THE AMERICAN WAY OF BOMBING

CHANGING ETHICAL AND LEGAL NORMS, FROM FLYING FORTRESSES TO DRONES

EDITED BY MATTHEW EVANGELISTA AND HENRY SHUE

CORNELL UNIVERSITY PRESS
Ithaca and London

First published 2014 by Cornell University Press
First printing, Cornell Paperbacks, 2014

Printed in the United States of America

Library of Congress Cataloging-in-Publication Data

The American way of bombing : changing ethical and legal norms, from flying fortresses to drones / edited by Matthew Evangelista and Henry Shue.
pages cm
Includes bibliographical references and index.
ISBN 978-0-8014-5280-2 (cloth : alk. paper)
ISBN 978-0-8014-7934-2 (pbk. : alk. paper)
1. Bombing, Aerial—United States. 2. Bombing, Aerial—Moral and ethical aspects. 3. Drone aircraft—Government policy—United States. I. Evangelista, Matthew, 1958– editor of compilation. II. Shue, Henry, editor of compilation. III. Biddle, Tami Davis, 1959– Strategic bombardment Contains (work):
UG703.A74 2014
358.4'24—dc23 2014006282

Cornell University Press strives to use environmentally responsible suppliers and materials to the fullest extent possible in the publishing of its books. Such materials include vegetable-based, low-VOC inks and acid-free papers that are recycled, totally chlorine-free, or partly composed of nonwood fibers. For further information, visit our website at www.cornellpress.cornell.edu.

Cloth printing 10 9 8 7 6 5 4 3 2 1
Paperback printing 10 9 8 7 6 5 4 3 2 1

THE AMERICAN WAY OF BOMBING

ACKNOWLEDGMENTS

The papers commissioned for this project were first intensively discussed at a workshop at Cornell University in April 2011. We are grateful to two Cornell institutions for providing support—the Mario Einaudi Center for International Studies for a seed grant and the Judith Reppy Institute for Peace and Conflict Studies for workshop funding and a publishing subvention from its MacArthur Foundation grant—and their directors and staff, including Fred Logevall, Heike Michelsen, Jonathan Kirshner, Judith Reppy, Elaine Scott, and Sandra Kisner. Sandy deserves a special note of thanks for her meticulous preparation of the manuscript for publication.

Owing to limitations of space, we were unable to include all of the papers presented at the workshop, but we are grateful for the contributions, published elsewhere, of Martin Cook and of Sarah Kreps and John Kaag. Other workshop participants who provided valuable comments include Charli Carpenter, Brian Cuddy, Fred Logevall, Muna Ndulo, Jens David Ohlin, and Judith Reppy. We are particularly indebted to Karl Mueller and an anonymous reader for Cornell University Press for their incisive and thorough reviews of all of the chapters. Michael McGandy, our editor at the Press, was an enthusiastic supporter of the project from the outset and we are grateful to him and his colleagues—including Karen Laun, Sarah Grossman, and copyeditor Kate Babbitt—for shepherding it through to completion.

THE AMERICAN WAY OF BOMBING

Contents

Introduction

The American Way of Bombing

MATTHEW EVANGELISTA

Aerial bombardment as a form of warfare is just about 100 years old and is showing no signs of decline. In the twenty-first century the United States has deployed airpower in military missions ranging from the wars in Afghanistan and Iraq to the "humanitarian intervention" in Libya and the surveillance and attacks on suspected terrorists by remotely piloted drones in Pakistan, Yemen, Somalia, and elsewhere. The norms governing bombing—and particularly the harm it imposes on civilians—have evolved considerably over a century: from deliberate attacks against rebellious villagers by Italian and British colonial forces in the Middle East to institutionalized practices seeking to avoid civilian casualties in the U.S. counterinsurgency and antiterrorist wars of today. In between, the strategic bombing campaigns of World War II caused great civilian destruction through fire-bombing of cities and, ultimately, the atomic attacks against Hiroshima and Nagasaki. What accounts for the dramatic changes in ethical and legal norms governing air warfare over time?

This volume brings together prominent military historians, practitioners, legal experts (civilian and military), political scientists, philosophers, and anthropologists to explore the sources of the evolution of bombing norms. The authors focus mainly on the United States—the world's preeminent military power and the one most frequently engaged in air warfare—because we expect that its behavior has influenced normative change in this domain

and will continue to do so. The United States sets the standard for bombing practices and remains the focus of efforts to change those practices. Even as observers note an overall decline in interstate war since the end of the Cold War, the role of air power has not diminished. Moreover, with the proliferation of remotely piloted aerial vehicles—known colloquially as "drones"—air power has taken on new forms. Several of our authors address the challenges that drones, as well as more thoroughly automated killing machines, pose to the existing legal regime.

On 15 August 2010, the possibility that NATO jets accidently killed five Afghan civilians merited prominent coverage in the *New York Times.*[1] Such media attention to civilian harm had become a commonplace during the U.S.-led wars of the early twenty-first century. The vastly more destructive air campaigns of World War II also prompted press comment on damage to civilians, especially in the early days, and protestations from political and military leaders on all sides that civilians were not the intended targets of bombing raids. As Sahr Conway-Lanz points out in his contribution to this volume, officials "continued to talk as if they were trying to uphold the prohibition against targeting civilians, even though the reality of civilian deaths strained the credibility of their claims."[2] Moreover, statements by Allied leaders to the effect that bombing hastened the end of the war by undermining civilian morale cast doubt on any commitment to protect civilians. Even in more recent wars—during the NATO air campaign against Serbia in 1999, for example—one could hear in the press conferences and congressional testimony of high-level political and military leaders claims for the beneficial "morale effect" of bombing. Yet such claims are fewer and less explicit than during World War II.

At first glance, the increasing public attention to "collateral damage" (as the unintentional harm to civilians is known) seems paradoxical. The advances in accuracy of modern weapons and the apparent concern—at least within the U.S. military command—for scrupulous adherence to the laws of war in targeting have done little to mute criticism of U.S. bombing practices. In the wars led by the United States in Iraq and Afghanistan, no one can say with any certainty how many civilians have died. The fact that estimates range from the tens of thousands to more than a million—and that the U.S. government evidently does not keep close track of the figures—makes one wonder whether enough is being done to prevent harm to civilians in modern wars.[3] Other countries' bombing practices also raise questions about protecting civilians.[4]

Superficially at least, the use of U.S. air power in Afghanistan or Iraq looks very different from its use in World War II. Much has indeed

changed: military technology has advanced (munitions themselves, information technology and sensors, aircraft); the body of relevant international law has grown (the Geneva Conventions of 1949, the Geneva Protocols of 1977, and specific treaties banning land mines and cluster munitions); domestic implementation of international law, at least in some domains, has increased, with more emphasis on the role of military lawyers—judge advocates general (JAGs)—in target review, for example; and nongovernmental organizations and civil society groups have sought to codify and expand the restraints on warfare.[5]

The contributors to this volume, despite their diverse backgrounds and attitudes toward air power, all agree that government and popular attention to the legal requirements for protecting civilians has increased over the past decades. Yet far more interesting are their disagreements. Some authors, particularly those with military affiliations, find that the laws of armed conflict do not in fact pose many specific constraints on states' ability to use air power but that the United States has adhered to what constraints exist, subject to the limitations of technology. As the technical capability has evolved to identify and attack targets with more discrimination and precision, the United States has improved its compliance with its legal obligations. It may be, these authors suggest, that improvements in technology have encouraged critics of U.S. military power to raise the standards of compliance beyond what is reasonable or militarily feasible.

Other authors disagree about both what the law requires and how well the United States has met its legal obligations since the advent of air power for military purposes. To the extent that they perceive a trend toward greater protection for civilians, they attribute that trend to popular pressure and the strengthening of international legal norms. In their view, technology has done more than generate the means to make bombing more discriminating. In some cases—cluster munitions, for example—the technological advance has posed greater risks to civilians and has necessitated political action to bring it under control. Several of the contributors focus on the threats posed by new technologies—remotely piloted drones and fully automated weapons, for example—and the popular campaigns that have arisen to address them. Some authors make specific proposals for interpreting and improving the existing body of law, highlighting areas where official U.S. interpretation of its obligations has fallen short of what is required for adequate protection of civilians.

U.S. political and military leaders claim—and many analysts agree—that the United States takes unprecedented caution to prevent civilian harm in its air campaigns and overall military strategy, an evident departure from the vast civilian destruction of World War II.[6] What accounts for the change?

Why did the United States conduct the bombing of Iraq in 1991, for example, so differently from the bombing of North Korea in the 1950s? Have developments in international law—the First Geneva Protocol of 1977, for example—made a difference for U.S. practice? Or should one argue the United States at the turn of the millennium has simply been fighting different wars rather than fighting wars differently?

One purpose of this book is to try to identify some pattern for the changes that have occurred and evaluate plausible explanations for those changes. We consider such factors as the evolution of international humanitarian law (laws of war); changes in technology; the emergence of new types of wars, which include different adversaries and goals; changes in domestic public opinion; and the influence of "global civil society."

If changing international law matters, how does it matter? The practical legal and military experience of many of our participants allows focus on questions that have received little attention in the public or specialist literature. For example, how much difference does the routine review of targets by JAGs actually make? More fundamentally, how does the very definition of "military objective" influence targeting? The First Geneva Protocol states that a military objective should "make an effective contribution to military action," a phrase that the United States tends to give a broader reading as "effectively contribute to the enemy's war-fighting or war-sustaining capability." How much of the civilian economy is included in "war-sustaining capability"?

In part as a reaction to what they consider excessively permissive definitions of military objective, scholars and practitioners have made efforts to revise the relevant guidelines, as in the Harvard-based project on International Humanitarian Law in Air and Missile Warfare, discussed by Charles Garraway in his chapter. Within the U.S. Department of Defense, sensitivity to civilian casualties in the context of the war in Afghanistan and wars of "counterinsurgency" in general led to changes in policy associated with Generals Stanley McChrystal and David Petraeus. Finally, the use of drone aircraft offers the promise of greater precision in attacks but still comes in for criticism for unintentional civilian casualties. Moreover, the operation of the drones by the Central Intelligence Agency and private contractors raises basic concerns about compliance with the laws of war. The widespread use of drones has fundamentally affected the spatial and temporal dimensions of modern warfare.

These are among the topics our authors take up in the chapters that follow. This introduction puts their contributions into broader historical and legal context and highlights the points of engagement and disagreement

among the contributors. The disagreements are substantial enough that we should acknowledge in advance that we do not fulfill the promise of our title by identifying *the* American way of bombing. Most of our authors might agree that the extent to which law infuses U.S. bombing norms and practices is distinctively American, but beyond that, disagreements on interpretation and implications abound.

What We Mean By Norms

The authors of this volume share a common interest in how the norms governing aerial bombardment have changed, do change, and should change—with some authors focused more on *explaining* change and others more on *advocating* particular changes. What do we mean by *norms*? In an earlier work, Neta Crawford, one of our authors, offered a distinction that we find useful between norms, normative beliefs, and prescriptive norms. For Crawford, norms are descriptions of dominant practices or behaviors—what is considered "normal" within a given community. "Principles, rules, and laws are prescriptive normative statements that rest on *normative beliefs*." Thus, normative beliefs serve to underpin or justify norms. Prescriptive norms are claims "about what dominant practices ought to be."[7] In this volume, the authors try to distinguish between norms as practices and norms as prescriptive standards of behavior. In doing so, however, we must recognize that conventional language often uses *norm* to mean *prescriptive norm*. For example, the concept, increasingly popular in the study of international politics, of a "norm entrepreneur" only makes sense if we intend *prescriptive norm*. Norm entrepreneurs are typically not promoting existing practices or behavior (the status quo) but are advocating new standards or the strengthening or expanding of existing standards.

There is inevitably some overlap in our language, and we see it reflected in the broader discussion of law as well. Consider the comment in a standard textbook on international law: "International Law does not necessarily consist of what a number of States might actually do. Rather, it is a blend of their respective expectations and their actual practice."[8] This observation applies in particular to *customary* law, which depends on the concept of *opinio iuris*—that states believe that certain practices are obligated by law, even if they sometimes stray from those practices. In Crawford's terms, customary law consists of norms that states follow out of a sense of legal obligation. Because *opinio iuris* is to some degree subjective it can be influenced by such factors as predominant legal opinion of specialists—including those who do not represent governments.[9] In 2005, for example, the nongovernmental

International Committee of the Red Cross (ICRC) compiled a 5,000-page study identifying 161 rules governing warfare (including bombing) that, in its view, had attained the status of customary law: each state—according to the ICRC's interpretation—was obliged to obey them, even if it had not signed specific treaties agreeing to do so.[10] The ICRC exercise, even if described as a codification of existing law, can also be understood as a form of advocacy—trying to influence states' beliefs about their legal obligations as *opinio iuris.*

The authors of this volume also seek to influence beliefs about the past evolution of norms governing aerial bombardment, and some explicitly seek to shape those norms for the future.

Two ethical-legal concepts are most relevant to our discussion: the principle of *distinction* (or discrimination) holds that only combatants should be deliberately targeted. Noncombatants—civilians and wounded or captured soldiers—should be protected from direct attack. Much of the controversy surrounding this principle—the topic of considerable discussion by our authors—concerns just who counts as a civilian or a combatant. The principle of *proportionality* holds that the military benefit expected from an attack should outweigh the damage to noncombatants. Several of our authors parse the legal treaty language relevant to the question of what constitutes a legitimate military objective—an issue highly consequential to the fate of civilians caught in war. The principles of distinction and proportionality lie at the heart of just war theory's guidelines for conduct in war (*ius in bello*). Just war theory, in turn, provides much of the basis for what specialists variously call international humanitarian law or the law of armed conflict (LOAC), commonly known as the laws of war.

Why Bombing, and Why the United States?

Readers may wonder why our focus on *bombing* and why we devote so much attention to the historical and contemporary practices of the *United States.* After all, civilians risk harm from warfare in many forms—as inadvertent or deliberate casualties of attacks from ground or naval forces; indirectly through damage to or deprivation of supplies of food and water, sanitary and electrical systems, and medical care; or as victims of sanctions, sieges, and forced migrations. And the United States is hardly the only country whose behavior in war merits scrutiny. Yet, aside from the obvious inability to cover everything in a single volume, we justify our choice on a number of grounds.

First, large numbers of civilians killed directly by military action during the previous century were victims of aerial bombardment (even if many

more civilians died from dislocation, starvation, and illness indirectly attributed to war).[11] Thus, bombing lends itself especially well as a subject for legal and ethical analysis related to protection of civilians.

Second, the laws governing targeting for air warfare are relatively underdeveloped compared to other areas, such as treatment of prisoners of war, and there are many controversial issues to debate.[12] Confronting the topic of harm to civilians, our authors reflect major disagreements in the broader community of scholars and practitioners about both history and contemporary practices. In particular, we disagree about the extent to which civilians have been, are, or should be targets of bombing. To be sure, few observers argue that states should deliberately bomb civilians. Yet the tolerance that some observers express for allowing civilians—especially the subjects of particularly odious and belligerent regimes—to suffer the consequences of their governments' engagement in war looks to other observers like insufficient concern for the principles of distinction and proportionality.

Third, given our interest in what shapes the norms of aerial bombardment, it makes sense to focus on the United States—the world's preeminent military power and the one most frequently engaged in air warfare—because we expect that its practice has influenced normative change in this domain and will continue to do so. Other countries, such as Russia and Israel, have engaged in air campaigns in recent years, and brutal dictators in Libya and Syria have set the normative clock back a century with the punitive bombing of (their own) civilians. But we expect the United States to continue to set the standard for bombing practices and to remain the focus of efforts to change those practices. As a leading scholar of customary international law explains, "It is generally easier for more powerful states to engage in behavior which will significantly affect the maintenance, development, or change of customary rules than it is for less powerful states to do so."[13] The editor of the ICRC study of customary international humanitarian law makes a similar point: "It is not simply a question of how many States participate in the practice, but also which States"—with those "whose interests are specially affected" most relevant to the establishment of customary rules.[14]

Fourth, we find that even as observers note an overall decline in interstate war since the end of the Cold War, the role of air power has not diminished. High-profile examples of so-called humanitarian intervention—the use of military force ostensibly to protect civilians, as in Kosovo in 1999 or Libya in 2011—depend heavily on bombing. The paradox of humanitarian intervention—that states will be reluctant to risk their own citizen-soldiers (and pilots) for the altruistic purpose of "saving strangers"—leads to a preference for bombing over deploying boots on the ground.[15] Given that the

United States has led the way in organizing the air campaigns at the heart of recent interventions, we find our emphasis on bombing and on the United States doubly justified.

Historical and Theoretical Perspectives

The early theorists of air power, such as Giulio Douhet, Billy Mitchell, and Hugh Trenchard, expected that civilians would be—and should be—the primary targets of air attack. Both Douhet and Mitchell rejected the principle of distinction between combatants and civilians. In a memorandum from 1919, Mitchell, one of the pioneers of U.S. air power, argued that "the entire nation is, or should be, considered a combatant force."[16] Douhet, an Italian general, argued in his 1921 treatise *The Command of the Air* that owing to the vulnerability of civilians to air attack, "there will be no distinction any longer between soldier and civilian."[17] With the experience of World War I fresh in mind, Douhet and the others expected that directly targeting civilians would shorten a war and that future wars themselves would consequently become more humane than the mutual slaughter of trench warfare.[18] World War II disproved the air theorists' predictions, as both sides fought on for years despite the devastation that aerial bombardment wrought on its cities. Tami Davis Biddle's chapter in this volume provides an expert overview of the theories of air power associated with Douhet, Mitchell, Trenchard, and others.

The earliest use of air power during the first decades of the twentieth century presaged some of the most vexing issues that would continue to confront states for the next hundred years. The armed forces of European states first employed aerial bombardment not to fight among themselves but to maintain domination over colonies in Africa and the Middle East. The Italians were the first to use air power in this fashion, dropping grenades on villagers, some of whom were armed, in Libya in 1911 in the course of war with Ottoman Turkey.[19] If it had ever been made, the distinction between rebels and the populations that supported them soon began to blur, as the British example demonstrates.[20] During the period 1919–1922 Winston Churchill served as Britain's secretary of state for war, secretary of state for air, and secretary of state for the colonies, in which role he was tasked with enforcing order among people who resisted British rule. One of the tools he advocated was aerial bombardment of tribal areas by poison gas, particularly in Iraq but also in India and Afghanistan—even when his advisors warned him that it could "kill children and sickly persons." "I am strongly in favour of using poison gas against uncivilised tribes," wrote Churchill to Trenchard,

chief of the Air Staff. In the event, the British used aerial bombardment against many villages in Kurdistan and gas against Iraqi rebels (although not delivered by air) with, in Churchill's words, "excellent moral effect."[21]

The laws of war relevant to aerial bombardment were rather undeveloped at the outbreak of World War II. The Hague Conventions, which were adopted in 1899 and revised in 1907, prohibited "attack or bombardment of towns, villages, habitations or buildings which are not defended" (Article 25) and required the attackers to warn the relevant authorities on the other side in advance (Article 26) and to take all necessary steps "to spare as far as possible edifices devoted to religion, art, science, and charity, hospitals, and places where the sick and wounded are collected, provided they are not used at the same time for military purposes" (Article 27). These prohibitions applied to the signatories of the Conventions only and only in their interactions with each other, not in their colonial territories.[22]

The criterion that a population center be undefended in order to be spared bombardment left a rather large loophole, as the presence of any troops or military facilities might disqualify it. Nevertheless the onus against intentional killing of civilians was evident in the reactions of British and U.S. leaders to the German air campaign of 1939 and the Japanese attacks in Manchuria. Churchill, as Britain's prime minister, condemned Hitler's bombing of Warsaw and Rotterdam as "a new and odious form of attack"—although it was not in principle much different from Britain's bombing of Kurdish villages under Churchill's command a couple of decades earlier—and vowed that his government would not "bomb nonmilitary objectives, no matter what the policy of the German Government may be." The U.S. government issued a statement in response to Japan's bombing campaign, reinforcing its view that "any general bombing of an extensive area wherein there resides a large populace engaged in peaceful pursuits is unwarranted and contrary to the principles of law and humanity." At the outbreak of World War II, President Franklin Roosevelt invoked both the legal prohibition of the Hague Conventions and the broader moral principle of civilian immunity when he addressed "an urgent appeal to every government which may be engaged in hostilities publicly to affirm its determination that its armed forces shall in no event and in no circumstances, undertake the bombardment from the air of civilian populations or of unfortified cities."[23]

The British and other colonial powers appeared to hold two standards regarding killing civilians by air—one for "civilized" peoples and another for everybody else. At the 1932 World Disarmament Conference, the British delegation was willing to restrict aerial bombardment but not "the use of such machines as are necessary for police purposes in outlying places," that is,