated into US military policy. An Air Corps Tactical School training manual on the international law of air warfare did attach some degree of significance to the Rules, but pointed out that their restrictions on air attack were more or less meaningless in practice because their implementation was in any case dependent on political decisions.\(^53\)

Generally speaking, however, the Hague Rules of Aerial Warfare played a decisive part in the emergence of binding customary international law in the pre-war period. Their semi-official status and their clear and practical approach, in comparison to other texts, to regulating aerial bombardment ensured that they were extensively used both as a basis for the study of international law and in actual political practice.\(^54\)

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51 Note of 8 October 1932, PRO AIR 8/141; however, Spetzler (*op.cit.*, p. 221) goes too far when he claims that “the Great Powers, including the United States, made it clear that they would tacitly recognize the Hague Rules.
52 HRC (U.S. Air Force Historical Research Center, Montgomery, Alabama), 168.65404-4.
53 HRC 248.101-16, p. 31: “When control of the air has been gained, then military objectives other than the hostile air force will receive increasing attention, including perhaps political capitals and centers of population”.
54 The author’s thesis is devoted to showing that aerial bombardment is covered by customary international law. Other projects by the author to be completed in the near future deal with the extent to which this customary law was observed in practice in aerial warfare during the Second World War.
The influence of the Hague Rules of Air Warfare since the Second World War

When the Second World War ended, the apathy that had slowed codification of the law of war during the twenties and thirties set in once again. In the mistaken belief that it was enough simply to outlaw the use of force, the fact was lost sight of that, after two world wars, the law of war was badly in need of reform. Valuable though the four Geneva Conventions of 1949 were in this respect, the lawmakers neglected to incorporate into them new rules governing the conduct of hostilities and the Conventions thus only protect the victims after the event, i.e. after hostilities have taken place. However, military conflicts after 1945 induced scholars and politicians once again to concern themselves with the law of war.

The Air Warfare Rules were admittedly mentioned, quoted and analysed by scholars after the Second World War, with much the same results as between the wars, but for most of the authors they merely represented an interesting episode in the history of international law. Key concepts in the law of air warfare, such as the abstract definition of a military objective and the prohibition of terror bombing and indiscriminate attack, were already firmly established in international legal terminology and completely dissociated from the Hague Rules of Air Warfare which had given rise to them. Thus, when the Fourth Geneva Convention of 1949 provided for hospital and safety zones and neutralized areas (Arts. 14 and 15), hardly anyone was reminded of Art. 26 of the Air Warfare Rules. The latter’s Article 26, together with the 1935 Washington Treaty on the Protection of Artistic and Scientific Institutions and Historic Monuments (Roerich-Pakt), moreover also formed the basis for the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict, which provided for the first time for the setting up of an inspection committee, as originally suggested in 1923, to verify its implementation.

The rules governing air attack against land targets were also further developed. A major milestone along the way were the 1956 “Draft Rules for the Limitation of the Dangers incurred by the Civilian Popu-

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55 In 1949 the International Law Commission refused to discuss a revision of the law of war on the grounds that “war having been outlawed, the regulation of its conduct had ceased to be relevant”. See Kunz, “The chaotic status”, op.cit., pp. 42 ff.
lation in Time of War". This text, drawn up by the ICRC and adopted by the 19th International Conference of the Red Cross (New Delhi, 1957), suffered the same fate as the Hague Rules of Air Warfare: although presented to the governments, it was ignored by them. That the New Delhi draft represented the logical extension of the Air Warfare Rules is obvious even though the latter were hardly mentioned in the official ICRC commentary. For example, the New Delhi draft prohibited terror bombing of the civilian population (Art. 6, para. 1) and contained an abstract definition of a military objective (Art. 7, para. 3). The latter, according to the commentary, was simply a more strictly worded version of Art. 24, para. 1, of the Hague Rules of Air Warfare. The list contained in Art. 24, para. 2, of the Rules was also discussed. Some of the ICRC experts accepted this list as an adequate basis for negotiation; others felt that it was inadequate and too general. They finally agreed to expand the list and make it more specific. In so doing, they avoided the mistake of drawing up a limitative list. Instead, they framed an annex listing objects that represented generally recognized, indisputably significant military targets. This annex was intended only as a guideline for the governments, to be used during negotiations on adoption of the rules in the New Delhi draft.

Experience during the Second World War made it necessary to give greater attention to the methods of attack that had been employed. Taking account of this need, Art. 10 expressly applied the prohibition of indiscriminate bombing to the practice of carpet bombing. Finally, the ICRC draft also contained the idea that the combat zone ("vicinity of military or naval operations") should be distinct from the area to which the more severe restrictions applied, i.e. the rear (Art. 9, para. 2). The remaining provisions for the most part served the purpose of providing clear and easily comprehensible rules for the conduct of air warfare. Since blanket clauses were well known as being a weak point in the law of war and were sometimes stretched out of all recognition in practice, the experts endeavoured to provide the most precise definitions possible of concepts such as "attack" and "civilian population" and to set out in detail the duties of the attacker. Really new ground was broken by provisions on modern weapons with uncontrollable effects. These provisions were based on experience of incendiary and atomic bombs during the war. But the essence of the

56 In Schindler/Toman, op.cit., pp. 179 ff.
New Delhi draft had its origins almost exclusively in the Hague Rules of Air Warfare.

Since the governments proved to be little impressed by the ICRC text, a new attempt was made and this time successfully produced treaty law when Protocol I additional to the Geneva Conventions was adopted in 1977. The Protocol’s provisions for the protection of civilians from the effects of hostilities (Arts. 48-60) are based on the 1956 New Delhi draft and also, therefore, on the main provisions of the Hague Rules of Air Warfare, a fact that escaped those who wrote the Commentary on the Additional Protocols.\(^57\) The reader of Protocol I soon encounters ‘old friends’: the prohibition of terror bombing (Art. 51, para. 2), the prohibition of indiscriminate attack, precisely defined here for the first time (Art. 51, paras. 4 and 5) and an abstract definition of military objective (Art. 52, para. 2). Though these provisions have been reworded, considerably expanded, made more specific and modified by the addition of definitions and provisions for their implementation, the key elements of the 1923 text are unmistakable. However, the distinction drawn between the combat zone and the rear, which was still present in the 1956 ICRC draft, survives only as an example provided for interpretation purposes in the commentary\(^58\) and the list of military objectives has disappeared entirely, though not without giving rise to debate in 1976 at the Diplomatic Conference.\(^59\)

One might think that not much remains of those provisions of the Hague Rules concerning aerial bombardment. But this is not true. On the contrary, in 1923 the prohibition of indiscriminate attack consisted of a mere short paragraph. Today there are two full paragraphs, each with several sub-paragraphs. It is much the same with the prohibition of attacks on the civilian population and civilian objects. The terse wording of the 1923 Hague Rules of Air Warfare — set down, as they were, at a time when air warfare was still viewed by some as a kind


\(^58\) There was some debate during the negotiations as to whether, in determining whether a specific object should be considered as military or civilian in nature, different criteria should be applied depending on its proximity to the front. See ibid., p. 326, but compare that with p. 307 of the same work. See also Commentary on the Additional Protocols, op.cit., pp. 620 ff.

of sport — constitute the indispensable core around which layer upon layer of new law has formed to keep pace with steadily growing technological capabilities.

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APPENDIX: SELECTIVE BIBLIOGRAPHY

The following bibliography naturally makes no claim to completeness; it is merely a very brief selection of works that have been used in this text. They have therefore been referred to in the footnotes only in exceptional cases. For a comprehensive list of literature in this area, see the Bibliography of international humanitarian law applicable in armed conflicts, 2nd edition, ICRC and Henry Dunant Institute, Geneva, 1987, No. 3115 ff., and the Bibliographie zur Luftkriegsgeschichte (up to 1960) prepared by K. Köhler, Frankfurt/M., 1966.

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